Fairness, Competition and Article 102[1]

by Alberto Pera[2]

Introduction

In this note we discuss the role of "fairness" in EU competition law, concentrating our attention on the application of Art.102 of the Treaty on the Functioning of the European Union (TFEU), concerning the abuse of a dominant position,

As we shall discuss, undoubtedly fairness has had and still has an important role in the formulation and application of European competition law. Such a role has lately been revamped in the context of a wide debate, which extends to reconsider the final objectives of antitrust law.[3] In the following we argue that the view of fairness that has informed much of the decisional practice in the application of Art. 102 is rather distant from such far reaching considerations .

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[3] See among the others: Sandra MARCO COLINO, "*The antitrust F word: fairness considerations in competition law"*, The Chinese University of Hong Kong, Research Paper n° 2018-09 (2018); Damien GERARD "Fairness in EU Competition Policy: significance and implications", *Journal of European Competition Law and Practice*, vol. 9, n° 4, 2018; Alfonso LAMADRID DE PABLO "Competition law as fairness", *Journal of Competition Law and Practice*, vol. 8, n° 3, 2017; Francesco DUCCI, Michael TREBILCOCK "The revival of fairness discourse in Competition Policy" *The Antitrust Bulletin , volume 64, n.1(2019*), MAURITS DOLMANS- Wanjie LIN, "How to avoid a fairness paradox in competition policy", Damien GERARD, Assimakis KOMNINOS, Denis WAELBROECK, *Fairness in EU Competition Policy: Significance and Implications*, Brussels, Bruylant, 2020.

The role of fairness in the design and application of EU competition law to dominant companies has been recently stressed in a number of interventions by the Commissioner for Competition and by high-ranking officials of the Commission, also with reference to recent abuse of dominance cases. See "*Fairness and Competition*" speech by EU Commissioner Margrethe Vestager VESTAGER the GCLC Annual Conference, Brussels, January 25, 2018; "*Fairness in EU competition law enforcement*", speech by Director General Alexis LAUTENBERG at the British Chambers of Commerce EU and Belgium, June 20, 2018.

We proceed as follows: first we summarize the recent debate about fairness and competition and in this context we present the view of fairness which we think informs EU competition law and its application. We then argue that such a view is closely related to the concept of "competition on the merits" that has had and still has an important role in EU decisional practice.

We then provide some examples of how this specific view of fairness has contributed to shape some important application criteria of Art. 102 with respect to exclusionary abuses and with specific attention to digital markets.

Finally, we show that this view may provide useful indications in the evaluation of exploitative abuses, in particular with regard to excessive prices.

1. Fairness and Competition

There is little doubt that "fairness" has had an important role in the formulation and the interpretation of the provisions of European competition law and especially of Art. 102, of the TFEU (previously Art. 86 of the Treaty for a European Economic Community–TEEC, and Art. 82 of the Treaty for a European Union-TEU). There are specific references to "fair competition" in European Treaties: it is specifically mentioned in the Preface of the TEEC and it has remained in the Preface of the TFEU[4], accompanying the reference to a market where competition is not distorted[5]. Reference to unfair practices is explicitly made in Art. 102, letter a) and principles of "fairness" may also be detected in letters c) and d) of the same article

Accordingly, the European Courts have always granted a "special" attention to the behavior of dominant firms. As we shall discuss later, a number of concepts which underpin EU competition law may be considered as deriving from the view that companies with a dominant position are required to behave fairly to ensure the physiological development of the process of exchange.

As we shall discuss later, this "special attention" has continued characterizing European Antitrust, even after, at the end of the 1990s, the EU Commission and the national authorities have endorsed the "more

[4] The original statement in the Treaty of Rome "Recognizing that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition," is present in all the following Treaties, including the TFEU.

[5] Originally in Art. 3 of the Treaty of Rome. In the Lisbon Treaty this reference is in Protocol 27 attached to the Treaties of the EU.

economic approach", which emphasizes the role of competition in ensuring efficiency and enhancing consumer welfare.

However, more recently, "fairness" has been given a new attention, on the echo of the debate that has been going on in the USA for some time. There "fairness" has been hailed as a leading criterion in the application of competition law by critics of the (until recently) prevailing framework of antitrust law enforcement, based on the Chicago School analysis, and concerned exclusively with the evaluation of the effects of conducts on efficiency and consumer welfare. These critics argue that in the US the prevailing framework has led to a weak enforcement towards big companies and to an increase in concentration, to the benefit of profits and damaging consumers, smaller competitors and wages. They therefore suggest a return to what they consider the original inspiration of the law, i.e. "fairness" [6].

In this context fairness has been given a peculiar meaning: according to its proponents a fairness-based approach to antitrust would be very concerned with the *effects* of competition on equity and equality and therefore would aim at a varied set of public interest objectives, among which distribution of income, protection of the small against the big, consumer choice, direct protection of the consumer (as distinct from consumer welfare). Therefore, enforcers would give special protection to the smaller players in the competitive process; prevent the expansion of big firms; and even try to mend the effects on income distribution caused by increases in market power.[7].

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[6] Such a role of fairness has been recognized as relevant in much of U.S. Antitrust history. For a review see for instance: EDWIN J. HUGES "The Left Side of Antitrust: What Fairness Means and Why It Matters" *Marquette Law Review* Vol 77, (2009), p.265-306. For the recent influential reappraisal see Lina KAHN, "Amazon's Antitrust paradox", *The Yale Law Journal*, vol. 126, n° 3, January 2017; Lina KAHN, "Market power and inequality: the antitrust counterrevolution and its discontents", *Harvard Law & Policy Review*, vol.11, 2017; Thomas PHILIPPON, "*The great reversal: how America gave up on free markets"* Cambridge, Harvard University Press, 2019; Carl SHAPIRO, "Antitrust in time of populism", *International Journal of Industrial Organization*,Oct. 2017; Johnatan BAKER, "*The antitrust paradigm: restoring a competitive economy"*; Cambridge, Harvad University Press, 2019; Tim WU, "After consumer welfare, now what? The protection of competition standard in practice", *www.competitionpolicyinternational.com*, April 2018.

[7] See for instance DINA I. WAKED "Antitrust as Public Interest Law: Redistribution, Equity and Social Justice" *The Antitrust Bulletin* 2020, Vol. 65(1) 87-101 Not surprisingly, this reference to "social" fairness has often been considered at odds with a coherent view of antitrust, aimed at ensuring a competitive environment, leading to a better and efficient companies' performance, to the benefit of consumers, who very often belong to the less well off layers of the population. See: Herbert J. HOOVENKAMP "Is antitrust's consumer welfare principle imperiled?" University of Pennsylvania Law School, *ILE,* Research Paper n° 18-15; Douglas MELAMED, Nicholas PETIT, "The misguided assault on the consumer

We suggest that the "public interest" interpretation of fairness is not the proper one to be provided with reference to European competition law, which is rather based on the view of "fairness" as *correct behavior on the market*.

The importance of a correct behavior for the working of the market has been underlined from many parts: economists who have pinpointed the institutional character of the market – such as the Nobel laureates James Buchanan, Douglas North and Oliver Williamson - have stressed that the working of the markets is shaped by the rules of conduct followed by participants in the exchange[8]; philosophers, like John Rawls, have recognized the role of this view of fairness for the social order.[9].

According to these analyses a proper working of the market requires certain standards of correctness among market participants. As a matter of normative law, contract law and legislation against unfair practices aim at transposing general principles of fair conduct into workable legal prescriptions which would be relevant for *all* subjects operating in the market.

As distinct from contract law and unfair practices rules, antitrust law concerns the issue of the misuse of market power, single or collective, in the working of the competitive market, through the (conscious or unconscious) compression of the market players' freedom to compete. The focus on the (mis)use of market power to distort competition gives a distinct and specific character to what is a fair conduct.

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welfare standard in the age of platform markets", *Journal of Industrial Organization*, 2019,n° 54.

[8] Douglass NORTH, *Institutions, Institutional change and economic performance*, Cambridge, Cambridge University Press, 1990; *Markets and Hierarchies; Analysis and Antitrust Implications* New York, The Free Press, 1975; According to James BUCHANAN "the market or market organization is not a means toward the accomplishment of anything. It is instead the institutional embodiment of the voluntary exchange process that are entered into by individuals in their several capacities"……..."a market is not competitive by assumption or by construction. A market *becomes* competitive and competitive rules come to be established as institutions emerge to place limits on individual behavior patterns" Excerpt from the Presidential Address to the Southern Economic Association, November 1968, reprinted in James BUCHANAN "*What Should Economists do*?", Liberty Press, 1979

[9] John RAWLS' inquiry in *A Theory of Justice*, Harvard University Press, 1971 and subsequent works concerns obviously much loftier subjects than competition law: the definition of the appropriate rules to govern a liberal society. However, at market level, Rawls' analysis implies certain standards of correctness among market participants. In his initial work, "Justice as Fairness" , *Journal of Philosophy*, 1958, p. 166-198, he sees fairness as capable of determining the "right dealing between persons who are cooperating or competing against one another, as one speaks of fair game, fair competition and fair bargains" …."The question of fairness arises when free persons, who have no authority over one another, are engaging in joint activity and among themselves setting or acknowledging the rules".

The above considerations are important, because it is well known that competition provisions in the Treaty of Rome are influenced by ordo-liberal views about their role in the functioning of a liberal society governed by the rule of law. In this framework of thought, competition law has a particular role in guaranteeing equality of opportunities among market participants:[10] competition law should give attention to the fact that market players with substantial market power do not use this power to distort the freedom of action of the other participants to the exchange.

This explains why certain conducts, which would be considered "fair" when practiced by a firm without substantial market power, may be considered unfair, and therefore an abuse of dominant position under art. 102, when practiced instead by a company which dominates the market and thereby it may compress competitors' freedom to compete.

Whether even this definition of fairness as *correct behavior in the exchange* could provide adequate guidance in the application of antitrust law is not uncontroversial. For instance, in her work about the foundations of Art. 102[11], Pinar Akman recognizes that there is clearly a concept of "fairness" in the European Commission and Courts' decisions concerning the application of Art. 102. In her opinion, this is evident from the use of concepts as *absolute necessity, equality, proportionality, transparency, objectivity, certainty* in the evaluation of dominant companies conduct, which the Courts use in attempting to define the limits within which the conduct of a dominant player may be deemed correct and therefore compliant with the norm.

However, according to Professor Ackman this concept of fairness is too vague and subject to arbitrary interpretations to direct the application of competition law. She derives this conclusion from the examination of the indications stemming from European contract and consumer protection law. She concludes that there is a risk that the indications stemming from these branches of law lead to undesirable results: "it is the application of…this second interpretation of fairness that can be prone to criticism, for example, for protecting competitors rather than competition, can turn "fair" competition law into "unfair competition law"[12]. Prof. Akman appears therefore to rule out fairness from competition law, because she considers

[10] See David J. GERBER, *"Law and competition in twentieth century Europe: Protecting Prometeus*", Clarendon Press, Oxford, 1998; contributions from German "ordo-liberals are collected in Alan. T. PEACOCK – Hans WILLGERODT "*Germany's social market economy: origins and evolution*" Pallgrave – Macmillan (1989)..

[11] Pinar AKMAN, *The Concept of Abuse in EU Competition Law: Law and Economic Approach,* Oxford, Hart Publishing, 2012.

[12] Pinar AKMAR, see note 9 above..

that an approach based on fair conduct would be less workable than one based on efficiency and the benefit of consumers.

However, this claim of vagueness does not seem necessarily justified if one considers that he concept of fairness is applied within the framework of analysis of the competitive market. There, "fairness" requires that dominant companies refrain from using their market power "unfairly": therefore competition is driven only by the superior performance in providing goods and services to the consumer. These are the same requirements implied by the concept of "competition on the merits" which has guided and still guides much of the European decisional practice: this suggests that conformity to competition on the merits would imply conformity to the criterion of fairness. The point is therefore whether we may rely on the benchmarks provided by competition on the merits.

2. Competition on the merits

With its emphasis on the competitive process driven by firms competing only on the bases of their superior performance (be it in innovation, production or distribution), the paradigm of competition on the merits may well be considered a reference for the definition of whether a conduct by a dominant undertaking may be considered fair.

The concept of "competition on the merits" was originally set in *Hoffman La Roche*, in direct relation to the abusive conduct by an undertaking in dominant position. An abuse of dominant position is "an objective concept relating to the behaviour 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, through *recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators*, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition." [13] Therefore, competition on the merits implies a particular attention to the way the competitive process develops[14].

[13] Hoffman La Roche & Co. AG v. Commission of the European Commission, Case 85/76; ECR 461

[14] See the opinion of Advocate General KOKOTT in British Airways vs Commission C-95/04 *ECR 2331*, 2007 "Art. 82 is not designed only as primarily to protect the immediate interests of individual competitors or consumers but to protect the structure of the market and thus competition as such (as an institution)" Advocate General Kokott also seems to endorse a view of fairness as correctness in exchange: see Juliane KOKOTT – Daniel

Over the years, the ECJ and CFI, now General Court, have provided indications of what they refer to under the concept of "methods *different* from those which condition normal competition in products or services on the basis of the transaction of commercial operators". In essence, conducts which give advantage to a dominant company must not be based on its market power but on the effects on some form of efficiency. For instance, with reference to rebates, the CFI clarified that the dominant company needs to show that there is a relationship between economies of scale achieved by virtue of extra sales and the rebates or bonuses paid. A rebate scheme will not fall under the qualification of 'abuse' if it "constitutes the exercise of the normal operation of competition or allows the company to reduce costs"[15].

Despite having been used as a reference even in very recent European Court decisions, the use of the paradigm of competition on the merits has been subject to criticism for its reference to the concept of a competitive process, without due attention to the end result of the process, i.e. the effects on efficiency and consumer welfare. Critics have argued, and still argue, that the attention to the competitive process could lead to give undue protection to the interest of competitors rather than to competition.[16]

DITTERT "Fairness in competition: law and policy" in Damien GERARD, Assimakis KOMNINOS Denis WAELBROECK, *Fairness in EU Competition Policy: Significance and Implications*, Brussels, Bruylant, 2020

[15] Irish Sugar, case T 228/97 [1999]; British Airways v. European Commission, case T 219/99 [2003]

[16] See the discussion at the OECD "*Roundtable on Competition on the Merits*", Paris, 2005. In particular, it is argued that the competitive process is a means and not an end, and that competition should not be protected as such, but because it leads to greater social (consumer) welfare: therefore, conducts which do not have effects on consumer welfare should not be prohibited. In this respect, it is noted that according to the scheme of "competition on the merits" conducts which do not affect consumer welfare could nevertheless be considered anticompetitive, as they interfere with the openness of the market or alter the "competitive process" . It is further argued that the evaluation of the conduct on the basis of its effects on a well identified objective, like consumer welfare, would prevent a discretionary application of the law. The discussion obviously concerns the basic tenets of competition law and policy and reflects differing views about the way competition affects the working of the economy also in the long term. However, one could doubt that the identification of a single objective, rather than of a standard of conduct, is necessary to prevent a discretionary application of the law. Douglas MELAMED and Nicolas PETIT "Before "After consumer welfare" A response to Professor Wu" *Competition Policy International,* July 2018, note that in any case the criterion based on protection of the competitive process corresponds to the conduct requirement in a consumer welfare based test. The difference between the two tests is therefore the necessary evidence of the consumer harm in the consumer welfare test.

However, this argument could be countered by the consideration that what really matters is that the evaluation of the conformity of conducts and arrangements to "competition on the merits" takes place through a well-defined process, with clear evaluation criteria, based on the economic analysis of the conducts under scrutiny.The issue is *how* it is determined whether a conduct is unfair or anticompetitive, and therefore what is the legal test, and what is the standard of proof. This assessment implies a set of presumptions and a certain requirement concerning the evaluation of whether these conducts and arrangements are necessary to achieve a better performance on the ground of productive efficiency and benefits to the consumer or rather they merely have the effect of preventing entry of competitors or excluding them.[17] .

In a well-known paper[18], Eleanor Fox summarizes what may be considered as the theory of harm subtending competition on the merits: even if consumers do not suffer immediately ill effects from a dominant firm conduct, the latter would be deemed anticompetitive, if it prevents efficient firms to enter and compete on the market. Melamed and Petit note that in any case the criterion based on protection of the competitive process corresponds to the conduct requirement in a consumer welfare-based test [19].

> Several tests have been devised to identify whether the conduct of a dominant firm does or does not conform to competition on the merits, based on prices (or discounts) or on other forms of anticompetitive behavior. In particular, in its 2009 Guidance Paper on the application of Art. 102, the Commission has introduced the As Efficient Competitor (AEC) test in order to evaluate the exclusionary effects of price-related practices[20].

17.On the relevance of objectives in the administration of competition law see Pablo IBANEZ COLOMO *"Discretionalists vs legalists in competition law",* Institute d'études europèennes, 7 september, 2018. Ioannis LIANOS "*Some Reflections on the Question of the Goals of EU Competition Law*" CLES Research Paper 3/2013; see also Pablo IBANEZ COLOMO "*Behond the More Economic Based Approach:A Legal Perspective on Article 102 TFEU"* London School of Economics, Department of Law, LSE papers 09/2016, stressing that the application of EU Antitrust law by the Competition Authorities and the Courts are the result of experience, not of what are the presumed objectives of the law.

[18] Eleanor M. FOX "We protect competition, you protect competitors", *World Competition*, vol.26, n° 2,2003.

[19] Douglas MELAMED and Nicolas PETIT "Before "After consumer welfare" A response to Professor Wu" *Competition Policy International,* July 2018. The difference between the two tests is therefore the necessary evidence of the consumer harm in the consumer welfare test.

[20] The "As efficient competitor test", which considers unlawful conducts likely to exclude a competitor at least as efficient as the dominant firm has been explicitly considered

On its part, the decisional practice of the Courts has provided useful indications: while continuing to refer to the basic framework of competition on the merits, it has requested that the analysis of conducts be based on solid economic ground, limiting the recourse to a priori definitions of restrictiveness. The obvious example is the Intel decision, where the European Court asked the Commission to reconsider its conclusions concerning fidelity discounts on the bases on a more thorough analysis of the impact on similarly efficient competitors.[21] In his recent opinion in *Servizio Elettrico Nazionale* Advocate General Rantos notes that in the tradition of the Courts the relation between the objectives of attention to the competitive structure of the market and to consumer welfare is not antinomic: usually conducts restraining the competitive process may affect directly or indirectly consumer welfare.[22]

3. **Fairness and abuse of dominance**

The role of "fairness", as defined above, in the application of Art. 102 is shown by some aspects of the decisional practice with respect to firms with dominant market power, which characterize the European practice and which appears directly related to the requirement of a "fair conduct" to the point of limiting some of the companies' fundamental rights[23].

First, the well-established "special responsibility" of the firm in a dominant position. It is recognized that competition on the merits requires for competing firms, even for the dominant one, to try to succeed on the market through better prices, quality and innovation. However, it is a principle of ECJ jurisprudence, established in *Michelin I* and continued to be confirmed until recent decisions in *Intel* and by the

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in the European Commission Guidance Paper on the application of Art. 82 (now 102), *Official Journal, C 45, 24 February 2009*. Among the tests to evaluate the dominant company conduct are also the "Profit Sacrifice Test", indicating that a conduct should be considered unlawful when it involves a loss of profits which would be irrational unless explained by a reduction of competition; the "No Economic Sense Test" which would consider a conduct unlawful if it would make no economic sense without a tendency to reduce or eliminate competition. See OECD *Competition on the Merits Roundtable*, 2005.

[21] Judgment of the Court of Justice of the European Union Intel vs European Commission C 413/14 (2017). See Massimiliano Kadar" Article ,102 and exclusivity rebates in a post-intel world: lessons from the Qualcomm and the Google-Android cases*" Journal of European Competition Law and Practice,* n° 10, 2019

Servizio Elettrico Nazionale and Others v. AGCM, C 377/20, opinion of the Advocate General Rantos, December 8, 2021.

[23] See Maarten Pieter SCHINKEL, Pierre LA ROUCHE, "Continental Drift in the Treatment of Dominant Firms: Art 102 TFEU in Contrast to Section 2 Sherman Act" in Roger d. Blair- Daniel Sokol (ed) *The Oxford Handbook of International Antitrust Economics*, Volume 2, Oxford University Press, 2015;

Commission in *Google Shopping*, that there is a "special responsibility" of the dominant firm not to allow its conduct to impair genuine undistorted competition on the common market"[24]. Such a "special responsibility" is also recognized in the 2009 Commission Guidance Notice concerning the application of Art. 102. This responsibility may be interpreted as amounting to the obligation not to prevent an effective and undistorted competition (Michelin I), and to not unreasonably constrain access to the market (Intel): elements which refer to an obligation to a conduct compliant with (fair) performance competition[25].

An additional example is provided by the "essential facility" doctrine, enshrined in the decisional practice of the EU Courts, which also puts limits to fundamental rights of firms, when they are in a dominant position. Competing firms, even dominant ones, have the right to an exclusive use of their own material and immaterial assets, and therefore to refuse to deal with competitors requiring access to those assets. However, in Europe since the 1974 Commercial Solvents judgment, the Court of Justice has stated that in "exceptional circumstances" a refusal to deal by a dominant company may be deemed anticompetitive when it concerns an "essential facility"[26].

This concept has been further developed over the years. In the Oscar Bronner case, the Court stated that, in case of a physical input, "exceptional circumstances" exist if the input cannot be replied by technical or economic reasons and access to it is indispensable to allow competition to the dominant firm in the market or in adjacent markets[27]. This principle has been extended to intellectual property rights protected by a patent guaranteeing a legal monopoly of their use. According to the ECJ decisions in the Magill and IMS Health cases, an intellectual property right could be subject to compulsory licence, in the "exceptional circumstances" where it was indispensable for a competitor to create a new product[28] The definition and expansion of the role of "exceptional circumstances" suggest that the analysis is guided by a view of "fairness" which induces to prevent a firm in

[24] Netherllandnsche Banden Industrie Michelin v Commission, Case 322/81, decided 9 November 1983, ECJ ECLI C 1983.313; (Michelin I); Intel vs European Commission C 413/14 (2017); Case AT.39740 Google Search (Shopping) June 27, 2017.

[25] And, as noted by SHINKEL e LA ROUCHE (see note above) the dominant firm is the one better placed to evaluate whether its conduct conforms to the criterion.

[26] Judgment of the Court of Justice of the European Union, Istttuto Dermoterapico Italiano SpA and Commercial Solvents Corp v. European Commission case C 6/73 (1974) where the refusal to deal concerned the interruption of supply to a previous client,.

[27] Oscar Bronner GmbH v Mediaprint Zeitungs GmbH case C 1998 ECLI 264

[28] Magill, joined cases C-241/91 and C-242/91 ECLI 1995 and IMS Health GmbH v. NDC Health GmbH C-418 01,ECLI 2004;

control of an essential material or immaterial asset from using this control to obstruct competition by other firms[29].

One may wonder what could justify such limits and obligations on the fundamental ownership rights of the (dominant) firm, like the ones stemming from the special responsibility of the dominant firm or deriving from the essential facility doctrine. It seems in fact difficult to derive these concepts, formed by jurisprudence, from the overwhelming role of the search for efficiency which characterizes the consumer welfare approach. It could be argued that they could depend on a view of competition which requires a plurality of players on the market, so to pursue the choice of consumers[30]. However, it looks to us more compatible with a liberal system of law to think that they derive from the previously discussed requirement of "fair conduct" by a dominant firm towards the other players on a market where, because of its position, competition is already severely restrained.[31]

Additional examples of the requirement to abide to a principle of correctness may be derived from some new forms of abuse of dominance which have emerged in the EU. In particular, Siragusa lists examples of

[29] That this may be the case is also suggested by the comparison with the approach until recently followed by the Supreme Courts in the USA, where the role of fairness is disavowed. For instance in the Verizon Communications Inc. vs. The Law Offices of Curtis vs. Trinko LLP case, 540 US, 398 (2004), where the Court excluded to consider the exceptional circumstances", even in the presence of an essential facility, therefore all but abandoning the lines previously set by the same Court in the Aspen Skiing and in the Otter Tail cases. The reasoning of the Supreme Court was based on the view that because the incumbent service provider (Verizon Inc.) was subject to regulation, there was no room for intervention for competition law: an efficiency-based view of antitrust would explicitly reject any reference to "fairness". A comparison may be made with the decisions taken by the Court of Justice in the almost simultaneous Telefónica and Deutsceh Telekom case, also concerning regulated telecom providers. See Alberto PERA "The Application of Article 82 in Regulated Sectors: the Case of Price Squeeze" in Barry HAWK, (ed.) *International Antitrust Law and Policy* Juris Publishing, 2008

[30] See Ioannis LIANOS, Valentine KORAH, Paolo SICILIANI, *Competition Law*, Oxford University Press, 5th edition 2019.pp.895-898, quoting the German ordo-liberal Walter Eucken.

[31] As Professor AKMAR notes in "*The concept of abuse…*" note 10 above "…since art.102 is expressly aimed at situations which clearly originate in contractual relations (Hoffman La Roche) and since freedom of contract is a fundamental right of the EU Member States and thus of EU law (A,G Jacobs in Oscar Bronner, see below) scrutinizing the transaction of dominant undertakings from a fairness perspective directly sets limits on this freedom as well". She then doubts that contract law may provide definitions sufficiently precise to evaluate the specific case.

vexatious litigation and the abuse of regulatory process.[32] In the ITT Promedia case[33] the General Court held that the right to effective judicial protection, through access to justice, which is guaranteed by Article 47 of the Charter of Fundamental Rights, may nevertheless constitute an abuse of a dominant position under two conditions: if the legal action cannot reasonably be considered as an attempt to establish the rights of the concerned undertakings (i.e. if the litigation is vexatious) *and* if the action is conceived in the context of a plan to eliminate competition, where the first condition concerns the "unfairness" of the conduct and the second its anti-competitiveness. In the Astra Zeneca case[34] one out of two abuses concerned the misrepresentation of the characteristics of its patents to the patent office, in order to prevent access to the market by producers of generics. The Court of Justice held that even if the firm considered that it could legitimately lay claim to a right, it could not use any means to obtain that right: resort to inappropriate means would be contrary to competition on the merits and to the dominant company special responsibility[35].

Other recent examples of the role of "fairness" concern the application of Art. 102 in connection with intellectual property rights, and especially with Standard Essential Patents (SEP) where the patent holder had committed with the Standard Setting Organization (SSO) to license its technology at Fair, Reasonable And Non-Discriminatory (FRAND) terms. In some of these cases the right holder issued cease and desist injunctions against users of the technology who did not accept their terms of use[36]. In *Huawei* the European Court recognized the validity of Huawei intellectual property right and that the right to enforce it by a legal action could not in itself

[32] Mario SIRAGUSA, "Italy- New forms of abuse of dominance and abuse of law" in P.L. PARCU, G. MONTI, M. BOTTA "*Abuse of Dominance in EU Competition Law: Emerging Trends*" Edward Elgar 2020

[33] ITT Promedia.v CommissionCase T- 111/96 17 July 1998.

[34] ECJ Astra Zeneca AB and Astra Zeneca plc v. EU Commission C-457/10 P (December 2012), par. 98.

[35] In the national Italian jurisprudence a similar case is represented by the Coop Estense judgment by the Supreme Administrative Court, where the conduct of opposing by vexatious litigation the establishment of a competitor supermarket in the area where CoopEstense was dominant was confirmed to be abusive. It may also be recalled that in order to assess its right to oppose such an establishment before the Court Coop Estense acquired a parcel of land, to no other use than litigate. The case also represented a specific application of the profit sacrifice test. AGCM A437-A437 B Coop Estense, 6 June 2012.

[36] Heike SCHWEITZER, "Standard Essential Patents and Abusive Patent Injunction: the Interplay between German Courts and the CJEU" in PARCU, MONTI, BOTTA, see note 29 above; Bjorn LUNDQVIST "The interface between EU competition law and essential standard patents: from Orange book standard to the Huawei case" *European Competition Journal*, 2-3/2015

constitute an abuse of dominant position[37]. However, the fact that the patent was essential for a standard established by a SSO and that Huawei had committed to license it at FRAND terms gave rise to "exceptional circumstances" which qualified the right and made the refusal to deal at FRAND terms abusive. However, the Court did not consider in the specific case that recourse to an injucntion was abusive. The Court set instead a course of action by the patent holder and the licencee in order to obtain a FRAND fee: only when the course of action is exhausted would an injunction be justified. Therefore, the Court considered that a "fair" process of determination of fees would be required for an abuse to be excluded.

5. New roles for Fairness

Fairness has assumed a particularly relevant role in the evaluation of conducts by a particular kind of dominant companies: digital platforms. Digital platforms share a number of characteristics leading to dominance. They are multimarket operators, where monetary prices of services to the final consumers may be equal to zero (even if access to personal data is required in exchange); due to network externalities the value of access to the platform increases exponentially as their size increases, so that markets for their services tend to tilt to monopoly; and they may become indispensable for final consumers and for operators searching access to the platform. This gives them a dominant position in the services provided by the platform, in many ways similar to essential facilities. The more so as often they extend their activity to markets vertically integrated with the platform. Furthermore, their indispensability for the consumer may lead to a situation of economic dependency[38]. Therefore, the dominant position poses competitive problems both in the platform market and in the vertically integrated markets. These problems may depend in particular on the dominance of the platforms in these markets, or on the power on the users based on economic dependency.

Given their entrenched dominant position, the issue of equal access to the services that the platforms provide becomes central in the evaluation of their competitive conduct. Therefore attention is given to the obstacles they create to the entry or expansion of competitors on the market for platform services or on neighboring markets.

[37] ECJ Huawei Technologies Co. v ZTE Deutchland Gmbh C-170/13 (16 July 2015).

[38] See David EVANS.- Richard SCHMALENSEE, "The Antirust Analysis of Multi-sided Platform Businesses" *NBER Working Paper*, n° 18871,2013; see also Harri KALIMO, Klaudia MAJCHER, "The Concept of Fairness: Linking EU Competition and Data Protection Law in the Digital Marketplace", *European Law Review*, n° 42 (2), 2017

These aspects have been central in cases recently decided by the EU Commission with respect to Google. In particular, the "fair treatment" of competitors is at the center of the *Google Shopping* case, recently confirmed by the General Court[39], where the abusive conduct was clearly related to "self preferencing"[40]. In fact Google was found to have leveraged its dominance in the market for general search systems into the market for comparison shopping services by favoring its own shopping comparison service, Google Shopping. In particular, Google had systematically given prominent placement to its comparison-shopping service at or near the top of its general search results, while demoting rival comparison shopping services.

It is notable that, while the decision also concerned the diversion of traffic from competitors rival to its own services, Google's abusive conduct consisted substantially in its giving preference to its own products: and that the reasoning of the Commission was founded on a truncated analysis based substantially on an evaluation concerning the "unfair treatment" of competitors, who were denied an equal access to a dominant search system[41]. In fact, as pointed out by the General Court, the obligations imposed on Google because of its dominance were even stronger than the one derived for an essential facility in the Oscar Bronner judgement[42].

The issue of the state of dependency of users from the dominant provider has been given prominent interest by the well known Facebook case in Germany, which has been decided on the basis of provisions in the German antitrust law substantially similar to Art. 102 and is based on the creation of "unfair economic conditions" vis-à-vis the users. The case has raised much attention both because it opens wide perspectives in the area of social networks and because of the way it identifies an abusive conduct, based on unfair acquisition of data[43] .

[39] Judgment in Case T-612/17 Google and Alphabet v Commission (Google Shopping), Press release, November 10, 2021.

[40] Case AT.39740 Google Search (Shopping) 27 june 2017.

[41] See par. 23-26 of the Summary of Commission decision.

[42] See the Press Release of the General Court, note 43 above: "..the general results page has characteristics akin to those of an essential facility inasmuch as there is currently no actual or potential substitute available that would enable it to be replaced in an economically viable manner on the market. However, the General Court confirms that not every practice relating to access to such a facility necessarily means that it must be assessed in the light of the conditions applicable to the refusal to supply set out in the judgment in Bronner on which Google relied in support of its arguments. In that context, the General Court considers that the practice at issue is based not on a refusal to supply but on a difference in treatment by Google for the sole benefit of its own comparison service, and therefore that the judgment in Bronner is not applicable in this case".

[43] Giuseppe COLANGELO, Maria Teresa MAGGIOLINO, "Data Accumulation and the Privacy-Antitrust Interface: Insights from the Facebook Case for the EU and the US"

The case concerned the conduct of Facebook on the German market, consisting of the changing of access conditions to its social platform bearing the same name, making the use of members' data collected on other services provided by Facebook, like Whatsapp and Instagram, conditional to access the platform. The change had to be accepted by users because of the indispensability of Facebook social servic[44]. According to the Bundeskartellamt, non-trasparent changes in access conditions represented a breach of privacy rules which was effected only to advantage Facebook. Given the unbalanced position of users with respect to the network, which is an indispensable counterpart, and the fact that their data have an economic value, the arbitrary change in the privacy conditions represented an unfair economic condition imposed on users and therefore was an exploitative conduct[45]. On these bases, the authority argued that it also represented an exclusionary abuse because in this way Facebook could unfairly acquire data inaccessible to its competitor social networks and therefore raise further barriers to entry.

The Facebook decision, which was taken under German law but could be also reached under EU law, stands on the recognition that a breach of privacy legislation by a dominant undertaking represents an unfair conduct with respect to customers and competitors and therefore it is an abuse of dominance. The decision has been subject to criticism, because it would consider abusive under article 102 a conduct which would be already sanctioned under the EU privacy law sets, GDPR. However, as noted by Wils, "the application of EU competition law always needs to take into account the legal context of the practice, and non-compliance with other branches of the law can be a relevant factor" [46]. Breach of the GDPR may

TTL Working Papers n° 31; Marco BOTTA, Klaus WIEDEMANN, "Exploitative Conducts in Digital Markets: Time for a Discussion after the Facebook Decision", *Journal of European Law and Practice,* vol.10, n° 8, 2019.

[44]The procedure has been opened under art. 19 of the German national competition law (GWB), which is the provision governing abuse of a dominant position. The Bundeskartellamt argued that the Facebook social platform is by far the dominant one and, due to the limited diffusion of multihoming and the impossibility of substitution with specialized platforms, it is indispensable for its users.

[45] To reach this conclusion, the Bundeskartellamt also relied on the provision of Art. 19 a) of the GWB enforceable under GDPR: when evaluating the conduct of a dominant company, account must be taken of any legal principle (in this case the GDPR) that aims to protect a contracting party in an unbalanced trading position.

[46] See Wouter P.J.WILS, "The Obligation for the Competition Authorities of the EU Member States to Apply EU Antitrust Law and the Facebook Decision of the Bundeskartellamt", *Concurrences*° 3,2019. As mentioned in note 42, in order to state the unfairness of the practice, the Bundeskartelamt makes reference to the provision in the law according to which the authority (and the judges) must take account of the protection provided by the (privacy) law to weak parties in the transaction. Since such a provision is not contained in Art. 102, it could be argued that this could not apply in this case. However,

then be considered in evaluating the fairness of the conduct, on the basis of necessity, proportionality and transparency.

An important corollary of the decision is that this conclusion could also be extended to conducts in breach of prescriptions of laws other than GDPR. From this point of view the decision represents an important extension, along the lines of the ITT Promedia and Alfa Zeneca cases we have previously reviewed, in the application of the concept of fairness in the evaluation of dominant companies conduct, which appears to be relevant even beyond its application to digital platforms[47].

6. Fairness in (excessive) pricing

The provision in letter a) of Art.102, forbidding "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions", has often been considered as the benchmark concerning the application of the criterion of fairness in EU competition law with respect to exploitative abuses[48].

One may well recognize that the provision in Art. 102 a) reflects the view that the conduct of firms with dominant market power must be "fair" not only with respect to competitors, but also with respect to their counterparts on the market, i.e. consumers. As a matter of fact, the early interpretation of the law on abuses of dominance assumed that its objective was to prevent

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in a number of decisions the European Courts have stated that the evaluation of a conduct must be made taking into account the provision of European and National law, and therefore that a direct reference to the duties stemming from the Privacy directive could be made in this case. In addition, Wils remarks that "the application of EU competition law always need to take into account the legal context of the practice, and non-compliance with other branches of the law can be a relevant factor". The GDPR sets the legal scheme for the protection of the personal rights of individuals: breach of the GDPR may then be considered in evaluating the fairness of the conduct, on the basis of necessity, proportionality and transparency. The conclusion would then be analogous to the one reached under Art. 102 a).

[47] The decision has been criticized on the ground that the definition of a breach of GDPR as a competition infringement is inappropriate, because the same infringement would represent a breach of privacy law and of competition law, therefore creating risks of *ni bis in idem*. see Giuseppe COLANGELO – Maria Teresa MAGGIOLINO, "Antitrust Über Alles. Whither Competition Law After Facebook?". *World Competition n.3, 2019.* In fact in other cases the same conduct has been evaluated under different laws, protecting different public interests. SeeMaximilian N. VOLMAR – Katharina O. HELDMACH "Protecting consumer and their data though competition law? Rethinking abuse of dominance in light of the Federal Cartel Office's Facebook investigation" European Competition Journal n.2-3, 2018

[48] Michal GAL "Abuse of Dominance-Exploitative Abuses" in Ioannis LIANOS and Damien GERADIN, *Handbook on European Competition Law,* Edward Elgar, 2013

exploitation by monopolistic enterprises[49]. The issue is that the Authority's intervention must not substitute the pressure of competition. The interpretation of what represent unfair practice must therefore be attentive.

The point is in fact that prices which allow high margins over costs, and could therefore be considered excessive, cannot necessarily be considered unfair and therefore abusive, has also recently recognized also by Advocate General Wahl[50] . High margins of prices over costs may depend on several factors: introduction of new products at the higher end of the market; shifts in demand; recoupment of past investments: the same definition of excessive prices is doubtful. Furthermore, it is generally felt that in the presence of profit opportunities related to excessive margins on costs, the competitive process would inevitably lead to the entry of new competitors or to the development of existing ones: high prices may be the consequence of high market power, but they themselves may lead to the physiological reduction or elimination of market power[51].

It is for these reasons, that the criteria for evaluating the competitive relevance of excessive prices set by the Court of Justice in the United Brands case[52], require that prices be not only excessive, but also *unfair*, i.e. that they are the result of an "abusive use of market power" and not the consequence of other legitimate reasons. In this regard, the Court stated that "charging a price which is excessive because it has no *reasonable relation to the economic value* of the product supplied would be such an abuse". The issue is therefore how the economic value of the product may be established: according to the United Brands judgment, this evaluation may be made by a direct assessment that the excessive prices are unfair per se (in the market context) or through a thorough analysis of the market and the comparison with conditions in other geographic or similar product markets.

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[49] See René JOLIET, "*Monopolization and Abuse of Dominant Position: A comparative Study of the American and European Approaches to the Control of Economic Power*" Université de Liège, 1970; see also Michall GAL, quoted in note 45 above.

[50] Opinion of the Advocate General Wahl, Case C-177/16 Biedriba AKKA – Latvia Autoru Apvienda v Koncurrence Padome (AKKA/LAA) , 6 April 2017. But for a quite different opinion see Bruce Lyons "The paradox of exclusion of exploitative abuse" CCP Working Paper 08-1 December 2007.

[51] These considerations would justify the view that competition law would better be concerned with exclusionary conduct by a dominant company preventing the development of competition, rather than concentrating on exploitation. As a matter of fact, this is the current view in the USA with respect to the application of the monopolization provision in Section 1 of the Sherman Act. A similar view has guided until very recently the application of Art. 102 by the European Commission: the Guidelines on the application of Article 102, issued after many years of discussions and consultations do not concern exploitative abuses.

[52] United Brands Company and United Brands Continental v Commission Case 27/76, 1978.

The relevance of the relation between price and economic value of the service in order to establish unfairness has been stressed by the Commission in two notable decisions of *rejection* of two complaints lodged against the Port of Helsingborg, alleging that the Port charged excessive port fees for services provided to ferry operators. In particular, the Commission argued that it was not sufficient to evaluate whether the profit margin of the Port were high, as claimed by the complainants, but it was necessary to evaluate that prices were unfair on the basis of the relation between price and economic value of the service supplied. From this point of view, the Commission considered that the economic value should be determined with regard to the particular circumstances of the case, taking into account also non-cost related factors such as the demand for the service, in particular the excellent logistic location of the port of Helsingborg, which enhanced the economic value of the service it provided[53].

In the recent preliminary judgement decision concerning excessive prices by the Latvian copyrights collecting society[54], the Court of Justice confirmed the need to examine the particular circumstances of the case. On the basis of Advocate General Wahl's opinion, the Court recognized that fees may be considered excessive if they are substantially and persistently higher with respect to some specific standards, which implies barriers to entry which preclude competition. In this case, the Latvian Competition Authority had argued that fees were at least three times higher than those practiced in neighboring countries, and in all European countries but one, once an adjustment was made for differences in cost and price levels. The Court in any case stated that the collecting society could argue that the fees were not unfair on the bases of the specific circumstances of the Latvian market.

These cases show that even when applied to excessive prices the concept of an unfair conduct of a dominant conduct has not an absolute character, but its relevance must be evaluated on the bases of the specific circumstances of the case: depending on whether the conduct may be justified by the specific circumstances under which it takes place.

An additional example may be provided by the decisional practice on SSO we have previously examined. In examining the Huawei Court decision, Schweitzer notes that the process should lead to a fee which should not be exploitative: in fact, "the legal acceptance of potential monopoly power

[53] Michel LAMALLE, Lenita LINDSTROM ROSSI, Antonio Carlos TEIXERA, "Two Impostant Decisions on Excessive Prices in the Ports Sector", *Competition Policy Newsletter*, N°3, 2004.

[54] AKKA/LAA, Case C 177/16, 16 September 2017. See Raphael DE CONINCK "Excessive Price: an overview of EU and national case law" e-Competition june 2018.

inherent in the standard-setting comes at the price of the promise to ensure…. its availability at a pro-competitive price" [55].

This conclusion is in line with the one reached by the Commission in the Motorola case, that FRAND royalties resulting from negotiations should not allow the SEP holder to "exploit the market power it enjoys following the inclusion of its patented technology in the standard". Therefore, the royalties should be set according to the SSO objectives of diffusion of the standard, and exploitation should be prevented[56]. In these cases, therefore, unfairness is related to the objectives set by the SSO to which the companies had agreed to participate.

One area in which the application of the concept of unfairness has been problematic is the pharmaceutical sector, where excessive prices have been the object of some cases at national level, both in Italy and in the UK, as well as at the EU level. The national cases concerned manifold increases (from 250 to 2500 per cent in Italy, up to 2700 per cent in the UK, depending on the product) of the prices of drugs which had been established on the market for many years, which were essential for the treatment of particular forms of cancer or other important diseases, with relatively small patient bases. The national Authorities effected a direct evaluation of the "unfairness" of excessive prices, arguing that they were unfair in themselves. However the cases in the two countries and at the Commission level developed differently.

In the Italian Aspen case the Italian Authority considered that the prices were "unfair" in themselves substantially based on a comparison to costs and on the absence of any specific motivation for such a large increase[57].

Following the Italian investigation, the EU Commission also opened a procedure against Aspen with respect to price increases in several European

[55] Heike SCHWEITZER, quoted above..

[56] EU Commission, *Motorola,* Case AT39985. Enforcement of GPRS standard essential patents, April 29, 2014.

[57]The ICA considered : (i) an inter-temporal comparison of prices, as previous prices already covered direct costs; (ii) the absence of any economic justifications for such an increase, as Aspen did not document any increase in production or distribution costs; (iii) the absence of any non-cost related factor leading to an improvement in quality or in the level of service to the National Health System or to patients; (iv) the nature of the drugs and characteristics of Aspen, as there was neither a patent coverage nor the need to recover R&D investments. The Italian Appellate Courts rejected the appeals against the ICA decision See Aspen Italy A480 "Price increase of English drugs" (English version) September 29, 2016. and Italian submission to the OECD Roundtable on *Excessive Prices, in Pharmaceuticals*, November 2018, See Luca ARNAUDO-Giovanni PITRUZZELLA *"La cura della concorrenza. L'industria afrmaceutica tra diritti e profitti"* Luiss University Press 2019.

countries, which however was closed with commitments to reduce its prices by 73 per cent[58].

In the UK, the Competition and Market Authority (CMA) opened proceedings against pharmaceutical companies Pfizer and Flynn, in relation to increase in prices of an anti-epilepsy drug. The CMA set a benchmark price based on the return on sales previous to the increases and, also in light of the characteristics of the product market, concluded that there were no risks or RD efforts justifying the increase[59]. However, the Competition Appeal Tribunal criticized the CMA for the way excessive prices were calculated. The Court of Appeal was not convinced by the argument that high margins in themselves implied that prices were unfair, and referred the decision to the CMA, in order to further evaluate the claim of the defendants that the prices of the concerned drugs were in line with those practiced abroad[60].

In conclusion, these cases further show that fairness in Art. 102 must in any case be related to a conduct which does not have a justification from the point of view of competition on the merits.

7. Conclusions

Fairness has played and plays an important role in the formulation and application of European competition law. A renewed interest on the concept of fairness in the application of Antitrust has emerged in recent years, also as a consequence of the reconsideration of the scheme of analysis based on consumer welfare which has driven the application of antitrust law during the last decades, However, there seems to be little consensus about the content of the concept of fairness in antitrust analysis.

In this note we have provided an interpretation of the role of fairness in the working of a competitive market which seems to us to conform to the European decisional practice on Art. 102. Such an interpretation is consistent, and actually closely interlinked, with the concept of competition on the merits, which is familiar to European Courts. It is also compatible with the legal constructions characterizing EU jurisprudence, such as

[58] EU Commission, Case AT. 40394, Aspen, Press Release 10 February 2021.

[59]Competition Market Authority (CMA) Phenytoin sodium capsules,, Flynn-Pfizer 7 december 2016. See James KILLICK; Assimakis KOMNINOS; Aqeel KADRI, "CMA v Flynn Pharma and Pfizer: Intel's influence evident as Court of Appeal clarifies "excessive pricing" test" *Journal od European Competition Law and Practice,* August 2020

[60] Judgment of the Competition Appeal Tribunal, 18 June 2018; judgment 0f the Court of Appeal, 10 March 2020.

"special responsibility" and "essential facility". And it seems also at the bases of the application of art. 102 through the different issues posed by the development of data based digital economy and in principles set by the European Courts for the application of art. 102 a) to excessive prices.