COMPETITION ENFORCEMENT: IS THE ABUSE TOOLBOX ADEQUATE?

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Abstract: Various proposals have emerged to adapt, complement, or overhaul the antitrust toolbox to address challenges in digital markets. Proposals include abrogating the consumer welfare standard, breaking up digital platforms, reversing the burden of proof requiring firms to show absence of impact, ex ante regulation, and competition tools that allow authorities to impose remedies without establishing competition law infringements and without allowing firms to show justifications. This chapter discusses some of these proposals in the context of whether the current rules of abuse of dominance under Article 102 TFEU are suitable to tackle digital antitrust issues. We conclude that, while we do not need to consign the existing abuse toolbox to the scrapheap, there is scope to introduce incremental improvements, including speeding up antitrust cases, introducing an "attempt to monopolize" doctrine, establishing ex ante rules that consider procompetitive justifications and anticompetitive effects, or instituting a market investigations regime.

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1. Introduction and Overview

The European Union was founded upon a vision of a socially responsible, free market-based economy unencumbered by the political and economic concentrations of power that contributed to World War II. The challenges of globalization and digitization may, though, be pushing that vision to the limit. In particular, there is a growing concern that technological development has come at the cost of increased concentration of power, rising inequality, invasion of privacy, a loss of meaningful employment, the destruction of the environment and climate change, and the erosion of democracy.

Attention has turned to competition law's accountability for these apparent market and societal failures, with a particular focus on digital markets. Academics, international enforcers, legislators, and US presidential hopefuls have variously argued that competition laws cannot cope with the perceived challenges raised by the digital economy. [1] In response, governments across the globe have commissioned reports on whether and how competition law should be reformed

[1] *See, e.g.*, Valentina Pop and Sam Schechner, *Tech Giants to Face EU Legal Push on Content, Competition, Taxes*, Wall. St. J., 5 July 2020 (quoting Margrethe Vestager) ("*[W]e need rigorous competition-law enforcement, but we also need regulation*"); David McCabe and Kenneth P. Vogel, *Big Tech Makes Inroads With the Biden Campaign*, The New York Times, 10 August 2020 (quoting Matt Hill, spokesman for Joe Biden's presidential campaign) ("*Many technology giants and their executives have not only abused their power but misled the American people, damaged our democracy and evaded any form of responsibility*"); Carl Shapiro*, Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, (2019) 33 J. of Econ. Persp. 69, 70 ("*[W]e need to reinvigorate antitrust enforcement in the United States*"); Elizabeth Warren, *Reigniting Competition in the American Economy*, 29 June 2016 ("*[C]ompetition is dying. Consolidation and concentration are on the rise in sector after sector. Concentration threatens our markets, threatens our economy, and threatens our democracy. Evidence of the problem is everywhere*"); Professor Joseph Stiglitz, *Monopsony and the State of U.S. Antitrust Law*, 21 September 2018 ("*[C]urrent antitrust and competition laws, as they are enforced and have been interpreted, are not up to the task of ensuring a competitive marketplace*"); and Ariel Ezrachi and Maurice E. Stucke, *Digitalisation and its impact on innovation* (European Commission R&I Paper Series, working paper 2020/07), at 4 ("*[I]t appears that competition is below optimal levels... The data from this angle suggests that many markets are becoming more concentrated and less competitive. Profit margins are widening, with a few firms reaping a significant share. Innovation levels also appear sub-optimal*.").

to address these challenges.[2] And ambitious legislative initiatives have been proposed to regulate the behaviour of digital platforms, including in the EU,[3] Germany,[4] and the UK.[5]

In broad terms, the concerns with digital markets are that certain market characteristics (such as network effects and tipping, lack of switching, and lock-in effects) lead to high concentration, insurmountable entry barriers, and exploitation of market power, especially (but not only) when combined with abusive conduct. To address these concerns, a constellation of far-reaching proposals has emerged, including moving away from the consumer welfare standard, breaking up digital platforms, reversing the burden of proof, *ex ante* regulation, and new competition tools that allow authorities to impose remedies without formally establishing competition law infringements.

This Chapter discusses some of these proposals in the context of the question whether the current rules of abuse of dominance under Article 102 TFEU (and equivalent rules of national law) are suitable to tackle contemporary digital antitrust issues.

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2 These include: in the UK, Report by the Digital Competition Expert Panel chaired by Professor Jason Furman, *Unlocking digital competition*, 13 March 2019 (the **Furman report**); and Report by the House of Lords Select Committee on Communications, *Regulating in the digital world*, 9 March 2019 (the **House of Lords report**); in the EU, Report by Professors Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition Policy for the digital era*, 4 April 2019 (the **EU Special Advisors' report**); in Germany, Report by Professor Heike Schweitzer, Justus Haucap, Wolfgang Kerber, and Robert Welker, *Modernising the law on abuse of market power*, 17 September 2018 (the **German report**); and in France, *Contribution de l'Autorité de la concurrence au débat sur la politique de concurrence et les enjeux numériques*, 19 February 2020 (the **French report**).

3 EU Commission, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector, COM(2020) 842 final (15 December 2020) (the **Digital Markets Act**).

4 Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer wettbewerbsrechtlicher Bestimmungen (19 October 2020), (**German Competition 4.0 Act**)

5 CMA, *A new pro-competition regime for digital markets*, Advice of the Digital Markets Taskforce, CMA135 (December 2020). *See also* UK Government, Response to the CMA's market study into online platforms and digital advertising, November 2020.

- First, we analyse proposals to re-orientate the goals of antitrust policy away from the consumer welfare standard towards a broader societal test (**Section 2**).[6]

- Second, we describe the tools presently available in the abuse toolbox and their adequacy to tackle new forms of conduct and new business models (**Section 3**).

- Third, we review three of the more eye-catching proposals for reform: implementing blanket structural separation across business lines, a *per se* ban on unequal treatment, or reversing the burden of proof for digital platforms (**Section 4**).

- Fourth, we describe several possibilities to sharpen the tools in the abuse toolbox, focusing in particular on the proposals set out in the EU's draft Digital Markets Act and the CMA's proposed new pro-competition regime (**Section 5**).

- The article concludes that, while we do not need to consign the existing abuse tools to the scrapheap, there is scope for incremental improvements to the current regime (**Section 6**).

2. The Goals of Article 102 TFEU

Today's EU competition policy is based upon the consumer welfare standard.[7] That standard is premised on the notion that promoting competition as a *process*

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[6] *See, e.g.*, Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age,* Columbia Global Reports 2018; and Maurice E. Stucke and Ariel Ezrachi, *The Rise, Fall, and Rebirth of the US Antitrust Movement*, Harvard Business Review, 15 December 2017. For a different perspective, *see* Joshua D. Wright, Elyse Dorsey, Jan Rybnicek and Jonathan Klick, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, George Mason Law & Economics Research Paper No. 18-29, Arizona State Law Journal 2019.

[7] In the context of Article 102 TFEU, the EU Commission (**EC**) notes that its enforcement activity aims to prevent "*an adverse impact on consumer welfare*"; 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 (the **Article 102 Guidance**), ¶19. In the context of Article 101 TFEU, the EC has stressed that "*the aim of the Community competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources*"; Guidelines on the application of Article 101(3) TFEU (formerly Article 81(3) TEC) [2004] OJ C 101, ¶33. *See also* Neelie Kroes, *European Competition Policy – Delivering Better Markets and Better Choices*, Speech at European Consumer and Competition Day, London, 15

– rather than regulating *outcomes* – best serves consumers and society in the form of lower cost; increased quality, functionality and innovation; and greater choice.[8]

September 2005 ("*Consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies*").

The EU Courts' case law lends support to these principles, *see* Joined Cases T-213/01 and T-214/01 *Österreichische Postsparkasse*, judgment of 7 June 2006, ¶115 ("*well-being of consumers*"); Case C-209/10 *Post Danmark*, judgment of 27 March 2012, ¶20; Case C-52/09 *TeliaSonera*, judgment of 17 February 2011, ¶21-24 ("*well-being of the European Union*" and avoiding "*damage to consumers*"). There are, however, no references *to* "*consumer welfare*" in the competition provisions of the TFEU, with the exception of Article 102(b) TFEU, which identifies as abusive "*limiting production, markets or technical development to the prejudice of consumers*." Competition provisions are presented in Protocol 27 as an instrument to foster the general "internal market" objectives of the European Union set out in Article 3 TEU (with Article 7 TFEU providing that "*The Union shall ensure consistency between its policies and activities, taking all of its objectives into account*", including the objectives set out in Articles 8 to 16 TFEU). These objectives encompass, but are arguably broader than, consumer welfare. Nonetheless, "*consumer welfare*" has been a helpful concept to focus an effective competition policy.

In the US, there is broad (but not unanimous) agreement that protecting consumer welfare is the ultimate goal of modern US antitrust enforcement. *See, e.g.*, Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, (1987) 62 N.Y.U. L. Rev 1020 ("*[E]fficiency and consumer welfare have become dominant terms of antitrust discourse*"); J. Thomas Rosch, *Monopsony and the Meaning of 'Consumer Welfare': A Closer Look at Weyerhaeuser*, remarks at 2006 Milton Handler Annual Antitrust Review New York City, NY, United States (7 December 2006) ("*Courts and federal law enforcement officials routinely invoke "consumer welfare" as the guiding principle behind their application of the antitrust laws*"); Joshua D. Wright and Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, (2013) 81 Fordham L. Rev. 2405; D. Daniel Sokol, *Tensions Between Antitrust and Industrial Policy*, 22 Geo. Mason L. Rev. 1247 (2015); John B. Kirkwood and Robert Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, (2008) 84 Notre Dame L. Rev. 191; and A. Douglas Melamed and Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, (2019) 54 Rev. Ind. Org. 741.

[8] *See, e.g.*, Melamed and Petit, *ibid.*, p. 742 ("*[T]he [consumer welfare] standard embodies the idea that antitrust laws promote economic welfare and are intended to protect economic agents from the predictable harms that are caused by improperly obtained market power*"). There is a separate debate as to whether the consumer welfare encapsulates only consumer surplus (as the name suggests), or whether it also takes into account the welfare of firms (*i.e.* a 'total welfare' standard), *see, e.g.*, Steven C. Salop, *Question: What is the real and proper antitrust welfare standard?* (2010) 22 Loy. Consumer L. Rev. 336.

The idea is to prevent firms from creating market power based on anticompetitive agreements with competitors, vertical restraints, or mergers; and if they have gained market power, to prevent them from maintaining or reinforcing that power by stifling the emergence of new competition, or exploiting it. The standard tolerates the marginalisation of firms from the market as a result "competition on the merits," because consumers benefit while that process plays out. And even if the process leads to one firm gaining temporary dominance, potential and actual new entrants can prevent the dominant firm from raising prices or lowering innovation.

As the Court of Justice held in *Post Danmark I* and confirmed in *Intel*:

> Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.[9]

Some contend, however, that the consumer welfare standard does not achieve, or no longer achieves, the right outcomes for competition and consumers in digital markets.[10] Because of allegedly insurmountable barriers to entry, it is argued that more should be done to prevent firms from gaining dominance in the first place, and more should be done to regulate firms' behaviour if they obtain dominance.

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[9] Case C-209/10 *Post Danmark I*, judgment of 27 March 2012, EU:C:2012:172, ¶¶21-22; and Case C-413/14 P *Intel*, judgment of 6 September 2017, EU:C:2017:632, ¶¶133. *See also Verband Deutscher Wetterdienstleister, e.V.*, LG Hamburg, 11 April 2013, 408 HKO 36/13 ("*The prohibition on the abuse of a dominant market position does not aim to preserve outdated business models that cannot withstand change*"); *Streetmap v. Google* [2016] EWHC 253 (Ch), ¶62; and Article 102 Guidance, ¶6. The notion of competition on the merits also prevails in the US. *See, e.g.*, *United States v. Aluminum Co. of America*, 148 F.2d. 416, 430 (2nd Cir. 1945) ("*A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry [...] The successful competitor, having been urged to compete, must not be turned upon when he wins*").

[10] For example, some criticise the current framework as focusing unduly on price effects. *See, e.g.*, Ezrachi and Stucke, Digitalisation, p. 66 ("*[C]ompetition enforcers must extend their sights beyond price effects.*"). But this is not the case, either in the US or Europe. *See, e.g.*, Christine S. Wilson, *Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get*, Luncheon Keynote Address at George Mason Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads?, Arlington, VA (February 15, 2019), at 5-6.

In particular, there have been calls to abandon the consumer welfare standard[11] in favour of a broader, multi-factored public interest test[12] – and even a "*fairness*" test.[13] These calls may reflect an impression that consumer welfare is interpreted more narrowly in the US than in the EU.

In our view, shifting the focus of competition law away from consumer welfare risks deterring procompetitive price reductions, quality improvements, and innovation by limiting firms' ability to compete once they reach a certain threshold of dominance. [14] Lina Khan, for example, advocates the structural separation of platforms from their adjacent businesses.[15] At the same time, however, she concedes that "*limiting a network monopolist's ability to compete on its own network would sacrifice certain cost savings*."[16] The consumer welfare standard does not countenance the sacrifice of consumer benefits to prop up firms that are less efficient.[17] Khan, for example, would have blocked Amazon's

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11 *See, e.g.*, Marshall Steinbaum and Maurice Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, (2020) 87 U. Chi. L. Rev. 595 (advancing an "effective competition" standard similar to the EU approach to replace the US consumer welfare standard); Lina M. Khan, *Amazon's Antitrust Paradox*, (2017) 126 Yale L.J. 710, 743 ("*Focusing antitrust exclusively on consumer welfare is a mistake*.").

12 *See, e.g.*, Steinbaum and Stucke, *ibid.*

13 *See, e.g.*, *Fairness in EU Competition Policy: Significance and Implications*, 1st edition, edited by Damien Gerard, Assimakis Komninos, Denis Waelbroeck (Bruylant: GCLC Annual Conference Series 2020), including Dolmans and Lin, *How To Avoid a Fairness Paradox in Competition Policy*, pp. 38-46 (on an overview of "*fairness versus consumer welfare as goals of competition policy*").

14 *See also* Richard J Gilbert, *Innovation Matters: Competition Policy for the High-Technology Economy*, 1-2 (MIT Press, 2020) (arguing that "*consumer welfare has been a stabilizing influence for antitrust enforcement*", whereas "*[a]lternative goals are often less precise or they admit policies that do not benefit consumers in the near term or in the more distant future*." The author argues, however, that "*positive change [in antitrust enforcement] can occur without sacrificing a focus on consumer welfare*," by moving from "price-*centric to* innovation-*centric competition policies.*").

15 Lina Khan, *The Separation of Platforms and Commerce*, (2019) 119 Colum L. Rev. 973.

16 *Ibid.*, 1080.

17 *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins.*, 784 F.2d 1325, 1338 (7th Cir. 1986) ("*Competition is a ruthless process. A firm that reduces cost and expands sales injures rivals – sometimes fatally. The firm that slashes costs the most captures the greatest sales and inflicts the greatest injury. The deeper the injury to rivals, the greater the potential benefit. These injuries to rivals are byproducts of vigorous competition, and the antitrust laws are not balm for rivals' wounds. The antitrust laws are for the benefit of competition, not competitors*").

acquisition of Whole Foods, arguing that the transaction enabled Amazon to "*leverage and amplify the extraordinary power it enjoys in online markets and delivery*."[18] But the integration of Whole Foods into Amazon's business appears to have resulted in price reductions and encouraged rival grocery stores to improve their online ordering infrastructure – "*exactly the type of price competition and product innovation that antitrust is designed to foster*."[19]

Others' proposals to abandon the consumer welfare standard seek to use antitrust law to tackle broader societal issues, such as widening wage inequality, declining democratic institutions, and rising global populism and intolerance – rather than a problem of competition.[20] Maurice Stucke and Ariel Ezrachi, for example, argue that promoting competition as a process has resulted in an "*overdose*" of competition that can be "*toxic*" for consumers.[21] Instead of competition on the merits, they advocate a concept of "*noble competition*" whereby rival firms help each other to compete instead of treating the process of competition as a zero-sum game. In terms of competition policy, the authors encourage authorities to reflect on what forms of competition firms should be engaging in, and whether the assumption that competition is inevitably good for consumers still holds.

The intentions of dealing with societal issues are laudable. We are concerned, however, that such proposals are not practically workable and would undermine the efficacy of the antitrust laws. Incorporating non-competition goals into antitrust law "*would broaden antitrust's proscriptions to cover business conduct that has no significant anticompetitive effects, would increase vagueness in the law, and would discourage conduct that promotes efficiencies not easily recognized or proved.*"[22] Antitrust laws are well-suited to curb the improper acquisition of market power, but ill-suited for remedying all problems in society – and

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18 Lina M. Khan, *Amazon Bites off Even More Monopoly Power*, The New York Times, 21 June 2017.

19 Jonathan M. Barnett, *Thanks to Smart Antitrust, Whole Foods is No Longer 'Whole Paycheck'*, The Hill, 8 April 2019.

20 *See, e.g.*, Maurits Dolmans, Ricardo Zimbron and Jacob Turner, *Pandora's box of online ills: technology solutions, regulation, or competition law?*, Concurrences No. 3-2017 (colloquium Pembroke College, Oxford, 22 May 2017); and Maurits Dolmans and Henry Mostyn, *Dominance and Monopolies Review*, 6th Edition (Law Business Research 2018).

21 Maurice E. Stucke, Ariel Ezrachi, *Competition Overdose: How Free Market Mythology Transformed Us from Citizen Kings to Market Servants*, 1st edition (Harper Collins 2020).

22 Donald Turner, *The durability, relevance, and future of American antitrust policy*, (1987) 75 Cal. L. Rev., 797.

introducing political objectives into antitrust risks politicising enforcement, reducing legal certainty, and undermining confidence in the foundations of antitrust.

That said, the consumer welfare standard is not a straitjacket that prevents agencies from tackling new forms of anticompetitive conduct or new problems that result from deficient competition. To the contrary, as it is interpreted in the EU, it is appropriately flexible: the consumer welfare standard can adapt and evolve to account for new business practices without the need for legislative change. It covers both static and dynamic aspects such as innovation. It allows agencies to develop new theories of harm to address novel forms of conduct.[23] It can be deployed in markets where products are offered for free by assessing reductions in quality or innovation (rather than price).[24] It could be used to tackle reductions in competition in labour markets (*i.e.*, employers using market power to reduce workers' wages or working conditions below competitive levels).[25] And presumptions can be deployed to speed up enforcement if evidence dictates that a particular practice is predominantly harmful.[26]

In our view, the consumer welfare standard is sufficiently flexible even to account for non-price costs (price externalities) that affect the well-being of consumers

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23 A. Douglas Melamed and Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, (2019) 54 Rev. Ind. Org. 741, p. 756.

24 Case COMP/M.6281 *Microsoft/Skype*, Commission decision of 7 October 2011; Case T-79/12 *Cisco Systems*, judgment of 11 December 2013, EU:T:2013:635; Case COMP/M.7217 *Facebook/WhatsApp*, Commission decision of 3 October 2014; and Commissioner Vestager, *Defining markets in a new age*, Speech at the Chillin' Competition Conference, Brussels, 9 December 2019.

25 OECD Note, *Competition Concerns in Labour Markets – Background Note*, 5 June 2019 ("*the identification of the goal of competition law with the protection of the competitive process, seems to suggest that there may be scope and sufficient flexibility to consider the negative impact of labour monopsony under an analogous standard*"). The Dutch antitrust authority ACM on 26 November 2019 published a Guideline on Labour and competition; *see* Arno Meijer and Kees Hellingman (ACM), – VvM webinar - Mededinging en arbeid, Presentation, 4 June 2020.

26 A. Douglas Melamed and Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, (2019) 54 Rev. Ind. Org. 741, p. 756, 767, 769.

generally, such as the cost to consumers from pollution or carbon emissions.[27] Price externalities from pollution and carbon emissions are a price increase for all consumers. They could therefore be incorporated into a competition assessment under the consumer welfare assessment.[28]

We conclude, in line with most of the recent expert reports commissioned on competition in digital markets, that consumer welfare goals should continue to guide antitrust enforcement regarding abuses of dominance.[29]

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27 The Dutch competition authority ACM in July 2020 set "*sustainability*" as a key priority and published draft Guidelines to describe how agreements between undertakings help public sustainability objectives, enabled by competition law. *See* ACM, *Guidelines: Sustainability agreements, Opportunities within competition law*, 15 July 2020, and ACM Press Release, *ACM opens up more opportunities for businesses to collaborate to achieve climate goals*, 9 July 2020. Sustainability as a goal of competition law has also received support from the European Commission and Greek competition authority. *See* Competition Commissioner EVP Margrethe Vestager, "*The Green Deal and Competition Policy*", Renew Seminar, 22 September 2020. *See also* Maurits Dolmans, *Sustainable Competition Policy*, CLPD Competition Law and Policy Debate Vol 5, Issue 4 and Vol 6, Issue 1, March 2020, and Julian Nowag, *Sustainability & Competition Law and Policy – Background Note*, OECD Paper DAF/COMP(2020)3, 13 November 2020.

28 For discussions on how to quantify sustainability, *see, e.g.*, True Price, *A Roadmap for true pricing*, 3 June 2019. *See also* P. Régibeau, EC chief competition economist, commenting that "out-of-market efficiencies" will play a role in future merger control assessment and that "green efficiencies tend by definition to be mostly out of market", Hellenic Competition Commission, Sustainable Development and Competition Law: Towards a Green Growth Regulatory Osmosis, 28 September 2020. The UK CMA and the French Competition Authority made sustainability an area of priority in their respective 2021 action plans, *see* CMA, *Annual Plan 2020/21*, CMA112, March 2020; and French Competition Authority, *Accord de Paris et Urgence Climatique: Enjeux de Régulation*, May 2020.

29 Filippo M. Lancieri and Patricia M. Sakowski, *Competition in Digital Markets: A Review of Expert Reports*, Stigler Center Working Paper Series No. 303; Stanford Journal of Law, Business, and Finance (working paper, 26 August 2020), p. 73, summarising the findings of the Stigler report, the Furman report, and the EU Special Advisors' report.

3. The Current Tools in the Abuse Toolbox

Article 102 TFEU is a flexible legal instrument.[30] Adopted in 1957, it is short (just under 130 words) and drafted in broad and open-ended language.[31] While it prohibits an abuse by a dominant undertaking and gives four examples (unfair trading conditions; limiting production, markets or technical developments to the prejudice of consumers; discrimination; and tying), it does not stipulate a definitive test for identifying what an "abuse" is. Nor does it set out any precise objectives for the application of this rule. In the six decades since its adoption, new Guidelines have been adopted, but there have been no legislative amendments or elaborations of the core text. Nor, unlike Article 101 TFEU, has the EC felt the need to publish block exemption regulations that disapply Article 102 TFEU in specific situations.

None of this has prevented the EC or national authorities from applying Article 102 TFEU across a vast range of different sectors. It has been used to sanction all manner of different behaviours and business models – spanning the analogue to the digital era – with new theories of harm frequently emerging.

In fact, in its first major opportunity to consider Article 102 TFEU, the Court of Justice in *Continental Can* took an expansionist approach. The Court held that the list of abuses contained in Article 102 TFEU is not an "*exhaustive enumeration*" of prohibited behaviours.[32] Rather, Article 102 TFEU is open-ended. It should be interpreted more broadly by reference to the policy of the EU treaties:[33] establishing a system ensuring that competition in the common market

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30 This article uses the current numbering of the Article throughout.

31 The notion of an abuse of a dominant position was first used in the European Coal and Steel Community Treaty (the **Treaty of Paris**) in 1951. That Treaty expressed the principle in even more abstract terms: the "*High Authority*" was empowered to address public or private enterprises using dominance "*for purposes contrary to the objectives of the Treaty*" (Article 66 of the Treaty of Paris). Article 4 also noted that "*restrictive practices tending toward the division of markets or the exploitation of the consumer*" were incompatible with the common market.

32 Case C-6/72 *Europemballage and Continental Can*, judgment of 21 February 1973, EU:C:1973:22, ¶26.

33 What was then Article 3(f) of the Treaty of Rome and is now Protocol 27 to the current EU Treaties.

is not distorted.[34] *Continental Can* thereby opened the door to an expansive interpretation of Article 102 TFEU by the EC and EU Courts in subsequent cases.[35]

Over the following years, the Courts fleshed out the concept of abuse. The Courts identified different categories of exclusionary abuses, and refined the concepts of causation, as-efficient competitors, and anticompetitive effects. They demarcated the limits of exploitative abuses, where a dominant firm uses its market power to extract rents from consumers. They also developed the concept of objective justification; identified principles for effective and proportionate remedies for abusive conduct; and set out limits on the EC's discretion to impose fines.

To assess whether the abuse toolbox is adequate, it is necessary to understand the scope and application of the current tools in the box. We therefore analyse the main elements of an abuse under Article 102 TFEU in Sections 3.1-3.6 below.

3.1 Exclusionary Abuses

The Court of Justice set out the classic formulation of an exclusionary abuse in *Hoffman-La Roche* in 1979. An exclusionary abuse involves behaviour "*which, through recourse to methods different from those which condition normal competition [...] has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition*."[36] That

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[34] Case C-6/72 *Europemballage and Continental Can*, judgment of 21 February 1973, EU:C:1973:22, ¶26.

[35] On the facts, the appellants prevailed in *Continental Can* because the Court identified errors in the Commission's definition of the relevant market. The application of Article 102 TFEU to takeovers (which was at issue in that case) was also superseded by the EU Merger Regulation. But the legal principles on abuse set out in *Continental Can* set the scene for the subsequent expansionist approach to the jurisprudence on Article 102 TFEU. In the words of Mr. Justice Roth in his Blackstone Lecture, *The Continual Evolution of Competition Law*, Pembroke College, Oxford, 9 November 2018 ("*Continental Can set the course for the legal approach to abuse developed in subsequent cases*").

[36] Case C-85/76 *Hoffmann-La Roche*, judgment of 13 February 1979, EU:C:1979:36, ¶91. In *Michelin*, the Court expressed a similar point in the following terms: "*A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market*", Case C-322/81 *Michelin*, judgment of 9 November 1983, EU:C:1983:313, ¶57.

rather cryptic formulation encapsulates two core concepts: conduct that deviates from "normal competition" or "competition on the merits", *and* that results in anticompetitive effects. To take these two concepts in turn:

The concept of exclusionary conduct. Exclusionary conduct is defined negatively as everything that is not competition on the merits.[37] The phrase reflects that a dominant firm does not contravene Article 102 TFEU by competing on price, quality, functionality, or innovation, even if this conduct marginalises competitors, because doing so ultimately benefits consumers.[38]

Accordingly, not every foreclosure of competitors is anticompetitive. It is a normal and desirable part of the competitive process that competitors that have less to offer customers may have to leave the market. A firm that improves the design of its product to benefit its customers competes lawfully on the merits, even if the design change means that other firms exit as a result of the improvement.[39] This is because competition law serves to protect the competitive process, leading to an efficient allocation of resources and benefit to consumers, rather than protecting the interests of competitors themselves.[40]

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37 In *Akzo*, the Court specifically distinguished abusive conduct from lawful "*competition on the basis of quality*", Case C-62/86 *Akzo*, judgment of 3 July 1991, EU:C:1991:286, ¶70. In later judgments, such as *Deutsche Telekom*, the Court introduced the phrase "*competition on the merits*" to distinguish lawful competitive conduct from abusive behaviour, Case C-280/08 P *Deutsche Telekom*, judgment of 14 October 2010, EU:C:2010:603, ¶177; Case C-209/10 *Post Danmark I*, judgment of 27 March 2012, EU:C:2012:172, ¶¶22, 25. While the wording has changed over time, the critical point flowing through these cases is that dominant firms may use all normal methods to compete to win business.

38 Case C-209/10 *Post Danmark A/S v. Konkurrencerådet*, judgment of 27 March 2012, ECLI:EU:C:2012:172, ¶¶21-22. *See also* Case C-413/14 P *Intel*, judgment of 6 September 2017, EU:C:2017:632, ¶¶133-134

39 Maurits Dolmans and Wanjie Lin, *How To Avoid a Fairness Paradox in Competition Policy*, in *Fairness in EU Competition Policy: Significance and Implications*, 1st edition, edited by Damien Gerard, Assimakis Komninos, Denis Waelbroeck (Bruylant: GCLC Annual Conference Series 2020), p. 54.

40 Article 102 Guidance, ¶6 ("*the Commission is mindful that what really matters is protecting an effective competitive process and not simply protecting competitors*"); Case C-8/08 *T-Mobile Netherlands BV*, Opinion of Advocate General Kokott of 19 February 2009, EU:C:2009:110, ¶71 ("*[T]he objective of European competition law must be to protect competition and not competitors, because indirectly that is of benefit also to consumers and the public at large*").

To distinguish between competition on the merits and abusive conduct, the case law has established different categories of abuse, each with their own specific legal criteria. For example: (i) establishing a tying abuse requires proof of separate products, power in the market for the tying product, coercion, and foreclosure in the market for the tied product;[41] (ii) a refusal to deal is abusive if there is a denial of access to an indispensable input, a risk of eliminating all effective competition in a product market requiring that input, and consumer harm (via higher prices or reduced innovation);[42] (iii) predatory pricing and margin squeezes involve pricing below marginal costs (or pricing below long-run average variable costs with intent to exclude) resulting in foreclosure;[43] and (iv) discrimination requires that equal situations are treated differently, placing trading parties "*at a competitive disadvantage*", without "*legitimate commercial reasons*", and thereby creating anticompetitive effects.[44] These criteria serve as successive filters to help distinguish between abusive behaviour and procompetitive conduct.

Although the categories of abuse are not closed, new abuses cannot be postulated without limitation. If a type of conduct falls within an existing category of abuse, the legal conditions necessary to establish that abuse need to be satisfied. This is necessary to uphold the internal logic and coherency that characterises Article 102

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41 Case T-201/04 *Microsoft*, judgment of 17 September 2007, EU:T:2007:289.

42 Case C-7/73 *Commercial Solvents*, judgment of 6 March 1974, EU:C:1974:18; Case C-311/84 *Telemarketing* (***Telemarketing***), judgment of 3 October 1985, EU:C:1985:394; Joined Cases T-374/94 et al. *European Night Services*, judgment of 15 September 1998, EU:T:1998:198; Case C-7/97 *Bronner* (***Bronner***), judgment of 26 November 1998, EU:C:1998:569; and Case T-504/93 *Tiercé Ladbroke*, judgment of 12 June 1997, EU:T:1997:84.

43 For predatory pricing: Case C-62/86 *Akzo*, judgment of 3 July 1991, EU:C:1991:286. For margin squeeze: Case C-52/09 *TeliaSonera*, judgment of 17 February 2011, EU:C:2011:83; Case C-280/08 P *Deutsche Telekom*, judgment of 14 October 2010, EU:C:2010:603; and Case T-851/14 *Slovak Telekom*, judgment of 13 December 2018, EU:T:2018:929. *See also* Commission decision of July 18, 2019, Case AT.39711, *Qualcomm (predation)*.

44 Case C-322/81 *Michelin*, judgment of 9 November 1983, EU:C:1983:313, ¶90; Case T-311/94 *BPB de Eendracht*, judgment of 14 May 1998, EU:T:1998:93, ¶309; Case T-31/99 *ABB,* judgment of 20 March 2002, EU:T:2002:77, ¶240; Case C-106/83 *Sermide*, judgment of 13 December 1984, EU:C:1984:394, ¶28; Case C-174/89 *Hoche*, judgment of 28 June 1990, EU:C:1990:270, ¶25; and Case C-525/16 *MEO*, judgment of 19 April 2018, EU:C:2018:270.

TFEU.[45] If existing legal rules could be bypassed by simply renaming the conduct at issue, that would violate legal certainty.[46]

Outside established abuse categories, conduct must be assessed based on general principles. The overarching principle for abusive conduct that emerges from the case law is that the dominant company engages in conduct that creates barriers to independent competition;[47] that is, the incumbent creates an obstacle, which the incumbent did not face, but that a new entrant must overcome, before it can even begin to build or expand its own business.[48]

Consider the following: Exclusivity clauses can create barriers to independent competition because rivals cannot reach the customers tied to the exclusivity conditions.[49] The same applies for loyalty rebates.[50] A margin squeeze creates barriers because it leaves equally efficient rivals insufficient margin to compete viably in the downstream market.[51] Similarly, below-cost pricing can create barriers because equally efficient firms might not be able to come to the market profitably (for example, if they have less financial resource), even if they could

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45 This is also referred to as the systematic interpretation (or "*systematische Auslegung*") of Article 102 TFEU. On the systematic interpretation of EU law, *see* Koen Lenaerts and José A. Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, (2014) 20 Columbia JEL 3, p.17 *et seq.*

46 The principle of legal certainty "*requires, on the one hand, that rules of law must be clear and precise and, on the other, that their application must be foreseeable by those subject to them*," Case C-63/93 *Duff*, judgment of 15 February 1996, EU:C:1996:51, ¶20.

47 Case T-201/04 *Microsoft*, judgment of 17 September 2007, EU:T:2007:289, ¶1088; Case C-52/09 *TeliaSonera*, judgment of 17 February 2011, EU:C:2011:83, ¶62; Case T-321/05 *AstraZeneca*, judgment of 1 July 2010, EU:T:2010:266, ¶¶357, 803, 808, 812, 836; and Article 102 Guidance, ¶22.

48 G. J. Stigler, *Organization of Industry* (Chicago, The University of Chicago Press, 1968), p. 70 (referring to costs that "*are higher for a new firm than for an existing firm*").

49 Case C-85/76 *Hoffman-La Roche*, judgment of 13 February 1979, EU:C:1979:36, ¶89 (referring to the exclusivity clauses as something that "*ties purchasers*" to obtain all or most of their requirements from the dominant undertaking).

50 Case C-23/14 *Post Danmark II*, judgment of 6 October 2015, EU:C:2015:651, ¶35 (the loyalty rebates enable "*the dominant undertaking to tie its own customers to itself and attract the customers of its competitors*").

51 Case C-52/09 *TeliaSonera*, judgment of 17 February 2011, EU:C:2011:83, ¶62 *("the anti-competitive effect must relate to the possible barriers which such a pricing practice may create to the growth on the retail market of the services offered to end users and, therefore, on the degree of competition in that market*").

operate equally efficiently.[52] A tie can create barriers to independent market entry via third-party channels.[53] And a refusal to supply an indispensable input can create barriers if rivals cannot compete viably without access to the input.[54]

That exclusionary conduct under Article 102 TFEU requires the dominant company to create barriers to independent competition also follows from the wording of Article 102(b) TFEU itself, which can be seen as a general definition of exclusionary abuse. Article 102(b) TFEU prohibits conduct that limits production, markets or technical development of a dominant company's competitors to the prejudice of consumers.[55] In other words, Article 102(b) TFEU implies that "*anticompetitive conduct creates or increases obstacles, handicaps or difficulties for competitors which they would not otherwise face. If the dominant companies offer lower prices or better products or services, that does not 'limit' the possibilities open to their competitors.*"[56]

The concept of anticompetitive effects. The second requirement from *Hoffman La Roche* to establish a violation of Article 102 TFEU is that the EC must demonstrate that the abusive conduct is likely to lead to anticompetitive

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52 Case C-62/86 *Akzo*, judgment of 3 July 1991, EU:C:1991:286, ¶72 ("*Such practices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them*").

53 Case T-201/04 *Microsoft*, judgment of 17 September 2007, EU:T:2007:289, ¶¶1043-1046, 1088 (Microsoft's tie foreclosed rival media players from access to third-party PC OEMs as a distribution channel; the Court held that Microsoft's tie facilitated the "*erection of such barriers for Windows Media Player*").

54 Case C-7/97 *Bronner*, judgment of 26 November 1998, EU:C:1998:569, ¶46. In fact, in a refusal to supply case, the owner of the indispensable input is expected not

55 The Court has made clear that the reference to "*limiting*" refers to limiting the production, markets or technical development of a dominant company's competitors. *See* Joined Cases C-40-48/73 *Suiker Unie and others*, judgment of 16 December 1975, EU:C:1975:174, ¶¶526-527; and Case T-201/04 *Microsoft*, judgment of 17 September 2007, EU:T:2007:289, ¶¶643-648.

56 John Temple Lang, *Restriction of Competition and Exclusionary Abuse under Article 102 – the Solution*, Global Competition Law Centre speech, January 2016; and *The Notion of Restriction of Competition. Revisiting the Foundations of Antitrust Enforcement in Europe*, edited by Damien Gerard, Massimo Merola, and Bernd Meyring (Bruylant: GCLC Annual Conference Series 2017).

effects.[57] The touchstone for assessing these effects is that they must be so serious that they exclude equally efficient competitors.[58] This is because it is not the role of competition law to subsidise less efficient competitors, which ultimately would harm consumers.[59]

The exception is that the Commission recognises that a "*less efficient*" competitor "*may also exert a constraint which should be taken into account when considering whether particular price-based conduct leads to anticompetitive foreclosure. The Commission will take a dynamic view of that constraint, given that in the absence of an abusive practice such a competitor may benefit from demand related advantages, such as network and learning effects, which will tend to enhance its efficiency.*"[60] The idea is that a dominant firm should not be able to nip a rival in the bud where there are objective factors indicating that in the counterfactual, the rival would eventually be "*as efficient*".

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57 Case C-23/14 *Post Danmark II*, judgment of 6 October 2015, EU:C:2015:651, ¶67 ("*only dominant undertakings whose conduct is likely to have an anticompetitive effect on the market fall within the scope of Article [102 TFEU]*"); and Case C-209/10 *Post Danmark I*, judgment of 27 March 2012, ECLI:EU:C:2012:172, ¶44 ("*In order to assess the existence of anti-competitive effects [...] it is necessary to consider whether [the conduct] produces an actual or likely exclusionary effect*"). *See also* Case T-201/04 *Microsoft*, judgment of 17 September 2007, EU:T:2007:289, ¶1089 (the question was whether there was "*a reasonable likelihood that tying Windows and Windows Media Player would lead to a lessening of competition*").

58 As noted, competition rules do not generally seek to protect less-efficient rivals or prevent them from leaving the market. What matters is an "*exclusionary effect on competitors considered to be as efficient*" as the dominant firm. *See* Case C-413/14 P *Intel*, judgment of 6 September 2017, EU:C:2017:632, ¶136. *See also* Case C-209/10 *Post Danmark I*, judgment of 27 March 2012, EU:C:2012:172, ¶21; Case C-525/16 *MEO*, judgment of 19 April 2018, EU:C:2018:270, ¶31; and Article 102 Guidance, ¶¶6, 23.

59 Jehan Sauvage, *Why government subsidies are bad for global competition*, OECD, 15 April 2019 ("*Subsidies and other government support measures can likewise hurt recipients over the long run by encouraging complacency in firms and stifling innovation, with flow-on effects on countries' growth potential*").

60 Article 102 Guidance, ¶ 24. *See also* Case C-23/14 *Post Danmark II* EU:C:2015:343, Opinion of Advocate General Kokott, ¶71 (an as-efficient competitor test may not be necessary where it "*is impossible for another undertaking to be as efficient as the dominant undertaking*," which may be "*because of the particular conditions of competition prevailing on the relevant market (such as the fact that the market – as here – is characterised by high barriers to entry, high economies of scale and/or network-based services) or because the level of the dominant undertaking's costs is specifically attributable to the competitive advantage which its dominant position confers on it*").

To establish a violation, it is not sufficient to point merely to abusive conduct and anticompetitive effects, and conclude, without more, that there is a breach of Article 102 TFEU. Instead, the anticompetitive effects must also be "*attributable*" to the dominant company's abusive conduct.[61] The EC cannot presume a causal link between conduct and effects. As the Court of Justice made clear in *AstraZeneca*, "*a presumption of a causal link [...] is incompatible with the principle that doubt must operate to the advantage of the addressee of the decision finding the infringement*."[62]

The burden instead falls on the EC to establish causation in fact based on cogent and convincing evidence.[63] This requirement is linked to the fundamental distinction inherent in Article 102 TFEU between anticompetitive exclusion and exclusion as a result of competition on the merits: exclusion cannot be condemned if it is caused by conduct that constitutes competition on the merits. Instead, it must be caused by anticompetitive conduct.

The correct way to prove causation is by conducting a counterfactual analysis.[64] This follows from well-established case law under Article 101 TFEU: to demonstrate causation "*it is necessary to examine what would be the state of*

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61 Case C-23/14 *Post Danmark II*, judgment of 6 October 2015, EU:C:2015:651, ¶47; and Opinion of Advocate General Kokott in the same case, ¶80 (the alleged abusive conduct must "*in practice*" cause the anticompetitive effects postulated). *See also* Article 102 Guidance, ¶20 (changes in rivals' shares are a relevant factor for identifying a restriction of competition only if the changes are "***attributable*** *to the allegedly abusive conduct*" (emphasis added)).

In a similar way, if anticompetitive conduct is required by national legislation, there will be no infringement of Article 102 TFEU. This is because "*the restriction of competition is not* ***attributable, as those provisions implicitly require,*** *to the autonomous conduct of the undertakings*," *see* Case C-52/09 *TeliaSonera*, judgment of 17 February 2011, EU:C:2011:83, ¶49 (emphasis added).

62 Case T-321/05 *AstraZeneca*, judgment of 1 July 2010, EU:T:2010:266, ¶¶824-863. The Court partly annulled the Commission decision for failing to establish this causal link.

63 Article 102 Guidance, ¶20. The Courts have described the standard of evidence required by the Commission in similar terms – including "*factually accurate, reliable and consistent*" and "*solid, specific and corroborative*," *see* Case C-12/03 P *Tetra Laval*, judgment of 15 February 2005, EU:C:2005:87, ¶39; and Case T-149/89 *Sotralentz SA*, judgment of 6 April 1995, EU:T:1995:69, ¶63.

64 *See, e.g.*, Case T-814/17, *Lietuvos geležinkeliai AB v Commissions*, judgment of 18 November 2020, ECLI:EU:T:2020:545 (***Baltic Rail***), where the General Court considered the counterfactual as part of the applicant's claims that removal of a section of railway track could not have had anticompetitive effects in a case under Article 102 TFEU.

competition" if the conduct "*did not exist*" (*i.e.*, the counterfactual).[65] Counterfactual analyses are similarly well-established in merger control for assessing whether a merger would have harmed competition that would have existed or grown absent the merger.[66]

Deploying a counterfactual analysis ought equally to apply to Article 102 TFEU, because the concept of causation is the same as under Article 101 TFEU.[67] In fact, the Guidance Paper confirms that alleged abusive conduct should usually be assessed by "*comparing the actual or likely future situation in the relevant market (with the dominant undertaking's conduct in place) with an appropriate counterfactual*."[68] This requirement is particularly relevant in a fast-moving digital environment, where it is necessary to pursue an evidence-based analysis so as to avoid speculation on how markets would develop in alternative scenarios.

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65 Case C-56/65 *Société Technique Minière v Maschinenbau Ulm*, judgment of 30 June 1966, EU:C:1966:38, p. 250; Case T-328/03 *O2*, judgment of 2 May 2006, EU:T:2006:116, ¶71; Case C-382/12 *MasterCard*, judgment of 11 September 2014, EU:C:2014:2201, ¶164; Case C-42/84 *Remia*, judgment of 11 July 1985, EU:C:1985:327, ¶¶17-20; Case T-64/02 *Dr Hans Heubach*, judgment of 29 November 2005, EU:T:2005:431, ¶106; Case C-551/03 P *General Motors*, judgment of 6 April 2006, EU:C:2006:229, ¶72; and Case T-491/07 *Cartes Bancaires II*, judgment of 30 June 2016, EU:T:2016:379, ¶111 (the EC must analyse "*la situation de la concurrence en l'absence des mesures en cause*" and examine whether "*en l'absence des mesures en cause, la situation de la concurrence aurait été différente*"). *See also* Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C 11, ¶29.

66 The Horizontal Merger Guidelines provide that when assessing the competitive effects of a merger, the Commission "*compares the competitive conditions that would result from the notified merger with the conditions that would have prevailed without the merger*." *See* Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31, ¶9. The failing firm counterfactual and acquisition counterfactual are examples of counterfactuals that differ from the prevailing conditions of competition.

67 "*It goes without saying that it is of the utmost importance that legal tests applied to one category of conduct are coherent with those applied to comparable practices*," see Case C-413/14 *Intel*, Opinion of Advocate General Wahl of 20 October 2016, EU:C:2016:788, ¶103. As noted at fn. 64, in the *Baltic Rail* case the General Court recently deployed the concept of a counterfactual in an Article 102 TFEU case.

68 Article 102 Guidance, ¶21.

3.2 Exploitative Abuses

As well as exclusionary abuses, the EU Courts have developed the concept of an exploitative abuse, where a dominant firm directly extracts monopoly rents from consumers. The seminal case is the *United Brands* judgment of 1978.[69] The judgment sets out a cumulative, two-stage test for identifying excessive pricing: First, is the difference between the company's costs actually incurred and the price actually charged "*excessive*"? Second, is the price charged unfair in itself or when compared to competing products?[70] The judgment, however, goes on to say that "*other ways may be devised*" to identify unfairly high prices.[71] Ultimately, a price is exploitative if "*it has no reasonable relation to the economic value of the product provided*."[72]

Abstracting some more general principles to other types of exploitative abuse than excessive pricing, the case law establishes three conditions to identify an exploitative abuse: First, exploitation occurs if the dominant company extracts some benefit from its trading partners – the company "*reap[s] trading benefits which it would not have reaped if there had been normal and sufficiently effective competition.*"[73] Second, exploitation involves a situation where the benefit extracted is so excessive that "*it has no reasonable relation to the economic value of*

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69 Case C-27/76 *United Brands*, judgment of 14 February 1978, EU:C:1978:22.

70 *Ibid.*, ¶252. In *United Brands*, the Court of Justice in fact annulled the EC's finding of excessive prices in that case, because the EC has not analysed United Brands' costs to determine whether they were excessive, but instead relied on the observation that prices in some EU countries were higher than in Ireland. The EC's reliance on the Irish price as a benchmark, without assessing profitability of pricing in Ireland and costs, was an error.

71 The *Latvian Banks* case, and accompanying Opinion from Advocate General Wahl, provide additional guidance: (i) to identify unfair prices, comparisons with prices in other Member States may be appropriate if reference countries are selected "*according to objective, appropriate and verifiable criteria*"; and (ii) excessive prices need to be "*significantly*" and "*persistently*" above the competitive level. *See* Case C-177/16 *AKKA/LAA*, judgment of 14 September 2017, EU:C:2017:689; and Opinion of Advocate General Wahl of 6 April 2017 in the same case, EU:C:2017:286, ¶¶61, 106.

72 Case C-27/76 *United Brands*, judgment of 14 February 1978, EU:C:1978:22, ¶250.

73 *Ibid.*, ¶249. *See also* Case C-52/07 *Kanal 5 Ltd and TV 4 AB v. STIM*, judgment of 11 December 2008, EU:C:2008:703, ¶27.

the product supplied"[74] or where the consideration is "*disproportionate to the economic value of the service provided.*"[75] Third, the disproportionate benefit accrues to the dominant company as a result of the dominant company's market power.[76]

Historically, exploitative abuses have been rare.[77] In recent years, however, the EC and national agencies have increasingly pursued exploitative abuse cases, especially

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74 Case C-27/76 *United Brands*, judgment of 14 February 1978, EU:C:1978:22, ¶250. Advocate General Wahl emphasized this in strong terms in the *Latvian Banks* case: an agency should intervene "*only when it feels sure that, regardless of the limitations and uncertainties surrounding the calculation of the benchmark price, the difference between that price and the actual price is of such a magnitude that almost no doubt remains as to the latter's abusive nature*," *see* Case C-177/16, *AKKA/LAA*, Opinion of Advocate General Wahl of 6 April 2017, EU:C:2017:286, ¶112.

75 Case T-151/01 *DSD*, judgment of 24 May 2007, EU:T:2007:154, ¶121.

76 In other words, there should be a causal link between the dominant position and the exploitation: in an exploitative abuse, the dominant company "*made use of the opportunities arising out of its dominant position*," *see* Case C-52/07 *Kanal 5 Ltd and TV 4 AB v. STIM*, judgment of 11 December 2008, EU:C:2008:703, ¶¶25-28.

77 As explained by Advocate General Wahl in the *Latvian Banks* case, "*in its practice, the Commission has been extremely reluctant to make use of that provision against (allegedly) high prices practiced by dominant undertakings. Rightly so, in my view. In particular, there is simply no need to apply that provision in a free and competitive market: with no barriers to entry, high prices should normally attract new entrants. The market would accordingly self-correct. It may however be different in markets with legal barriers to entry or expansion and, in particular, in those in which there is a legal monopoly. Indeed, there may be markets which, because of their particular features, are not run efficiently when open to competition*," *see* Case C-177/16, *AKKA/LAA*, Opinion of Advocate General Wahl of 6 April 2017, EU:C:2017:286, ¶¶3-4.

The economic consensus for when excessive pricing cases could be justified is set out by Motta and de Streel: First, the market at issue has large and stable barriers to entry that entrench a strong dominant position. Second, the dominant position arises based on exclusive special rights or past anticompetitive exclusionary conduct that escaped condemnation. Third, there is no sector-specific regulator that is competent to address the matter, *see* Massimo Motta and Alexandre de Streel, *Excessive Pricing in Competition Law: Never say Never?*, in Konkurrensverket – Swedish Competition Authority (ed.), *The Pros and Cons of High Prices* (2007).

in the pharmaceutical sector, but also in the technology industry.[78] Competition agencies have also sought to show their alertness to consumer exploitation during the COVID-19 pandemic.[79] In March 2020, the European Competition Network issued a statement identifying excessive pricing as a particular concern during the outbreak, noting that "*it is of utmost importance to ensure that products considered essential to protect the health of consumers in the current situation (e.g. face masks and sanitising gel) remain available at competitive prices*."[80]

Below, we discuss two recent exploitative abuse cases in the technology sector below, demonstrating an increasingly flexible use of pre-existing concepts to meet perceived new challenges in the digital platform economy.

Facebook. In February 2019, the *Bundeskartellamt* found that Facebook's terms and conditions relating to its collection of user data constitute an abuse.[81] The *Bundeskartellamt* held that Facebook's terms and conditions, under which users agreed to the combination of their data from, *e.g.*, WhatsApp, Instagram, and Facebook, violated the GDPR. Relying on German law principles that unlawful terms and conditions can constitute an abuse, the *Bundeskartellamt* concluded that Facebook committed an exploitative abuse by combining data from different sources.[82] In August 2019, the Düsseldorf Court of Appeals granted suspensive

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78 There are ongoing or recent excessive pricing cases in the UK (*Pfizer / Flynn, Concordia, Actavis*), Italy (*Aspen*), the Netherlands (*Leadiant Biosciences*), Denmark (*CD Pharma*), the EU (*Gazprom*), Spain (*Aspen*), China (gas pipelines), South Africa (*Babelegi Workwear*), Turkey (*Biletix*), and Israel (*Tamar*). Similarly, Commissioner Vestager has stressed that "*we should intervene directly to correct excessively high prices, and other ways that businesses exploit their customers*", *see Protecting consumers from exploitation*, Speech at the Chillin' Competition Conference, Brussels, 21 November 2016.

79 George Cary *et al.*, *Exploitative abuses, price gouging & COVID-19: The cases pursued by EU and national competition authorities*, 30 April 2020, e-Competitions Competition Law & Covid-19, Art. N° 94392.

80 European Competition Network, *Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis*, 23 March 2020.

81 B6-22/16 *Facebook*, Bundeskartellamt, 6 February 2019.

82 Interestingly, Commissioner Vestager has stated that the *Facebook* decision could not "*serve as a template"* for EU action because the case "*sits in the zone between competition law and privacy*", *see* Aoife White and Lenka Ponikelska, *Germany's Facebook Order Will Be Studied by EU, Vestager Says*, Bloomberg, 8 February 2019. That reflects case law from the European Court of Justice in *Asnef-Equifax* that "*issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection*", Case C-238/05 *Asnef-Equifax,* judgment of 23 November 2006, EU:C:2006:734, ¶63. By contrast, President Mundt and Judge von

effect to Facebook's appeal against the decision, holding there are serious doubts about its legality.[83]

That decision, however, was reversed by the Federal Court of Justice's June 2020 decision, which ordered that "*Facebook must give users the choice to reveal less about themselves – above all what they reveal outside of Facebook*."[84] Interestingly, the Federal Court implicitly rejected the *Bundeskartellamt*'s reasoning, refusing to identify an abuse based on a violation of data protection law, but instead examining Facebook's data usage exclusively under competition law. [85] Commentators have noted that the ruling "*suggests that the existing rules on abuse of dominance are flexible enough to address new types of conduct on multi-sided markets*."[86] Facebook's appeal on the substantive case before the Düsseldorf Court of Appeals is pending, but it is expected that the Düsseldorf court is likely to follow the direction of the Federal Court.

Gibmedia. In December 2019, the French Competition Authority found in its *Gibmedia* decision that Google's termination of an advertiser's Google Ads account was abusive.[87] The authority's theory is that termination policies that

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Danwitz have argued that the same reasoning could be applied under Article 102 TFEU, *e.g.*, by analogy with the *AstraZececa* precedent, *see, e.g.*, *Consumers, privacy and competition – All elements of the same bigger picture?*, Panel III at the 19th International Conference on Competition, Berlin, 15 March 2019.

83 Case VI-Kart 1/19 (V) *Facebook*, OLG Düsseldorf, 26 August 2019. The Court found the following: First, users are not exploited by Facebook's use of data because, unlike financial payments, the data can be replicated and used again. Users freely decide whether to allow use of their data by balancing pros and cons of using ad-funded social network. Second, the Bundeskartellamt had failed to prove the required causal link Facebook's abuse and its market power: it failed to show that Facebook's terms deviated from the terms that would exist in a more competitive scenario.

84 Bundesgerichtshof, *Bundesgerichtshof bestätigt vorläufig den Vorwurf der missbräuchlichen Ausnutzung einer marktbeherrschenden Stellung durch Facebook*, 23 June 2020.

85 Romina Polley *et al.*, *German Federal Court of Justice Provisionally Finds Facebook's Data Collection Practices Abusive*, Cleary Gottlieb Alert Memorandum, 29 June 2020, p. 3.

86 *Ibid*., p. 4.

87 Décision 19-D-26 *Gibmedia*, Autorité de la concurrence, 19 December 2019. By way of background: Google terminated the accounts of three advertisers that it considered violated its policy on untrustworthy promotions. Google considered that the websites were misleading users by charging them for basic information that is typically available for free (*e.g.*, basic weather forecasts, directory information, company profiles).

allegedly lack objectivity, transparency, and are discriminatory are a form of exploitation of customers. The case has colourful facts involving an advertiser that the French Courts had held engaged in "*more than doubtful*" practices by exploiting vulnerable consumers to pay for basic information, such as directory information, that is available elsewhere for free. On the legal theory, it is difficult to see how a decision to terminate supply can exploit the customer: it does not extract any benefit from a trading partner. It therefore does not appear to fit the requirements of an exploitative abuse set out by the Court of Justice in *United Brands* and other cases. Again, the *Gibmedia* case provides an example of expanded use of existing rules to deal with perceived novel concerns in the digital environment (here, that service providers have become dependent on online platforms to reach customers).

3.3 Objective Justifications

As well as developing new abuses to capture new types of conduct, the case law has also evolved mechanisms to address possible justifications for conduct that affects competitors. A company can justify its conduct either by demonstrating that the conduct is necessary and proportionate, or that it produces efficiencies that counterbalance or outweigh the anticompetitive effects.[88] Efficiencies are not confined to economic considerations in terms of price or cost; they also include technical improvements in the quality of goods,[89] innovation, and possibly even the elimination of negative price externalities.

When invoking justifications or raising an efficiency defence, the company under investigation bears the initial evidentiary burden to submit "*firm evidence*" that its conduct is justified.[90] If the company submits such evidence, it then "*falls to the Commission [...] to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward*

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88 Case C-209/10 *Post Danmark I*, judgment of 27 March 2012, EU:C:2012:172, ¶41; and Article 102 Guidance, ¶28.

89 Article 102 Guidance, ¶30. *See also Microsoft (WMP)*, where the General Court accepted that Microsoft's conduct may in principle have been justified if it led to "*superior technical product performance*," but rejected this on the facts, Case T-201/04 *Microsoft*, judgment of 17 September 2007, EU:T:2007:289, ¶1159.

90 Case T-57/01 *Solvay*, judgment of 17 December 2009, EU:T:2009:519, ¶334. This reflects that it will typically be the dominant company that is better placed to adduce evidence and explanations justifying its conduct, *see* Case T-321/05 *AstraZeneca,* judgment of 1 July 2010, EU:T:2010:266, ¶686.

cannot be accepted".[91] In *GSK Spain*, both the General Court and the Court of Justice found that the EC erred because it had not seriously engaged with the justifications advanced by the defendant.[92] And in *Intel*, the Court of Justice confirmed that the EC must examine whether the benefits the conduct at issue created outweigh its alleged restrictive effects.[93]

Although we are not aware of an Article 102 TFEU case where the EC has blessed suspected anticompetitive conduct based on objectively justified efficiency considerations,[94] there are examples of the EC and EU Courts accepting that, in principle, abusive conduct may nonetheless be justified. For example, in *GSK Greece*, the Court of Justice recognized that a dominant company would be justified in not meeting orders that went beyond ordinary levels of supply, even if the limitations were intended to restrict parallel trade.[95] In *Motorola* and *Samsung*, the EC accepted that a holder of standard essential patents who has given a promise to license on FRAND terms, is nonetheless justified in seeking injunctions against patent users that do not qualify as willing licensees.[96]

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91 Case T-201/04 *Microsoft*, judgment of 17 September 2007, EU:T:2007:289, ¶1144.

92 Case T-168/01 *GlaxoSmithKline Services*, judgment of 27 September 2006, EU:T:2006:265, ¶¶275, 301; and Joined Cases C-501/06 *GSK Spain et al.*, judgment of 6 October 2009, EU:C:2009:610, ¶81. The *GSK Spain* cases concern the Commission's obligations under Article 101(3) TFEU when an undertaking has shown that the "*conditions of that provision could reasonably apply*", which is analogous to objective justification under Article 102 TFEU. The Court held that the Commission must take those arguments "*seriously*" and is "*obliged to refute those arguments*."

93 Case C-413/14 *Intel*, judgment of 6 September 2017, EU:C:2017:632, ¶140.

94 An explanation for the dearth of case law in this respect is that the question of objective justification arises early on in investigations in the definition of "abuse". Conduct that is efficient or objectively justified qualifies as "competition on the merits" and is not an "abuse".

95 Joined Cases C-468/06 to C-478/06 *GSK Greece*, judgment of 16 September 2008, EU:C:2008:504.

96 Case AT.39985 *Motorola,* Commission decision of 29 April 2014; and Case AT.39939 *Samsung*, Commission decision of 29 April 2014. In both cases, the EC considered that, on the facts, there was no objective justification because "*Apple was not unwilling to enter into a license agreement on FRAND terms*" (*Motorola,* ¶3; and *Samsung*, ¶5). The Court of Justice confirmed this principle in Case C-170/13 *Huawei v ZTE*, judgment of 16 July 2015, EU:C:2015:477.

3.4 Remedies and Commitments

If the EC finds an abuse of dominance, it can impose "*any remedy, whether behavioural or structural, which is necessary to bring the infringement effectively to an end.*"[97] Remedies imposed under Article 102 TFEU must comply with four main elements:

First, the remedy must be appropriate, necessary, and proportionate to bring the identified infringement to an end.[98] It must "*not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the act in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued*."[99] Accordingly, structural remedies are only a means of last resort when no behavioural remedy is appropriate.[100]

Second, all remedies are subject to the principle of legal certainty. This means that any remedy must be "*clear and precise*" so that companies "*may know without*

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97 Article 7(1) and Recital 12 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1, 4.1.2003 (**Regulation 1/2003**). For example, in *ENI*, the Commission identified concerns with regard to conduct by ENI that result from its ownership of strategic natural gas pipeline infrastructure. ENI offered to divest its stake in its international transport businesses and, as a result, the Commission held that "*ENI will no longer be subject to the inherent conflict of interest it faced operating both as a transmission system operator and as a company active on the Italian wholesale market*", *see* Case COMP/39.315, *ENI*, Commission decision of 29 September 2010.

98 Article 7 of Regulation 1/2003; and Case T-395 *Atlantic Container Line* (also known as the ***TAA* case**), judgment of 28 February 2002, EU:T:2002:49, ¶410.

99 Case T-491/07 *Cartes Bancaires*, judgment of 29 November 2012, EU:T:2012:633, ¶¶ 428, 438. *See also* Case T-201/04 *Microsoft*, judgment of 17 September 2007, EU:T:2007:289, ¶1276: "*the principle of proportionality requires that the burdens imposed on undertakings in order to bring an infringement to an end do not exceed what is appropriate and necessary to attain the objective sought, namely re-establishment of compliance with the rules infringed*".

100 A structural breakup remedy should be imposed "*where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking*" (Recital 12 of Regulation 1/2003).

ambiguity what are their rights and obligations and take steps accordingly."[101] Relatedly, the EC must have previously set out the remedy to the defendant "*in a sufficiently detailed manner*"[102] in a statement of objections so that companies can "*defend themselves as to the necessity and proportionality of the remedies envisaged.*"[103]

Third, in cases where an infringement can be brought to end in different ways, the EC cannot "*impose . . . its own choice from among all the various potential courses of actions which are in conformity with the treaty.*"[104] This means that the EC can impose a specific behavioural remedy if it is "*the only way of bringing the infringement to an end.*"[105] For example, in the Microsoft interoperability case, the EC decision stated that Microsoft had to disclose interoperability information at reasonable rates. But the decision did not prescribe the precise terms and conditions, and the EC argued in court that it did not have the power to make such an order.[106]

Finally, Article 7(1) of Regulation 1/2003 requires bringing the abuse "*effectively*" to an end. This reflects the overarching principle of "*effet utile*" of EC decisions.[107] As early as in *Camera Care*, the Court of Justice stressed that "*the Commission must be able to exercise the right to take decisions conferred upon it in*

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101 Case 92/87 *Commission v. France*, judgment of 22 February 1989, EU:C:1989:77, ¶22; Case C-279/95 *P Langnese-Iglo*, judgment of 1 October 1998, EU:C:1998:447, ¶78; and Case T-491/07 *Cartes Bancaires*, judgment of 29 November 2012, EU:T:2012:633, ¶¶443-444.

102 *TAA* case, ¶418.

103 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, [2011] OJ/C/308, ¶83.

104 Case T-24/90 *Automec*, judgment of 18 September 1992, EU:T:1992:97, ¶52; and Case T-167/08 *Microsoft*, judgment of 27 June 2012, EU:T:2012:323, ¶95.

105 In the words of Hjelmeng, the EC may order a company to comply, but it may not dictate it how to comply, *see* Erling Hjelmeng, *Competition law remedies: Striving for coherence or finding new ways?*, (2013) 50 Common Market Law Review 1007, p. 1012.

106 Case T-167/08 *Microsoft*, judgment of 27 June 2012, EU:T:2012:323, ¶95.

107 *See, e.g.*, Judgment of 20 September 2001, *Courage*, Case C-453/99, ECLI:EU:C:2001:465, ¶26; Judgment of 10 April 1984, *Von Colson*, Case 14/83, EU:C:1984:153, ¶28; Judgment of 5 April 1979, *Ratti*, Case 148/78, EU:C:1979:110, ¶¶20-21; Judgment of 4 December 1974, *Yvonne van Duyn*, Case 41/74, EU:C:1974:133, ¶12; Judgment of 6 October 1970, *Franz Grad*, Case 9/70, EU:C:1970:78, ¶5; Judgment of 16 July 1956, *Fédération Charbonnière de Belgique*, Case 8/55, EU:C:1956:7.

the most efficacious manner best suited to the circumstances of each given situation."[108] This offers adequate flexibility to craft new remedies that are not so stringent as to be disproportionate but strong enough to be effective.

The EC can also resolve proceedings through voluntary commitments under Article 9 of Regulation 1/2003.[109] Commitment decisions involve no finding of infringement and entail no fines.[110] Commitments are not appropriate if the conduct is sufficiently serious to warrant a fine,[111] and are disproportionate if they affect acquired rights of parties who were not involved in the proceedings.[112]

3.5 Interim Measures

The EC can impose interim measures provided three cumulative conditions are met: (i) there is *prima facie* evidence of an infringement, (ii) there is a need for urgent intervention due to the risk of serious and irreparable harm to competition,[113] and (iii) the balance of interests favours the imposition of interim

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108 Judgment of 17 January 1980, *Camera Care*, Case 792/79, EU:C:1980:18, ¶ 17. *See also* C. Ritter, *How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements?*, JECLAP 2016.

109 In addition, firms can voluntarily settle cases under Article 7 by admitting liability and winning a reduction in the fine. In the 2016 *ARA waste management* decision, the EC for the first time employed the settlement mechanism traditionally used for cartel cases in a case under Article 102 TFEU. ARA admitted liability for refusing to supply its rivals with access to its essential household waste management infrastructure in return for a 30% fine reduction; Case AT.39759, *ARA foreclosure*, Commission decision of 20 September 2016.

110 Since 2010, the Commission has opened around 37 abuse of dominance cases. It has found around 10 infringements in that time, and closed 15 cases with commitments or via no action.

111 Recital 13 of Regulation 1/2003. The Commission's Manual of Procedure likewise states that "*legally, a commitment decision is not appropriate when the Commission considers that the nature of the infringement calls for the imposition of a fine*". DG Competition, *Antitrust Manual of Procedure*, Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU, March 2012, Module 16, point (13).

112 *Groupe Canal+ v Commission* (Case C-132/19 P) EU:C:2020:1007.

113 This second limb is strict: there must be some harm – such as an irremediable loss of market share – that could no longer be remedied by the final EC decision. Purely financial harm only qualifies as "*serious and irreparable*" if it is so large as to imperil the existence of companies before the final decision in the main proceedings.

relief.[114] In October 2019, in *Broadcom*, the EC imposed interim measures in an abuse of dominance case for the first time in 20 years. The EC ordered Broadcom to remove exclusivity provisions in its agreements with six manufacturers of TV set-top boxes and modems.[115] In April 2020, Broadcom proposed commitments to the EC so that it would lift the interim measures.[116]

The EC has indicated that more interim measures decisions should be expected. On announcing the *Broadcom* decision, Commissioner Vestager stressed that interim measures decisions are "*so important*," especially in "*fast-moving markets*." The Commissioner emphasised that she is "*committed to making the best possible use of this important tool*" so as to enforce competition rules "*in a fast and effective manner*."[117] As discussed in Section 5 below, national authorities in France, Germany, and the UK have likewise pushed for greater use of interim measures. This may be particularly relevant in dynamic digital markets.

3.6 Fines

As well as imposing behavioural remedies, the EC can impose a fine of up to 10% of a company's total turnover of the preceding business year for abuses of dominance. The EC has broad discretion in setting fines, subject, broadly, to three limiting principles:

First, the EC's power to impose fines is circumscribed by the principle of proportionality.[118] Any fine must be "*in proportion*" and "*commensurate*" to the

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114 The legal basis is included in Article 8 of Regulation 1/2003. The Court first recognised the EC's power to impose interim relief in *Camera Care* in 1980, *see* Case C-792/79 R *Camera Care*, judgment of 17 January 1980, EU:C:1980:18. Before the *Broadcom* case, the EC last applied interim measures in an abuse of dominance case in *IMS Health*. The EC lost its case following three Court rules.

115 Broadcom has appealed the EC's interim measures decision before the General Court.

116 Charley Connor, *Broadcom proposes commitments to end EU interim measures*, GCR, 27 April 2020.

117 EC Commissioner Vestager, *Statement by Commissioner Vestager on Commission decision to impose interim measures on Broadcom in TV and modem chipset markets*, Brussels, 16 October 2019.

118 Case T-113/07 *Toshiba*, judgment of 12 July 2011, EU:T:2011:343, ¶282; *see also* Case T-54/03 *Lafarge*, judgment of 8 July 2008, EU:T:2008:255, ¶670; and Case T-224/00 *Archer Daniels Midland*, judgment of 9 July 2003, EU:T:2003:195, ¶198.

gravity and scope of the infringement.[119] Accordingly, while the EC has a margin of discretion in setting the amount of a fine,[120] it may not set a disproportionate fine.[121]

Second, the EC can impose a fine only where an undertaking acts intentionally or negligently.[122] This requirement is met only if the undertaking "*cannot be unaware of the anti-competitive nature of its conduct*."[123] Accordingly , the EC and Courts have confirmed in several cases that fines are not appropriate in cases that present novel theories of harm, or where there is diverging Member State jurisprudence.[124]

Third, the EC is bound by the self-imposed obligations it has set out for itself in its Fining Guidelines.[125] These set out in detail the methodology by which the EC sets fines, which will take into account, among other things, the nature, length

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119 Case T-229/94 *Deutsche Bahn*, judgment of 21 October 1997, EU:T:1997:155, ¶127; Joined Cases T-202/98 *et al. Tate & Lyle*, judgment of 12 July 2001, EU:T:2001:185, ¶106; Case C-295/12 P *Telefónica*, Opinion of AG Wathelet of 26 September 2013, EU:C:2013:619, ¶117; Case C-99/17 P *Infineon Technologies*, judgment of 26 September 2018, EU:C:2018:773, ¶¶195, 196, 204, 206; Case C-295/12 P *Telefónica*, judgment of 10 July 2014, EU:C:2014:2062, ¶200; and Article 23(3) of Regulation 1/2003.

120 Case C-520/09 P, *Arkema*, judgment of 29 September 2011, EU:C:2011:619, ¶93.

121 Case C-189/02 *et al Dansk Rørindustri*, judgment of 28 June 2005, EU:C:2005:408, ¶¶304, 319; Case C-628/10 *Alliance One International*, judgment of 19 July 2012, EU:C:2012:479, ¶58; and Case C-101/15 *Pilkington*, Opinion of AG Kokott of 7 September 2016, EU:C:2016:631, ¶93.

122 Article 23(2) of Regulation 1/2003

123 Case C-295/12 P *Telefónica*, judgment of 10 July 2014, EU:C:2014:2062, ¶156.

124 *See, e.g.*, Case AT.39985 *Motorola – Enforcement of GPRS standard essential patents*, Commission decision of 29 April 2014, ¶561; Case COMP/38.096 *Clearstream (Clearing and Settlement)*, Commission decision of 2 June 2004, ¶¶344-345; Case COMP/37.685 *GVG/FS*, Commission decision of 27 August 2003, ¶¶163-164; Case COMP/C-1/36.915 *Deutsche Post AG*, Commission decision of 25 July 2001, ¶193; Case COMP D3/34493 *DSD*, Commission decision of 20 April 2001; Case IV/36.888 *1998 Football World Cup*, Commission decision of 20 July 1999, ¶123; Case IV/33.218 *Far Eastern Freight Conference*, Commission decision of 21 December 1994, ¶¶157-159; Case T-191/98 *et al. Atlantic Container Line and Others (TACA)*, judgment of 30 September 2003, EU:T:2003:245, ¶¶1611, 1617; Case T-86/95 *Compagnie Générale Maritime and Others v Commission*, judgment of 28 February 2002, EU:T:2002:50, ¶¶484-485, 488; Case C-62/86 *Akzo*, judgment of 3 July 1991, EU:C:1991:286, ¶163.

125 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, [2006] OJ C 210.

and scope of the infringement; the value of sales of goods affected by the infringement; and whether there are aggravating or mitigating circumstances.[126]

Before 2004, the EC had never imposed a fine for an infringement of Article 102 TFEU that exceeded 1% of the turnover of the undertaking involved. In recent years, the EC has shown a tendency to impose increasingly high fines for abusive conduct, in particular in digital markets, culminating in cases such as *Google Shopping*, where the EC imposed a fine of €2.42 billion and *Google Android*, where it imposed a fine of €4.34 billion. If Google had not terminated the respective conduct within 90 days, Google would have faced penalty payments of up to 5% of the average daily worldwide turnover of Alphabet.

Fines can be imposed for a failure to abide by interim measures or commitment decisions. In 2013, the EC fined Microsoft €561 million for failing to comply with its browser choice screen commitments. The EC is also entitled to impose procedural fines of up to 1% of an undertaking's annual turnover if an undertaking provides false answers or answers late to the EC's requests for information.[127] Finally, the EC can impose periodic penalty payments to compel companies to abide by remedies and commitments decisions.[128]

3.7 Quantitative tools

Finally, Article 102 TFEU is flexible enough to take account of new business models and the emergence of new technologies. Economic and quantitative tools exist for the assessment of multi-sided platforms, for instance, and are fit for purpose. They include the concepts of direct and indirect network effects, zero-price sides of the platform, multihoming, lock-in, and user inertia. A given vertical restraint or conduct that is exclusionary in a single-sided market may have opposite effects in a platform environment. Specifically, when assessing conduct relating to a two-sided market, it is important to consider indirect network effects

126 *Ibid*.

127 Article 23(1) of Regulation 1/2003.

128 Article 24(1) of Regulation 1/2003. These can amount to 5 per cent of an undertaking's average daily turnover.

between all sides of the platform.[129] A one-sided approach can lead to incorrect conclusions about the competitive effects of conduct and could lead to competition authorities inappropriately sanctioning firms for pro-competitive behaviour, risking reducing competition and innovation.

One example is the Areeda-Turner test that has become a standard tool to assess claims of predation. Areeda and Turner conclude that a price below average variable cost should be presumed unlawful.[130] The opposite applies to platform markets. Behringer and Filistrucchi for example, show that applying a one-sided Areeda-Turner rule to a platform may mislabel a perfectly legitimate profit maximizing pricing policy as predation.[131] The welfare effects of conduct in a platform context depend on the specific platform characteristics, such as the strength and direction of the indirect feedback effects, the degree of multi-homing, the characteristics of platform participants, and the degree of sector convergence. With scale economies, a below-cost or no-cost price today may become an above-cost price in the future as costs drop with increased volume. Courts have already recognized this.[132]

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The range and scope of the different types of conduct captured by Article 102 TFEU, and its adaptability to different situations that have emerged over the last 60 years, suggest that there is little missing from the abuse toolbox when it comes to identifying and capturing new behaviours. Somewhat ironically, given the present criticisms that Article 102 TFEU is insufficiently flexible, Article 102

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129 Case C-67/13, *Groupement des cartes Bancaires*, EU:C:2014:2204, ¶¶78-79; and (in the US) Case 16-1454, *Ohio v. American Express*. For a discussion of the economics,.*see, e.g.*, David S. Evans, Multisided Platforms, Dynamic Competition, and the Assessment of Market Power for Internet-Based Firms (Univ. of Chicago Coase-Sandor Institute, Working Paper No. 753, 2016), https://ssrn.com/abstract=2746095.

130 E. Areeda, Phillip & F. Turner, David. (1975), *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act. Harvard Law Review,* 88.

131 Behringer, Stefan & Filistrucchi, Lapo. (2014), *Areeda-Turner in Two-Sided Markets*. SSRN Electronic Journal 46.

132 See, for instance, CA Paris, 25 novembre 2015, *Google / Evermaps (previously Bottin Cartographes)*, RG n° 12/02931.

TFEU has in the past been criticised as being too open-ended, thereby undermining legal certainty.[133]

What Article 102 TFEU does not offer, however, is tools to address non-competition-related societal concerns, that are not in the sphere of industrial economics, including fake news, rising inequality, robots and artificial intelligence replacing employees, data privacy and security (to the extent not parameters of competition), the creation of echo chambers, cronyism and corruption in public office, the coarsening of public discourse, or rising intolerance. Some of these issues are prevalent in competitive markets, while others prevail in concentrated markets that tend towards monopoly. But these issues are not competition problems that can or should be resolved by competition law. These societal problems should be resolved outside of antitrust law.[134] In our view, antitrust laws are ill-suited for remedying political problems in society – and introducing political objectives into antitrust risks politicising enforcement, reducing legal certainty, and undermining confidence in the foundations of antitrust.

4. Proposals for Adding Tools to the Abuse of Dominance Toolbox

Despite the broad scope of abuse of dominance rules, a range of new proposals has emerged to disrupt competition rules in order to address the challenges of the digital era. Discussing each of these at length is beyond the scope of this chapter,

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133 Pinar Akman, *The Concept of Abuse In EU Competition Law*, Law and Economic Approaches, 1st edition (Hart Publishing 2015).

134 Maurits Dolmans, Ricardo Zimbron and Jacob Turner, *Pandora's box of online ills: We should turn to technology and market-driven solutions before imposing regulation or using competition law*, Concurrences N°3-2017 I Conference I Oxford, 22 May 2017. For a different perspective, reflecting the US political landscape, see Lemley, *The Contradictions of Platform Regulation* (February 3, 2021). Available at SSRN: https://ssrn.com/abstract=3778909 ("*Tech platforms have an enormous influence on our lives, and they are not much constrained by competition today. Those facts have led to calls for their regulation from across the political spectrum. Many of those calls demand contradictory things, a sign that we increasingly want tech regulation (and tech platforms) to be all things to all people. Regulation can't serve that need. ... A focus on reintroducing competition into tech platforms will obviate the need for some regulation altogether....*")

and they have been addressed at length in other publications.[135] That said, in this section, we pick out three proposals that give us cause for concern; in section 5 below, we then go on to discuss some more promising proposals.

4.1 Blanket Structural Separation

Some commentators have argued that dominant digital platform companies should be structurally separated from their downstream businesses.[136] Amazon, for example, would be unable to both operate a marketplace and sell its own private-label goods on its marketplace. Structural separation, its proponents argue, would "*prevent leveraging and eliminate a core conflict of interest currently embedded in the business model of dominant platforms*."[137]

Structurally separating vertically-integrated businesses would sacrifice important procompetitive benefits and efficiencies that arise from the presence of operating in neighbouring or complementary markets, such as eliminating double marginalisation, avoiding post-contractual hold-up, or economies of scope or distribution that reduce costs.[138] As Bruce Owen notes, "*prophylactic regulation is not necessary, and may well reduce welfare by deterring efficient investments*," in circumstances where "*[e]mpirical evidence that vertical integration or vertical*

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135 *See, e.g.*, Tim Wu, *The course of bigness: Antitrust in the New Gilded Age,* Columbia Global Reports 2018; and Carl Shapiro*, Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, (2019) 33 J. of Econ. Persp. 69; Maurits Dolmans and Tobias Pesch, *Should We Disrupt Antitrust Law?*, (2019) 5 Competition Law & Policy Debate 2; Oliver Bethell, Gavin Baird and Alexander Waksman, *Ensuring Innovation Through Participative Antitrust*, (2020) 7 Journal of Antitrust Enforcement 30; Nicholas Levy, Henry Mostyn and Bianca Buzatu, *Reforming Merger Enforcement To Capture "Killer Acquisitions" – The Case For Caution*, (2020) 19 Competition Law Journal, 51; RBB, *Brief 59: A questions of balance: comments on a proposed new test for UK merger control*, RBB publications, 1 May 2019; Joshua Wright *et al.*, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, George Mason Law & Economics Research Paper No. 18-29, Arizona State Law Journal 2019; and Patrick Todd, *Digital Platforms and the Leverage Problem*, (2019) 98 Neb. L. Rev. 486.

136 Lina M. Khan, *Sources of Tech Platform Power*, (2018) 2 Geo. L. Tech. Rev. 325, 332 (proposing to implement "*[s]tructural remedies and prophylactic bans [to] limit the ability of dominant platforms to enter certain distinct lines of business.*"); and Elizabeth Warren, *Here's How We Can Break up Big Tech*, Medium, 8 March 2019 (proposing a prohibition on "*owning both the platform utility and any participants on that platform*").

137 Khan, *ibid*., at 333.

138 For a brief overview, see Patrick F. Todd, *Digital Platforms and the Leverage Problem*, (2019) 98 Neb. L. Rev. 486, at 515-517.

restraints are harmful is weak, compared to evidence that vertical integration is beneficial."[139] Accordingly, structural remedies risk "*throwing the baby out with the bathwater*".[140]

The EC, moreover, already has the power to structurally separate firms in order to remedy anticompetitive conduct.[141] But the EC has never used its power under Regulation 1/2003,[142] and Commissioner Vestager has recognised that structural remedies are a last resort.[143]

Some argue that behavioural remedies did not work in the *Microsoft (WMP)* and *Google Shopping* cases and that this shows that structural separation should have been ordered. In our view, this misunderstands the substance of those cases and their remedies. In *Microsoft (WMP)*, the ineffectiveness was due to the fact that the EC ordered unbundling without requiring Microsoft to charge a different price for Windows with and without Media Player. Microsoft was therefore allowed to replace technical and contractual bundling with a price tie. The solution would have been to charge different prices, reflecting the different values users derived from the different packages.

In *Google Shopping*, the EC raised a concern about unequal access – as between Google Shopping and rival comparison shopping services (CSSs) – to an

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139 Bruce M. Owen, *Antitrust and Vertical Integration in "New Economy" Industries with Application to Broadband Access*, (2011) 38 Rev. Indus. Org. 363.

140 Jean Tirole, *Competition and the Industrial Challenge for the Digital Age* (working paper, 3 April 2020).

141 Regulation 1/2003, Article 7. Article 16 of the EC's draft DMA proposes to allow the EC to impose behavioural or structural remedies necessary to ensure compliance, in the case of systematic non-compliance.

142 Prior to Regulation 1/2003, the Commission used its power to impose structural remedies twice in *Continental Can* and *Gillette*. Case 33440 *Warner-Lambert/Gillette and Others* and Case 33486 *BIC/Gillette and others*, Commission decision of 10 November 1992; and Case 26811 *Europemballage,* Commission decision of 9 December 1971 (annulled on other grounds). *See further* Cyril Ritter, *Remedies for breaches of EU antitrust law* (working paper, February 2017).

143 Foo Yun Chee, *EU's Vestager says breaking up companies is last option*, Reuters, 8 October 2019.

attractive design on Google's results pages known as the "Shopping Unit".[144] Consistent with the Shopping Decision's remedial order, Google provides CSSs with equal access to the Shopping Unit, by giving them the same opportunity to place product ads in Shopping Units as Google Shopping.[145] While some complainants object to the remedy because it does not provide links to CSSs' websites,[146] these criticisms are unrelated to the allegations of the case and thus the remedies (and, if anything, indicate deficiencies in the underlying theory of harm, rather than the remedy). The remedy mirrors the substantive concern in the case, which was about unequal access to the Shopping Unit, not links to CSSs' websites.[147] Criticism of the remedy therefore implies criticism of the substantive concern.

In short, we see no reason why a proportionate approach, which prefers behavioural remedies (which effect actual changes in market outcomes) and fines to structural separation, should not also prevail in respect of platform owners.

4.2 Broad Prohibitions on Different Treatment or "Self-Preferencing"

Some commentators had propose introducing *per se* bans on digital platforms or companies that perform a "*regulatory function*" from engaging in self-

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144 Case AT 39.740 – *Google Search (Shopping)*, Commission decision of 27 June 2017 (the Shopping Decision). For a full discussion of the *Google Shopping* case and its remedy, *see* T. Graf and H. Mostyn, Do We Need to Regulate Equal Treatment? The Google Shopping Case and the Implications of its Equal Treatment Principle for New Legislative Initiatives, Journal of European Competition Law & Practice, Volume 11, Issue 10, December 2020, pp. 561–574.

145 In the words of EC officials, the remedy "*appears to ensure equal treatment between Google Shopping and rival CSSs*," Joao Vareda, Line of business restrictions, the Google Shopping case, OECD, 8 June 2020.

146 *See* Hausfeld, *Google Shopping: 41 European Founders and CEOs Write to Commissioner Vestager*, 28 November 2019; and Joint Letter to Commissioner Vestager of 12 November 2020.

147 Because the Shopping Decision raised a concern about unequal treatment, what the Shopping Decision's remedy requires Google to do is to treat rival CSSs equally with its own CSS, including with regard to 'landing pages' (Shopping Decision, recital 700(c)). This is what the remedy does. Clicks on product ads in Shopping Units – from either Google Shopping or rival CSSs – lead to the landing page of the CSS's merchant partner where the user can buy the identified item. The condition applies consistently to all product ads, from both Google Shopping and rival CSSs. Google Shopping cannot place product ads that link to Google Shopping pages, just as CSSs cannot place product ads that link to CSS pages.

preferencing or treating affiliates differently to rivals.[148] The meaning of the term "self-preferencing" or "unequal treatment" in this context describes the situation where a digital platform owner treats its own downstream products or services more favourably within the platform's ecosystem than those of third parties (including rivals). Banning self-preferencing might be accomplished by expanding the application of competition law (as in the *Google Shopping* case), by codes of conduct, or through regulation.

The EC's recently published draft Digital Markets Act envisages prohibiting gatekeepers from engaging in certain conduct that may qualify as unequal treatment, without the possibility for justifications or an assessment of effects. Proposed prohibitions include degrading interoperability with third-party alternatives, refusing business users' access to data generated through their sales digital platforms, or treating third-party services less favourably in search rankings.[149] Similarly, the German Competition 4.0 Act includes a prohibition of self-preferencing and leveraging power from one market to another without the German competition agency having to prove competitive harm.[150]

The rationale for introducing a ban on unequal treatment is the notion that (a) platforms have emerged that are protected by barriers to entry such as network effects, and that have become "unavoidable trading partners" on which other firms are thought to depend for market access; and (b) platform firms are vertically integrated, like Amazon, providing not only the platform, but also products and services marketed downstream via the platform. This is thought to give rise to a conflict of interest, where platform owners have an incentive to favour their own downstream businesses. Where insufficient *inter*-platform competition is thought to exist to constrain such behaviour – for instance, where users do not multi-home, and alternative platforms to which businesses and users could switch

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148 EU Special Advisor's report, p. 66 ("if "*the platform performs a regulatory function, it should bear the burden of proving that self-preferencing has no long-run exclusionary effects on product markets*"). The Furman report refers to prohibiting situations where a "*platform with strategic market status [is] giving undue preferential prominence on its webpages to its own integrated services*"; Furman report, ¶2.47.

149 Digital Markets Act, *supra* note 3.

150 German Competition 4.0 Act, *supra* note 3.

are considered unlikely to emerge – a ban on unequal treatment is thought necessary to preserve *intra*-platform competition.[151]

No distinction is made between platforms in markets that have tipped and those that have not, and it is unquestioningly assumed that all digital markets are prone to tipping.[152] In addition, broad prohibitions against unequal treatment would, by their nature, not be fact-specific but would apply across a category of different firms, competing in different areas, engaged in many different forms of conduct. In our view, this could have several unintended consequences: hampering vertical integration, which is presumptively efficient; eliminating synergies; and leading to delayed or mothballed product improvements.[153]

In particular, not all conduct that could be characterised as unequal treatment is invariably harmful. To the contrary, the case law on refusals to deal makes clear that it is not abusive for a dominant company to treat itself differently by reserving for its own use an asset that is not indispensable, but merely "*advantageous.*"[154] Even entry into adjacent markets based on self-preferencing is not necessarily anti-competitive. Non-coercive self-preferencing can in fact be welfare enhancing when it facilitates entry into new sectors and creates inter-platform competition.[155]

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151 See, e.g., Todd, supra note 138, at 522 *ff.* (examining the empirical conditions under which it could be considered appropriate to shift the emphasis of competition policy from inter-platform competition to intra-platform competition).

152 *See, c.f.,* Herbert J. Hovenkamp, *Antitrust and Platform Monopoly*, forthcoming, 2021, Yale L.J., at 17 ("*Notwithstanding overwhelming evidence to the contrary, the market for digital platforms is often said to be winner-take-all*")

153 For an expression of this consensus, *see* OECD, *Vertical Mergers in the Technology, Media and Telecom Sector*, DAF/COMP(2019)5; and Simon Bishop, Andrea Lofaro, Francesco Rosati and Juliet Young, *The Efficiency-Enhancing Effects of Non-Horizontal Mergers*, Report by RBB Economics for DG Enterprise and Industry.

154 Case C-7/97 *Bronner*, judgment of 26 November 1998, EU:C:1998:569, ¶43; Joined Cases C-6/73 and C-7-73, *Commercial Solvents*, judgment of 6 March 1974, ¶25; C-311/84, *CBEM*, judgment of 3 October 1985, ¶26; and Joined Cases C-241/91 P and C-242/91 P, *Magill*, judgment of 6 April 1995, ¶56.

155 *See e.g.*, Feng Zhu & Qihong Liu, *Competing with Complementors: An Empirical Look at Amazon.com,* 39 Strategic Mgmt. J. 2618, 2619 (2018) (Finding that Amazon's entry into third-party sellers' product markets benefitted users due to use of Amazon's more efficient distribution system); Jens Foerderer et al., *Does Platform Owner's Entry Crowd Out Innovation? Evidence from Google Photos*, 29 Inf. Syst Res. 444 (2018) (Finding that Google's entry into photography apps for the Android OS created additional consumer

It is generally procompetitive policy to encourage companies to develop their own innovations and use those innovations for themselves.[156] Fostering incentives to innovate upstream and invest in alternative infrastructure or platforms, instead of mandated sharing of assets, is beneficial for all participants.[157] Participating in the fruits of one's innovation is what encourages innovation in the first place. As Advocate General Jacobs explained in *Bronner*:[158]

> It is generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business [...] Thus the mere fact that by retaining a facility

awareness of and demand for photography apps generally, which benefitted third-party producers); and Zhuoxin Li & Ashish Agarwal, Platform Integration and Demand Spillovers in Complementary Markets: Evidence from Facebook's Integration of Instagram, 63 Mgmt. Sci. 3438 (2017) (Finding that Facebook's integration of Instagram into Facebook benefitted users and third-party producers (who benefitted from users' increased awareness of the app ecosystem)).

156 The German Bundesgerichtshof has consistently excluded self-preferencing as an abuse, absent indispensability, precisely because competition law does not require companies to subsidise competition against themselves, "*Niemand ist verpflichtet, zu seinen Lasten fremden Wettbewerb zu fördern*", BGH, KVR 17/08 *Bau und Hobby*, 11 November 2008, NJW 2009, 1753, ¶24; *see also* BGH, KZT 2/90 *Aktionsbeträge*, 12 November 1991, NJW 1992, 1827 (1828), ¶22; BGH, KZR 65/10 *Telefon- und Branchenverzeichnisse*, 31 January 2012, NJW 2012, 2110, ¶14; BGH, KZR 7-10 *Grossistenkündigung*, 24 October 2011, NJW 2012, 773, ¶¶31, 53; BGH, KZR 4/01 *Kommunaler Schilderprägebetrieb*, 24 September 2002, GRUR 2003, 167 (168); BGH, KZR 6/86 Freundschaftswerbung, 10 February 1987, NJW 1987, 3197 (3198-9); BGH,KVR 5/81 *Stuttgarter Wochenblatt*, 29 June 1982, NJW 1982, 2775 (2776); BGH, KZR 54/71 *Registrierkassen*, 26 October 1972, NJW 1973, 280 (281).

US Courts have reached a similar conclusion: *Allied Orthopedic* held, "*a monopolist has the right to redesign its products to make them more attractive to buyers*" and *"has no duty to help its competitors survive or expand*", *Allied Orthopedic Appliances Inc v. Tyco Health Care Group LP*, 592 F.3d, 991, 999 and 1002 (9th Cir. 2010). As held in *Berkey*, a company has the right to compete on the merits, including by "*seek[ing] the competitive advantages of its broad-based activity*," including "*greater ability to develop complementary products*", *Berkey Photo, Inc. v Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979).

157 Case COMP/39.525 *Telekomunikacja Polska*, Commission decision of 22 June 2011, ¶700. *See too* Case C-7/97 *Bronner*, Opinion of Advocate General Jacobs of 28 May 1998, ECLI:EU:C:1998:264, ¶57.

158 Case C-7/97 *Bronner*, Opinion of Advocate General Jacobs of 28 May 1998, EU:C:1998:264, ¶57.

> for its own use a dominant undertaking retains an advantage over a competitor cannot justify requiring access to it.

A duty to deal should therefore be limited to (a) truly essential facilities and (b) cases where refusal to deal reduces the quality of the platform.[159] Even in such cases, a case-by-case evaluation is needed *(*for example, of the degree of multi-homing and switching). Self-preferencing and tying does not necessarily increase market power in the primary market and may in fact reduce it. Efforts at self-preferencing, if they reduce the quality of the platform, can result in consumer switching to other competing platforms and consequently to the decline of the platform. In such cases it may not be appropriate to require a duty to deal.

Moreover, an obligation to provide equal treatment to all participants on a platform could unintentionally lead to a reduction in quality of the service in question. To take some practical examples: Consider Google's introduction of a thumbnail map on its results pages in response to location-based queries – after a full trial of the evidence, the High Court of England and Wales held that this was "*pro-competitive*" and an "*indisputable*" product improvement.[160] Showing rival

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[159] This was the situation in the Microsoft cases. By reducing interoperability with complementary products (the work-group server OS) and tying applications (streaming media players and browsers), Microsoft's PS OS became less attractive and lost quality. Microsoft had no other reason than the desire to prevent the emergence of rival products that could eventually evolve into rival platforms – as servers and browsers eventually did once a remedy was imposed in the *Microsoft (WMP)* case and the *Microsoft (tying)* case. *See* Case T-201/04 *Microsoft*, judgment of 17 September 2007, EU:T:2007:289; and Case COMP/AT.39530 *Microsoft (Tying)***,** Commission decision of 16 December 2009. *See also* the General Court in *Baltic Rail*, where EC found that Lithuanian Railways committed an abuse by removing a short section of 150-year old railway. The removal of the track meant that its downstream rival had a longer and more expensive route to reach Latvian ports – a significant quality reduction that the General Court found on the facts was unjustified. The judgment notes that the point of the *Bronner* test is to protect incentives to invest in infrastructure but held that this was not a concern because Lithuanian Railways had a regulatory obligation to grant access. Given that there was an obligation to supply via regulation, the *Bronner* test did not come into play.

[160] *Streetmap v Google* [2016] EWHC 253 (Ch), ¶84. The hearing, on abuse only, lasted 6 days in the High Court in front of Mr. Justice Roth, who is also President of the UK's competition specific court, the Competition Appeals Tribunal. In the trial, Streetmap called a factual witness, two experts in computer science, and an expert economist. Streetmap was declined permission to appeal on three separate occasions: at the hearing itself, by the Court of Appeal on the papers, and by the Court of Appeal at an oral hearing.

maps would have had a "*serious impact on the quality*" of Google's results, including delays in returning results and inaccurate maps.[161]

Similarly, around 2006, Google introduced a weather box on its pages to provide direct weather information in response to queries for weather. This increased the quality of Google's search service, but complainants argued that by showing the weather box, Google engaged self-preferencing and harmed competing weather service websites. In the *Wetterdienstleister* case, the Hamburg Court rejected these complaints, holding that "*it is reasonable for a search engine to provide a direct response to a search query rather than link to third-party pages that may or may not offer the responsive content*".[162]

Suppose that a broad prohibition on unequal treatment had been in place in 2006, when Google began to show these designs. A requirement to treat all downstream services equally could have discouraged Google from launching these beneficial and procompetitive innovations in Europe. Search would be stuck at the level of "ten blue links" for weather and maps queries – an obvious degradation in quality. European consumers would have thereby been deprived of the benefits of those innovations.

These sorts of integrative efficiencies are common in software development, even if closer integration means "preferencing" one's own features or code.[163] As Carl Shapiro notes, "*the boundary between the 'platform' and services running on that platform can be fuzzy and can change over time*."[164] Under the contemplated prohibitions against unequal treatment, companies risk being prohibited from

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161 *Streetmap v Google* [2016] EWHC 253 (Ch), ¶166-171.

162 District Court of Hamburg, Ref 408 HKO 36/13 *Verband der Wetterdienstleister v Google*, order of 4 April 2013.

163 Indeed, there are efficiencies stemming from both a platform owner's *presence* in an adjacent market (e.g. elimination of double-marginalisation, elimination of hold up; economies of scope or distribution) and a platform owner's integration of the adjacent product with its platform or other downstream products or features. *See* Patrick F. Todd, *Digital Platforms and the Leverage Problem*, (2019) 98 Neb. L. Rev. 486, at 514-19; EC Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07), para. 13 ("*The integration of complementary activities or products within a single firm may produce significant efficiencies and be pro-competitive*"); and Dennis W. Carlton and Jeffrey M. Perloff, Modern Industrial Organization (4th ed, Pearson 2015) 420–428.

164 Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, (2019) 33 J. of Econ. Persp. 69, 84.

launching an incremental improvement to the platform because there is a risk that the improvement is characterised as a separate service that is treated unequally.

Rather than blanket prohibitions, we believe it is better if allegations of unequal treatment are assessed based on a case-specific factual assessment that can take into account both procompetitive justifications and the assessment of the effects. Indeed, the EC has shown in several cases that it can detect and sanction cases of anticompetitive unequal treatment based on case-specific analyses: In *Telemarketing*, the dominant television station was penalised for favouring its own telemarketing service by admitting only ads with its own telemarketing service's telephone number.[165] In *Orange Polska*, the EC fined the incumbent telecom network provider for granting its subsidiary "*more favourable conditions*" for accessing its indispensable broadband network.[166] And in *Decca Navigator*, Decca deliberately degraded the quality of its platform through "*sham*" changes in transmission frequency to provide its own accessory products with an advantage.[167]

By contrast, claims of unequal treatment have been rejected based on the facts in other cases, showing that agencies and courts can discern between deserving and undeserving claims of unequal treatment. The *Streetmap* and *Wetterdienstleister* cases discussed above are two notable examples applied to search results, but search is not the only situation where unequal treatment allegations have been rejected. For example, in *Bronner*, the Court of Justice held that it was not abusive for Mediaprint to engage in self-preferencing by including only its newspapers in its distribution network.[168] Other means of distribution were available, such as kiosks and post, and the fact they were perceived as "*less advantageous*" was insufficient to create an abuse.[169] In *Getmapping*, the High Court rejected allegations that a dominant mapping provider (Ordinance Survey) gave

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165 Case C-311/84 *CBEM*, judgment of 3 October 1985, EU:C:1985:394.

166 Case COMP/39.525 *Telekomunikacja Polska*, Commission decision of 22 June 2011, ¶¶748, 762.

167 Case IV/30.979 *Decca Navigator Systems*, Commission decision of 21 December 1988, ¶¶52, 108. Similarly, in *Microsoft (WMP)*, Microsoft's coercive tie of Windows Media Player (WMP) to Windows OS (a form of self-preferencing) degraded the overall quality of the Windows OS and Microsoft admitted that there was 'no technical reason' for the preferencing of WMP, *see* Judgment of 17 September 2007, Microsoft, T-201/04, EU:T:2007:289, ¶1221.

168 Case C-7/97 *Bronner*, judgment of 26 November 1998, EU:C:1998:569.

169 Case C-7/97 *Bronner*, judgment of 26 November 1998, EU:C:1998:569, ¶43.

preference to its own digital photos, rather than photos from rivals, when showing maps on its website. [170] Getmapping was capable of selling its images without access to the maps on Ordinance Survey's website.

What the different outcomes in these cases show is that concerns of unequal treatment should be assessed based on the facts of a particular case that takes into account justifications and effects.[171] For example, the following questions may be relevant to the assessment:[172]

(i) Does the design improve quality of the platform and benefit consumers (and has the platform carried out testing to prove that this is the case)?

(ii) Is the design or feature part of a single business or a distinct business that may be the subject of preferencing?

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170 G*etmapping Plc v. Ordnance Survey* [2002] EWHC 1089.

171 *See* Pedro Caro de Sousa, What Shall We Do About Self-Preferencing?, CPI, 24 June 2020 ("*Absent the identification of specific features that make the conduct anticompetitive, it becomes very hard to distinguish between lawful and unlawful conduct, particularly since self-preferencing is a normally accepted business practice*"). *See also* P. Regibue, Discussion at CRESSE, 7 July 2020, from 24 minutes, 50 seconds ("*Look at self preferencing. I do not want an ex ante regulator to deal with self-preferencing. No. Because that's a proper antitrust issue. The theory of harm to be precise will differ from one platform to the other, so that is still something I want to deal with. But if I have a regulator that kind of monitors the use of algorithm[s] as part of, for example, remedy implementation, this regulator might at least describe what you do with your algorithm. Do you self-preference or not? Then it might be up to me to see whether it's a problem. It might be that in a given set-up, self-preferencing is not a problem*").

172 *See* T. Graf and H. Mostyn, Do We Need to Regulate Equal Treatment? The Google Shopping Case and the Implications of its Equal Treatment Principle for New Legislative Initiatives, Journal of European Competition Law & Practice, Volume 11, Issue 10, December 2020, pp. 561–574; and M. Pickford QC, *In Defence of Competition Law: Addressing the European Commission's Proposals For Ex Ante Regulation of Online Platforms, Including In Particular Prohibiting Self-Preferencing By Search Platforms,* November 2020 (Arguing that "*no new rules are required to tackle self-preferencing, whether in the form of outright prohibition, reversal of the burden of proof, or a code of conduct. Existing ex post competition law in the form of the duty to supply, together with development of the law on the prohibition on product degradation, provide a sufficient basis for intervention in the interests of consumers*").

(iii) Does the design provide a direct answer to a question, does it link to third parties, or does it link to the platform's own services without justification?

(iv) Does the design provide users with an easily-accessible choice of different services?

(v) Is the design inclusive of ecosystem players that have different business models?

(vi) What is the degree of multi-homing,[173] and at which cost can (potential) rivals access or develop other channels to reach consumers?

(vii) If the competitor is dependent on a given upstream service or platform, is that the result of its own choice not to develop for other platforms?[174]

This kind of case-specific analysis would be consistent with how competition authorities and courts have approached allegations of unequal treatment concerning Google's specialised results. While the EC found an infringement in the *Google Shopping* case, many other courts and authorities have rejected similar allegations because they held these results are a procompetitive product improvement and do not foreclose competition.[175]

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173 The welfare impact of tying typically depends on the specific platform context, including the degree of multi-homing on the different sides of the platform. Multi-homing can also counteract the tendency towards tipping and lock-in effects. Even if tying leads to foreclosure, the welfare implications can be subtle and ambiguous. See Choi, Jay Pil. *Tying in two-sided markets with multi-homing The Journal of Industrial Economics* 58, no. 3 (2010): 607-26.

174 Similar questions are discussed in G Federico, F Scott Morton, and C Shapiro, *Antitrust and Innovation: Welcoming and Protecting Disruption in Innovation Policy and the Economy* (Eds. J Lerner and S Shern, University of Chicago Press), December 2019, p.162 ("*Whether or not consumers are harmed depends on whether the platform owner's policies increase the overall value of the platform to users, the nature of competition among substitutes for the complement, and the ability to move away from the platform (which is a function of the degree of effective interplatform competition)*")

175 The FTC held that specialised results are product improvement for users. The High Court of England & Wales found that specialised results (a map) were an "*indisputable*" product improvement and "*procompetitive*". In *Wetterdienstleister*, the Hamburg Landgericht found that Google's display of specialised weather information "*increases the overall*

As a final point, the EU has recently adopted the EU Platform to Business Regulation.[176] The Regulation aims to ensure that businesses that distribute through platforms "*are granted appropriate transparency, fairness and effective redress possibilities.*" The Regulation introduces transparency obligations, including requiring platforms to explain any differential treatment they may give to themselves or a business they control, and mandates for a suitable redress mechanism.[177] The EC, moreover, has just published detailed guidance on how the Regulation should operate, including the disclosure obligations for differentiated treatment.[178] The Regulation may solve concerns expressed about platforms engaging in unequal treatment in ranking and presentation.[179] It may, therefore, be better to wait to see how the new Regulation plays out before introducing broad prohibitions on unequal treatment that risk unintentionally outlawing procompetitive conduct and beneficial innovations.

4.3 Reversing the Burden of Proof for Digital Platforms

Another proposal to overhaul competition law is that the burden of proof in unilateral conduct cases involving digital platforms should be reversed, so that a

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attractiveness of its search engine". CADE stressed that when Google introduced specialised results "*Google innovated to improve the quality and experience of online searches for users, which is considered to be a pro-competitive behavior.*" The Canadian Competition Bureau found that: "*Google's changes are generally made to improve user experiences*". And the Taiwan Fair Trade Commission held that Google's specialised results served "*to improve its users' search experiences*".

176 Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, [2019] OJ L 186.

177 For example, the P2B Regulation imposes a notice period of at least 15 days before platforms can implement changes to their terms and conditions; requires platforms to provide a business user with a statement of reasons when restricting, suspending and terminating its service; requires platforms to set out in their terms and conditions (i) the main parameters determining ranking and the reasons for the relative importance of those main parameters as opposed to others, (ii) a description of any differentiated treatment platforms give, (iii) and a description of the access of business users to data.

178 Commission Notice Guidelines on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council 2020/C 424/01

179 The EC's Expert Group for the Observatory on the Online Platform Economy has noted that the P2B Regulation provides a "*good starting point*" for promoting "*transparency and oversight [for] the practices in which platforms engage.*" *See* EC Expert Group for the Observatory on the Online Platform, *Work Stream on Differentiated Treatment*, Progress Report, 10 July 2020.

dominant platform should bear "*the burden of proof for showing the procompetiveness of its conduct*."[180] Commissioner Vestager had previously noted that she was considering the EU Special Advisors' report's proposal that digital companies "*would need to show that their behaviour is causing no harm to competition rather than the Commission having to prove it*."[181] The proposal to reverse the burden of proof raises several concerns:

First, the reversal of the burden of proof is not consistent with the presumption of innocence[182] protected under Article 48 of the Charter of Fundamental Rights and Article 6(2) of the European Convention of Human Rights and Fundamental Freedoms (**ECHR**).[183] Because antitrust proceedings are quasi-criminal,[184] these fundamental rights are fully engaged and apply to digital platforms, too. This is

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180 EU Special Advisors' report, pp. 4, 51. *See also* Stigler Committee on Digital Platforms, Final Report, September 2019 (the **Stigler Report**), p. 98: "*Perhaps most importantly, antitrust law might be revised to relax the proof requirements imposed upon antitrust plaintiffs in appropriate cases or to reverse burdens of proof*"; and "*Qualitative or imperfect evidence of harm, when combined with deliberate and severe data restrictions, should be considered prima facie evidence of harm*".

181 Financial Times, *Margrethe Vestager eyes toughening "burden of proof" for Big Tech*, 30 October 2019. More recently, the Commissioner said that reversing the burden of proof would likely require changes to the law, but that rebuttable presumptions were already enshrined in the EC's legal framework and are used where "*[w]e can safely assume from a given conduct [that] anticompetitive effects are likely to follow.*" PaRR, *Vestager cites rebuttable presumptions in digital dominance proof debate - ABA Spring Meeting*, 27 April 2020.

182 *See also* Universal Declaration of Human Rights, Article 11, and International Covenant on Civil and Political Rights, Article 14.

183 Under Article 6(1) TEU, the Charter is a binding source of primary law in the EU. Article 6(2) TEU provides that the EU (as is already the case for its Member States) shall accede to the ECHR. Fundamental rights are enshrined in general principles of EU law protected by the Court of Justice and are inspired by the ECHR, Case C-29-69 *Stauder*, judgment of 12 November 1969, EU:C:1969:57; and Case 36-75 *Rutili*, judgment of 28 October 1975, EU:C:1975:137.

184 ECtHR, *A. Menarini Diagnostics srl v Italy*, second section, judgment of 27 September 2011, ¶10. *See also* Opinion of Advocate General Sharpston in *KME* discussing the ECtHR case law, and holding that competition law is of general application and that anticompetitive conduct is "*generally regarded as underhand, to the detriment of the public at large, a feature which it shares with criminal offences in general and which entails a clear stigma*," thus concluding that competition law is of a criminal nature, Case C-272/09 P, *KME*, Opinion of AG Sharpston of 10 February 2011, EU:C:2011:63, ¶64. In *Pergan*, the General Court confirmed these principles apply in competition cases, Case T-474/04 *Pergan Hilfsstoffe für industrielle*, judgment of 12 October 2007, EU:T:2007:30.

especially the case if the lower evidentiary standard is combined with the EC having greater regulatory powers. As the President of the General Court, Marc van der Woude, recently observed:[185]

> Where the contested conduct of the public authorities is repressive in nature, it is hard to conceive, at least in free democratic societies, that citizens and firms can be condemned on the basis of estimates, approximations or guesses, even if they are informed ones. Uncertainty must then be balanced against the requirements of the presumption of innocence [...]. [T]his balance is struck by relying on legal concepts, such as the burden of proof.

Second, while courts and agencies can resort to presumptions to avoid analysis where conduct is obviously (i.e., "by nature") harmful to competition, these presumptions should – in the words of the Court of Justice – be used "*restrictively*."[186] Otherwise, agencies can prohibit measures that "*may, in reality, be procompetitive.*"[187] There is no suggestion that all the types of conduct engaged in by dominant platforms fall into the categories of conduct, like hardcore cartels, "*which reveal a sufficient degree of harm to competition*" that they can be presumed to be anticompetitive.[188] Rather, outlawing whole new categories of conduct based on presumptions, rather than case-specific analysis, risks depriving European consumers of the benefits of risky innovation, and new business models.[189] The EU Special Advisor's report admits that "*it is extremely difficult*

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185 Marc van der Woude, *Judicial Control in Complex Economic Matters*, (2019) Journal of European Competition Law & Practice 10(7) 415.

186 Case C-67/13 *Cartes Bancaires*, judgment of 11 September 2014, EU:C:2014:2204, ¶58.

187 Case C-413/14 P *Intel*, Opinion of Advocate General Wahl of 20 October 2016, EU:C:2016:788, ¶119. *See also* Case C-67/13 *Cartes Bancaires*, Opinion of Advocate General Wahl of 27 March 2014, EU:C:2014:1958, ¶55.

188 Case C-67/13 *Cartes Bancaires*, judgment of 11 September 2014, EU:C:2014:2204, ¶58. To the contrary, there is literature that digital platforms that exhibit network effects create value for users. *See, e.g.*, Stephen F. Ross, Network Economic Effects and the Limits of GTE Sylvania's Efficiency Analysis," (2001) 68 Antitrust Law Journal 945, 951: "*Firms that produce goods with network effects can engage in conduct that promotes efficiency, in the sense that the resulting product is cheaper, intrinsically superior in quality, or that the product's greater use by others increases each consumer's utility*".

189 *See, e.g.*, Statement of the Federal Trade Commission Regarding Google's Search Practices, *In the Matter of Google Inc.*, FTC File Number 111-0163, 3 January 2013 ("*Product design is an important dimension of competition and condemning legitimate product improvements risks harming consumers*").

to estimate consumer welfare effects of specific practices" and "*our insights into possible countervailing efficiencies are still evolving*."[190] Conduct that a reallocated burden of proof would apply to, such as bundling or refusing to deal, is frequently procompetitive.[191]

Third, the risk of unintentionally outlawing procompetitive conduct is particularly acute given that, to our knowledge, the EC has not yet blessed otherwise abusive unilateral conduct based on objectively justified efficiencies.[192] Raising companies' burden of proving their conduct is procompetitive therefore runs an even higher risk of false positives and deterring valuable product improvements. Moreover, if the EC does not identify or quantify the competitive harm, it is not clear what efficiency threshold the parties would need to pass to rebut the accusation. As explained by Advocate General Wahl in *Intel*, an assumption of unlawfulness based on form, as is envisaged, in practice "*cannot be rebutted*" based on efficiencies.[193]

Dominant firms already, therefore, face a difficult burden of demonstrating procompetitive justifications. Reversing the burden of proof to render exclusionary conduct presumptively anticompetitive risks, in effect, achieving the same outcome as instituting a blanket prohibition on unequal treatment: product improvements and other fruits of procompetitive innovation would never reach the market in the first place.

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190 EU Special Advisor's report, p. 71.

191 As seen, Advocate General Jacobs in *Bronner* explained that if a dominant company that is not an essential facility refuses to deal with a competitor, that may be procompetitive. This dictum was recently endorsed by Advocate General Saugmandsgaard in *Slovak Telekom*, noting that it is "*justified by economic considerations aimed at preserving the long-term benefits of free competition in terms of investment and creativity*"; Cases C-152/19 P and C-165/19 P *Deutsche Telekom AG, Slovak Telekom*, Opinion of Advocate General Saugmandsgaard of 9 September 2020, ECLI:EU:C:2020:678, ¶78.

192 *See, e.g.*, Robert O'Donoghue, Jorge Padilla, *The Law and Economics of Article 102 TFEU*, 2nd Edition (Hart Publishing 2013), p. 287 ("*[T]here are almost no reported cases under Article 102 TFEU in which objective justification has actually been accepted by courts and competition authorities*").

193 Opinion of Advocate General Wahl, delivered on 20 October 2016, in Case C-413/14 P, *Intel v Commission*, ECLI:EU:C:2016:788, paras. 86 to 88 ("*[T]here is no efficiency or other consideration that can assist an undertaking in justifying the use of 'exclusivity rebates' where the prohibition is concerned with form, rather than effects. Indeed, irrespective of the effects, the form remains the same*.").

Given these concerns, we are comforted by recent comments from senior DG Competition officials that the EC's view is that the standard of proof for antitrust probes should remain with the EC,[194] and by the fact that a proposal to reverse the burden of proof does not feature in the draft Digital Markets Act.[195]

5. Constructive Proposals to Sharpen and Supplement the Tools in the Abuse Toolbox

Care needs to be taken before upending the coherent system of Article 102 TFEU that, on the whole, works well.[196] Scepticism of some of the more radical proposals, however, does not mean resistance to updating, improving, and refining any of the current tools in the abuse toolbox. We discuss below some proposals for incremental improvements on current practice.

5.1 Speeding Up Antitrust Cases

It is commonly argued that abuse of dominance proceedings take too long.[197] Excessively long proceedings are to no-one's benefit: they create disproportionate uncertainty and costs for defendant companies; they risk victims of anticompetitive conduct going out of business before the case is concluded; agencies cannot focus on other pressing matters; and markets may have moved on by the time a decision is taken. Fortunately, there is room within the current toolbox to speed up investigations.

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194 *See* MLex, *Debate needed on 'standard of proof' for tech probes, Guersent says*, 28 April 2020 (referring to the remarks of Olivier Guersent, director general of DG COMP, that, while a debate is required on the standard of proof in antitrust cases, the burden of proof should remain with the regulator).

195 Digital Markets Act, *supra* note 3.

196 This is also referred to as the systematic interpretation (or "*systematische Auslegung*") of Article 102 TFEU. On the systematic interpretation of EU law, *see* Koen Lenaerts and José A. Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, (2014) 20 Columbia JEL 3, p.17 *et seq.*

197 *See, e.g.*, Furman report, p. 63; and Parliamentary Question by Ramon Tremosa, 30 May 2017, E-003564-17.

First, as noted, agencies are making greater use of interim measures as a way to speed up proceedings:[198] the EC took its first interim measures decision in 20 years in *Broadcom*;[199] France is frequently cited as source of inspiration for its use of interim measures; [200] the UK CMA has stated that greater use of interim measures is "*essential if the CMA is to respond to the challenges thrown up by rapidly changing markets*"; [201] and Germany is adopting new rules to accelerate proceedings and apply interim measures.[202]

While enforcers should be applauded for looking to act quickly, we note several points of caution. Interim measures decisions should focus on the most egregious and obvious abuses, such as exclusivity clauses by obviously dominant firms, rather than seeking to create new law or go against existing precedent. The efficiency and effectiveness of competition procedures should not come at the expense of investigative rigor, due process, and the right to be heard. Interim measures decisions should be tailored to implementing measures that are possible in principle to reverse, if it subsequently turns out that on a full merits review there is no case to answer.[203] And the new appetite to impose interim measures should

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198 Commissioner Vestager stated "*I'm particularly happy about the interim measures tool now being out of the toolbox. If we find cases where interim measures is the right tool to use, we will use it again*", Javier Espinoza and Sam Fleming, *Margrethe Vestager eyes toughening "burden of proof" for Big Tech*, Financial Times, 30 October 2019.

199 EC Press Release, *Antitrust: Commission imposes interim measures on Broadcom in TV and modem chipset markets*, 16 October 2019.

200 MLex, *Vestager looks into using 'interim' orders to speed up probes*, 16 March 2017; and PaRR, *Vestager says EC considering reviewing interim measures – BkartA Berlin*, 16 March 2017.

201 Andrew Tyrie, Letter to the Secretary of State for Business, Energy and Industrial Strategy, 21 February 2019, p.7

202 The German Competition 4.0 Act establishes new rules to facilitate, among other things, acceleration of proceedings and the use of interim measures. The Act was passed by Germany's parliament on 14 January 2021. See *German parliament passes competition act digital reform*, PaRR (14 January 2021).

203 While companies can be compensated under state liability rules in such circumstances, they receive full compensation for "wrong" decisions by competition authorities only in cases of clear error. Case T-351 *Schneider Electric*, judgment of 11 July 2997, ECLI:EU:T:2007:212 (¶¶ 278-279) and Case C-440/07 *Schneider Electric*, judgment of 16 July 2009, ECLI:EU:C:2009:459.

not slow down the speed of the main proceedings, as agencies get caught up duplicating investigations and appeals of the interim measures decision.[204]

Second, we see no principled reason why abuse of dominance cases cannot be sped up under the existing regime. A full analysis under Article 102 TFEU can be conducted swiftly. In the *Ice Cream* case, the UK CMA opened and closed an antitrust investigation in 6 months.[205] In a recent pharmaceuticals case, the CMA opened an investigation, reviewed potentially abusive conduct, and secured commitments from the defendant, all in less than 3 months.[206] The *Bundeskartellamt*'s Facebook case, which considered a novel theory of harm in a complex digital sector, took three years to conclude.[207] And the EC, for its part, frequently conducts extremely detailed economic analyses of prospective anticompetitive effects – under significant time pressures – when assessing mergers.[208]

Third, we believe the following suggestions could help improve the speed of antitrust proceedings:

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204 For example, in the *IMS Health* proceedings, one of IMS Health's competitors asked the Commission to order interim measures to force IMS Health to grant it access to its database. The Commission granted the interim measure (Case COMP D3/38.044 *NDC Health/IMS Health: Interim measures*, Commission Decision 2001/165/EC of 3 July 2001), following which IMS Health successfully appealed the interim measure to the General Court (Case T-184/01 *R IMS Health v Commission*, Order of the Court of First Instance of 26 October 2001, ECLI:EU:T:2005:95). The competitor unsuccessfully appealed to the ECJ (Case C-481/01 *P(R) NDC Health v IMS Health*, Order of the Court of Justice of 11 April 2002, ECLI:EU:C:2002:223).

205 CMA, *Investigation relating to supplies of impulse ice cream*, No grounds for action decision, 9 August 2017.

206 CMA, *Decision to accept commitments offered by Essential Pharma in relation to the supply of Priadel*, Case number 50951 (18 December 2020).

207 B6-22/16 *Facebook*, Bundeskartellamt, 6 February 2019.

208 *See, e.g.*, the Commission's use of economic analysis in Case COMP/M.1672 *Volvo/Scania*, Commission decision of 15 March 2000, ¶72 (noting that "*econometric studies can be a valuable supplement to the way the Commission has traditionally measured market power*"); and Case COMP/M.2978 *Lagardere/Natexis/VUP*, Commission decision of 7 January 2004, ¶¶700-707.

(i) Agencies could rely on specialised digital markets units whose staff would have expertise and detailed knowledge of technology markets, and avoid personnel changes pending investigations.[209]

(ii) Agencies could have regular case management conferences instead of springing surprises on defendants or complainants, and publish timetables at the start of an antitrust investigation, indicating key milestones, such as state of play meetings, white papers and RFIs.[210]

(iii) Agencies could drop speculative theories of harm at an earlier stage of proceedings, allowing investigations to focus on the core issues.

(iv) Agencies and defendants should discuss the scope and proportionality of information requests at an early stage, allowing agencies to understand the types of information that is and is not available.

(v) Access to file could be sped up by having companies agree to initial review of unredacted documents in confidentiality rings by outside counsel or the Hearing Officer.[211]

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209 The US Federal Trade Commission has already set up its Technology Task Force; the UK CMA has put in place its Data, Technology and Analytics Unit (and is also setting up its Digital Markets Unit, discussed below); and the EC has Directorate C of DG Competition that specialises in IT and media.

210 *See CMA rules of procedure for merger, market and special reference groups* (CMA17), March 2014 (corrected November 2015), Rule 7. *See e.g., Anticipated acquisition of Outbrain, Inc. by Taboola.com Ltd.*, Administrative timetable published by the CMA on 16 July 2020; *Amazon / Deliveroo Phase 2 merger inquiry*, Revised administrative timetable published by the CMA on 24 June 2020; *Completed acquisition by Bottomline Technologies (DE), Inc of certain parts of the Experian Limited business*, Administrative timetable published by the CMA on 15 November 2019; *Prosafe SE / Floatel International Limited merger inquiry*, Administrative timetable published by the CMA on 21 October 2019; *Anticipated acquisition by Tesco PLC of Booker Group plc*, Administrative timetable published by the CMA on 28 July 2018.

211 *See* CMA, *Confidentiality ring and disclosure room undertakings templates*, 20 January 2017; CMA, *Confidentiality rings and disclosure rooms: CMA roundtable*, 20 January 2017; and CMA, *Transparency and disclosure: Statement of the CMA's policy and approach*, January 2014, ¶¶4.29-4.34. *See also* European Commission, *The use of confidentiality rings in antitrust access to file proceedings*, 12 December 2018; and DG COMP, *Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and the EU Merger Regulation*, 2 June 2015.

(vi) Technology could be employed for data gathering, as well as sifting and reviewing large sets of internal documents.[212] The EC should adopt best practice guidelines to allow companies and their advisers to understand and anticipate the circumstances in which internal documents will be requested and the types of documents that will be required.[213]

(vii) Agencies should continue to make use of the settlement and commitments procedures where appropriate. Settling on final commitments can be best achieved by small teams entering into intensive, in-person negotiations, rather than trading written documents.[214]

In short, we believe that concerns that antitrust cases take too long can be addressed by incremental improvements to the current system. We do not believe that procedural delays in certain cases warrant calls to overhaul competition law.

5.2 Introducing An "Attempt to Monopolize" Doctrine

The German report suggests that agencies could directly intervene to prevent large incumbents from achieving a dominant position through anticompetitive

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212 For example, in *Thales/Gemalto*, the EC accepted the use of technology-assisted review in the production of internal documents, aligning the document requests and collection methods with those adopted in the same case by the US federal agencies. *See* Case COMP/M.8797 Thales/Gemalto, Commission decision of 11 December 2018.

213 Nicholas Levy and Vassilena Karadakova, *The EC's increasing reliance on internal documents under the EU Merger Regulation: issues and implications* (2018) 39 E.C.L.R. The EC has already consulted on Best Practice guidelines on requests for internal document, but not guidelines have yet been published. In the UK, on the other hand, the CMA last year issued new guidance on requests for internal documents, *see* CMA 100, Guidance on requests for internal documents in merger investigations.

214 *See, e.g.*, the "*tunnel*" negotiations successfully implemented by the UK and EU in the final weeks of the negotiation of the UK's EU Withdrawal Agreement; *see* Peter Walker, *Entering 'the tunnel': what does it mean for the Brexit talks?*, The Guardian, 11 October 2019.

practices in the first place.[215] That is, similar to the "attempt to monopolize" concept in the US,[216] competition agencies would be able to intervene where a company is not yet dominant, but it is engaging in anticompetitive conduct to become dominant.

There are types of conduct where an "attempt to monopolize" doctrine could plug gaps in the existing antitrust toolbox. In *Rambus*, for example, Rambus engaged in a "patent ambush" by failing to disclose its IP during the standard setting process for a new type of RAM memory chip (as the rules of the standard setting organisation required). But Rambus' failure to disclose IP – the initial anticompetitive act – took place when Rambus was not dominant; its IP was not yet incorporated in the standard. The EC got around the issue by holding that the abuse was the subsequent exploitation of the dominant position after Rambus' IP was incorporated in the standard by "*claiming royalties for the use of its patent [...] which, absent its allegedly intentional deceptive conduct, it would not have been able to charge*."[217]

An "attempt to monopolize" doctrine would allow an authority to challenge anticompetitive conduct (i) carried out by a non-dominant company; (ii) which lacks procompetitive justification; and (iii) is likely to result in the defendant achieving a dominant position. There are, however, challenges to the introduction of such a regime. First, at the EU level, this suggestion would require a change to the architecture of the TFEU, so it is unlikely to be a short- or medium-term fix.[218]

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215 German report, pp. 62-64, 157-158. The EC noted in its Impact Assessment for the proposed "New Competition Tool" that the tool could be used to tackle "*monopolization strategies by nondominant companies*". European Commission, Inception Impact Assessment, New Competition Tool, Ref. Ares(2020)2877634, 4 June 2020, p. 2. It does not, however, appeal that an "attempt to monopolize" doctrine will be incorporated into the final proposal. See further section 5.4 below.

216 See *Spectrum Sports Inc. v. McQuillan*, 506 U.S. 447, 456, 459 (1993) (attempted monopolisation, which requires a dangerous probability of achieving monopoly power, anticompetitive conduct that threatens to help achieve that power and a specific intent to monopolise, can violate Section2 of the Sherman Act).

217 Case COMP/38.636 *Rambus*, Commission decision of 9 December 2009, ¶28.

218 Under the TFEU, imposing sanctions for attempts to monopolise is possible under Article 101 TFEU in the case of concerted practices. But when it comes to unilateral practices, Article 102 TFEU requires the existence of dominance when the abuse occurs.

Second, determining what constitutes anticompetitive conduct for the purposes of the doctrine will be challenging. The doctrine would need to tackle, as in the US, "*a specific intent to destroy competition or build monopoly*," [219] without penalising "*an intent to compete vigorously*."[220] There is a strong argument that, in competitive markets, firms that engage in anticompetitive conduct will not succeed. For example, a non-dominant platform that degrades its platform by favouring or tying its own inferior downstream product would lose sales to rival platforms – without dominance, the mechanism for leveraging would not be present.

Third, market features that result in anticompetitive outcomes, other than those resulting from a dominant position, can be dealt with by a market investigations regime with remedies, which can usefully be introduced to supplement the existing toolbox (discussed at Section 5.4 below). This type of regime, present in jurisdictions such as the UK, Greece, Israel and Mexico, plugs the enforcement gap for many competition issues and market failures that result in consumer harm, but which do not stem from anticompetitive behaviour – and leave the category of conduct falling to be resolved by an "attempt to monopolize" doctrine even smaller.

In short, the category of abuses that an "attempt to monopolize" doctrine would cover is narrow. We would not encourage its adoption in the UK, for example, where the markets regime already amply supplements the existing antitrust toolbox, or in the EC, where proposals in the DMA are specifically aimed at firms in digital markets prone to tipping which engage in conduct that induces such tipping.[221] If an "attempt to monopolize" doctrine were introduced, it would be important to at least introduce requirements to provide "*a dangerous possibility of success*," as in US antitrust law, to mitigate the risk of over-enforcement due to any lack of an effects analysis.[222] The doctrine should be appropriately narrow in light of the narrow gap in the existing toolbox it would plug.

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219 *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 626 (1953).

220 *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993).

221 Digital Markets Act, *supra* note 3, at para. 26.

222 *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). *See* discussion in Maurits Dolmans and Tobias Pesch, *Should We Disrupt Antitrust Law?*, (2019) 5 Competition Law & Policy Debate 2

5.3 Establishing Codes of Conduct or Ex Ante Rules that Consider Procompetitive Justifications and Anticompetitive Effects

The Furman report recommended that the CMA in the UK should set up and oversee "*a code of conduct for companies whose position means other markets depend on them*".[223] In response, the CMA has proposed establishing a code of conduct to be overseen by a new Digital Markets Unit (**DMU**) based on principles of fair trading, open choices, and trust and transparency.[224] The EC, for its part, has recently published its draft Digital Markets Act, which contains broad prohibitions on certain types of conduct.[225]

In principle, well-crafted codes of conduct or regulatory rules of the road could have several benefits. For example, they could: (i) provide greater certainty for businesses when deciding how to modulate their conduct; (ii) assist consumers and other stakeholders to more easily know when their rights are infringed and take appropriate action; (iii) ease the burden on agencies, who would be able to apply clear rules via expert case teams; (iv) help to speed up cases; and (v) promote greater competition in digital markets.[226]

That said, establishing rules that can achieve these advantages, while applying across different platforms with different business models, promoting inter- and intra-platform competition, and not outlawing procompetitive conduct will be a challenge. We identify several recommendations below that should be considered in order to achieve advantages from codes of conduct or *ex ante* regulator rules.

First, any rules should take an evidence-based and case-specific approach to the conduct they apply to, so as to not punish procompetitive product improvements. Companies subject to the rules should be able to justify their behaviour on grounds of procompetitive effects or benefits for users, and they should also be able to establish that certain conduct is not likely to cause anticompetitive effects. For example, the CMA recognises that "*conduct which may in some circumstances be harmful, in others may be permissible or desirable as*

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223 Furman report, ¶2.17.

224 CMA, *A new pro-competition regime for digital markets, Advice of the Digital Markets Taskforce, December 2020* (**CMA Pro-Competition Regime**).

225 Digital Markets Act, *supra* note 3.

226 Furman report, ¶2.17 ("*[T]he procompetitive approach is to agree rules upfront, providing clarity to businesses in the market about the rules of the game*").

it produces sufficient countervailing benefits," and envisages taking this principle into account when it designs its Code of Conduct.[227]

The draft Digital Markets Act, by contrast, contains broad prohibitions on certain conduct and broad behavioural requirements by particular digital companies considered to be gatekeepers, including: (i) bans on engaging in unequal treatment in search result ranking;[228] (ii) a requirement to provide third parties access to and interoperability with all OSs, hardware, and software features available to the gatekeepers' services;[229] (iii) a requirement to provide business users, including rivals, 'continuous and real-time access' to user data and data generated from user interactions with their products on the gatekeeper platform; [230] and (iv) a requirement for gatekeepers to provide any third-party search service access to ranking, query, click, and view data in relation to users' search activity on the gatekeepers' search engine.[231]

In specifying these obligations, the draft Digital Markets Act does *not* appear to anticipate any type of exemption, either by reference to either a demonstrable lack of competitive or procompetitive justifications.[232] This is a troubling omission. As currently framed, the prohibited behaviours and obligations are broad and capable of capturing conduct that is procompetitive. As discussed in section 4.2 above, conduct that can be characterised as unequal treatment can have procompetitive benefits and outlawing such conduct creates obvious harms for society. Duties to share ranking, query, click, and view data, for example, risk dulling rivals' incentives to innovate, disclosing valuable trade secrets, allowing competitors to free ride on investments and intellectual property, invading users' privacy, and opening up search services to manipulation by spammers and bad

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227 CMA Pro-Competition Regime, *supra* note 224, para. 4.40. *See also* para. 4.35 ("*in trading with small advertisers, a term may be unfair if it is applied by default and benefits the SMS firm by imposing costs on the advertiser by comparison to alternatives, unless there are offsetting benefits to advertisers from the default option*").

228 Digital Markets Act, *supra* note 3, Article 6(1)(d).

229 Digital Markets Act, *supra* note 3, Article 6(1)(f).

230 Digital Markets Act, *supra* note 3, Article 6(1)(i).

231 Digital Markets Act, *supra* note 3, Article 6(1)(j).

232 This deviates from the German Competition 4.0 Act (*supra* note 4) rules, which do allow for justifications across the board and, for some provisions, imply a requirement of the authority to analyse anticompetitive effects.

actors.[233] These are the kind of considerations that should be taken into account in a case-specific analysis that weighs procompetitive justifications against the alleged competitive harm.[234]

Second, the rules should be crafted after careful testing with consumers and industry, and detailed research as to their appropriateness and proportionality. Guidance should be developed, in collaboration with those firms that will be subject to the rules, so that firms can easily distinguish permitted and prohibited conduct. Otherwise, the rules could result in firms delaying or cancelling procompetitive product launches.

As an example: the draft DMA's Article 6 obligations are far-reaching, and allow for the EC to further specify how they should apply.[235] But the wording of Article 6 and Articles 7(1), 11(1), 25, and 26 may suggest that gatekeepers must comply with Article 6 immediately, so that the obligations are self-executing without the EC having to specify first more concrete criteria to assess a given practice, such as whether it creates benefits for consumers or is demonstrably not harmful. In our view, the Article 6 obligations should not be binding until the EC specifies how they should apply to particular platforms (which would then be consistent to how the CMA is approaching its code of conduct under the auspices of the DMU).

Third, the way that digital platforms should be designated to be subject to the code needs to be given careful thought. The draft Digital Markets Act applies to

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233 Accordingly, the EU Platform to Business Regulation recognises the harms from disclosure of ranking information and sets limits on the disclosure of such information, *see* Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, [2019] OJ L 186, Article 5(6) and Recital 27 (confirming that disclosing the "detailed functioning of their ranking mechanism" could impair a search services' ability to act against manipulation of their ranking, to the detriment of consumers).

234 A case-specific analysis that accounts for benefits would also be consistent with other passages of the draft DMA. For example, Recital 57 discusses the concept of "fairness" and explains that "unfairness" involves unjustified differentiation and disproportionate advantages. While Recital 57 discusses fairness principles in the context of app stores, there is no reason for formulating different fairness principles across different obligations in the draft DMA.

235 Recital 58 suggests that in certain cases the EC may need to further specify "*the measures that the gatekeeper concerned should adopt in order to effectively comply with [Article 6 obligations]*" and that "*regulatory dialogue should facilitate compliance.*"

"gatekeeper" companies that offer "*core platform services*"[236] and fulfil three cumulative criteria of market impact, gateway status, and entrenched market position.[237] The UK's proposed regime would apply to "Strategic Market Status" (SMS) firms, which essentially means market power plus some indication of the firm's conduct having particularly widespread effects.[238] It would be important that any obligations apply only to the designated gatekeeper core platform service, otherwise the rules risk creating obligations when there is no risk of a gatekeeper

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236 This is defined in Article 2 of the draft Digital Markets Act and is currently broad. It includes companies that provide any of the following services: Online intermediation; online search engines; online social networking; video-sharing platforms; number-independent interpersonal communication; operating systems; cloud computing; advertising (including networks, exchanges, intermediation) provided the firm also supplies one of the foregoing. The EC can extend this list after a market investigation or after the publication of a report (24 months after the investigation is open).

237 Article 3 of the draft Digital Markets Act.

238 CMA Pro-Competition Regime, *supra* note 224: SMS means having "*substantial, entrenched market power in at least one digital activity, providing the firm with a strategic position (meaning the effects of its market power are likely to be particularly widespread and/or significant)*" (para. 12). In turn, "*substantial*" means "*users of a firm's product or service lack good alternatives*" and "*there is a limited threat of entry or expansion by other suppliers*" thereby enabling the firm to "*increase prices and/or reduce quality and innovation*" (para. 4.10). Assessing market power under the SMS standard would draw on "*existing competition law*" albeit market power would not require the CMA carry out a "*formal market definition exercise*" (para. 4.14).

Entrenched means "*not merely transitory and likely to be competed away in the short term*" (para. 4.12). Strategic position means (i) "*the effects of its market power are particularly widespread or significant*", (para. 4.19): (ii) the firm's "*very significant size or scale in an activity*" (e.g., "*regularly used by a very high proportion of the population or where the value of transactions facilitated by a specific product is large*"); (ii) the firm is an "*important access point to customers*" for a range of other businesses; (iii) the firm has developed an "ecosystem" or can use the activity to "*extend market power*" into other activities; (iv) the firm can "*determine the rules of the game*" for other market participants; and (v) the activity impacts markets with "*broader social or cultural importance*."

position in the first place.[239] Given the fast-moving nature of digital markets, gatekeeper positions or SMS firms should also be reviewed periodically.[240]

Fourth, the rules set out any proposed code or *ex ante* regulation should not cut across policy positions that have been settled by other legislation. For example, the prohibitions on personal data combinations across products without user consent set out at Article 5(a) of the EC's draft DMA appears to be seeking to re-regulate the position on combining personal datasets that was just recently settled under the General Data Protection Regulation,[241] which is not appropriate.

Fifth, the rules should embody procedural checks-and-balances to prevent them being weaponised by authorities (swayed by political pressure) or claimants exploiting the rules as a means of illegitimately hampering competition. Careful thought should be given, for example, to the enforcement and resolution mechanisms included in any rules. If agencies want to enforce the rules via financial penalties or mandatory changes to business practices, that would have require building in procedures for the exercise of full rights of defence and appeal.

For example, the CMA has proposed that decisions of its Digital Markets Unit (**DMU**), responsible for enforcing its proposed code of conduct, should be subject to judicial review on "ordinary judicial review" principles, rather than a full appeal on the merits of the decision.[242] In our view, this risks not being

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239 For example, under the proposed UK pro-competition regime, the designation of "Strategic Market Status" (the equivalent of "gatekeeper" under the EU's Digital Markets Act would mean applying the provisions of a code to particular activities – it would not subject a firm's non-designated activities to code rules (albeit the DMT envisages a general provision about not making "changes to non-designated activities that further entrench the position of its designated activity"). In other words, if Amazon's marketplace were 'designated' as having SMS, Amazon would not necessarily have to apply the provisions of the code to Amazon Web Services or Alexa (unless they were designated, too).

240 This is consistent with the Commission's practice of including clauses in commitments decisions that allow for a review of obligations where there has been a material change in circumstances, *see, e.g.* , Case COMP/AT.40153 E-Book MFNs and related matters , Commission decision of 4 May 2017, Clause 5 of the Final Commitments.

241 Regulation 2016/679 of 27 April 2017 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), Articles 4-6.

242 CMA Pro-Competition Regime, *supra* note 224, para. 4.114 to 4.119. The CMA is still considering how best to ensure that the DMU's decision-making model can allow for "*sufficient internal scrutiny to ensure robust and objective decision-making*." *See* CMA Pro-Competition Regime, *supra* note 224, para. 4.109. The CMA also considers that the

compliant with Article 6 ECHR, given that competition law is of a quasi-criminal nature and should be subject to full merits review.[243] In fact, the UK Government has in recent years twice consulted on reducing parties' rights to appeal from full merits to judicial review and on both occasions concluded this reduction in rights would be inappropriate.[244] We see no principled reason why these considerations should change for the DMU.[245] Indeed, the justification for judicial review, rather than a full review on the merits, is even weaker where the UK has a specialist court (the Competition Appeal Tribunal) to hear competition-related cases and so does not suffer from a lack of judicial expertise in competition matters.[246]

Sixth, it may be possible to develop what Lord Tyrie, former Chairman of the CMA, has called "*soft power*" mechanisms[247] that encourage firms to modulate their conduct swiftly, enhancing the effectiveness of enforcement, without

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ability to order full ownership separation between businesses should not be available to the DMU. Instead, this power should remain with the CMA following a market investigation. *See* CMA Pro-Competition Regime, *supra* note 224, para. 470.

243 *See* case law discussed *supra* note 184.

244 When the Government decided not to introduce a prosecutorial system with the advent of the CMA, but to maintain an administrative system, it was on the basis that appeals against infringement decisions of the CMA would be subject to an appeal on the merits. In its March 2012 response to the consultation paper, the Government explained that: "*The Government accepts the strong consensus from the consultation that it would be wrong to reduce parties' rights and therefore intends that full merits appeal would be maintained in any strengthened administrative system.*"

245 In the words of Justice Barling when criticising the Government's 2013 suggestion to remove a full merits review for competition infringements: "*a finding of infringement of the competition rules has a number of very serious reputational and financial consequences for a company and for the executives involved. It can result in huge penalties, including an uplift in penalty in the event of any recidivism by the company. Further, such a finding can be used as a binding base for a follow-on damages action*," *see* G. Barling, *Competition litigation: what the next few years may hold*, 19 June 2013, The David Vaughan CBE, QC/Clifford Chance Annual Lecture on Anti-Trust Litigation

246 Lord Irvine of Lairg, *Judges and decision makers: the theory and practice of Wednesbury review* [1996] P.L. 59-78 (stating that one justification for judicial review standard over merits review is a "*lack of judicial expertise*" on technical matters).

247 Lord Andrew Tyrie, *Soft power with a hard edge: harnessing the benefits of fast-moving markets*, Speech at the CMA Digital Markets event, 3 March 2020. Lord Tyrie described soft power mechanisms as follows: "*engagement with private sector counterparties, and other public authorities, to discourage some activity and encourage others, to secure well-functioning markets, not just alongside enforcement; but, in some cases, as a way of preventing enforcement action from becoming necessary*."

needing to engage full defence rights. Examples could include negative public statements about defendants' behaviour, mandating defendants that breach the rules to report on their behaviour on an ongoing basis, and referring particularly egregious breaches to the EC, CMA or other regulators for full investigations.

Finally, agencies should publish reasoned decisions for their actions taken under codes of conduct or regulatory rules – both complaint rejections and infringement decisions.[248] This is both an essential procedural right and important to create a body of precedent that assists companies and agencies in modulating their conduct in the future. As Commissioner Vestager recently noted, clearance decisions, in particular, allow companies to get greater legal certainty to know when their conduct is on the right side of the line.[249]

5.4 Introducing a Market Investigations Regime

The EC recently consulted on a "New Competition Tool" (**NCT**), which was at one point planned to resemble the market investigation reference regime in the UK.[250] The EC's Impact Assessment asserted that the NCT was intended to

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248 The CMA has noted that it expects the DMU to publish its provisional decisions and provide an opportunity for affected parties to makes representations. CMA Pro-Competition Regime, *supra* note 224, paras. 4.111. The draft DMA similarly notes that the Commission shall publish decisions. *See* CMA, *supra* note 3, Article 34.

249 MLex, *Greater use of EU antitrust clearance decisions may give more clarity, Vestager says*, 2 March 2020. Although the Commissioner's comments appear to have been made in relation to agreements (in particular, in relation to R&D and environmental sustainability) the rationale behind the comments should apply more broadly to abuse of dominance decisions.

250 European Commission, *Proposal for a Regulation: Single Market – new complementary tool to strengthen competition enforcement*, June 2, 2020. *See also* Charley Connor, *Vestager: EU may introduce competition rules for "digital gatekeepers"*, GCR, 24 April 2020 (quoting Commissioner Vestager as saying "*I think it is quite impressive how well the CMA uses [the market study and investigation regime].*"). The EC consulted on four options: (i) a dominance-based competition tool with a horizontal scope, which would address competition concerns arising from unilateral conduct by dominant companies without any prior finding of an infringement pursuant to Article 102 TFEU; (ii) a dominance-based competition tool limited in scope to sectors identified as being especially prone to such competition concerns; (iii) a market structure-based competition tool with a horizontal scope; and (iv) a market structure-based competition tool limited in scope to sectors in which the structural competition problems are most prevalent. Of these options, only (iii) would resemble the market investigation reference regime in the UK. Even then, the CMA has pointed out that linking the NCT to 'market structure' is narrower than the scope of the UK regime, which looks at 'features of the market' (of which market structure

address "*structural competition problems*" that Articles 101 and 102 TFEU "*cannot tackle (e.g. monopolization strategies by nondominant companies with market power) or cannot address in the most effective manner (e.g. parallel leveraging strategies by dominant companies into multiple adjacent markets).*"[251] Commissioner Vestager stated that it could facilitate interventions "*with regard to anticompetitive behaviour by powerful but not dominant players in tipping markets*," and could "*prevent the creation of future market players with entrenched or gatekeeper positions.*"[252]

The EC's proposal for the NCT tool, however, does not go as far as the UK regime, which enables the CMA to impose remedies absent a finding of individual infringement of the Competition Act 1998.[253] Instead, the investigation function in the DMA is intended to complement the rules that the EC proposes to introduce to regulate the conduct of digital "gatekeepers" (discussed above). The investigation function would enable the EC to: (i) designate a company as a "gatekeeper", such that the rules would apply to it; (ii) investigate systematic non-

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could be one among others). *See* CMA, *The CMA's response to the European Commission's consultations in relation to the Digital Services Act package and New Competition Tool* (2020) (**CMA Response to NCT**), ¶ 51.

251 European Commission, Inception Impact Assessment, New Competition Tool, Ref. Ares(2020)2877634, 4 June 2020, Section A.

252 Charley Connor, *Vestager: EU may introduce competition rules for "digital gatekeepers"*, GCR, 24 April 2020.

253 The EC can already conduct sector inquiries where "*the trend of trade between member states, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market*." Article 17, Regulation 1/2003. But the EC does not have the power to impose remedies at the end of a sector inquiry. If the EC finds actionable breaches of competition law during its inquiry, it must proceed to open individual investigations, which can be costly and time-consuming. The EC cannot therefore impose market-wide remedies to repair any general market failures it identifies during a sector inquiry. In past examples of EC sector inquiries conducted under Regulation 1/2003, the EC has subsequently or concurrently opened investigations into individual firms and accepted commitments or imposed remedies or fines years later. For example, following the publication of the final report of the EC's energy sector inquiry in January 2007, the EC accepted commitments from several market players over the next three years, with the final set of commitments offered by ENI SpA made binding in September 2010. After its pharmaceuticals sector inquiry, the final report for which was published in July 2009, the EC investigated several market players for practices that delayed generic drug entry, fining Les Laboratoires Servier and five generic competitors in July 2014 (the investigation was opened in July 2008).

compliance with regulatory obligations under the DMA and impose remedies; and (iii) update the obligations that digital "gatekeepers" are subject to.

We are concerned that the NCT, as currently proposed, is simultaneously insufficiently ambitious, while also endowing the EC with an overly broad discretion to extend the scope of the DMA without proper parliamentary scrutiny.

First, the narrowed scope of the NCT seems a missed opportunity for the EC to introduce a proper cross-sector market investigations regime that could apply to all sectors, resembling the regime in the UK, to tackle a range of anticompetitive market features that fall outside the current antitrust toolbox.

Second, the current drafting of the NCT would allow the EC to extend the scope of the DMA unilaterally and impose quasi-regulatory remedies (including structural separation) to tackle conduct that would be excluded from the remit of the DMA [254] The EC's ability unilaterally to introduce broad new prohibitions and obligations on digital platforms – with potentially far-reaching consequences for competition and consumers in the EU – without parliamentary scrutiny is troubling.

Third, the EC has suggested that the NCT could be used to intervene at a potentially early stage in dynamic markets to prevent them from tipping.[255] As the CMA noted in its response to the NCT consultation, however, "*identifying when a market might tip is very difficult*" and there are "*real risks and difficulties of intervening pre-emptively without significant investigation and strong information gathering powers*."[256] It is not clear how the EC could be sure *ex ante*

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254 CMA Response to NCT, ¶ 62 ("*[W]here the Orders arising from [market investigations] are behavioural (which is often the case), they effectively constitute a form of ex ante regulation*").

255 European Commission, Inception Impact Assessment, New Competition Tool, Ref. Ares(2020)2877634, 4 June 2020, p. 2 ("*The ensuing risks for competition can arise through the creation of powerful market players with an entrenched market and/or gatekeeper position, the emergence of which could be prevented by early intervention.*").

256 CMA Response to NCT, ¶ 65 ("*There is likely to be a small proportion of markets that will actually tip which (i) can be identified and (ii) where such identification can be done sufficiently far in advance or swiftly enough to act.").*

that a market is destined to tip and, if so, that subsequent technological developments or market entry would not reverse the tip.[257]

Fourth, the UK market investigations regime is shielded from political drivers because decisions are taken by a panel of independently appointed decision makers, who are not affiliated with the CMA. The institutional independence of and within the CMA that shields its decision makers from political interference may not possible within the institutional framework of the EC, and it therefore cannot be assumed that it is appropriate for the EC to have the power to widen the scope of the DMA without a separate parliamentary process.[258] As Fletcher points out, "*tight checks and balances*" are required in circumstances where "*the sorts of interventions imposed... can be similar to those more typically imposed in other jurisdictions through legislation, but without any process of parliamentary review.*"[259]

Overall, we are concerned that the NCT attached to the DMA grants the EC a broad discretion to outlaw conduct that goes beyond the scope of the DMA as drafted and that lacks sufficient parliamentary safeguards.

6. Concluding Remarks

Overall, the existing abuse of dominance tools work well to protect the competitive process, while ensuring that dominant firms can legitimately compete in their existing and new markets on the basis of price, quality, and innovation. We believe that a faster Article 102 TFEU investigative process could greatly reduce the need to introduce new measures to achieve the same goals.

We nonetheless recognise the political impetus for regulatory change in respect of concentrated digital markets, as reflected in a range of reports from antitrust

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257 See Evans "Why the Dynamics of Competition for Online Platforms Leads to Sleepless Nights But Not Sleepy Monopolies" (July 25, 2017) (concluding that even large incumbent platforms can be challenged and tipped towards decline).

258 Maurits Dolmans and Wanjie Lin, *How To Avoid a Fairness Paradox in Competition Policy*, in *Fairness in EU Competition Policy: Significance and Implications*, 1st edition, edited by Damien Gerard, Assimakis Komninos, Denis Waelbroeck (Bruylant: GCLC Annual Conference Series 2020), p. 67 ("*Due process has particular import in an inquisitorial system such as the EU competition law regime, in light of the quasi-judicial role performed by the European Commission in investigating and enforcing competition law*").

259 Amelia Fletcher, *Market Investigations for Digital Platforms: Panacea or Complement?* (working paper, 6 August 2020), p. 7.

authorities and legislative proposals in the EU, UK, and Germany. Codes of conduct or regulatory rules that take into account business justifications and the possibility to demonstrate lack of competitive harm – and subject to suitable procedural checks-and-balances – could enhance the existing toolbox without, at the same time, undermining the existing consumer welfare standard embedded in the current antitrust regime. In our view, the DMA and its investigation tool go too far, however, by provisionally outlawing potentially procompetitive conduct without an assessment of justifications or effects, and granting the EC a broad discretion to prohibit conduct without a case-specific analysis.

Moreover, whatever changes and refinements are implemented to abuse of dominance rules, we encourage close international cooperation between agencies. Digital platforms – the companies that many of the proposals we have reviewed are aimed at – are typically active internationally. They must comply with rules in all countries where they compete and they have to take into account all these different rules when modulating their conduct. And there are now around 140 international agencies that review competition matters, covering 85% of the world's population.[260]

Enforcement in one jurisdiction out of line with international standards may deter businesses from engaging in productive activities that other jurisdictions would condone or even encourage because they are understood to be beneficial to consumers.[261] This can already be seen in the proposals taken forward in Europe, Germany, and the UK, which contain diverging proposals concerning, for example, data sharing obligations and the ability of firms to justify their conduct as procompetitive.. A harmonised approach is needed to ensure that rules are consistent across jurisdictions, without creating a cumulatively excessive burden.

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260 Commissioner Vestager, *Merger review: Building a global community of practice*, ICN Merger Workshop, Brussels, 24 September 2015 ("*about 85% of the world's population live in a place with some form of competition policy enforcement. In 1990 the figure was less than 25%*").

261 *See* Damien Geradin, *The Perils of Antitrust Proliferation: The Globalization of Antitrust and the Risks of Overregulation of Competitive Behavior*, (2009)10 Chi. J. Int'l L. 189, 189-90. With respect to digital markets, *see* Maurits Dolmans and Tobias Pesch, *Should We Disrupt Antitrust Law?*, (2019) 5 Competition Law & Policy Debate 2.