European market oversight reforms: a critical look at types and objectives of intervention

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Governments' oversight in markets characterized by Significant and Sustainable Market Power (SSMP), is witnessing unprecedented reforms recently throughout the world. The European Commission (EC), EU countries and UK are at this movement's forefront to increase both ex ante and ex post regulatory enforcement with the aim of controlling the adverse effects of SSMP, especially in big tech digital markets. Fox (2023) mentions that "the EC is in front of the world in examining the conduct of Big-Tech gatekeepers...."[2].

We distinguish between:

A. Reforms in the type of intervention (regulation vs competition policy);
B. Reforms in objectives of intervention;
C. Reforms in competition law assessment rules and standards.

These are interrelated: undertaking reforms on one dimension will affect reform choices on the other ones. This article focuses on A and B.

Have the reforms been necessary?

Though there are dissenting voices in Europe and, mainly, US, about the need for the proposed reforms, from Chicago School adherents (Melamed and Petit, 2019[3], Mungan and Wright[4]; Wright and Fauver, 2022[5], Wright and Portuese, 2019 [6]) a consensus has been reached among post-Chicago economists (what Shapiro, 2021, calls Modernists) and the neo-Brandesians (what he calls Populists) that reforms are necessary[7]. The two groups share the view that there has been a rise in concentration and market power and that the power of the tech giants is durable. Also, "antitrust enforcement has been too lax, largely as a result of the durable influence of the Chicago School"[8], "rule of reason in practice is overly forgiving to defendants, ...(there has been an) over-focus on

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[2] E Fox (2023) "Simple Rules for Antitrust" in "Antitrust and the Digital Economy: Legal Standards, Presumptions and Key Challenges", Concurrences Publications, edited by Y Katsoulacos.

[3] AD Melamed and N Petit (2019) "the Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets" Review of Industrial Organisation, Vol. 54.

[4] M Mungan and JD Wright (2021) "The Easterbrook Theorem: an Application to Digital Markets", 130 Yale Law Journal.

[5] JD Wright and C Fauver (2022) " Antitrust Reform and the Nirvana Fallacy", Columbia Business Law Review.

[6] Wright, Joshua and Portuese, Aurélien (2019) "Antitrust Populism: Towards a Taxonomy". Stanford Journal of Law, Business, and Finance, 21, 2020,

[7] C. Shapiro (2021) "Antitrust: What went wrong and how to fix it ", Antitrust, 35.

[8] Shapiro (an.cit. 2021). He cites evidence in footnote 1,

downstream consumer welfare"[9]. There are also significant differences: "the populists want antitrust to deconcentrate…the Modernists want antitrust to protect and promote competition"[10].

Koltay, Lorincz and Valletti claim[11] that "Recent empirical evidence suggests that …(t)here is an increase in firm mark-ups, higher aggregate industry concentration, a decline in the labour share of output, larger firm and income inequality, and a reduction in business dynamism. These trends affect both US and Europe, though they tend to be more pronounced in the US".

Carlton (2020; 2020a)[12] mentions, however, that the conclusion of significant increases in the price–marginal cost ratio, reached in the seminal investigation of DeLoecker et. al.(2020),[13] is not unanimously supported and "More importantly, the evidence is fully consistent with Demsetz's[14] claim about concentration increasing as a result of efficient firms expanding…".[15] Nevertheless there is, if not unanimous, "overwhelming evidence of an increase in market power", loss of dynamism and "making matters worse, market power is a key factor contributing to increased inequality"[16]. Hovenkamp (2023), while recognizing that evidence based on market concentration studies is still controversial, concludes that "the "indirect" evidence from market concentration and the "direct" evidence from monopoly markups points in the same direction. Since the 1980s markets have become more concentrated and price-cost margins increased. Today there is no general reason to assume that markets will naturally work themselves from positions of lesser to positions of greater competition and at least some reason for thinking that they will do just the opposite"[17]. This implies a shift of surplus, from consumers to firms, through higher prices, reduced choice, and potentially reduced incentives to innovate. Further, and here we have agreement between neo-Brandeisians and Modernists, the extreme levels of income and wealth inequality is intensified by the lower share going to labour, while excessive inequality and political power of large corporations poses threats to plurality, diversity and democracy[18].

US is mainly characterized by antitrust infringement underenforcement. Excluding cartels, there has been essentially no enforcement for over 40 years[19]. This is not true for Europe and it is also not true that Europe has over-focused just on downstream consumer welfare. The reform debate in Europe has been mostly pre-occupied by whether market oversight specifically in digital sector should be extended to ex ante rules and, currently, about making enforcement of art.102 more workable.

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[9] S Salop (2023) "The Reasonable Competitive Conduct Standard for Antitrust", Stigler Center Conference, April 2023.

[10] Shapiro ab.cit. n 7 (2021), p.42. He explains in detail the points of agreement and of disagreements in objectives and in the limits of antitrust.

[11] "Concentration and Competition: Evidence from Europe and Implications for Policy (December 23, 2021). Available at SSRN: https://ssrn.com/abstract=3992591. A number of studies backing up their claim are cited.

[12] D Carlton & Ken Heyer (2020) "The revolution in antitrust: an Assessment", Antitrust Bulletin. D Carlton (20020a): "Some observations on claims thar rising market power is responsible for US economy ills and that lax antitrust is the villain", CPI.

[13] Jan DeLoecker et al., (2020) "The Rise of Market Power and the Macroeconomic Implications", QUARTERLY J. ECON..

[14] H Demsetz (1973) "Industry Structure, Market Rivalry and Public Policy", Journal of Law and Economics, 16(1).

[15] Carlton cites a number of papers to support his claims.

[16] Joseph Stiglitz (2024) "The Biden's administration's recent antitrust wins help us all", Project Syndicate. Mentions the merger between *Adobe and Figma* that was called off following pressure by FTC, and FTC's *Illimina* decision, upheld by the Circuit of Appeals, in which the company agreed to divest itself, as this was expected to "diminish innovation….. increase prices and reduce choice…"

[17] H Hovenkamp (2023), "Making Antitrust Decisions about Digital Platfroms" in Katsoulacos (ed.) n2. See also J Baker (2017) "Market Power in the US Economy Today".

[18] Shapiro (ab.cit. 2021, n7). The groups differ on what should be the policy response to the latter.

[19] See, Fox (2023) and Hovenkamp (2023), ab cit.n2 & n17.

A. Reforms in the type of intervention (regulation vs competition policy)

As Tirole (1999) observes, Industrial Organisation focused "(rightly so) on the many imperfections of the competitive process"[20] and, in market economies, the two main policy approaches dealing with such imperfections, are the ex ante regulation approach, dealing with cases in which competition in undesirable/too costly (natural monopolies in "public utilities"), and the Competition Law approach that focuses on the maintenance of a competitive environment. These are generally enforced, respectively, by (sectoral) Regulatory Agencies (RAs) and by Competition Agencies (CAs). The success of RAs, depends on whether their aim to keep prices low does not prevent the promotion of cost efficiency and innovation, whether *it ensures access to bottleneck segments to allow competition in adjacent markets*[21] and whether it facilitates redistribution … through the provision of universal service[22]. These objectives have been very much behind Europe's Digital Markets Act (DMA), enacted in 2022), which reverses a 25 year trend toward less regulation and more involvement of CAs in network industries, focusing on the challenges posed by digital economy, for which competition law is not considered an effective policy tool. In many countries ex ante regulations, differing in scope and breadth of target companies or markets have been emerging, sometimes enforced by the existing CA that broadens its responsibilities (like in EC with DMA) or by newly established regulators for data and privacy protection and ensuring access to bottleneck elements of platforms, that prevent the effective operation of their ecosystem, and making transactions among platforms and business users fairer and the ecosystem more contestable[23].

There have been criticisms of this recent trend. Metz et al.(2020) examine and reject the approach of "utility like regulation of internet platforms (under the pretext) that these platforms can become "natural monopolies""[24]. They make a number of points. That they are not always natural monopolies, that there has been entry (e.g. of competing platforms to Facebook), that there may be multi-homing (they consider multihoming "the most important difference between some platforms and classic "natural monopoly") and that regulatory control "could stifle future innovation and hence future social efficiency".

Carlton (2020a, n12) points out that "(t)he history of regulation especially in rapidly changing industries is not encouraging for thinking that regulators perform better than markets even when (the latter) are highly concentrated"[25]. Hovenkamp (2023) is also sceptical about whether or not digital markets deserve a special treatment.

However, critics miss an important point behind the reforms: that even if/when it is not right to treat platforms as traditional natural monopolies, platforms' characteristics and their SSMP, deserve

[20] J Tirole (1999) "The Institutional Infrastructure of Competition Policy", IDEI, Toulouse.

[21] My emphasis.

[22] Tirole, ab cit. n19, provides an account of the main difference and relative (dis)advnages between regulation and competition low (p.6-10).

[23] H Shelanski (2023) "Looking Beyond Courts for Competition Enforcement in Digital Platform Markets", in Katsoulacos (ed) (2023), ab.cit.n2. He provides an interesting discussion of lessons from US telecom regulation for the regulation of platforms. In some countries, e.g Holland, New Zealand, Australia, the CAs took complete control of promoting competition in all markets.

[24] R Abrantez Metz and A Metz (2020) "Regulating Multi-Sided Platforms? The Case Against Treating Platforms as Utilities", CPI Antitrust Chrinicle, August 2020.

[25] Though, 30 years of EU telecom markets regulation are considered a success. Neverthelss, Tirole (1999) had also noted that rapid technological progress "makes standard regulatory tools inadequate….(as these) presume a stable set of services to be regulated".

some form of *ex ante* regulation in order to improve contestability, that could enhance innovation, ensure effective, non-discriminatory access to complementary markets and make transactions fairer. Ex post antitrust law is inadequate and too costly to satisfy these objectives. Further, even if antitrust reforms were enough in principle, they would take a very long time to take effect because of the inertia of the judicial review system[26]. At the end of the day, the relevant question is not whether there is an ideal policy tool, but which tool is better given our objectives.

The Digital Markets Act

The DMA in EU, targeted to GAFAM, reforms objectives, from *primarily* welfarist (see below too) to fairness and contestability and, adopts Per Se Illegality rules for a number of conducts (telling these companies what they should not do), plus ex-ante regulatory rules (that instruct them about what they should do)[27]. These, and difficulties of implementation have been discussed extensively[28].

Colangelo (2023) argues that making "fairness" a fundamental objective for regulatory policy "is very problematic", despite the criterion's long history in competition policy in the EU (and, we should add, other countries like the BRICS), in the context of assessing excessive prices, margin squeezen and FRAND. While there are still well recognised difficulties in applying the criterion, the number of cases involving these conducts, especially excessive pricing, have been increasing in EU and economics have become more central in assessments[29]. Further, the use of the criterion has been extended to other exploitative (discriminating) antitrust abuses in platform markets. This indicates that, in contrast to what Colangelo suggests "enforcers have (not) been reluctant to engage with the notion of unfairness …". Indeed, Schawartz (2021) thinks (rightly we consider) that the "fairness" objective of DMA do not involve goals fundamentally different "from the ones inherent in EU competition law"[30].

Colangelo also argues that "the vagueness and ambiguity" associated with its meaning may make fairness particularly attractive to policy makers and, accordingly, "risks being simply functional to grant them more discretion and room for intervention". But Bisceglia and Tirole (2023)[31], have shown how the criterion of fairness can be neither vague nor ambiguous and "can enable business users to get the "fair share" of their contribution to a digital ecosystem, where "fair" refers to third party developers and merchants receiving their contribution to the ecosystem". They show, furthermore "a deep connection between…fairness and Baumol and Willig's "Efficient Component Pricing Rule" (ECPR) that has been used for many decades in determining the access charge in traditional utilities. So, there is certainly no "vagueness". An excellent discussion and clarification of many of the issues

[26] E.g. R Whish (2023) "Introduction" in Katsoulacos (ed) (2023) n2.
[27] DMA followed the publication in 2019 of reports for the EC, from UK and US: Cremer et al., Furman et al, and the Stigler Center, considering why and how there should be increased oversigh of platforms – see details in articles of next footnote.
[28] Heike Schweitzer (2021) "The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair: A Discussion of the Digital Markets Act Proposal"https://ssrn.com/abstract=3837341. Anne Witt (2023) "The Digital Markets Act – Regulating the Wild West" (2023) 60(3) Common Market Law Review. Colangelo G (2023) "In fairness we (should not) trust. The duplicity of the EU competition policy mantra in digital markets" The Antitrust Bulletin.
[29] As was made clear in the special policy session on excessive prices in Cresse 2023 (www.cresse.info).
[30] Ab.cit. n28.
[31] M Bisceglia and J Tirole (2023) "Fair Gatekeeping in Digital Ecosystems", TSE WP, n.1452.

surrounding "fair platform behaviour" by Cabral et.al (2021)[32] "support(s) FRAND access to markets….., including FRAND provisions to search engine data and app stores" prescribed in DMA.

There are difficulties in measurement/implementation and, Bisceglia and Tirole also discuss "Implementation" issues, in some situations. However, it is not clear that difficulties are necessarily greater than with the consumer welfare criterion in common situations where the outcome on pricing / output is in a different direction than the outcome on quality, variety or market-wide innovation (i.e., given that the criterion of consumer welfare has a number of often conflicting sub-criteria that must be assessed and weighted). As Caffara (2023)[33] or Kanter (2023)[34] note this is never seriously done in practice (the other criteria end up in the consumer welfare estimate via output or price). Caffarra rightly points out that "the idea that we must continue to do what we do because "it is measurable" is deeply misguided". She considers measurability "as mostly an illusion. And what is measurable is also not so interesting or dispositive most of the time"[35], as it may not account properly for effects on quality, variety and innovation .

Suggesting that these objectives are politically motivated (cover for increasing market intervention), implies a religious belief that the latter is not needed; see Shapiro's (2021) severe criticism of Easterbrook's Hypothesis (1984)[36] that markets always self-correct. And, by the same token, consumer welfare serves, for Chicago adherents, the political (neoliberal) objectives of reducing to the minimum market intervention and number of infringements (see very good discussion of these points by A Ezrachi (2018))[37] thus benefiting mainly, at the end of the day, defendant corporations rather than consumers.

Another question is whether there will be considerable differences in regulatory enforcement under the DMA objectives rather than with welfarist objectives.

Fairness. in many cases there is a significant gap, as in situations in which there is an imbalance of bargaining power in vertical, complementary and conglomerate relationships in an ecosystem. Then taking regulatory measures to improve fairness, that aim at redistributing rents from dominant platforms to those contributing to creating these rents, will not improve welfare, indeed critics argue, may well reduce welfare, sometimes increasing prices and reducing incentives to invest in new service varieties, higher quality or innovation. So different criteria (fairness vs welfare) can lead to different decisions though we do yet know the extent to, and circumstances under which, differences will emerge.

Contestability. In the presence of economies of scale and scope, facilitating entry may reduce productive efficiency and social welfare. Is this a price we are always prepared to pay? Also, and even more importantly perhaps, regulatory measures to ensure that new entrants are not excluded, so incumbents do not gain market power in new markets that they open up, may well reduce

[32] L Cabral, J Haucap, G Parker, G Petropoulos, T Valletti, M van Alstyne (2021) "The EU Digital markets Act: A Report from a Panel of Experts", European Commission JRC.
[33] ""Consumer Welfare Is Dead": What Do We Do Instead?—A Perspective from Europe" Promarket.
[34] Remarks at NY City Bar Association's Handler Lecture.
[35] The 'operational difficulties" of the standard are discussed also by M. Steinbaum and M. Stucke (2020) " The Effective Competition Standard: a New Standard for Antitrust", The Uniiversity of Chiacago Law Review.
[36] F Easterbrook (1984) The Limits of Antitrust.Texas Law Review 63.
[37] "EU Competition Law Goals and The Digital Economy", Oxford Legal Studies Research Paper No. 17/2018.

incentives to invest in innovation (investment often involving a high degree of uncertainty) and subsequently may reduce consumer welfare. On the other hand, in the absence of the contestability objective, genuinely innovative entry, in new markets created by new firms, will be easier for incumbents to exclude under an welfarist standard, that would require showing that in the counterfactual welfare will be lower. Of course, the entrant may be taken over, which implies that it is additionally necessary to deal with killer acquisitions by reforming merger review policy.

A final point is that, using Per Se Illegality rules to achieve the objectives of DMA may increase welfare costs of decision errors and, in particular, of false convictions. However, this is unlikely given the focus on specific firms and services in which SSMP is very strong.

Implementation difficulties of DMA: the Chicken-and-egg problem[38]

According to DMA, designated gatekeeper platforms must *comply* with the law (March 2024). This requires that, for the 22 Core Platform Services regulated, the platforms create and make available (technical specifications of) interfaces that allow business users to access end-users in ways that "are not burdened with costs and restrictions imposed by the gatekeeper, and can innovate in ways that the gatekeeper may not prefer". That is, for compliance, the interface must be "effective" and compliance is "defined not in a technical sense but in outcomes: can a business user effectively employ the interface to achieve the goal decribed in the rule?" But, "without engagement from business users, it is difficult for the EC to evaluate effectiveness". In other words, implementation has a chicken-and-egg problem, compounded by the fact that delays in platforms and business users interacting to create "effective" interfaces may become cumulative as parties try to catch with latest developments in ecosystems characterized by rapid technological change.

Scott Morton (2024) points to a fundamental shortcoming in DMA: that "(t)here is no instruction in the law" about how this problem will be resolved and describes the costs .... caused by ineffective compliance that, apart from "failing to change fairness and contestability, weakens trust in the law, (which) in turn impacts business users incentives to invest...". She proposes how to interpret "lack of entry" and some solutions, concluding that "The DMA may simply have been designed in a way that requires several years of iteraction before consumers can see the effective opening-up of gatekeeper platforms and increased innovation". This of course would be a disappointing outcome given that, as noted above, proponents of ex ante regulation consider speed of enforcement as one of the adavantages that led to its introduction.

B. Reforms in the objectives of competition law

The last years have witnessed a continuing intense debate on both sides of the Atlantic about reforming the objectives of, and thus, the criteria for deciding whether there is liability under competition law - the Substantive Standard (SS); SSs can be categorised as:

I. Welfarist SS – this can be consumer or total welfare (in practice, it has been the former). Depending on the type of conduct examined, an adverse "effect" on welfare may have to be "proved" (as under rule of reason); or it may be inferred or "presumed", as when a conduct can be characterized by virtue of its nature (or *form*) as Per Se Illegal, e.g. horizontal cartels.
II. Non-welfarist SS, which can be either Simple or Complex:

[38] We follow closely Fiona Scott Morton (2023) "The Chicken-and-egg problem in the EU DMA", CPI, Jan. 2024.

i) Simple SS: here the criterion is whether a *subset* of the diagnostic screens, that should be considered, when conduct is not considered Per Se Illegal, in order to be able to presume or to prove an adverse effect on welfare, is satisfied. E.g. it could be just whether there is extant SSMP. Or, there is a distortion of the competitive process; or disadvantaging rivals etc. Modernists' proposed criteria are often framed in these terms. See also Fox (2023).

ii) Complex SS: involving a combination of criteria. This may include (but not necessarily) simple criteria (or even welfarist criteria) with *additional* criteria such as fairness, a more equitable distribution of economic benefits and other public interest objectives (e.g. competitiveness, sustainability etc.), or criteria related to non-economic objectives (such as freedom and democracy). US populists propose Complex SSs and now, though not so clearly, EU too (see below).

Substantive and Legal Standards have a very significant impact on whether there is over- or under-enforcement. If our ultimate objective is welfarist, there is underenforcement when too many conducts, genuinely harmful to *welfare* as a consequence of SSMP, are not deterred and, if detected, are not convicted. But, even if this does *not* hold, there may well be underenforcement, if we wish to deal with SSMP for other reasons e.g. harm of rivals or unfair outcomes. Then increasing enforcement will be desirable even if there is no welfare gain. Reforming objectives and legal standards could reinvigorate enforcement and generate benefits from a number of effects:

(i) increased deterrence of "harmful" conducts;

(ii) increased conviction of undeterred "harmful" conducts;

(iii) reduction in the rate of false acquittals resulting from:

- Excessive tendency to consider conduct as Presumptivel Legal (as in US) and, either dismissing cases without assessment (Per Se Legality) – both for antitrust and mergers (particularly with small rivals); or, assessing these cases with a very high (rule of reason) evidentiary standard under the Easterbrook Hypothesis[39], which makes the *effective level of certainty for anticompetitiveness* very low relative to the standard of proof of the Courts, leading to excessive acquittals. Empirical evidence by Carrier (2009) on the outcome of rule of reason assessments from 1977 – 2009 in US shows that the courts, *dispose of (almost all) of rule of reason cases on the grounds that the plaintiff cannot show anticompetitive effect"*[40].
- Excessively high evidentiary standards, when conducts, undertaken under SSMP, are considered Presumptively Illegal, as in EU, relying on an effects-based approach and consumer welfare SS, leading again to many acquittals under appeal[41].

(iv) avoiding excessive delays in reaching decisions[42].

With regard to costs of increased enforcement, at least for the high-tech digital platforms:

(v) chilling effects of genuinely "benign" conducts are small;

(vi) the cost of wrongly convicting undeterred "benign" conducts are small;

[39] ab.cit. n34.

[40] Michael Carrier, The Rule of Reason: An Empirical Update for the 21st Century, Geo. Mason L. Rev. (2009).

[41] See Y Katsoulacos, G Makri (2021) "The role of Economics and the Type of Legal Standards in Antitrust Enforcement by DGCOMP: an empirical invesrigation", Journal of Antitrust Enforcement. Revised and extended in 2023. This has not been the case in UK.

[42] Whish (2023) ab.cit. n26.

(vii) by simplifying and speeding-up the litigation process we may even lower enforcement costs.

In EC, primacy had been given for a long time to "disadvantaging rivals" not "consumer welfare"[43]. Some scholars have pointed to this as the main difference between Europe and US after the 1970s when consumer welfare dominated in US. As Korah noted, the tradition of the Ordo Liberal School had a deep influence on the Commission and the thinking in National CAs, as a result of which more emphasis was placed on any restrictions of conduct that disadvantaged rivals, restricted choice or increased market concentration[44] – i.e. on Simple SSs.

However, in the last 15 or so years, especially following the Guidance Paper in 2008, increased emphasis has been placed on consumer harm, as also noted by Caffarra (2023)[45]. An empirical study of 7 recent infringement decisions in high-tech, mainly platform, markets shows that consumer welfare has certainly played a dominant role in 6/7 cases[46]. To demonstrate that the choice of SS is that of Consumer Welfare the authors do not solely look for evidence that the DGCOMP tried to *examine and prove* what will be the final impact on prices and output and on other factors that affect Consumer Welfare, but also search for evidence in the text decision that the DGCOMP *presumes* (without full examination) that there will be a price increase or other negative effect on wefare to reach a decision.

Nevertheless, recently, the *primacy* of consumer welfare seems once again to be questioned, though now there may be a broader range of objectives, including the sort proposed in US by neo-Brandesians. EC's recent Competition Policy Brief (2023)[47], while emphasizing consumer welfare as a fundamental objective of enforcement, it notes, quoting Vestager, that "….EU competition policy is able to pursue multiple goals such as fairness and level-playing field, market integration, preserving competitive processes, consumer welfre, efficiency and innovation and ultimately plurality and democracy". To back this up the Brief mentions a number of judgements by Courts that "…have provided several indications and clarifications on the substantive standard (and) the eividentiary requirements upon the Commission". Ezrachi (2018), also examines in detail and endorses the multitude of objectives in European antitrust. On the other hand, Fumagalli and Motta (2024)[48] are against either Simple or Complex objecives, though emphasizing that *long run* consumer welfare should be the objective and *innovation* must be taken into account, which is exactly what diminishes the main advantage of the consumer welfare standard, considered to be that it provides

[43] This was certainly true prior to the EC's switch to a more economics-based approach in mid-2000s, but also for some years, following EC's 2008 Guidance Paper on art. 102, during which there was inconsistency between policy documents and enforcement practice.

[44] "The authorities considered that always several inefficient firms were more competitive than fewer more efficient firms and they were more interested in static than dynamic competition—V Korah, 'The Reform of EC Competition Law: The Challenge of an Optimal Enforcement System' in I Lianos and I Kokkoris (eds), *The Reform of EC Competition Law* (Kluwer Law International, 2010).

[45] Caffarra (2023), n33.

[46] Y Katsoulacos, G Makri and E Metsiou (2023) "The Dominance of the Consumer Welfare Criterion in Antitrust Enforceent: an Empirical Analysis of UK and EC. CPI Antitrust Chronicle. In 1 of the cases the SS is closer to disadvantaging rivals. In UK the criterion has been present in 52/54 antitrust cases in the period 2000 – 2020.

[47] DOJ 102763/731952, March 2023. Brief prepared in preparation of the new guidelines on exclusionary abuses.

[48] C Fumagali and M Motta (2024) "Economic Principles for the enforcement of abuse of dominance provisions" CEPR, Jan 2024.

a simple metric (Hovekamp and Scott Morton (2023))[49]. Interestingly, Federico et.l. (2020)[50] argue, in the context of assessing effects on innovation in favor of adopting a lower evidentiary standard that relies on showing "distortion of the competitive process" in order to then *presume* consumer harm. In terms of impact on enforcement this is equivalent to adopting a distortion of the competitive process as SS[51].

In US, arguments have been more widespread. They include the use of "Simpler" criteria than (downstream) consumer welfare[52] and de-previleging the latter, to account more generally for "trading-partner (including workers') welfare" (Salop[53]). Shapiro (2021) masterfully defends the "protecting competition standard" according to which "A business practice is jufged to be anticompetitive if it harms trading parties in the other side of the market as a result of disrupting the competitive process". Also they include the use of more Complex criteria involving the protection of public interest including plurality, democracy, freedom, as proposed by Khan (2018)[54] and Wu (2018)[55] as well as other neo-Brandeisians.[56]

[49] "The Life of Antitrust's Consumer Welfare Model", Stigler Center 2023 Conference.

[50] Giulio Federico, Fiona Scott Morton, Carl Shapiro (2020). "Antitrust and Innovation: Welcoming and Protecting Disruption" (Innovation Policy and the Economy, Edited by Josh Lerner & Scott Stern, The University of Chicago Press).

[51] Note the substitute relation between Simple SSs and lowering evidentiary standards – see Katsoulacos Y (2019) "On the Concepts of Legal and Substantive Standards (and how the latter influence the choice of the former)" Journal of Antitrust Enforcement.

[52] See Fox (2023) n2. Though, for Hovenkamp (2018), the principal goal should be "preservation of market competition as measured by consumer welfare". Also, with F Scott Morton (2023), ab. cit. n44.. For reform criticisms see articles in footnotes 3-6 and Manne Geoffrey (2020) "Error Costs in Digital Markets", The Global Antitrust Institute Report on the Digital Economy.

[53] Salop (2023) ab.cit n9.

[54] Khan Lina (2018). "The Ideological Roots of America's Market Power Problem," 127 Yale L. J. .

[55] Wu T. (2018). "After consumer welfare, now what? The 'protection of competition' standard in practice," CPI.

[56] See also Steinbaum and Stucke (2020) n33 and Kanter, ab.cit. n34.