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FAIRNESS, DIGITAL MARKETS AND COMPETITION LAW – RECONCILING FAIRNESS NORMS IN DIGITAL MARKETS ACT, DATA ACT AND AI ACT WITH COMPETITION LAW

Abstract
The present article explores the implication of fairness as a regulatory and competition law concept applied to digital and Artificial Intelligence markets, in light of recent law and policy developments targeting the interaction between data, market power and competition law.
Much of the policy discussions, legislative proposals as well some emerging case law elevate the matter of "fairness" in the context of digital markets and AI, creating both a novel regulatory framework as well as encouraging competition law to curb "unfairness" of said markets and related "unfair practices".
The interface between intellectual property rights and competition law is of utmost importance in this context, where we might find similar analogous insights as we can find regarding the matter of fairness within traditional EU competition law. Further, the question remains whether the "fairness norm" expressed in regulatory acts such Digital Markets Act, EU AI Act and the EU Data Act are akin to the "fairness" norms found in Union competition law, mainly under Article 102 Treaty on the Functioning of the European Union (TFEU).

JEL CLASSIFICATION: K2; K21;K23;K24;L4;L5;B5

SUMMARY

1 Fairness as a regulatory concept in digital markets

Much of the policy discussions, legislative proposals as well some emerging case law elevate the matter of "fairness" in the context of digital markets and encourage competition law to curb "unfairness" of said markets and related "unfair practices".

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[1] Paraphrasing the Danish legal scholar Alf Ross, the problem with the above is that "Fairness, like a harlot, is at disposal of anyone",[2] meaning that the intuitive, subjective element invariably entailed in the concept of fairness - if not defined consistently, objectively and practically - will make the concept rather void.

Although there are several EU directives and regulations to be found which deal with "fairness / unfairness" in various sectors,[3] and although Union competition law elevates fairness literally in Article 102 Treaty on the Functioning of the European Union[4] (henceforth TFEU), the matter of "fairness" is much more elevated in the recently introduced legal acts targeting digital, data- and AI-driven markets.

Therefore, the present article will by way of delimitation focus on Digital Markets Act,[5] the EU AI Act[6] as well as the EU Data Act,[7] which all elevate fairness to a high-degree in those sectors, and do indeed seem to align with each other regarding the ontological definition of fairness as "equitable exchange" per the literal wording of those said acts as will be demonstrated.

One such prime example is the recently introduced Digital Markets Act, as the final legislative act elevates the concept of "unfair" in no less than 43 instances while "fairness" is mentioned in 18 instances. Nowhere in the document is fairness / unfair legally or economically defined beyond the mere contours of what would constitute "unfairness" and the desired outcome of "fair markets", which has become a point of criticism already.[8]

A definition is given at the point 33 in the preamble of the act, defining unfairness for the purposes of the regulation as "unfairness should relate to an imbalance between the

[1] Margarethe Vesterager, 'Fair Markets in a Digital World' (Danish Competition and Consumer Authority, Copenhagen, March 9, 2018); Johannes Laitenberger, 'EU Competition Law in Innovation and Digital Markets: Fairness and the Consumer Welfare Perspective' (Brussels, October 10, 2017).

[2] Alf Ross, 'Analysis and Critique of the Philosophy of Natural Law', in Alf Ross (ed), *On Law and Justice* (Oxford University Press, 2019), 350.

[3] See Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain [2019] OJ L 111; Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts; 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*; Regulation (EU) 2021/2117 of the European Parliament and of the Council of 2 December 2021 amending Regulation (EU) No 1308/2013 establishing a common organization of the markets in agricultural products [2021] *OJ L 435*.

[4] Consolidated Version of the Treaty on the Functioning of the European Union [2012] *OJ C 326*, Article 102.

[5] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 [2022] *OJ L 265*.

[6] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending certain Union legislative acts [2024] *OJ L 2024/1689* (Artificial Intelligence Act).

[7] Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 [2023] *OJ L, 2023/2854* (Data Act).

[8] See Wolfgang Kerber, 'Taming Tech Giants with a Per Se Rules Approach? The Digital Markets Act from the "Rules vs Standard" Perspective' (2021) 3 Concurrences 28.

rights and obligations of business users where the gatekeeper obtains a disproportionate advantage".

Students of economics would argue that any successful business deal does display some "disproportionality", and already we arrive at the grand debates on whether markets should strive to produce optimal, efficient results, or socially and morally desirable results, and whether there exists a trade-off between these two, or if there is possible to overcome the dichotomy.

The present article will not attempt to grapple itself with these matters as this has been done at some length in other works[9] and would lead the focus astray, but the next section will delve briefly into the contours of the grand debates sketched above.

Moving on to the next regulatory act elevating fairness, the EU AI Act mentions "fair" in 17 instances, also referring to the seven non-binding ethical principles for AI which are intended to help ensure that AI is trustworthy and ethically sound. The seven principles include human agency and oversight; technical robustness and safety; privacy and data governance; transparency; diversity, non-discrimination, and fairness; societal and environmental well-being and accountability, framed in 2019 Ethics guidelines for trustworthy AI developed by the independent AI HLEG appointed by the Commission.[10]

Fairness in turn in the AI Act is merely defined as "Diversity, non-discrimination and fairness means that AI systems are developed and used in a way that includes diverse actors and promotes equal access, gender equality and cultural diversity, while avoiding discriminatory impacts and unfair biases that are prohibited by Union or national law."[11] This writing does not expand our knowledge at all, since it merely references rather general non-discrimination and non-bias ideals, and refers to other bodies of Union law prohibiting "unfair biases", but also "unfair behaviours", one would presume.

Indeed, as seen from point 45 in the preamble of the EU AI Act, it is prescribed that "practices that are prohibited by Union law, including data protection law, non-discrimination law, consumer protection law, and competition law, should not be affected by this Regulation."[12]

Finally, the Regulation (EU) 2023/2854,[13] also known as the " EU Data Act," which establishes rules for fair access to and the use of data within the EU, the term **"fair"** appears prominently as the regulation focuses on ensuring equitable data-sharing among various stakeholders. The EU Data Act mentions the word **"fair" 28 times,** where the

[9] Behrang Kianzad, 'Beyond Justice versus Efficiency – Reconciling Law and Economics Approaches to Fairness' in Klaus Mathis and Avishalom Tor (eds), *Law and Economics of Justice: Efficiency, Reciprocity, Meritocracy* (Springer 2024), 91-130.

[10] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (EU AI Act) [2024] OJ L168/1, p. 27.

[11] Ibid.

[12] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (EU AI Act) [2024] OJ L168/1, point 45, preamble.

[13] Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data (Data Act) [2023] OJ L, 22.12.2023.

regulation primarily focuses on establishing fair access and sharing of data to foster balanced opportunities within the EU's data economy.

However, while the document is oriented around promoting fair and balanced data sharing, specific terms like **"unfair"** and **"unfairness"** do not appear frequently as key legal terms in the regulation itself. Instead, "unfair" may appear in relation to consumer protection or unfair contractual practices, defined partly by way of reference to various other directives on unfair commercial practices.[14]

The EU Data Act nevertheless in para 62 defines certain terms relating to data as being ex ante "unfair" and others presumed to be such, which mimics the so-called hardcore restrictions and block exemptions under Article 101 TFEU,[15] making it even more relevant to draw insights from EU competition law debates on the matter of fairness for the purposes of interpretation and enforcement of the EU Data act.

The above can be compared to the Unfair Commercial Practices Directive,[16] which mentions "unfair" in 32 instances but gives a clear-cut definition of what constitutes such "unfair" practices in Article 5.2, defining such practices as a) those contrary to the requirements of professional diligence, and (b) materially distorting or likely to materially distort the economic behavior with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.

Although such *ex ante* regulations relating to Digital Market actors (gate keepers, core platform providers, Tech giants), Data and AI all elevate fairness, when this is done in relation to "fair" markets, or fairness towards consumers, the interaction with Union competition law regime is self-evident. Nevertheless, as indicated in the DMA, "existing Union law does not address, or does not address effectively, the challenges to the effective functioning of the internal market posed by the conduct of gatekeepers that are not necessarily dominant in competition-law terms… At the same time, since this Regulation aims to complement the enforcement of competition law, it should apply without prejudice to Articles 101 and 102 TFEU".[17]

[14] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29; Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive) [2005] OJ L149/22.

[15] Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data (Data Act) [2023] OJ L, 22.12.2023, para 62: 'In order to ensure legal certainty, this Regulation establishes a list of clauses that are always considered unfair and a list of clauses that are presumed to be unfair."

[16] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (Unfair Commercial Practices Directive) [2005] OJ L149/22.

[17] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1, preamble, points 5 and 10, respectively.

As fairness has long been a controversial competition law concept[18] seen from the perspective of welfare economics[19] (which puts the analytical and normative emphasis on economic efficiency, not fairness), there is manifest risk for a hampered and non-harmonious enforcement. Although welfare economics are not the only economic school affecting competition law, and there is indeed a shift away from those theories to other economic theories[20] being better suited to deal with the legal matter of fairness, the impact of the welfare economics on European competition law is still considerable.[21]

Interestingly, a range of competition law cases have seen the light of the day[22] targeting exactly the type of data-driven, often-times algorithmic, abusive behaviour, a trend that will only continue as further scrutiny, ex ante regulation but also ex post competition law enforcement is levied against such data & AI-driven markets.

Concluding on the matter of fairness as a concept pertaining to laws governing behaviours, markets and economics, at the outset, we can note that the doctrine is torn between Neoclassical and welfarist approaches casting efficiency as the be-all goal and rationale of competition law, on the one hand;[23] and New Brandesian / Neo-Kantian approaches, on the other hand;[24] emphasizing a host of issues to be addressed by competition law, ranging from fairness to inequality.

Thus, it is necessary to investigate, compare and lay bare the ontological and epistemological similarities and differences between the *ex ante* approach chosen in DMA, EU AI Act and EU Data Act with the ex post approach in Union competition law. This would in turn enable a more in-depth analysis of the implications of centring regulatory instruments as well as competition law and enforcement policy around the concept of fairness in this area from a law and economics perspective.

Following the introduction, the second section discusses the concept of fairness from a law and economics perspective and offers an overview of the contentious debates surrounding the concept of fairness. Thereafter, the third section moves on to the matter of fairness within EU competition law as an object but also its practical applicability. The fourth section discusses the interaction between competition law and intellectual property law in general, while the fifth section delves more deeply into comparing the ex ante approach to fairness in regulation of data-driven markets with the ex post approach

[18] Damien Gerard, 'Fairness in EU Competition Policy: Significance and Implications' (2018) 9 Journal of European Competition Law & Practice 211.
[19] Louis Kaplow and Steven Shavell, 'Fairness versus Welfare' (2001) 114 Harvard Law Review 961.
[20] Behrang Kianzad, 'A Neo-Kantian Approach to Competition Law? – The Re-Emergence of Fairness in Antitrust Law & Policy' in Ramsi Woodcock (ed), *Toward an Inframarginal Revolution -Redistributing the Gains from Trade* (forthcoming, Cambridge University Press, May 2025).
[21] Dzmitry Bartalevich, 'The Influence of the Chicago School on the Commission's Guidelines, Notices and Block Exemption Regulations in EU Competition Policy: The Influence of the Chicago School' (2016) 54 JCMS: Journal of Common Market Studies 267.
[22] See e.g. US District Court for the Middle District of North Carolina, RealPage, Case No. 1:24- cv-00710, Complaint, 23 August 2024; Amazon v District of Columbia (DC Court of Appeals, Case No 22-CV-0657, 22 August 2024); Case T-334/19 *Google and Alphabet v Commission (Google AdSense for Search)* [2024] ECLI:EU:T:2024:634.
[23] Kaplow and Shavell (n 19).
[24] Kianzad (n 9).

of competition law. The sixth section concludes that the approach in DMA, EU Data Act and EU AI Act regarding what constitutes "equitable exchange" as well as "fair and contestable" versus what constitutes "unfair behaviour" should be firmly grounded and inspired by the long-standing approach to those matters within European competition law, as well as insights from behavioural economics regarding fairness preferences, in order to offer legal certainty and harmonious application throughout the Union.

2 Fairness as a concept in law and economics

Rebutting the criticism by Alf Ross cited in the introduction, one could argue that as relative, subjective and abstract as the concept of fairness might present itself, the entirety of human history and experience is filled with in-depth inquiries on the matter of fairness and justice, alongside philosophical, legal, economic, psychological and even neurological studies in search of what constitutes fair and unfair, respectively.

The question of what constitutes fairness and justice, its conditions and conditionality, and its volition and volatility, has been a defining character of the legal, philosophical, ethical debates since time immemorial. According to various Natural Law schools, fairness and justice are the departing notion, and final outcome, of the legal discipline, having its roots in religious texts via imperial decrees and later, the first legal texts and treaties. Other schools, such as legal realists and legal positivists, rather emphasise the procedural fairness and the process of codification as the main element of the legal discipline.[25]

The division of the Justice and Fairness concept along the lines of reciprocity, equality and conformity to social and moral norms or laws have dominated much of the Western discourse on Justice and Fairness. As such, concepts such as consequentialism, deontology and virtue ethics have subsequently been developed. Consequentialists put the emphasis on maximisation of beneficial outcomes, aligning the theory with utilitarianism, focusing on both individual and societal maximisation of "utility", counting Jeremy Bentham among others as important figures.

Deontological discourse ("deon" from Greek word for duty and "logos" meaning science) denotes the diametrical opposition of utilitarianism, in that the discourse put the emphasis on the moral value and volition inherent in actions, and not, the outcome and consequences. The outcome, even if not beneficial from a strict utilitarian viewpoint, is secondary to the moral good inherent in the action. Immanuel Kant can be said to have formulated the greatest treatise on the matter, complete with his formulation of the Categorical Imperative, a "moral law" to be determined by reasoned experience, denoting that all actions should be such that they could be elevated to a universal law.[26]

The economic research has mainly taken the form of behavioural and experimental research, beyond traditional political economy, with Kahneman et alia. laying some of the

[25] Hans Kelsen, *Pure Theory of Law* (Lawbook Exchange Ltd, 2009).
[26] Immanuel Kant, *Grundlegung zur Metaphysik der Sitten* (Felix Meiner Verlag, 2016).

groundwork of this field of research in mid 1980´s. In behavioural science, fairness oftentimes denotes the social preference for equitable outcomes, largely alongside the views of fairness.[27]

Such preference for equitable outcomes can also manifest itself as “inequity aversion”, denoting people’s tendency to dislike unequal payoffs in their own or someone else’s favour, a matter which has been investigated by way of experimental games, such as the ultimatum, dictator, and trust games.[28]

Briefly explained, the Ultimatum Game consist of a setting where one player, called the proposer, is endowed with a set amount, such as $100. The proposer will then share this amount with another player, called the responder, by way of a proposal regarding division of the total sum in question. After the proposition is made, the responder has the choice to accept or reject the offer made by the proposer. If the responder accepts the offer, both players get to keep the proposed sum. However, if the responder rejects the offer, neither party gets to keep any of the proposed division. The players are aware of the rules of the game in advance, thus characterising the game as an "ultimatum game."[29]

According to traditional game theory, which assumes rational decision-making and strict utility maximization, the proposer should offer the smallest possible sum. This is because the responder faces a choice between accepting this minimal amount or receiving nothing. Accepting even a very small sum would increase the responder's utility compared to receiving nothing at all. This outcome constitutes a Nash Equilibrium, named after American Economist John Nash (1928-2015) which describes a solution to a non-cooperative game where players, knowing the playing strategies of their opponents, have no incentive to change their strategy, as having reached Nash equilibrium, a player will be worse off by changing their strategy.

Given this logic, proposers initially have no incentive to make "fair" offers. Surprisingly, experimental evidence shows proposers frequently do offer relatively fair shares, and responders often reject offers they perceive as unfair. Research indicates that most proposers offer between 40% and 50% of the total amount, and responders almost always accept these offers. However, when the offered share decreases to around 20%, responders reject the proposal about half the time. Rejection rates further increase as offers drop to 10% or below."[30]

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[27] Daniel Kahneman, Jack L Knetsch and Richard H Thaler, ‘Fairness as a Constraint on Profit Seeking: Entitlements in the Market’ (1986) 76 The American Economic Review 728; Daniel Kahneman, Jack L Knetsch and Richard H Thaler, ‘Fairness and the Assumptions of Economics’ (1986) 59 The Journal of Business S285.

[28] Ernst Fehr and Klaus M Schmidt, ‘A Theory of Fairness, Competition, and Cooperation’ (1999) 114 The Quarterly Journal of Economics 817.

[29] Mascha van ‘t Wout and Johannes Leder, ‘Ultimatum Game’ in Virgil Zeigler-Hill and Todd K Shackelford (eds), *Encyclopedia of Personality and Individual Differences* (Springer International Publishing, 2018).

[30] Daniel Houser and Kevin McCabe, ‘Experimental Economics and Experimental Game Theory’ in *Neuroeconomics* (Elsevier, 2014) 19–34; see also Stéphane Debove, Nicolas Baumard, and Jean-Baptiste André, 'Models of the Evolution of Fairness in the Ultimatum Game: A Review and Classification' (2016) 37(3) Evolution and Human Behavior, 245–54; MA Nowak, ‘Fairness Versus Reason in the Ultimatum Game’ (2000) 289 Science 1773.

The fair allocation can be seen as evidence regarding fairness as constraint on pecuniary gaining, where people engage in fair sharing "in order to avoid large deviations from what they consider a fair solution. This type of behaviour has been extensively documented in laboratory experiments with games such as the ultimatum game and the dictator game".[31]

The implication of Fairness concerns for Game Theory and Equilibrium was already highlighted by Rabin in 1993, noting "People like to help those who are helping them, and to hurt those who are hurting them...one should care not solely about how concerns for fairness support or interfere with material efficiency, but also about how these concerns affect people's overall welfare."[32]

Earlier still, the seminal work by Kahneman, Knetsch and Thaler in 1986,[33] of great importance for the context of the present work on excessive pricing, demonstrated that people are wary of pricing unfairness, where prior prices of the undertaking served as one benchmark for such fairness considerations.

Just a year earlier in 1985, the non-maximising tendencies (framed around non-rationality) and its implications for rationality and overall Economic Equilibrium was also investigated by Akerlof and Yellen.[34] Building on prior work by Artur Okun in 1981,[35] who had also observed that firms do not maximise prices despite facing excess demand (such as new models of automobiles or tickets for events which ex ante are known to generate excess demand), Kahneman et alia. investigated the fairness perceptions regarding (unfair)pricing.

The observed behaviour in the experimental games and the asserted human bias towards fairness and equity was by some labelled as altruism, however, the work by Fehr and Schmidt showed that this was not the case, as noted "Altruism is consistent with voluntary giving in dictator and public good games. It is, however, inconsistent with the rejection of offers in the ultimatum game, and it cannot explain the huge behavioural differences between public good games with and without punishment. It also seems difficult to reconcile the extreme outcomes in market games with altruism."[36]

The above does indeed hold immense theoretical and practical implications when e.g. AI driven algorithmic pricing substitute the human price determination dynamics about which we have amassed considerable knowledge in the past. AI, lacking any “moral” or “legal” constrictions and considerations, is thus able to engage in a truly profit-maximising

[31] Alexander W Cappelen and others, 'The Pluralism of Fairness Ideals: An Experimental Approach' (2007) 97(3) American Economic Review, 818–27; John von Neumann and Oskar Morgenstern, *Theory of Games and Economic Behavior* (Princeton University Press, 60th Anniversary Commemorative Edition, 2007).
[32] Matthew Rabin, ‘Incorporating Fairness into Game Theory and Economics’ (1993) 83 The American Economic Review 1281.
[33] Kahneman, Knetsch and Thaler (n 27).
[34] George A Akerlof and Janet L Yellen, ‘Can Small Deviations from Rationality Make Significant Differences to Economic Equilibria?’ (1985) 75 The American Economic Review 708.
[35] Arthur Okun, *Prices and Quantities: A Macroeconomic Analysis* (Brookings Institution 1981).
[36] Fehr and Schmidt (n 28).

behaviour without risk of losing reputation, sales or encountering competition law scrutiny, left unchecked.

As indicated the concept of fairness is in law and economics is indeed surrounded by controversies, with some schools rejecting fairness to be an economic concept at all. There are three main problems with the line of reasoning which rejects "any conceptual basis in economics"[37] regarding fairness as a legal-economic concept (where in European law we find a clear prohibition against unfair pricing), on both normative and empirical lines. Firstly, total welfare is not the object of European competition law, and never has been, as seen from the legal-history and jurisprudence of CJEU, which is geared towards consumer welfare.[38]

Secondly, the definition of "economists" or "economics" in a monolithic sense is not a correct framing of the discipline and its practitioners, rather, enforcement against undue rent transfer and profiteering can indeed be seen as the prima facie function of competition law, in preventing undue wealth transfer, creation of market power and preventing in-efficiencies.

The conceptual basis of human aversion against unfair pricing is rather solid from both behavioural and neuro-economics studies. In comparison, empirical and neurological evidence for utilitarianism, rational choice and Homo Oeconomicus are yet to be substantiated. Fairness is further able to be aggregated and modelled in a strict economic sense.[39]

Thirdly, the assertion of "serious economic harm" being a risk associated with vigorous enforcement against excessive pricing must be qualified on a case-by-case approach, in the light of an empirical reality demonstrating the opposite, i.e., the absence of a causal relationship between excessive profits and innovation as the evidence examined rather points to less innovation and wealth and not being able to create "welfare", if this latter is defined on a societal and not individual level.[40]

The re-emergence of the concept of fairness in competition policy[41] which have long been dominated by technocratic, econometric, marginalist approach forwarding efficiency as the only rationale and end-goal can thus be seen as a re-affirmation of the

[37] Frédéric Jenny, 'Abuse of Dominance by Firms Charging Excessive or Unfair Prices: An Assessment' in Yannis Katsoulacos and Frédéric Jenny (eds), *Excessive Pricing and Competition Law Enforcement* (Springer International Publishing 2018).
[38] Doris Hildebrand, 'The Equality and Social Fairness Objective in EU Competition Law: The European School of Thought' (2017) 1 Concurrences 1; Ioannis Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law', in Ioannis Lianos and Damien Geradin (eds), *Handbook on European Competition Law*, (Edward Elgar Publishing, 2013), 1–84.
[39] Stefan Wintein and Conrad Heilmann, 'Theories of Fairness and Aggregation' (2020) 85 Erkenntnis 3; Jan Boone, 'Pricing above Value: Selling to an Adverse Selection Market' (2020) CentER Discussion Paper 2020-023; Marcel Canoy and Jan Tichem, 'Lower Drug Prices Can Improve Innovation' (2020) 14(2–3) European Competition Journal, 278-304.
[40] General Secretariat OECD, 'Beyond Growth: Towards a New Economic Approach - Report of the Secretary General's Advisory Group on a New Growth Narrative' (12 September 2019).
[41] Sandra Sandra, Marco Colino, 'The Antitrust F Word: Fairness Considerations in Competition Law' [2019] Journal of Business Law 329.

social policy rationales underpinning competition law[42] (but also intellectual property law to a great extent) and can serve as a clarification of the multitudes of rationales and benchmarks, fairness being one.

Having discussed the overall contours of the debate in law and economics of laws relating to economic activity in the above, it becomes clear that the re-emergence of the concept of fairness in competition policy[43] is rather eye-catching. Competition law and policy has long been dominated by technocratic, econometric, marginalist approach forwarding efficiency as the only rationale and end-goal. The next section moves on to discuss the matter of fairness as a goal for EU competition law, economics and policy, using Article 102 TFEU as proxy.

The next section moves on to the matter of fairness within EU competition law as an object but also its practical applicability.

3 Fairness as a goal for EU Competition law and policy

The inherent tension between the legal discipline (concerned primary with delivering justice and fairness) and the economic discipline (concerned primary with ensuring equilibria and allocative efficiency) is probably most evident in the case of "fairness" rules such as Article 102a TFEU ban on "unfair pricing", but also in the areas such as essential facilities and FRAND licensing, highly relevant to the digital markets.

As per the literal wording of Article 102a, to be applied by the Commission and the NCAs, the undertaking in question must a) hold a dominant position in the relevant market b) engage in a conduct capable of having an effect on trade within the internal market and c) allegedly have abused its dominant position and market power in some ways foreseen by the Article 102a - such as imposing unfair pricing.

The article in question is "law of the land" across all Member States, and it has been subject to an ever-increasing harmonization efforts within European competition law, where the latest step consist of the Directive 2019/1 of 11 December 2018, accords more powers to NCAs.[44]

In regard to the object and function of Article 102 TFEU, as established by settled jurisprudence of the CJEU, the main function of EU competition law rules, including Article 102a TFEU is to “prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union… Accordingly, Article 102 TFEU must be interpreted as referring

[42] Ioannis Lianos, ‘Polycentric Competition Law’ (2018) 71 Current Legal Problems 161.
[43] Sandra Marco Colino, 'The Antitrust F Word: Fairness Considerations in Competition Law' (2019) Journal of Business Law 329.
[44] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L11/3.

not only to practices which may cause damage to consumers directly…but also to those which are detrimental to them through their impact on competition"[45]

Fairness can thus be said to constitute a guiding principle behind Union competition law in general and Article 102 TFEU specifically, which been routinely applied by the EU case law to both exclusionary and exploitative cases, and fairness has indeed been cited as a goal for EU competition law.[46]

Traditionally, competition law can be said to have been seen as a tool to ensure "fair and contestable markets",[47] which is the parlance of the Digital Markets Act. While the Court of Justice of the European Union (CJEU) plays a crucial role in interpreting and enforcing EU laws, including the DMA, there is no specific reference to the exact phrase "fair and contestable markets" in its rulings. However, the CJEU has addressed concepts related to market fairness and contestability in various cases concerning competition law and digital markets.

For instance, in the Courage v. Crehan decision, the CJEU emphasized the importance of private enforcement in competition law, aligning with the DMA's objective of ensuring fair and contestable markets.[48]

Additionally, the CJEU has been involved in cases related to the DMA's enforcement. For example, in July 2024, the General Court upheld[49] the European Commission's designation of ByteDance, the owner of TikTok, as a gatekeeper under the DMA, reinforcing the regulation's aim to maintain fair and contestable digital markets

The CJEU has rather used tin recent years, "competition on the merits"[50] but already in Consten and Grundig in 1966 the court emphasized that the Union competition rules intended to ensure a "fair share" to consumers, and recently in its Interflora decision the CJEU referred to the matter of "fair competition".[51]

Furthermore, regarding the interaction between data and competition, the CJEU in its Lindenapotheke judgement held that:

"it is important to recall that access to and use of personal data are of great importance in the context of the digital economy. Access to personal data and the ability to process

[45] Case C-52/09 *Konkurrensverket v TeliaSonera AB* (Preliminary ruling, Judgment of the Court (First Chamber) [2011] *OJ C 103*, paras 22 and 24 and case law cited therein.
[46] Konstantinos Stylianou and Marios Iacovides, 'The Goals of EU Competition Law - A Comprehensive Empirical Investigation' [2020] SSRN Electronic Journal.
[47] Einer Elhauge and Damien Geradin, *Global Competition Law and Economics* (Hart Publishing, 2011) 1; see also William J Baumol, John C Panzar and Robert D Willig, *Contestable Markets and the Theory of Industry Structure* (Harcourt Brace and Jovanovich, 1982).
[48] Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others. Reference for a preliminary ruling: Court of Appeal (England and Wales) (Civil Division) - United Kingdom* [2020] ECLI:EU:C:2001:465. See Jörg Hoffmann, Liza Herrmann and Lukas Kestler, 'Gatekeeper's Potential Privilege—The Need to Limit DMA Centralization' (2024) 12(1) Journal of Antitrust Enforcement 126–147.
[49] Case T-1077/23 *Bytedance v Commission* [2024] ECLI:EU:T:2024:478.
[50] See e.g. Case C-413/14 P *Intel Corp. Inc. v. European Commission* [2017] ECLI:EU:C:2017:632 , Case C-48/22 P *Google v Commission* [2024] ECLI:EU:C:2024:67; *Servizio Elettrico Nazionale and Others v Autorità Garante della Concorrenza e del Mercato* (Case C-377/20) [2021] ECLI:EU:C:2021:710; *Deutsche Telekom AG v European Commission* (Case C-280/08 P) [2010] ECLI:EU:C:2010:603; *France Télécom SA v European Commission* (Case C-202/07 P) [2009] ECLI:EU:C:2009:214.
[51] Case C-323/09 *Interflora Inc. v Marks & Spencer plc* [2011] ECLI:EU:C:2011:604, para 64.

such data have become a significant parameter of competition between undertakings in the digital economy. Therefore, in order to take account of the reality of this economic development and to ensure fair competition, it may be necessary to take into account the rules on the protection of personal data in the context of the application of competition law and the rules on unfair commercial practices".[52]

Adding to this dimension the interaction between sector regulation and competition law, and the dichotomy depicted above in parts of law and economics doctrine on the nature of competition law, one is faced with an emerging law and economics field where insights from both consumer protection, non-discrimination and competition law are intertwined in ensuring "fair and contestable markets".

But can fairness be said to have acted as an independent goal of European competition law? As a departing point, a comprehensive empirical data study[53] of the decisions by the Commission, judgements by Court of Justice of European Union and Advocate General Opinions as well as Commissioner for Competition Speeches, might be a helpful tool laying bare *de lege lata*, before embarking on the normative discussion which invariably has more a *de lege ferenda* character.

The data study investigated 1082 Commission decisions, 2267 CJEU and General Court judgements and AG opinions, spanning a timeline between 1960´s and 2020. The study shows that seven overarching goals are found in the references in the documents examined, these goals being integration, freedom to compete, structure, competition, welfare, efficiency and fairness.

Looking at the Protocol No 27, annexed to the Treaty of Lisbon, the goals of EU competition Law are described as "...the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted."[54]

The object of European competition law has nevertheless ever since its conception been the target of fierce scholarly (and political) debate on whether it should concern protection of consumer welfare or the competitive process as such, beyond the European Economic Integration and harmonisation of inner market. Albeit, as formulated by Ioannis Lianos "the quest for the goals of competition law may prove in the end a meaningless exercise. Indeed, social goals affecting the interpretation and implementation of EU competition law are evolving and are highly dependent on the institutional and political context."[55]

Evidently, the matter of fairness is "at the heart of the matter" and cannot be ignored. As noted by Johannes Laitenberger, then director of DG Competition in 2017 "Fairness" is as old as competition law itself. Standing on the floor of the U.S. Senate in 1890, Senator Sherman explained that his bill was about ensuring "free and fair competition"...Likewise,

[52] Case C-21/23 *ND & DR v European Commission* [2024] ECLI:EU:C:2024:846.
[53] Stylianou and Iacovides (n 46).
[54] Consolidated Version of the Treaty on European Union - Protocol (No 27) on the Internal Market and Competition [2008] OJ C115/309.
[55] Lianos (n 42).

the Spaak Report of 1956 – when the EU competition rules were first discussed – stressed the importance of "fair" competition."[56]

Moving on to distinguish "competition law" from "unfair trading" laws as per the German legal tradition, Laitenberger points to the fact that although competition law is primarily more concerned with restriction of competition, than unequitable behaviour among competitors, the matter of fairness belongs firmly to the realm of competition law, as well. Laitenberger noted that "the term "fair" appears in Article 101(3) TFEU, while the term "unfair" appears in Article 102 TFEU. The preamble of the TFEU calls for concerted action in order to guarantee "fair" competition. It is a rationale that underpins the EU competition rules."[57]

Margarethe Vesterager, European Commissioner for Competition, revisited the theme of fairness in yet another speech in 2018, this time at a conference titled "Fairness and Competition", noting the long-roots of fairness from the Codes of Hammurabi to modern day refined tools and answers to what constitute "fairness" in a market setting, with competition law rules being one example.[58]

In regard to the matter of exploitative, unfair and excessive pricing by dominant undertakings and detailing the latest actions by the Commission in regard to exploitative pricing practices, the recent years have seen a marked focus on fairness and protecting consumers from abuse of dominant companies.[59]

This particular legal-policy focus on fairness towards consumers as a central tenet of European competition law is also self-evident in a range of other activities and statements from the Commission, Council and the Parliament in regard to fairness, but also a string of enforcement of the most important EU competition law rules on fairness, such as the prohibition against unfair pricing.

As also noted by Damien Gerard, also at the Member State level, fairness seems to be used "as a convenient unifying concept to capture and convey the overarching objective of competition policy, thereby also accommodating different conceptions of the defining principles of justice governing social institutions, including the role and scope of government intervention".[60]

Indeed, European competition law has designated "unfair pricing" as inherently evil and harmful to consumers warranting enforcement beyond market dynamics and even the reach of sector regulators. This is evident in cases such as the case of excessive mobile roaming surcharges or excessive pharmaceutical pricing. The latter received immense

[56] Johannes Laitenberger, 'EU Competition Law in Innovation and Digital Markets: Fairness and the Consumer Welfare Perspective' (Brussels, October 10, 2017).
[57] Johannes Laitenberger, 'EU Competition Law in Innovation and Digital Markets: Fairness and the Consumer Welfare Perspective' (Brussels, October 10, 2017).
[58] Margarethe Vesterager, 'Fairness and Competition - Speech at GCLC Annual Conference' (Brussels, January 25, 2018).
[59] Margarethe Vesterager, 'Protecting Consumers from Exploitation' (Chillin' Competition Conference, Brussels, November 21, 2016); Neelie Kroes, 'Preliminary Thoughts on Review of Article 82' (Fordham Corporate Law Institute, September 23, 2005).
[60] Gerard (n 18).

attention on both Commission and member state levels from 2016 onwards, resulting in a range of decisions against unfair and excessive pharmaceutical pricing across the EU.[61]

Regarding roaming charges, this was a legislative saga[62] that began in 2002 and ended about15 years later with the abolition of all roaming charges within European Union whereas as of 15 June 2017, European consumers have been able to use their mobile devices while travelling within a the EU, paying the same prices as they would do at home, under the so called "Roam like at Home" principle.[63]

Directive (EU) 2018/1972 on European Electronic Communications Code[64] thus target excessive pricing and conditions thereof within the telecommunication sector and enables national regulatory agencies to intervene in the market in order to prevent excessively high prices if the competition in the market is not able to function properly.

Another example is the Unfair Commercial Practices Directive of 2005, having a strict consumer protection characteristic, albeit offering some insights into the focus on fairness towards consumers. Unfair Commercial practices are defined in Article 5 of the Directive as being a practice that "…is contrary to the requirements of professional diligence" and "materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed or of the average number of the group when a commercial practice is directed to a particular group of consumers".[65]

Although the Directives cited above target areas of law other than competition law and cannot be thus are not able of being directly invoked or applied by analogy in a competition law context, the reasoning of the Commission in regard to unfairness, markets and consumers are is closely related to matters routinely addressed by competition authorities and courts when dealing with market behaviour and market power.[66]

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[61] Behrang Kianzad, 'Towards Fair Pricing of Medicines?' (2022) 6(1) European Health & Pharmaceutical Law Review, 2-23.

[62] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) [2002] OJ L108/33; Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC [2007] OJ L171/32, repealed and replaced by Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union [2012] OJ L172/10.

[63] Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC [2007] OJ L171/32; Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union [2012] OJ L172/10.

[64] Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code [2018] OJ L321/36.

[65] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') [2005] OJ L149/22.

[66] For a comparison between fairness elements in Article 102 TFEU and other bodies of law such as contract law and unfair commercial practices, see Pinar Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Hart Publishing, 2015).

The focus of Article 102 TFEU in regard to direct, exploitative abuses and prevention of harm to consumers is also affirmed by the settled case law of CJEU, why e.g. Digital Markets Act (DMA) refers to the Union competition law by way of references to articles 101 and 102 TFEU.[67]

DMA was also inspired by Union competition law as evidenced by the preparatory works and annexes surrounding the document, mainly elevating article 102 TFEU.[68] Nevertheless, as DMA clearly states, the aims and purposes pursued by DMA differ slightly from objectives pursued under Union competition law, framed as:

"This Regulation pursues an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition-law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, potential or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market. This Regulation therefore aims to protect a different legal interest from that protected by those rules and it should apply without prejudice to their application."[69]

One could argue that the prohibition against "unfair, excessive pricing" in European competition law is construed alongside equality and equity in exchange per the Aristotelian and Just Price tradition informing the ratio legis of the prohibition, but also its *ratio oeconomica*.[70]

This is an important insight when attempting to understand and compare the "fair and contestable" and "equitable exchange" notions of fairness entailed in DMA with fairness norms in European competition law on e.g. unfair pricing.

Aristotle devoted an entire book in his Ethics to the matter of Justum Pretium, or Just Price, noting "But the justice in transactions between man and man is a sort of equality need, and the injustice a sort of inequality…according to arithmetical proportion. Therefore, this kind of injustice being an inequality, the judge tries to equalize it…therefore the equal is the intermediate between the greater and the less…therefore the corrective justice is the intermediate between loss and gain."[71]

[67] Joined Cases 6 and 7-73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities* [1974] ECLI:EU:C:1974:18; Joined Cases C-468/06 to C-478/06 *Sot. Lélos kai Sia and Others* [2008] ECR I-7139, para 68; Case C-280/08 P, *Deutsche Telekom v Commission*, Judgment of the Court (Second Chamber) [2010], ECLI:EU:C:2010:603, para 176.

[68] See e.g. Commission Staff Working Document SWD(2020) 363 final, Impact Assessment Report – Annexes, Brussels, 15.12.2020, Annex 5.6; European Commission, Digital Markets Act - Impact Assessment Support Study, Annexes, December 2020, Annex 4 "case studies".

[69] Digital Markets Act, para 11, preamble.

[70] Behrang Kianzad, *What Makes A Price (Un)Fair)? Excessive Pharmaceutical Pricing in European Competition Law* (Det Juridiske Fakultet, København 2022).

[71] Aristotle, *Nicomachean Ethics, Book VII* (Batoche Books, translated by WD Ross, 1999).

This interpretation of "Just Price" thus re-connects with the Aristotelian position on "equality in exchange".[72] This approach to "just price"[73] was further developed in Roman Law and the concept of laesio enormis[74], and later during the Medieval times by Albert the Great and Thomas Aquinas[75] et alia, in part re-connecting with the biblical concept of "usury", and thus came to impact the European competition law prohibition against unfair pricing.[76]

Further economic research has targeted fairness in pricing and the notions of customers related to increase in pricing, demonstrating that consumers are generally less accepting of price increases as result of a short term growth in demand than rise in costs.[77]

Regarding unfairness in pricing, if defined as per article 102 TFEU, the reliance on past prices when judging appropriateness of current prices and use of current prices to predict future prices has also been demonstrated by other researchers,[78] however past prices are not the sole determinant regarding fair pricing perceptions, where prevailing competitive prices are also of importance.[79]

However, it appears that people do not spontaneously or fully appreciate retailer costs when judging fair prices. Profit is viewed as constituting a large proportion of the selling price.[80] Interestingly, comparison with past prices, or prices charged for the same product in other markets, are two of the central assessment methods related to unfair and excessive pricing in European jurisprudence related to Article 102a TFEU.[81]

Indeed, the reference to "fairness" is also found in Article 101(3) in relation to pro-competitive effects of an agreement which might make Article 101 incompatible in cases "which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit" and does not unduly restrict competitors and competition.

What constitutes a "fair share" is probably on pair regarding complexity as finding what would constitute a "fair price", if not yet more complex, as defining a fair share must invariably involve a more subjective and discretionary measures, similar to how a competitive price is determined using of the Cost Plus approach and other benchmarking approaches developed in the jurisprudence.

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[72] Aristotle, *Nicomachean Ethics*, 1132b, lines 31–33 as cited in Michal S Gal, 'Abuse of Dominance – Exploitative Abuses' in Lianos and Geradin (n 39).
[73] Oswald von Nell-Breuning, 'The Concept of Just Price' (1950) 8(2) Review of Social Economy, 111–22.
[74] Michal S Gal, 'Abuse of Dominance – Exploitative Abuses' in Lianos and Geradin (n 39) 385–422.
[75] Daryl Koehn and Barry Wilbratte, 'A Defense of a Thomistic Concept of the Just Price' (2012) 22 Business Ethics Quarterly 501.
[76] For an in-depth inquiry on the roots of the prohibition, see: Kianzad (n 70).
[77] Daniel Kahneman, Jack L Knetsch, and Richard H Thaler, 'Fairness as a Constraint on Profit Seeking: Entitlements in the Market' (1986) 76(4) The American Economic Review 728 – 774.
[78] Richard A Briesch and others, 'A Comparative Analysis of Reference Price Models' (1997) 24 Journal of Consumer Research 202.
[79] Kahneman, Knetsch and Thaler (n 27).
[80] Lisa E Bolton, L Warlop and JB Alba, 'Explorations in Price (Un)Fairness - Oepartement Toegepaste Economische Wetenschappen -Research Report 0145' [2001].
[81] Jenny (n 37).

A further example of the emphasis on fairness, direct harm to consumers, and artificially high prices is the 2019 EU Directive on competition law, which empowers the competition authorities of the Member States to be more effective enforcers and ensures the proper functioning of the internal market, noting that "effective enforcement of Articles 101 and 102 TFEU is necessary to ensure fairer and more open competitive markets in the Union".[82]

A final example demonstrating the increased Fairness-trend is the New Competition Tool by the European Commission, which was designed to combat tech-giants, when hindering emergence of new competitors by their sheer size and market power, thus aiming towards structural remedies, a clear U-turn to Big-Is-Bad and per se illegality, one might argue.[83] An effort that was outshone by the enactment of Digital Markets Act and the AI Act, providing the ex ante investigate powers to the Commission and relevant authorities and creating per se liability rules for e.g. designated gatekeepers or developers of high-risk AI systems.

Narrowing down the discussion of fairness to e.g. "fairness in pricing" for the purpose of comparing Union competition law with the notions of fair markets and equitable exchange in DMA, there exist a substantial body of economic research on the matter of fairness notions related to pricing which can guide and inform enforcement and legal certainty. In regard to law and economics, two major works have recently been published which summarize some of the main approaches in the normative.[84]

The issue of fairness as an object of laws regulating economic activity, such as competition law, has been the subject of fierce debate among law and economics scholars, where the contours of the debate have progressed along the asserted dichotomy between efficiency v justice as regards the object of competition law. Should competition law deliver "fair" outcomes, or should it be more concerned by protecting the competitive process, thereby ensuring a competitive market, where efficient outcomes are produced?

As noted by White: "The deeper problem with externalities from a Kantian point of view is that the economic analysis focuses on the harm imposed rather than the wrong done. Economics, based on brute utilitarianism, treats all harms the same and recommends any measures to make harms efficient. But not all harms are wrongful, and in fact some harms are protected by rights."[85]

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[82] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L11/3, Preamble 1.

[83] European Commission, 'New Competition Tool Initiative', <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-Single-Market-new-complementary-tool-to-strengthen-competition-enforcement_en> accessed 15 November 2024.

[84] Erik O Cappelen and Bertil Tungodden, *The Economics of Fairness* (Edward Elgar Publishing, 2019); Lee Anne Fennell and Richard H McAdams (eds), *Fairness in Law and Economics* (Edward Elgar Publishing, 2013).

[85] Mark D White, 'With All Due Respect: A Kantian Approach to Economics' in Mark D White (ed), *The Oxford Handbook of Ethics and Economics* (Oxford University Press 2019).

This "Kantian" interpretation of the *ratio legis* behind excessive pricing prohibition in European competition law is reflected in the wording in the leading case of United Brands on unfair pricing,[86] where "unfair pricing" per Article 102a TFEU were defined as prices having "no reasonable relation to the economic value of the product."[87]

According to the seminal test developed in the case, the excess in turn could be determined objectively if it would be possible to calculate it through a comparison between the selling price of the product and its cost of production, which would disclose the "profit margin". Finally, the question to be determined would consist in answering the question if the disclosed difference is "either unfair in itself or when compared with competing products".[88]

If notions and preferences relating to fairness were only treated as externalities by "mainstream" economics which have influenced competition law to a great extent during the past decades, this approach would run the risk of being in direct conflict with the core *ratio legis* of a statute such as Article 102a TFEU.

Concluding on the matter of fairness in European competition law, as evident from the above, fairness is a core tenet of the European approach to regulating economic activity, although the issue of efficiency and the so-called more economic approach, inspired by the Welfarist and Chicago school of competition theory dominated the field for several decades.[89]

There is thus a solid body of case law relating to issues such a unfair pricing,[90] which helps clarify the study of fairness norms in the DMA, Data Act and AI Act, but also a body of legal acts exists that, in one way or another, elevates the matter of fairness, with particular emphasis and most importantly, on its connection to Union competition law.[91]

The next section moves on to discuss the interaction between intellectual property law and competition law, as much of digital, data and AI-driven markets are protected by various intellectual property rights, enabling the rightsholders to certain practices which might come in conflict with Union competition law.

The next section discusses the interaction between competition law and intellectual property law in general.

[86] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] ECLI:EU:C:1978:22, paras 250-253 regarding the test for excessive pricing.
[87] In turn defined in Case 26-75 *General Motors Continental NV v Commission of the European Communities* [1975] ECLI:EU:C:1975:150, para 12.
[88] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] ECLI:EU:C:1978:22. See paras 250-253 regarding the test for excessive pricing.
[89] Bartalevich (n 21).
[90] Behrang Kianzad, 'Are Excessive Pricing Cases Few and Far Between? A Quantitative Analysis of Fifty Years of European Jurisprudence 1971-2021' (2023) 3 *Concurrences*.
[91] See e.g. DMA point 10 in the preamble; EU Data Act point 32 in the preamble and EU AI Act point 45 in the preamble.

4 The interface between competition law and intellectual property law

As Intellectual Property Rights (the "IPRs") are legally granted monopolies, shielding the rightsholder from actual or potential competition during the protection period (in case of patents, 20 years, plus secondary protection certificates etc.), the rightsholder is able to set and enforce supra-competitive, monopolist prices, which might at first look be in conflict with the roots of competition law.

Some, such as Joseph Schumpeter, indeed posit this possibility of monopolist prices and probability of monopolistic profits as the main driver behind innovation, in turn driven by dynamic competition.[92]

When "costs" increase relative to "value", and when markets are protected by exclusive rights conferred through of patents, thereby shielding them from competitive pressure, there is manifest risk for abuse of dominant position, including the imposition of unfair pricing, although prohibited by per Article 102a TFEU as detailed in the previous section.

Since all forms of data are mainly protected by some form of intellectual property rights (such as patents, copyrights, trade secrets or other sui generis rights relating to data and databases), the interaction between this body of law - granting exclusivity by way of legal-monopolies- and competition law, which traditionally challenges exclusivity and monopolies, is worth exploring, and in fact, this interaction is clearly articulated in the EU Data Act.[93]

At least on the face of it, these bodies of laws do indeed seem to be in conflict. The delicate interaction between competition law and intellectual property law is probably most evident in innovative, high-risk sectors, such as the data-driven and digital sectors or the pharmaceutical sector.

On the matter of boundaries between IP law and competition law, the CJEU has accepted that an intellectual property right allows its proprietor to charge higher prices compared to non-protected goods.[94] However, the CJEU also has consistently affirmed there an upper limit for prices that can be set by a dominant undertaking.

As in every introductory course on intellectual property law, it is important to distinguish between the existence and the exercise of granted and protected rights. Competition law should therefore fulfil the necessary check-and-balances function in this public-private rights equation and balancing of interests. The impact of IPR protection on

[92] Richard Gilbert, 'Looking for Mr. Schumpeter: Where Are We in the Competition Innovation Debate?', in *Innovation Policy and the Economy, vol. 6* (MIT Press, 2006), 159–215; Jonathan B Baker, 'Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation' (2007) 74 Antitrust Law Journal 575.

[93] See e.g. EU Data Act, Point 32 in Preamble, noting "Whether a connected product competes with the connected product from which the data originates depends on whether the two connected products are in competition on the same product market. This is to be determined on the basis of the established principles of Union competition law for defining the relevant product market".

[94] Case 24/67 *Parke, Davis and Co. v Probel, Reese, Beintema-Interpharm and Centrafarm* [1968] ECLI:EU:C:1968:1.

innovation is a highly complex matter dependant on a range of factors beyond the legal incentives.[95]

Crucially, as the ratio legis and economic justification for providing innovators with intellectual property protection entail the prospect of supra-competitive prices in order to recoup costly and risky investments. The resulting trade-off between innovation and access can be approached by way of competition law, acting as a moderating and equalising force and arbiter.

Although it has been re-affirmed by the CJEU in the Parke Davis case[96] that a difference in price emanating from its legally exclusive nature compared to other non-exclusive goods would be justified, there are however other metes and bounds applying to the use of those exclusive rights. The legal discourse on FRAND in regard to Standard Essential Patents is one such example.[97]

In short, actions that are perfectly legal under IP law can be deemed illegal in a competition law setting, as was the case in the seminal AstraZeneca case where AstraZeneca made use of its legal rights to deregister an established product and its marketing authorization, allegedly as a conscious strategy to delay generic entry.

As held by the Court, "...the illegality of abusive conduct under Article 82 EC (now article 102 TFEU, author remark) is unrelated to its compliance or non-compliance with other legal rules and, in the majority of cases, abuses of dominant positions consist of behaviour which is otherwise lawful under branches of law other than competition law."[98]

Hence, the distinction between existence and exercise of IPRs builds the basis of European law and jurisprudential approach to the interface between IPRs and Competition Law, where CJEU has, on numerous occasions,[99] reiterated that the exercise of IPRs and possible anti-competitive practices arising from such exercise is well within the ambit of European competition law. This view was developed in the *Consten & Grundig* case,[100] where the European Court of Justice elaborated on the distinction between the granting of IPRs and the exercise of the IPRs, and the court has consistently reaffirmed this position ever since.[101]

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[95] Yi Qian, 'Do National Patent Laws Stimulate Domestic Innovation in a Global Patenting Environment? A Cross-Country Analysis of Pharmaceutical Patent Protection, 1978–2002' (2007) 89 Review of Economics and Statistics 436.

[96] Case 24-67 (n 94).

[97] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee setting out the EU approach to Standards essential Patents, 29 November 2017, COM(2017) 712 final.

[98] C-457/10 P *AstraZeneca v Commission* [2012] ECLI:EU:C:2012:770, para 132.

[99] See e.g. Joined cases 56 and 58-64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966] ECLI:EU:C:1966:41; Case 78-70 *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG* [1971] ECLI:EU:C:1971:59; Case 24-67, *Parke, Davis and Co. v Probel, Reese, Beintema-Interpharm and Centrafarm* [1968] ECLI:EU:C:1968:11; Case C-372/19, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Weareone.World BVBA and Wecandance NV* [2020] ECLI:EU:C:2020:959.

[100] Joined cases 56 and 58-64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966] ECLI:EU:C:1966:41, see recital 10-11.

[101] Case 78-70 *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG* [1971] ECLI:EU:C:1971:59 ;Case 238/87 *AB Volvo v Erik Veng (UK) Ltd* [1988] ECLI:EU:C:1988:477; Case 40/70 *Sirena Srl v Eda Srl and others* [1988] ECLI:EU:C:1979:236; Case 24-67 *Parke, Davis and Co. v Probel, Reese, Beintema-Interpharm and Centrafarm* [1968] ECLI:EU:C:1968:11.

Other cases such as Magill[102] and Deutsche Grammophon[103] can also be read in that light. One might point to numerous cases at both the EU level[104] and on the Member State level that have dealt with abusive pricing issues related to intellectual property rights, albeit not innovative medicines as such, beyond the cited AstraZeneca and Servier cases, where the excessive price resulted from other practices.

Furthermore, the impact of competition law enforcement on innovation has been investigated to some extent, and has been demonstrated to be a positive, as noted by one the most comprehensive studies on the matter, which uses a unique firm-level dataset on patenting activities that includes over 1.2 million firm-year observations across 66 countries, from 1991 through 2015.

The study confirmed a strong connection between competition laws and firm innovation. More stringent competition laws were associated with sharp increases in firm innovation, as measured by the number of patents, forward citations to patents, citations per patent, the number of very highly cited patents, and the number of explorative patents. The results were stronger among firms that are less financially constrained, publicly listed firms, and non- family-controlled firms.[105]

As long-standing research[106] on the matter demonstrates, neither more protection, nor perfectly competitive markets, invariably lead to more innovation, but many other factors such as firm size, industry sector and overall innovation policy, also interact to a high degree.

In sum, a conceptual framework related to the anti-competitive exercise of IPRs has long been developed in European law and jurisprudence, making a distinction between the lawful existence and unlawful exercise of IPRs, where charging unfair (excessive) pricing is one of the anti-competitive abuses that might arise from the exercise of IPRs.

Hence, the settled case law[107] of CJEU makes it clear that EU competition law can be utilised against breaches of other bodies of laws, more importantly, intellectual property

[102] Joined cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities* [1995] ECLI:EU:C:1995:98.

[103] Case 78-70 *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG* [1971] *ECLI:EU:C:1971:59* (n 121).

[104] Case 40-70 *Sirena S.r.l. v Eda S.r.l. and others* [1971] ECLI:EU:C:1971:18; Case 24-67, *Parke, Davis and Co. v Probel, Reese, Beintema-Interpharm and Centrafarm* [1968] ECLI:EU:C:1968:1; Case 238/87 *AB Volvo v Erik Veng (UK) Ltd* [1988] ECLI:EU:C:1988:477.

[105] Ross Levine and others, 'Competition Laws and Corporate Innovation' (National Bureau of Economic Research, 2020) w27253.

[106] Lawrence M Debrock, 'Market Structure, Innovation, and Optimal Patent Life' (1985) 28 The Journal of Law and Economics 223–44; William D Nordhaus, *Invention, Growth, and Welfare: A Theoretical Treatment of Technological Change* (The MIT Press 1969).

[107] See e.g. Case 24-67 *Parke, Davis and Co. v Probel, Reese, Beintema-Interpharm and Centrafarm* [1968] ECLI:EU:C:1968:11; C-457/10 P *AstraZeneca v Commission* [2012] ECLI:EU:C:2012:770, para 132; Joined cases 56 and 58-64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966] ECLI:EU:C:1966:41; Case C-372/19 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Weareone.World BVBA and Wecandance NV* [2020] ECLI:EU:C:2020:959.

law and exclusive rights, thus being applicable also on matters regulated by DMA; Data Act and the AI Act, where these acts indeed refer to Union competition law, also.[108]

The next section delves more deeply into comparing the *ex ante* approach to fairness in regulation of data-driven markets with the *ex post* approach of competition law.

5 The interaction between ex ante regulation and ex post competition law enforcement in digital markets

The above conceptual framework is also well-suited for the challenges posed by the data-driven markets and the abuse of dominant positions by those possessing massive amounts of data which gives them a competitive lead and, in many cases, an entrenched market position with high markets shares. This can at times come close to monopolistic situations when discussing certain tech giants and their services, as well as their unassailable lead over would-be competitors.

This matter has also been referred to as "network effects" and is one of the motivating factors behind the enactment of Digital Markets Act, the EU Data Act, the EU AI Act and so on. Network effects entail that the value of a product, service, or platform depends on the number of buyers, sellers, or users who leverage it.

Typically, the greater the number of buyers, sellers, or users, the greater the network effect—and the greater the value created by the offering.[109] This in turn leads to a "winner-takes-all" scenario that influence strategies, such as pricing and quality,[110] but also entrenches market power for those firms enjoying such network effects, further insulating them from competition, and competition law enforcement.

This matter becomes even more complex in the case of so-called data network effects, a concept that has emerged from advances in artificial intelligence and the growing availability of data, where a platform exhibits data network effects if, the more it learns from the data it collects on users, the more valuable the platform becomes to each user.[111]

One prime example in the literature is the case where Microsoft succeeded in making MS Office (spanning Word, Excel, and PowerPoint) the dominant suite of office productivity applications, encouraging users to standardize on MS Office for both business

[108] Digital Markets Act, Para 10.
[109] Tim Stobierski, 'What are Network effects?' (*Harvard Business School*, 12 November 2020) https://online.hbs.edu/blog/post/what-are-network-effects, accessed 2024-11-15.
[110] Rietveld J and Schilling MA, 'Platform Competition: A Systematic and Interdisciplinary Review of the Literature' (2021) 47(6) *Journal of Management* 1528 - 1563.
[111] Robert Wayne Gregory et al., 'The Role of Artificial Intelligence and Data Network Effects for Creating User Value' (2021) 46(3) *Academy of Management Review* 534.

and personal use. The direct network effects for these applications were based on easy file sharing across users.[112]

Another example concerns the increased use of algorithms and AI solutions in to product price monitoring and algorithmic price changes, where a bulk of previously human-made decisions are now increasingly automated, complicating the matter further. Such was the defence by Lufthansa when investigated by German *Bundeskartellamt* alleged unfair and excessive pricing[113] by Lufthansa on some selected routes following the exit of rival Air Berlin.

Lufthansa pointed in this case to the algorithm being the reason behind price increases as a result of changes in demand. Although the case eventually was dropped by the *Bundeskartellamt*, citing the speedy entry of other competitors (Easyjet) into the market and subsequent price reductions Lufthansa's defence is interesting to note in regard to the boundaries of human-made law in relation to unfair pricing when faced with non-human, algorithmic "unfairness" as perceived by the human eye and according to human notions of fairness.[114]

Finally, in the context of fairness, data and competition law, the Meta / Facebook case brought by German *Bundeskartellamt* in 2019 and decided on as a preliminary ruling[115] by Court of Justice of European Union in 2021 is a seminal one which was recently concluded with Meta offering necessary commitments.

In February 2019 the *Bundeskartellamt* prohibited Meta (formerly Facebook) from combining personal user data from different sources without user consent. Meta appealed this decision. Over the years of legal proceedings, in which the Federal Court of Justice (2020) and the Court of Justice of the European Union (2023) confirmed the *Bundeskartellamt's* position on matters of principle, Meta and the Bundeskartellamt also intensively negotiated concrete measures to implement the authority's decision.

The CJEU ruled (Case C-21/23) that a competitor not classified as a "data subject" under the GDPR can enforce GDPR compliance through national competition rules. This case involved a German pharmacy owner marketing medicinal products on Amazon, requiring customer data entry. A competitor claimed this violated German unfair competition laws, arguing the lack of customer consent for processing health data constituted an unfair practice affecting market players and consumers.

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[112] Catherine Tucker, 'What Have We Learned In the Last Decade? Network Effects and Market Power' (*The Global Antitrust Institute*, Spring 2018) <https://gai.gmu.edu/wp-content/uploads/sites/27/2021/05/Session-13_Tucker-Network-Effects.pdf> accessed 15 November 2024.

[113] Imposing so-called "unfair pricing" by a dominant undertaking (holding 40% or more of market shares in the relevant market) is prohibited by Union competition law per article 102a TFEU. See Kianzad (n 92).

[114] See Bundeskartellamt and Autorité de la concurrence, 'Algorithms and Competition' (November 2019) < https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Algorithms_and_Competition_Working-Paper.pdf?__blob=publicationFile&v=5> accessed 20 August 2020.

[115] Case C-252/21 *Meta Platforms Inc and Others v Bundeskartellamt* [2023] ECLI:EU:C:2023:537. It was held that GDPR concerns can indeed be pursued by competition law, a ruling which will have immense practical implication for abuses of DMA, Data Act and AI Act.

The CJEU found this consistent with the GDPR, allowing Member States to enable competitors to seek injunctions against GDPR breaches. It acknowledged such actions might not stem from data protection concerns but aim to ensure fair competition. The court emphasized personal data's role in digital economy competition and noted competitors' actions could strengthen GDPR compliance and safeguard data protection effectively.

Meta's individual measures are now deemed to be a sufficiently effective package allowing the *Bundeskartellamt* to close the case. Meta has withdrawn the appeal pending before the Düsseldorf Higher Regional Court (OLG Düsseldorf) against the *Bundeskartellamt's* decision. The decision is thus final.[116]

Although there is a clear presumption of the possibility of abuse with such market power, it must be observed that for example monopoly pricing of goods and services in the context of network effects at times can sometimes lead to lower markups, which can be even zero or negative in multi-sided markets. This context necessitates a somewhat different analysis than the traditional focus on, for instance SSNIP-based market power, particularly in the case of zero price products and services.[117]

The pre-supposed pre-occupation of sector regulator further targets all market players in the sector, whilst competition law is more concerned with market power and dominance as such, thereby being less intrusive and all-encompassing as opposed to sector regulator which is a per se intrusion upon market dynamics.

A cooperation between competition authority and sector regulator would further cure many of the deficiencies pointed out by the those opposing an interventionist role of competition authorities regarding finding of proper benchmarks. Furthermore, as competition rules are part of the TFEU, they have superiority to sector regulation rules and as such can be invoked to cure deficiencies.[118]

Some commentators have maintained that the presence of a sector regulator would rebut competition law enforcement against alleged anti-competitive practices, such as unfair pricing. Looking at the settled jurisprudence and types of cases, there is support to the contrary, affirming the position that the existence of a sector (price) regulator does not preclude ex post competition law enforcement.

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[116] Bundeskartellamt, 'Facebook Proceeding Concluded' (10 October 2024) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2024/10_10_2024_Facebook.html> accessed 15 November 2024.

[117] Emilio Calvano and Michele Polo, 'Market Power, Competition and Innovation in Digital Markets: A Survey' (2021) 54 Information Economics and Policy 100853.

[118] OECD, 'Excessive Prices' (2011) Background Paper, para. 120, DAF/COMP/W2(2011)7; European Commission, Commission Notice on the Application of Competition Rules to Access Agreements in the Telecommunications Sector (98/C 265/02) *OJ C 265, 22.8.1998, p. 2-28*.

The legal position is evident from settled jurisprudence in Telekom,[119] Airport[120] and Energy[121] sectors, where despite being heavily regulated sectors, they still observed a non-trivial number of excessive pricing cases, where the price level set by the sector regulator could be invoked as a benchmark in the assessment.[122]

Many times the sector regulator has been unable to address the anti-competitive practices of unfair pricing, as evident from the string of excessive pharmaceutical pricing cases.[123] The aim of Digital Markets Act, the EU AI Act and the EU Data Act are in turn to curb deficiencies and shortcomings on part of Union competition law which is said not have been able to come to terms with the issues targeted by those aforementioned legal acts pertaining to digital, data and AI markets.

The interaction between sector regulation and competition law will thus be in the forefront regarding the application of said legal acts, as many cases might present themselves in the interface between these bodies of law and regulation.

6 Conclusions

Much of the ongoing research[124] elevating "fairness" related to data, digital markets and, most importantly, Artificial Intelligence, targets non-discrimination, ethics and bias. However, little work has been done on the matter of fairness as a competition law and regulatory concept applied to digital, data-driven and AI markets. This is unsatisfactory, since the recent legal acts elevate fairness to a great extent, while referring to norms and principles derived from and developed in EU competition law.

As EU competition law itself has long entertained contentious debates on whether fairness could and should act as a goal and concept for laws governing economic activity, among them competition law, it becomes even more important to have a clear discussion on whether the "fairness" norm elevated in legal acts such as DMA, EU Data Act and EU AI Act sustains the same understanding of "fairness" as within EU competition law, not least since there are multiple references in those legal acts to Union competition law.

EU competition law indeed includes rules prohibiting for example "unfair pricing", supported by settled case law and various doctrinal approaches, however it is apparent that the fairness dimensions in the aforementioned legal acts do not entirely mirror those

[119] Case C-280/08 P *Deutsche Telekom AG v European Commission* [2010] ECLI:EU:C:2010:603.
[120] Michele Giannino, 'Enforcement of Excessive Price Competition Provisions in the Airport Sector' (2012) SSRN Electronic Journal.
[121] Case AT.39816 –*Upstream gas supplies in Central and Eastern Europe (Gazprom)* - Final Committment Decision, 24/05/2018.
[122] See Commission Decision of 15 November 2011 in Case COMP/39.592 - *Standard & Poor's*, C (2011) 8209 final, para 26; referring further to Case C-66/86 *Ahmed Saeed*, paragraph 43; see also Case 30/87, Corinne Bodson, para 31.
[123] Behrang Kianzad and Timo Minssen, 'How Much Is Too Much? Defining the Metes and Bounds of Excessive Pricing in the Pharmaceutical Sector' (2018) 2(3) *European Pharmaceutical Law Review* 133 – 148.
[124] Anna Jobin, Marcello Ienca, and Effy Vayena, 'The Global Landscape of AI Ethics Guidelines' (2019) 1(9) Nature Machine Intelligence 389.

found in competition law, as per literal wording in acts such as DMA which note that DMA is enacted to curb deficiencies not being able to be curbed by Union competition law.[125]

As noted by one critique offered by Wolfgang Kerber "the objectives of the DMA (contestability, fairness) differ from the competition objective of Articles 101 and 102 TFEU, and any investigations and assessments have to refer to the still not sufficiently clarified objectives of contestability and fairness, i.e., consumer welfare might not be the sole and decisive criterion anymore".[126]

Nevertheless, it can be claimed that the concept of unfairness in competition law, e.g. when talking about "unfair pricing", has a rather solid "conceptual basis" in both law and economics, as the matter of unfair pricing has laid the groundwork of Nobel Prize in Economics, following the work of Kahneman et alia.[127] who demonstrated that people hold strong fairness in transaction preferences. People are willing to forgo increases in utility if they perceive a transaction as unfair, or when they are faced with manifest price increases without objective reasons such as an increase in the costs of supplying the product.[128]

As aptly summarized by Klaus Mathis "In people's minds, justice – however it is defined – has an immanent value, which is very difficult to weigh up against an increase in economic efficiency."[129] Fairness becomes relevant in these contexts simply because the core analytical structure of neoclassical and welfarist theories of harm do not neatly encompass the law and economics of digital and AI markets, nor the traditional political economy focus on "equitable exchange", which came to build the foundation of laws governing market activity and exploitation.[130]

The marginalist and welfarist approach to competition law and economics is not fully suited to come to terms with the observed phenomena of the unassailable competitive lead gained through access to Big Data, Network effects and the ability to invest in costly AI systems which in turn build upon the treasure-trove of Big Data in the hands of few Big Tech corporations.

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[125] Digital Markets Act, point 5, preamble, noting "It follows that the market processes are often incapable of ensuring fair economic outcomes with regard to core platform services. Although Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) apply to the conduct of gatekeepers, the scope of those provisions is limited to certain instances of market power, for example dominance on specific markets and of anti-competitive behavior, and enforcement occurs ex post and requires an extensive investigation of often very complex facts on a case by case basis. Moreover, existing Union law does not address, or does not address effectively, the challenges to the effective functioning of the internal market posed by the conduct of gatekeepers that are not necessarily dominant in competition-law terms".

[126] Wolfgang Kerber, 'Taming Tech Giants with a Per Se Rules Approach? The Digital Markets Act from the "Rules vs. Standard" Perspective' (2021) 3 Concurrences 28.

[127] Daniel Kahneman, Jack L Knetsch and Richard H Thaler, 'Fairness and the Assumptions of Economics' (1986) 59(4) The Journal of Business S285-S300.

[128] Robert Piron and Luis Fernandez, 'Are Fairness Constraints on Profit-Seeking Important?' (1995) 16(1) Journal of Economic Psychology 73–96.

[129] Klaus Mathis, *Efficiency Instead of Justice?* (Springer, 2009) 48.

[130] von Nell-Breuning (n 73).

In this context the recently introduced ex ante regulatory approaches such as EU AI act, EU Data act as well as Digital Markets act, all elevate "fairness" and "fair processes" in various forms, ranging from safety in AI systems, to disclosure of data, non-discrimination and various ethical aspects of AI and the use of Big Data.

Thus, when DMA notes that "for the purpose of this Regulation, unfairness should relate to an imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage",[131] then it is possible to argue that this is the same Aristotelian norm regarding equality in exchange, that in turn built the basis for "just price" and later, the prohibition against "unfair pricing".

The recent approaches by behavioural economics also contribute to our understanding of human bias towards fairness and aversion towards unfairness, especially regarding transactions and pricing. The works of Kahneman, Knetch and Thaler,[132] Piron and Fernandez,[133] Fehr and Schmidt,[134] Varian,[135] Ulen,[136] Sunstein and Jolls[137] et alia. in combination with research on neuro-economics experiments[138] further contributes to the normative understanding when trying to make sense of what role fairness should and could play in the law and economic analysis of allegedly "unfair behaviour" or "unfair prices".

Adding to this normative conundrum, the practical applicability of many competition law concepts and benchmarks such as dominance, definition of relevant market, differential pricing, MFN-clauses, unfair pricing and so on merit further exploration in the case of multisided-platforms due to their dual character.

However, less attention has been focused on the emergence of AI as a practical challenge for competition law enforcement when dealing with for example, instances of algorithmic price collusion, refusal to license data by a dominant undertaking and price gouging / excessive pricing resulting from AI information sharing and collusive behaviour.

A string of recent cases[139] nevertheless, demonstrates the legislative appetite for bringing such cases, enabled by *ex ante* regulatory approaches. As evident from the

[131] Digital Markets Act, Point 33, preamble.
[132] Kahneman, Knetsch and Thaler (n 27).
[133] Robert Piron and Luis Fernandez, 'Are Fairness Constraints on Profit-Seeking Important?' (1995) 16 Journal of Economic Psychology 73.
[134] Fehr and Schmidt (n 28).
[135] Hal R Varian, 'Distributive Justice, Welfare Economics, and the Theory of Fairness' (1975) 4 Philosophy & Public Affairs 223.
[136] Thomas S Ulen, 'Law and Economics, the Moral Limits of the Market, and Threshold Deontology' in Aristides N Hatzis and Nicholas Mercuro (eds), *Law and Economics: Philosophical issues and fundamental questions* (1st edn, Routledge 2015).
[137] Cass R Sunstein, Richard H Thaler and Christine Jolls, 'A Behavioural Approach to Law and Economics' (1998) 50 Stanford Law Review 1471.
[138] A W Cappelen et al., 'Equity Theory and Fair Inequality: A Neuroeconomic Study' (2014) 111(43) *Proceedings of the National Academy of Sciences* 15368 - 15372; Mario F Mendez, 'The Neurobiology of Moral Behavior: Review and Neuropsychiatric Implications' (2009) 14(11) *CNS Spectrums* 608 - 620; M Hsu, C Anen and SR Quartz, 'The Right and the Good: Distributive Justice and Neural Encoding of Equity and Efficiency' (2008) 320 Science 1092.
[139] See e.g. US District Court for the Middle District of North Carolina, RealPage, Case No. 1:24- cv-00710, Complaint, 23 August 2024; DC Court of Appeals, Amazon, Case No.22-CV-0657, Opinion, 22 August 2024; Case T-334/19 *Google and Alphabet v Commission (Google AdSense for Search)* [2024] ECLI:EU:T:2024:634.

section on law and economics approaches to fairness, the concept of fairness and its practical application in law and economics is not without challenges in overcoming the inherent "subjective" elements entailed in fairness considerations.

Focusing on the practical issue of "unfair pricing" as an anti-competitive practice under EU competition law – one that most readily lends itself for comparison with the type of "unfair behaviour" that legal acts such as DMA, EU Data Act and EU AI act aim to combat- would be a practical approach to devise a clear, objective and practical framework to enforce and implement the fairness norms in these legal acts. Fairness can indeed act as an objective and operational concept in both law and economics of laws governing economic activity, such as the Digital Markets Act, Data Act and AI Act, provided that the enabling conditions for defining what constitutes fair / unfair are clearly established.
As noted by Gerard, "instead of weakening legal certainty, the candid exposure of the fairness rationale underlying competition principles…might increase the predictability of individual assessment by shedding light of some of the variables capable of affecting outcomes".[140] Since EU competition law, which the aforementioned acts seem to be inspired by, and also refer to, entails concepts such as "unfair pricing" with long-established case law and doctrinal development, it would be advisable to analogously interpret the fairness dimension in the these legal acts in light of such competition law rules, particularly on unfair pricing.

[140] Damien Gerard, 'Fairness in EU Competition Policy: Significance and Implications' (2018) 9 Journal of European Competition Law & Practice 211.