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Mariateresa Maggiolino: "The Multi-Purpose Approach and Article 102 TFEU"

The Network Law Review is pleased to present a symposium entitled "The Future of the Neo-Brandeis Movement", asking experts the following question: will the neo-Brandeis movement have a lasting impact on antitrust law?

This contribution is signed by Mariateresa Maggiolino (Bocconi). The entire symposium is edited by Thibault Schrepel (Vrije Universiteit Amsterdam) and Anouk van der Veer (European University Institute).

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1. Introduction

The increasing economic and social inequalities in Western countries, the emergence of digital ecosystems, and the challenges of climate change have brought to the forefront issues such as equitable wealth distribution, personal data protection, and sustainability. Given the significant impact of these matters on the lives of current and future generations, there have been numerous proposals to utilize Article 102 of the Treaty on the Functioning of the European Union (TFEU), on the basis of which dominant firms that abuse their significant market power can be fined, to protect interests beyond efficiency and innovation, such as fairness, environmental protection, or workers' social rights.[1]

In particular, the argument underlying these proposals, which altogether go under the name of the multi-purpose approach to Article 102, proceeds as follows:[2] Article 3(3) of the Treaty on European Union (TEU) mandates the Union to pursue several goals beyond mere competition protection, including sustainable development, balanced economic growth, and social progress.[3] Furthermore, Article 7 TFEU can be interpreted as requiring the Union to be consistent in pursuing all these goals.[4] Many companies that do adversely affect individuals' income levels, privacy, social rights, and the environment are large and powerful entities that, as a consequence, can be effectively addressed by Article 102. Therefore, why should this existing provision not be utilized to protect such significant interests? In the end, deploying Article 102 has one merit: it is an *already available* legal tool, which was precisely designed to limit the harm caused by companies with significant (market) power.

This short paper opposes the EU Commission's adoption of the multipurpose approach. Section 2 begins by explaining that this approach leads to different outcomes compared to standard antitrust law, but only in certain cases: when protecting competition and innovation conflicts with other mentioned interests, and consumers in a specific market are unwilling to pay for those interests. Essentially, Section 2 clarifies that adopting the multipurpose approach becomes significant as it allows antitrust authorities to authorize behaviors of dominant firms that would otherwise be illegal and ban behaviors that would otherwise be legal. The following sections focus on the latter scenario, discussing the value-based (Section 3), legal (Section 4), and policy (Section 5) reasons why the European Commission should not use Article 102 to prohibit dominant firms' practices that do not harm competition and innovation.

2. Much ado about nothing

The debate between supporters of the multi-purpose approach[5] and those favoring the more-economic approach is quite intense.[6] However, to be practical, it is necessary to move beyond this hype and understand how applying either approach would actually affect the current enforcement of Article 102. This is particularly important for two reasons: first, because it helps to understand the different nuances that the aforementioned debate takes in the US and in the EU; and second, because in many cases, "standard" or "ordinary" antitrust law can already protect interests other than static and dynamic efficiency, with the ultimate result of showing that today the significance of the multi-purpose approach is quite exaggerated.

Consider first that many critics of the more economic approach focus on the adoption of the consumer surplus standard, meaning its attention to the short-term effects of business practices on market output and prices in the markets for final goods.[7] However, those familiar with European competition law know that this has never been a significant issue on the Old Continent. Even proponents of the more economic approach in Europe have consistently maintained that Articles 101 and 102 should focus on consumers in both input and output markets,[8] addressing not only the effects of business practices on market prices and quantities but also their impact on medium and long-term factors like quality, variety, and innovation.[9] In short, it is clear to everyone in the European Union that antitrust law must protect the well-functioning of all markets—whether for input, output, or intermediate products—and safeguard not only static efficiency but also dynamic efficiency, considering how current business behavior may affect the future development of markets and industries.[10]

Furthermore, unlike Section 2 of the Sherman Act, letter (a) of Article 102 already penalizes dominant firms that apply excessively high prices and unfair trading conditions. In 1957, when the Treaty of Rome was drafted, most dominant firms were state-owned companies that had not earned their market positions through merit. Consequently, it was considered just and necessary to cap the amount of money they could extract from their counterparties and consumers and to oblige them to act fairly. While nowadays, this market scenario has clearly changed, there are still industries, such as the pharmaceutical, energy, and the digital sectors, where letter (a) may still be applicable. In these industries, indeed, structural features, together with detailed regulations, prevent consumers and dominant firms' counterparties from escaping the exploitative practices of incumbents. Therefore, from this perspective, there is no need to revolutionize Article 102 to guarantee equitable wealth distribution and fairness: letter (a) is already available. Moreover, due to the case law developed so far, EU scholars already know the specific conditions under which letter (a) of Article 102 can be applied to pursue these 'other' goals. Therefore, the concern that prioritizing wealth equality and fair trade might lead to a broad, indiscriminate enforcement of Article 102 is appropriately mitigated.

As a consequence, in the EU, supporting the multi-purpose approach could at most serve to use Article 102 in relation to the protection of other non-economic interests, such as certain human or social rights like privacy, workers' rights, or sustainability. However, even this potential needs clearer boundaries.

Consider, indeed, that there may be cases where the protection of competition and the promotion of other interests do already align with no need for any exogenous intervention. For example, a dominant firm may introduce a privacy-friendly or sustainability-friendly innovation. Conversely, a dominant firm may maintain high monopolistic prices on its core product by excluding rivals who have launched revolutionary privacy-friendly or sustainability-friendly goods. In both scenarios, independently from any privacy- or sustainability-related consideration, the enforcement of ordinary Article 102 would suffice to deem the two types of practices lawful and unlawful, respectively.

As a result, one could argue that the multi-purpose approach becomes relevant in those scenarios where the protection of competition does not align with the protection of other interests, that is in situations where a practice

either harms competition while enhancing other interests, or reduces these other interests (potentially violating associated laws) without impeding competition. Yet, even this argument might be over-reaching!

As long as consumers in a given market are willing to pay for the other interests we are concerned with today – such as privacy or sustainability– standard antitrust law can protect these interests without any need to reform its goals. Willingness to pay refers to the maximum price consumers are ready to spend on a product or service. If consumers show a willingness to pay for a certain feature –such as privacy or sustainability– companies will compete to provide it. Consequently, the usual market mechanism based on competition among firms will deliver results that meet these consumers' preferences. Conversely, if consumers are not willing to pay for that feature, companies lack the incentive to produce it, and the interplay between demand and supply will not result in any product or service having that feature.

Therefore, in markets where consumers are, for example, willing to pay for privacy-friendly or sustainable products and services, the levels of privacy or sustainability achieved are a natural consequence of competition and market dynamics. Consequently, we can align ordinary pro- or anti-competitive effects –such as variations in prices, output, quality, variety, and innovation– with enhancements or decreases in other consumer interests, such as privacy and sustainability. We can view these enhancements as pro-competitive effects and decreases as anti-competitive effects, comparing them with other effects that a given practice has on the standard variables influencing consumer welfare.[11] Thus, in these scenarios, there is no need for a multi-purpose approach to the enforcement of Article 102. To sum up, as long as antitrust law aims to protect competition and, due to consumer preferences, competitive markets deliver products and services that respect other interests, any harm to competition is also harm to these other interests!

Thus, the only scenarios in which the multi-purpose approach may play a role are those in which consumers – perhaps short-sighted– are not willing to pay for other interests and, as a consequence, firms do not compete to produce goods and services that align with those interests. In such situations, supporting the multi-purpose approach would mean: (*i*) deeming lawful the practices of dominant firms that promote/protect these other interests, even if they harm static and dynamic efficiency; and (*ii*) qualifying as unlawful the practices of dominant firms that do not harm competition at all, but produce negative effects on other interests, such as privacy and sustainability.

In what follows, I will explain why endorsing the multi-purpose approach, specifically where Article 102 could be applied to punish firms for harming interests other than competition, is not advisable.

3. Consumers' (short-sighted) choices and paternalism

Adherents of the market economy argue that, except in cases of failure, competition among firms is a natural, bottom-up mechanism that effectively delivers what consumers demand.[12] Consequently, they believe that competition law has a purely instrumental role: to address market failures where firms exploit their market power to stifle competition while maintaining consumer favor, even when offering overpriced, inferior, or unoriginal products. They do not believe that antitrust law is a tool designed to create the market, make it function, or steer it toward various economic or political goals. More importantly, they cannot believe that competition law is a piece of legislation to be repurposed for any objective based on current needs.

Therefore, if the market fails to produce certain outcomes, such as privacy-friendly or sustainability-focused solutions, because consumers are unwilling to pay for those interests, proponents of the market economy might concede that legislators should implement alternative regulations to address such deficiencies. However, they cannot accept that a law designed to protect the outcomes of competitive markets –what consumers want– compels firms to produce outcomes that those markets are inherently unable to deliver because consumers do not want them!

The moment new Brandeis scholars start treating antitrust rules as malleable tools for achieving whatever socio-political goals are necessary at the moment, they betray the very essence of a free market economy and, in so doing, undermine a system that inherently benefits consumers by fostering genuine competition. From this perspective, hence, the new Brandeis approach is a clear example of paternalism that tarnishes the essence of competition and, more importantly, disregards consumers' choices and their economic freedom. To be sure, one might argue that today the prevailing circumstances, such as the advent of digital ecosystems or climate change, necessitate disregarding consumers who do not prioritize values like privacy and sustainability. However, this should involve making a deliberate political decision –albeit one that leans toward elitism– resulting in tailored regulations. More crucially, this course of action should be recognized without attributing it to a law, such as competition law, which fundamentally exists to safeguard consumers' choices and prevent companies from unduly manipulating consumers through their market dominance.[13]

4. The legal arguments

At least three compelling legal arguments challenge the use of Article 102 for purposes beyond achieving static and dynamic efficiency.

Consider *firstly* markets in which consumers are unwilling to pay for interests such as privacy and sustainability because, as previously mentioned, these are the only scenarios in which applying the multipurpose approach is meaningful. If antitrust authorities defend and promote these interests in those instances, they are presuming that firms compete to be privacy-friendly or sustainable even when they do not. In other words, they are assuming that, if allowed to develop competitively, the markets they are analyzing will deliver privacy-friendly or sustainable products and processes, although this is not true. Therefore, incorporating these interests as further goals of antitrust law means accepting that in certain situations –though not always– antitrust authorities will apply Article 102 based on a *fiction*: presuming that there is competition for privacy and sustainability, even when such competition does not exist, as consumers are not willing to pay for these interests.

In general terms, enforcing a piece of law based on fiction is neither a trivial nor a routine decision, as it involves accepting as true something that is not established or may even be deliberately false, all in pursuit of a specific goal.[14]In legal systems founded upon the principle of legality, this poses a particular problem, especially when the fiction is a judicial one –applied by judges– because it could allow them to circumvent the application of the law.[15] Furthermore, considering that such fiction –like the existence of competition for privacy or sustainability where it does not exist– would initially be invoked by competition authorities, the specter of arbitrary exercise of power arises, lacking clear, pre-established, and exceptional criteria delineating the circumstances justifying the invocation of such a legal construct.

Therefore, one should conclude that punishing (dominant) firms based on a fiction is totally unacceptable in any legal system founded upon the principle of legality; but this is exactly what happens when a dominant firm is fined for having harmed privacy or sustainability (or any other similar interest) without harming competition.

Secondly, applying Article 102 to behavior that harms privacy or sustainability but does not restrict competition goes against the diligence standard set by the Court of Justice for firms holding a dominant position. Unlike other businesses, those firms have the special responsibility *not to further stifle competition in the markets they dominate*.[16] Thus, enforcing Article 102 in cases where privacy or sustainability is harmed, but competition is not restricted contradicts the Court's directive.

Some scholars –and Holmes is one among them– indeed argue that this special responsibility mirrors the Roman law principle of *neminem ledere* under which physical and legal persons should never harm anybody. However, under current case law, this is not entirely accurate. The Court of Justice has never prescribed the special responsibility of Article 102 in such absolute terms. Instead, it has always applied this responsibility specifically to competition, compelling dominant firms not to harm it further. According to the Court, as in the presence of

competition, compelling dominant firms not to harm it further. According to the Court, as in the presence of dominance the degree of competition in the market is already weakened, any further interference with the market structure is likely to distort competition.[17]

Thus, the idea that dominant firms have the special responsibility not to harm other legal interests, ranging from sustainability to privacy, is not grounded in the current understanding of the special responsibility regime.

Thirdly, if you are curious why antitrust law targets agreements, practices of dominant firms, and mergers, it is because these behaviors tend to aggregate and wield market power. This is because –as a matter of fact and not as a matter of law– firms that lack market power cannot harm competition. A practice that damages privacy or sustainability without affecting competition does not necessitate market power either to occur or to produce its effects; any firm –whether dominant or not– can potentially harm privacy or sustainability even in a significant way. Therefore, prosecuting practices that harm these interests but not competition is not aligned with the inherent rationale of competition law. Indeed, it is precisely from this perspective that one might think that many scholars want to use Article 102 to protect privacy or sustainability simply because it is a *readily at-hand* provision, independently from its own rationale.

It is indeed often said that under *Continental Can* and *Hoffmann-La Roche*, enforcing Article 102 does not require establishing a causal link between the dominant position and the abusive practice.[18] However, as scholars have clarified,[19] there is room to take distance from those two precedents, as the very same Court of Justice has started to do in recent times, by introducing the concept of super-dominance and by stating that the greater a firm's market power, the larger its anticompetitive impact.[20]

Briefly, as a matter of logic, the relationship between dominance and abusive practices –which consist of two main components, the dominant firms' actions, and their anticompetitive effects– can result in two distinct scenarios. First, an abusive act may inherently require dominance because it cannot be performed by non-dominant firms. For example, consider unfair prices: firms without market power cannot impose them because their counterparts can easily turn to other companies.[21] Second, the anticompetitive effects of certain actions may either not occur or be exacerbated without dominance. For instance, any company, dominant or not, can sell below cost. However, a non-dominant company would not have the capacity to sell below cost long enough to drive competitors out of the market. Even if it succeeds in doing so, it would be unable to recoup the losses incurred when it raises its prices. Similarly, while any firm can refuse to deal with a rival, only dominant firms can harm competition through such refusals. The cases of *Continental Can* and *Hoffmann-La Roche* fall into this second category: while even non-dominant firms can merge (*Continental Can*) or conclude exclusive agreements (*Hoffmann-La Roche*), dominance is necessary to make these practices harmful to competition.[22] Thus, in these specific cases, the Court correctly held that no causal link needed to be established because the two dominant firms did not need their market power to engage in these practices. However, generalizing this ruling to all cases of abuse would be too far-reaching because even in *Continental Can* and *Hoffmann-La Roche*, there was a link between the market positions of the dominant firms involved and the fact that their practices worsened competition – a link that the Court acknowledged, indeed.[23]

In summary, using Article 102 to punish firms for harming interests other than static and dynamic efficiency would contradict the rule of law, the standard of special responsibility, and the fundamental rationale for why we perceive dominant firms as potentially harmful.

5. The policy arguments

Finally, a couple of policy arguments militate against enforcing Article 102 consistently with the multi-purpose approach.

Firstly, in such a scenario, it becomes unclear how antitrust authorities should proceed when confronted with a case where the promotion of one of those interests, say, for example, sustainability, conflicts with the promotion of other legal interests unrelated to competition protection, such as privacy or workers' rights. In other words, the risk of broadening the scope of antitrust law is that it becomes impossible to establish a clear hierarchy of interests,[24] with a detrimental effect on legal certainty. Suppose, for example, that a dominant fashion company decides to use organic and recycled materials to reduce its environmental impact: these materials are often more expensive than conventional ones. To keep overall production costs competitive, hence, the firm reduces salaries, increases work rhythms, relocates to countries where workers' rights are not respected, and reduces the personnel. How should an antitrust authority intervene? Stated differently, if not competition protection, which legal interest should antitrust authorities prioritize among the myriad they are tasked to uphold? One should note that the balancing of conflicting interests pertains solely to the legislator (or, at most, to constitutional or supreme courts in judging the reasonableness of such decisions), unless the law itself delegates such activity to antitrust authorities. Others could argue that striking a fair balance among the many interests at hand in a given case is precisely the task of administrative authorities and judges.

However, this latter viewpoint presents a significant issue: it introduces uncertainty regarding the boundaries of permissible behavior for companies in dominant positions. Until now, these firms understood that their actions would be deemed lawful under Article 102 as long as they promoted efficiency and innovation. If the multipurpose approach were adopted, this criterion would no longer suffice. They would now need to ensure that their actions do not adversely affect various other interests—criteria that are not always clearly defined by specific rules. For instance, it could occur that a dominant company's behavior, which promotes innovation and supports environmental and social sustainability, might be penalized as an abuse of dominance if it enables the company to avoid paying a specific tax. After all, such conduct cannot be considered respectful of the general interest that all taxpayers fairly contribute to state expenditures; and under the multi-purpose approach, there is no reason why antitrust law should not protect also this interest.

Secondly—and precisely in relation to what just stated—if we endorse the multi-purpose approach, we run the risk of transforming antitrust authorities into "economy-wide regulators":[25] they would be perceived as the possible guardians of any interest other than competition (!) This implies a scenario where they might need to intervene in lieu of other authorities or regular judges responsible for enforcing any other kind of regulations. However, if one wants to design a rational and efficient legal system, this ongoing and kaleidoscopic overlap between the tasks of many authorities and judges would significantly increase the level of complexity that market agents should bear. In fact, we are already seeing this issue play out in the overlap between privacy protection and antitrust law. Although the Commission has repeatedly stated that antitrust law does not aim to address violations of data protection rules,[26] the Court of Justice had to step in to clarify how an antitrust authority can work with a privacy regulator if it incidentally uncovers a privacy violation. [27]Furthermore, we have already seen how enforcing two prohibitions—precisely, Italian consumer protection law and Regulation (EC) No 715/2007 on emissions—at the same time has rendered one of the two sanctions—that applied by the Italian authority—ineffective, due to the principle of double jeopardy.[28]

In addition, from a practical perspective, such a scenario would never be sustainable, especially in the long run. Antitrust authorities do not have enough financial and human resources to use competition law as a parachute for infringements that other enforcers fail to prosecute.[29] Should they start to intervene in fields different from the traditional ones, the result would be a "significant investment of political energy and time that has a very uncertain and unclear return".[30]

6. Concluding remarks

EU competition law, particularly Article 102, is already highly comprehensive and multifaceted in its scope. Not only does it safeguard static efficiency by ensuring that markets operate smoothly and effectively in the short term, but it also protects dynamic efficiency, which fosters innovation and long-term growth. In addition, under specific

requirements and conditions, letter (a) of Article 102 also addresses broader social concerns such as wealth distribution and fairness. Finally –and more importantly– EU competition law extends its protection to interests beyond just static and dynamic efficiency in two key scenarios. First, it acts when the promotion of competition naturally aligns with these broader interests because –a fact that is often overlooked– the pursuit of competitive markets does also advance societal goals. Second, it considers situations where consumers are willing to pay for the promotion of these other interests. In these cases, competition law allows the effects on non-market variables to be factored into its analysis alongside traditional metrics like prices, output, quality, variety, and innovation.

Hence, through the protection of competition and consumers' choices, Article 102 TFEU already performs a delicate balancing act. It maintains market integrity while simultaneously addressing broader social goals because –as those who believe in the market economy know– competition itself is capable of adapting to consumer preferences that embrace evolving societal values.

Thus, the so-called multipurpose approach may not be as essential as it appears. Its most pertinent application would be in cases where dominant firms have not harmed competition but have instead impacted other interests, such as privacy or sustainability, which the consumers of some given markets do not deem significant.

However, as discussed in this article, employing antitrust law in this manner is not only paternalistic but also punitive based on fiction –an approach that contravenes the rule of law principles. Furthermore, it overlooks the special responsibility regime of dominant firms and the essential factual connection that must exist between the dominant position and the alleged violation. In addition, this method cultivates unrealistic expectations, as there are no clear criteria for prioritizing non-economic interests that authorities should safeguard. It also fails to recognize that antitrust authorities will never have the resources necessary to protect all interests beyond ensuring competition.

So far, the Court of Justice seems to have understood this. In the *Superlega* case,[31] it could have embraced the multipurpose approach, but it did not.[32] Hopefully, the anxiety over presenting certain interests as essential will not make the Court change its mind.

Mariateresa Maggiolino

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[1] See, e.g., Erika Douglas, 'Monopolization Remedies and Data Privacy', 24 VA. J.L. & TECH. 2 (2020); Maurice E. Stucke, Allen P. Grunes, 'No Mistake About It: The Important Role of Antitrust in the Era of Big Data', Research Paper #269 (2015); Cristina Caffarra, Gregory Crawford, Johnny Ryan, 'The Antitrust Orthodoxy is Blind to Real Data Harms' (2021); Marios Iacovides, Christos Vrettos, 'Radical for Whom? Unsustainable Business Practices as Abuses of Dominance' (2021) available at: https://ssrn.com/abstract=3815630; Marios Iacovides, Valentin Mauboussin, 'Sustainability Considerations in the Application of Article 102 TFEU: State of the Art and Proposals for a More Sustainable Competition Law' (2023), available at: https://ssrn.com/abstract=4319866; Simon Holmes, 'Climate change, sustainability, and competition law' 8 Journal of Antitrust Enforcement 354 (2020); and Simon Holmes, Michelle Meagher, 'A Sustainable Future: how can control of monopoly power play a part?' (2022), available at: https://ebcam.eu/images/SSRN-id4099796.pdf.

[2] See Ioannis Lianos, *Polycentric Competition Law*, 71 CURRENT LEGAL PROBLEMS 161-213 (2018).

[3] Namely, Article 3(3) TEU reads that «[t]he Union shall [...] work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advances. It shall combat social exclusion and discrimination and shall promote social justice and protection, equality between women and men, solidarity between generations, and protection of the rights of the child. It shall promote economic, social, and territorial cohesion and solidarity among Member States. It shall respect its rich cultural and linguistic diversity and shall ensure that Europe's cultural heritage is safeguarded and enhanced».

[4] Indeed, Article 7 TFEU states that «[t]he Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers».

[5] See, e.g., Tim Wu, *The Course of Bigness* (Columbia Global Reports, 2018); Lina Khan, 'The New Brandeis Movement: America's Antimonopoly Debate', Journal of European Competition Law & Practice 131 (2018); and Sandeep Vaheesan, 'Privileging Consolidation and Proscribing Cooperation: The Perversity of Contemporary Antitrust Law', Journal of Law and Political Economy (2020), available at: https://ssrn.com/abstract=4594642.

[6] See, e.g., Anne C Witt, *The more economic approach to EU competition law* (Hart, 2020); Robert O'Donogue, Jorge A. Padilla, *The law and economics of Article 102* (Hart 2020); Richard Wish, David Bailey, *Competition Law* (OUP, 2013).

[7] See, e.g., John Kwoka, *Revising the Merger Guidelines To Return Antitrust to a Sound Economic and Legal Foundation*, Promarket, 27 September 2023.

[8] See, in particular, Case C-377/20, *Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato and Others*, ECLI:EU:C:2022:379, para. 46 (clearly referring to both intermediary and final consumers).

[9] This was clear even in 2009. See, in this regard, Communication from the Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, OJ C 45, 24.2.2009, p. 7–20.

[10] Consider, e.g., Case COMP/C-3/37.792, *Microsoft*, 24 March 2004 (taking into consideration the impact that the duty to share Microsoft's APIs would produce not only on the incentives to innovate of Microsoft but also on the incentives to innovate of its rivals and the other operators in the overall industry).

[11] See Roman Inderst, Stefan Thomas, *Prospective Welfare Analysis Extending Willingness-to-Pay Assessment to Embrace Sustainability* (2020) 4, available at: https://ssrn.com/abstract=3699693.

[12] See Ludwing von Mises, Human Action: A Treatise on Economics 269 (Foundation for Economic Education, 1996) (reading "The direction of all economic affairs is in the market society a task of the entrepreneurs. Theirs is the control of production. They are at the helm and steer the ship. A superficial observer would believe that they are supreme. But they are not. They are bound to obey unconditionally the captain's orders. The captain is the consumer"). Furthermore, see Friedrich von Hayek, *Cosmos and Taxis*, in *Law, Legislation and Liberty*, *Volume I*: *Rules and Order* (UCP, 1973) 35-52, where he makes the famous distinction between unplanned orders (Cosmos) and planned order (Taxis). The market is ascribable to the first type of order (Cosmos) and therefore its natural working must be preserved against those trying to undermine it, pretending that it is a "Taxis", since any intervention could upset the overall equilibrium.

[13] Peter Behrens, *The 'Consumer Choice' Paradigm in German Ordoliberalism and its Impact Upon EU Competition Law* (2014), Europa-Kolleg Hamburg, Discussion Paper No. 1/14, Available at SSRN: https://ssrn.com/abstract=2568304.

[14] Britannica, The Editors of Encyclopaedia, *"legal fiction"*, *Encyclopedia Britannica*, 12 April 2018, available at: https://www.britannica.com/topic/legal-fiction, last accessed 2n June 2024. See also Liron Shmilovits, *Legal Fictions in Private Law*, Cambridge University Press, 2022, 1, available at:https://www.cambridge.org/core/services/aop-cambridge-core/content/view/527591E0622FD5F995C9AC65783A79F5/9781316519479int_1-4.pdf/general_introduction.pdf; and Giovanni Tuzet, *Una teoria coerentista delle finzioni*, 37 Ragion Pratica 2011, 530.

[15] See Giovanni Tuzet, 'Finzioni', *Filosofia del diritto: norme, concetti, argomenti 269 (2005).*

[16] The Court of Justice has repeatedly affirmed that «a dominant undertaking has a special responsibility not to allow its behavior to impair genuine, undistorted competition on the internal market». See, e.g., Case C-209/10, *Post Danmark*, EU:C:2012:172, § 23; Case C-457/10 P, *AstraZeneca v Commission*, EU:C:2012:770, § 188; Case C-202/07 P, *France Telecom v Commission*, § 105; and Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission*, EU:C:1983:313, § 57. Furthermore, on the evolution of the concept of special responsibility, see Giorgio Monti and Ekaterina Rousseva,'The special responsibility of dominant undertakings' in Pınar Akman, Or Brook, and Konstantinos Stylianou (eds), *Research Handbook on Abuse of Dominance and Monopolization* (Edward Elgar Publishing, 2023).

[17] Case 85/76, *Hoffmann-La Roche v Commission*, EU:C:1979:36, §§ 91 and 120, where the Court established that «[t]he concept of abuse is … relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which … has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition».

[18] Case 6-72, *Continental Can*, ECLI:EU:C:1973:22, § 27 « such being the meaning and the scope of article 86 of the EEC treaty, the question of the link of causality raised by the applicants which in their opinion has to question exist between the dominant position and its abuse, is of no consequence, for the strengthening of the position of an undertaking may be an abuse and prohibited under article 86 of the treaty, regardless of the means and procedure by which it is achieved, if it has the effects mentioned above»; and *Hoffmann-La Roche*, § 91.

[19] P Vogelenzang, 'Abuse of a Dominant Position in Article 86: The Problem of Causality and Some Application', 13 Common Market Law Review 61, 66 (1976). In particular, the A. went through the exemplary types of abuses listed in Article 102 to conclude that in all of them, there is a link between dominance and the conduct or between dominance and its effects. See also E Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Hart 2010) 75–9, stating «however, to draw the conclusion from these two statements (cfr. Continental Can and Hoffmann-La Roche) that no causal link between dominance and abuse is needed, is too far-reaching and, in my view, such a conclusion is contrary to the very essence of Article [102]». See, furthermore, O'Donoghue and Padilla, *The law and Economics,* 215-217, stating that «it would be absurd to blame a dominant firm for adverse effects on a rival firm or competition that are not caused by anything done by the dominant firm».

[20] Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, ECLI:EU:C:2011:83, §§ 80-81. Here the Court held that, as a general rule, the degree of dominance is not relevant for finding an abuse because Article 102 TFEU does not envisage any variation in form or degree in the concept of a dominant position but also clarified that this does not mean that the undertaking's strength in the market is irrelevant. Indeed, in *Intel* the Court expressly pointed out the market share covered by the conduct as an important element of finding an abuse in the context of rebates when the Commission is required to examine their effects – see Case C-413/14 P, *Intel Corp. Inc. v. European Commission*, ECLI:EU:C:2017:632, § 139.

[21] See, e.g., Miguel da la Mano, Renato Nazzini, and Hans Zenger, in: Jonathan Faull/Ali Nikpay, The EU Law of Competition (OUP 2014), 371.

[22] Indeed, any firm can enter into exclusive dealings, but the negative impact of such contracts increases with the firm's market power. Notably, exclusive dealings involving firms with market shares below 30% are exempt from the application of Article 101.

[23] *Continental Can*, § 26 and *Hoffmann-La Roche*, § 91.

[24] On the drawbacks of a multi-purpose approach, see Giuseppe Colangelo, 'The Privacy/Antitrust Curse: Insights From GDPR Application in Competition Law Proceedings' (2023), available at: https://ssrn.com/abstract=4599974, where the A. contends that once a certain interest is included among the ones ostensibly protected in antitrust proceedings, firms may have incentive to adjust their strategies to invoke such interest (in our case, sustainability) as a business justification for allegedly anticompetitive conduct.

[25] *Ibidem,* 6.

[26] See, recently, Case M.9660, *Google/Fitbid*, para. 452.

[27] See Case C-252/21, *Meta Platforms and Others*, EU:C:2023:537. See, in this regard, Valeria Caforio, *Molto rumore per nulla: la sentenza della Corte di giustizia sul rapporto tra diritto della concorrenza e tutela dei dati personali nell'Unione europea*, Il diritto industriale, 2023, 404; Vincenzo Iaia, *The Strengthening Liaison between Data Protection, Antitrust and Consumer Law in the German and Italian Big Data-Driven Economies*, 2021, available at: https://ssrn.com/abstract=4533788.

[28] Case C-27/22, *Volkswagen Group Italia e Volkswagen Aktiengesellschaft*, ECLI:EU:C:2023:663. The case implicated the Volkswagen Group for installing systems in its vehicles to manipulate pollutant emissions measurements for approval under that regulation. On 4 August 2016, the Italian Competition Authority deemed such conduct an unfair commercial practice involving the marketing and dissemination of misleading advertisements for vehicles equipped with illegal defeat devices. Consequently, it imposed a fine of EUR 5 million. The Volkswagen Group contested this decision before the Italian Regional Administrative Court and the Italian Supreme Administrative Court. Meanwhile, on 13 June 2018, the German Public Prosecutor's Office of Brunswick levied a fine of EUR 1 billion on the Volkswagen Group for circumventing emissions requirements. The group opted not to challenge this decision, rendering it final, while both Italian administrative proceedings were still pending. Therefore, during them, the Volkswagen Group invoked Article 50 of the Charter of Fundamental Rights of the European Union, arguing that the Italian decision and fine had become unlawful as they violated the ne bis in idem principle—the right not to be tried or punished twice for the same offense in one or multiple EU member states. In the above preliminary ruling requested by the Italian Supreme Administrative Court, the Court of Justice held that Volkswagen had grounds to make this claim.

[29] See Giuseppe Colangelo, Mariateresa Maggiolino, 'Antitrust Uber Alles. Whither Competition Law After Facebook?' (2019) 18, available at: https://ssrn.com/abstract=3362428.

[30] Eugene Kimmelman, Harold Feld, Augustin Rossi, 'The Limits of Antitrust in Privacy Protection', International Data Privacy Law, (2018) 271, with regard to the antitrust-privacy interface. However, a similar line of reasoning can be applied to sustainability.

[31] Case C-333/21, *European Superleague Company SL v. Fédération internationale de football association and Union des associations européennes de football*, ECLI:EU:C:2023:1011, § 196.

[32] Giorgio Monti, 'EU Competition Law After The Grand Chamber's December 2023 Sports Trilogy: European Super League, International Skating Union And Royal Antwerp FC', Revista de Derecho Comunitario Europeo

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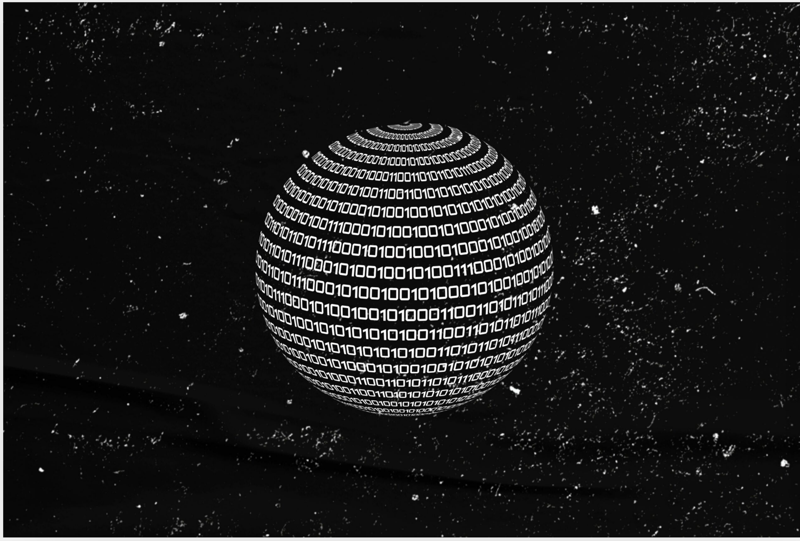

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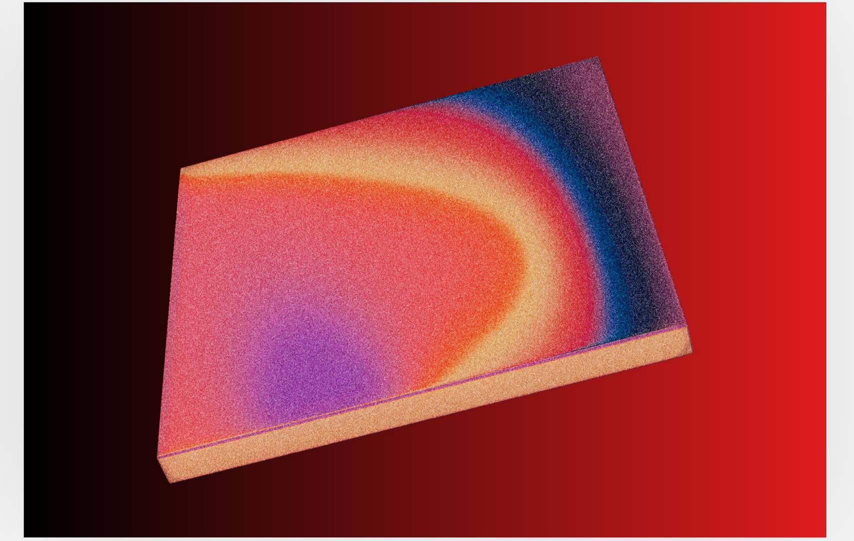

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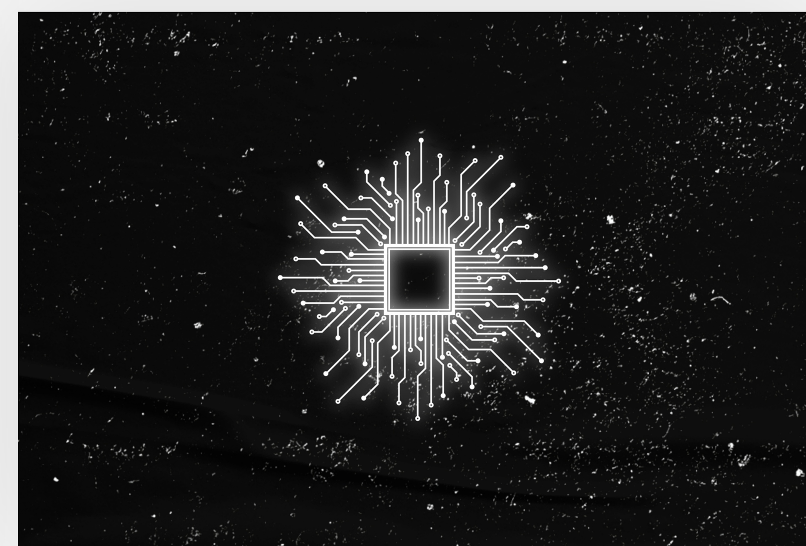

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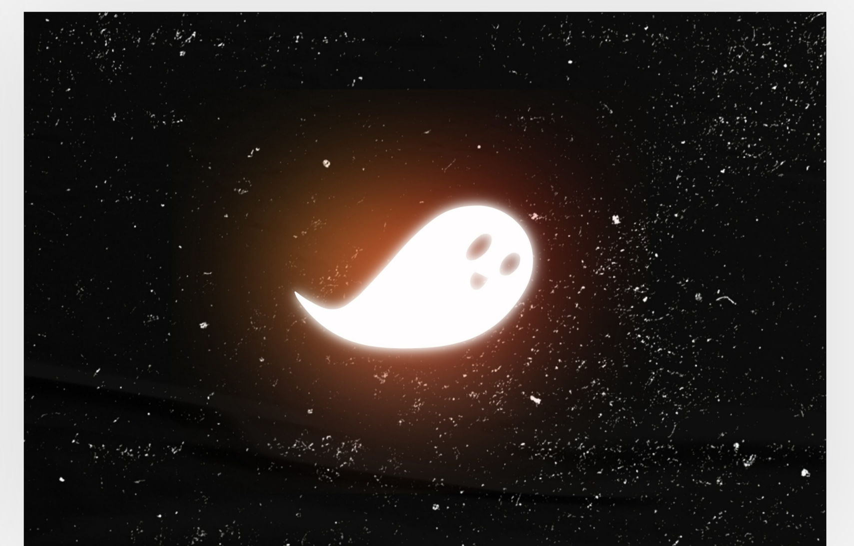

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