FROM JUST PRICE TO RESILIENT MARKETS – LAW AND ECONOMICS OF UNFAIR, EXCESSIVE PRICING AND DIGITAL MARKET ABUSES IN EU COMPETITION LAW AND POLICY

BEHRANG KIANZAD*

Historically, societies have imposed limits on excessive pricing and abuse of market power, a legal tradition informing Article 102 TFEU prohibition against unfair, excessive pricing.

In today's digital economy, traditional ex post enforcement, such as cases against Google, Meta, Amazon, or Apple, often struggles to keep pace with rapid market developments and leads to lengthy investigations. This lag has spurred calls for ex ante regulatory frameworks, with fairness and equitable exchange re-emerging as guiding principles. Recent EU legislative efforts, including the Digital Markets Act (DMA), explicitly emphasise fairness, aiming for contestable markets and equitable value distribution.

The COVID-19 pandemic reignited debates over unfair pricing, revealing tensions between neoclassical economic models and fairness-oriented enforcement grounded in real-world conditions. These developments mark a broader shift: the reintroduction and evolution of fairness within regulatory instruments such as the DMA, the AI Act, the Data Act, and so on.

This paper argues that the reintegration of fairness offers a necessary corrective to outdated legal-economic paradigms exerting an undue influence over Union law, calling for a rethinking of competition law and policy to meet the challenges of crisis-prone digital and antitrust enforcement, especially in light of legal-historic and behavioural economic perspectives on unfair pricing.

1 INTRODUCTION: THE RE-EMERGENCE OF FAIRNESS AS A COMPETITION AND REGULATORY NORM IN EUROPEAN LAW AND POLICY

Recent years have witnessed the re-emergence of the highly contested concept of 'fairness' in European competition law, economics, and policy, not least regarding digital markets, Big Tech, and AI.[1] This development is seen by some as part of a notable shift from the neoclassical focus on 'efficiency' to a broader competition law and economics policy

* LLM / PhD; Senior Researcher, Institute of Global Political Studies, Malmö University. This research has been supported by Swedish Competition Authority between through grant between 2025-2028 for the project 'Towards A Working Definition of Fairness in Digital & AI Markets'.

[1] See e.g. Commissioner Margarethe Vesterager keynote speech at the European Competition day 2022 in Prague, 'Fairness and Competition Policy', available at: <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_6067> accessed 1 May 2026: 'So protecting competition is about efficiency, but not only. Fundamentally, it is a question of fairness'.

including goals such as sustainability[2] and fairness.[3]

The intersection of fairness and competition law has noted a revival[4] with added focus on digital markets and tech giants in the EU and hefty fines against tech giants such as Google, Meta, and Apple on the heels of DMA and EU Competition Law. Also, other sectors such as pharma have seen an unprecedented enforcement appetite towards 'unfair' and excessive pharmaceutical pricing.[5]

As we all seemingly become Keynesian[6] and even Kantian[7] during crises such as the COVID-19 pandemic, including antagonists such as Milton Friedman,[8] such crisis might be used as a proxy towards insights[9] regarding whether the Pareto / Kaldor-Hicks efficiency criterion, the cherished Wealth maximisation standard, and the strict division between equity and efficiency in Antitrust law and policy stand closer scrutiny.

As opposed to many claims in the doctrine on law and economics of competition law, there exists no such thing as 'mainstream' or 'sound' economics, against which all other approaches are to be measured. Regarding the goals of competition law, as noted by Stucke regarding the supposed 'consensus' in Antitrust law and economics:

> Despite the push for a single economic antitrust goal, there is no consensus in the U.S. or worldwide on any well-defined goal. Four oft-cited economic goals (ensuring an effective competitive process, promoting consumer welfare, maximizing efficiency, and ensuring economic freedom) have failed to unify antitrust analysis. No consensus exists on what the four goals mean or how they are achieved.[10]

The recent decades of economic research on both macro and micro level by way of behavioural, experimental, Neuro-economics, and empirical industrial economics have thoroughly challenged the normative foundations upon which the efficiency-oriented

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[2] Julian Nowag, 'OECD - Sustainability and Competition' (OECD Competition Committee Discussion Paper 2020) <http://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf> accessed 1 May 2026.

[3] Margarethe Vesterager, 'Fairness and Competition - Speech at GCLC Annual Conference' (Brussels, 25 January 2018); Johannes Laitenberger, 'EU Competition Law in Innovation and Digital Markets: Fairness and the Consumer Welfare Perspective' (Brussels, 10 October 2017).

[4] Behrang Kianzad, 'Fairness, Digital Markets and Competition Law – Reconciling Fairness Norms in Digital Markets Act, Data Act and AI Act with Competition Law' (2025) 4 Journal of Law, Market & Innovation 133.

[5] Behrang Kianzad, 'Towards Fair Pricing of Medicines? Lessons from European Commission's Aspen Decision' (2022) 6(1) European Health & Pharmaceutical Law Review 3.

[6] Jorge Padilla, 'A Keynesian Antitrust Response to the COVID-19 Crisis' (2020) 8 Journal of Antitrust Enforcement 302.

[7] Joe Humphreys, 'Are We All Kantians Now? The Covid-19 Effect on Moral Philosophy' (*The Irish Times*, 23 April 2020) <https://www.irishtimes.com/culture/are-we-all-kantians-now-the-covid-19-effect-on-moral-philosophy-1.4229595> accessed 1 May 2026.

[8] Milton Friedman, 'We are All Keynesians now' (*Time Magazine*, 31 December 1965) <http://content.time.com/time/magazine/article/0,9171,842353,00.html> accessed 19 November 2025.

[9] INET Commission on Global Economic Transformation, 'The Pandemic and the Economic Crisis: A Global Agenda for Urgent Action' (*Institute for New Economic Thinking*, 11 March 2021) <https://www.ineteconomics.org/research/research-papers/the-pandemic-and-the-economic-crisis-a-global-agenda-for-urgent-action> accessed 19 November 2025.

[10] Maurice E Stucke, 'OECD Hearing on Competition and Behavioural Economics – The Implications of Behavioural Antitrust' DAF/COMP/WD(2012)12.

approach traditionally has relied upon.[11]

People are not rational, care less about utility than punishing perceived 'unfair behaviours', and neither firms nor people display the cherished utility and wealth maximisation tendency over other concerns such as equity, sustainability, and fairness in pricing. This matter becomes yet more complex concerning price gouging and excessive pricing during a crisis such as the COVID-19 pandemic.[12] Nevertheless, such dynamics are not caught by the strict neoclassical and marginalist analysis, which is partly due to a circular view of what constitutes price, value, and profit.

For decades, the prevailing competition-law paradigm, especially in U.S. antitrust but also with marked influence in EU such as the now all but abandoned 'More Economic Approach',[13] has been dominated by neoclassical economics and a single-minded focus on efficiency and consumer welfare.[14] Post-financial crisis of 2008, the Chicago School approach to Antitrust law and policy, and neoclassical economics as a whole, have experienced a severe reckoning which has paved the way for other approaches, which we are witnessing in the case of manifest focus on issues such as fairness pertaining to digital markets and AI.

The neoclassical forefathers such as Walras, Jevons, and Menger, and later Arrow and Debreu,[15] all pre-supposed and developed different views on competition as part of the general theory on how markets function, placing great emphasis on this neutral arbiter. The distinction between price, value, and profit, although made already some 150 years ago, has simply been forlorn in the ever more mathematical approach to economics, where exchange value has come to be the end-all definition of value, although the gist of human writings on value instead contemplates 'intrinsic value' and how to define this value more narrowly.

Fairness in pricing is such an 'intrinsic value', a value in itself, to use Kantian parlance, which cannot be substituted by any increase in utility. This is underscored by the manifest human preferences for fairness in pricing which people hold higher than any increase in utility, as evidenced by, for example, Ultimatum Game experiments.[16] It is argued that the classic tension between neoclassical economics, with its singular focus on efficiency and 'total welfare', thus stands in bright contrast with the European discipline´s tradition on administration of fairness and justice.[17]

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[11] For a collected volume on some recent research on this matter, see: Alexander W Cappelen and Bertil Tungodden (eds), *The Economics of Fairness* (Edward Elgar Publishing 2019).

[12] For an in-depth study, see: Behrang Kianzad, 'Excessive Pricing during the COVID-19 Crisis in the EU: An Empirical Inquiry' (2021) 1 Concurrences 250 <https://awards.concurrences.com/IMG/pdf/09.concurrences_1-2021_legal_practices_kianzad.pdf> accessed 1 May 2026.

[13] Wouter PJ Wils, 'The Judgment of the EU General Court in Intel and the So-Called "more Economic Approach" to Abuse of Dominance' (2014) 37 World Competition 405; Robert Pitofsky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U. S. Antitrust* (Oxford University Press 2008).

[14] Joseph Stiglitz, 'Towards a Broader View of Competition Policy' in Tembinkosi Bonakele, Eleanor M Fox, and Liberty Mncube (eds), *Competition Policy for the New Era: Insights from the BRICS Countries* (Oxford University Press 2017).

[15] Kenneth Arrow and Gerard Debreu, 'Existence of equilibrium for a competitive economy' (1954) 22 Econometrica 265.

[16] Martin A Nowak, Karen M Page, and Karl Sigmund, 'Fairness Versus Reason in the Ultimatum Game' (2000) 289(5485) Science 1773.

[17] Michael Nance and Jeppe von Platz, 'From Justice to Fairness Does Kant's Doctrine of Right Imply a Theory of Distributive Justice' in Kate A Moran (ed), *Kant on Freedom and Spontaneity* (Cambridge University

This tension in law and economics, highly observable in the divergent approaches to monopolist pricing,[18] is only to be understood through a soul-searching of the moral-philosophical foundation of the European Legal Corpus as opposed to the US Antitrust approach, having its own distinct historical roots. The tension further finds its roots in what has been dubbed the 'adversarial institutions' of firms and markets, where although greed and profiteering are frowned upon on an individual level, firms have profit-seeking as their main objective, which is why they should be granted a 'free pass' from the strict moralistic view on profit-seeking, although within limits set by the Sovereign.[19]

In the words of Friedrich Hayek: 'Where the source of a monopoly position is a unique skill, it would be absurd to punish the possessor for doing better than anyone else by insisting that he should do as well as he can'.[20]

This position is a far cry from the substantive law of European competition law as well as settled case law of CJEU,[21] banning abuse of dominance and requiring that dominant firms, at least in some respects, behave 'as if' they were not dominant. There is also a normative aspect of what harm competition law should act against and along what rationales. However, as noted by Ioannis Lianos, 'it is possible to build a broader narrative for intervention, on the basis of some wider conception of "consumer welfare" or "consumer harm"'.[22] The undue wealth transfer from consumers to suppliers enabled by sheer market power, dependency, or defunct competition is and ought to be the 'original sin' in Antitrust.[23]

The recent legal approaches at the EU level targeting digital and artificial intelligence (AI) sectors all have one common denominator, namely the manifest focus on fairness in transactions and equality in exchange, a clear step away from efficiency-oriented discourses. Beside the numerous new legal acts and proposals, such as the Digital Markets Act, the Digital Services Act, the Data Act, the AI Act, and the Digital Fairness Act, which have seen the light of the day, the appetite among enforcers to pursue cases alongside fair exchange stratum has also increased considerably.

In July 2025, a senior European Commission (EC) official confirmed multiple ongoing investigations into algorithmic pricing. In September 2025, the UK Competition and Markets Authority's (CMA's) chief executive described the practice as an 'area of focus and concern', noting the agency is 'watching and learning' from US cases and exploring links with generative AI.[24]

These crises of paradigms, one being the crisis of neoclassical economics post-financial

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Press 2018).

[18] Michal S. Gal, 'Monopoly Pricing as an Antitrust Offense in the U.S. and the EC: Two Systems of Belief about Monopoly?' (2024) 49(1-2) The Antitrust Bulletin 343.

[19] Joseph Heath, 'The Moral Status of Profit' in Mark D White (ed), *The Oxford Handbook of Ethics and Economics* (Oxford University Press, 2019).

[20] Friedrich Hayek, *Law, Legislation and Liberty, vol. 3* (Chicago 1979) 72, cited in Antonio Robles Martín-Laborda, 'Exploitative Prices in European Competition Law' in Fabiana Di Porto and Rupprecht Podszun (eds), *Abusive Practices in Competition Law* (ASCOLA Competition Law Series 2018).

[21] Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities* EU:C:1974:18 para 25.

[22] Ioannis Lianos, 'Competition Law as a Form of Social Regulation' (2020) 65(1) The Antitrust Bulletin 49.

[23] Robert H Lande, 'Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged' (1982) 34(1) Hastings Law Journal 65.

[24] Michael Masling et al, 'Algorithmic Pricing Emerges as Enforcement Priority for EU & UK Antitrust Regulators' (*Morgan Lewis*, 14 October 2025) <https://www.morganlewis.com/pubs/2025/10/algorithmic-pricing-emerges-as-enforcement-priority-for-eu-and-uk-antitrust-regulators> accessed 1 May 2026.

crisis of 2008/9, the other being the experiences during the COVID-19 crisis, and finally, the emerging challenges within the digital realm, compels us to rethink law and economics of antitrust law and economics and move towards a more holistic paradigm. The next section investigates the neoclassical crisis of faith more in-depth.

Following this introduction, framing the problem of unfair pricing and exploitative abuses, as well as the crisis of neoclassical economics paired with COVID-19 crisis, the second section investigates the said crisis in light of Union competition law and policy and legal-historic perspectives on the role of the Sovereign intervention in markets and pricing. The third section depicts some legal-economic approaches to the matter of fairness and fairness in pricing. The fourth section recasts an empirical inquiry into European approaches to unfair pricing during COVID-19 crisis as a proxy. The fifth section connects the ex-ante regulation of fairness, with ex-post approaches to unfair pricing within Union competition law. The sixth section concludes.

2 NEOCLASSICAL ECONOMICS AND THE QUESTION OF INTERVENTION BY THE SOVEREIGN

Neoclassical-welfarist Economic Analysis of Law,[25] which has come to dominate not only much of antitrust debate but also law and policy in the European Union[26] during the past four decades, is in turn characterised by five core assumptions, those being:

> 1) the assumption of scarcity of resources,
> 2) the belief in Homo Oeconomicus, presupposing that all economic agents are self-interested, act based on perfect and complete information, and that the human good consists in nothing more than economic welfare,
> 3) the idea of Utilitarianism, meaning that human behaviour can be reduced to rational calculation and maximisation of welfare,
> 4) that the value of any given thing originates from the value individuals consider it to have,
> 5) the availability and readiness of multiple possibilities guiding individuals in their search for the optimal choice.

Whereas neoclassical economics finds its roots in the Utilitarian and Welfarist perspectives, focusing on economic efficiency and total welfare, the Keynesian, neo-Keynesian,[27] Kantian,[28] or the Progressive (dubbed by its neoclassical antagonists with the derogatory, 'Hipster Antitrust' School)[29] schools allow more room for other public policy rationales beyond economic efficiency.

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[25] Richard A Posner, *Economic Analysis of Law* (9th edn, Wolters Kluwer Law & Business 2014).
[26] Dzmitry Bartalevich, 'The Influence of the Chicago School on the Commission's Guidelines, Notices and Block Exemption Regulations in EU Competition Policy: The Influence of the Chicago School' (2016) 54(2) Journal of Common Market Studies 267.
[27] Padilla (n 6).
[28] Behrang Kianzad, 'A Neo-Kantian Approach to Competition Law? – The Re-Emergence of Fairness in Antitrust Law & Policy' in Ramsi Woodcock (ed), *Inframarginalism and Internet* (Cambridge University Press 2025).
[29] Joshua D Wright et al, 'Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust' (*SSRN Electronic Journal*, 19 September 2018) <https://doi.org/10.2139/ssrn.3249524> accessed 1 May 2026.

Price controls and direct government intervention in the market to alter prices have always been hotly debated issues, depending on what economic theory and legal rationales one adheres to. Such rules can be found in the Old Testament prohibiting interest on loans to fellow Israelites;[30] war-time government price controls (such as the creation of the US Office of Price Administration);[31] and more recent regulations of prices such as petrol, wages, or rents.[32]

Already back in 1780 BC, the Code of Hammurabi regulated prices and economic transactions.[33] Later during Roman times, the Diocletian's Edict on Maximum Prices (Edictum De Pretiis Rerum Venalium) sought to set maximum prices to combat inflation and excessive prices, built on the concept of 'laesio enormis', i.e. great harm, or excessive harm.[34] There was further an equivalent to be found in the law of the Catholic Church, the Canon Law, where '[…] the sale of anything for more than its just price was considered turpe lucrum, or ill-gotten gain, and prohibited'.[35] This in turn built the basis of the Scholastic Just Price theory.[36]

It is important to note that for Aristotle, economic value contained both use and exchange value. It might be meritorious to quote him in full here, not least due to his enduring influence on what has been dubbed 'equitable exchange', a concept that just recently was applied to Digital and AI Markets, where the Digital Markets Act defines fairness as 'For the purpose of this Regulation, unfairness should relate to an imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage'.[37]

Aristotle on his part defined equitable exchange as meaning:

> These names, both loss and gain, have come from voluntary exchange; for to have more than one's own is called gaining, and to have less than one's original share is called losing, e.g., in buying and selling and in all other matters in which the law has left people free to make their own terms; but when they get neither more nor less but just what belongs to themselves, they say that they have their own and that they neither lose nor gain. **Therefore the just is intermediate between a sort of gain and a sort of loss,** viz. those which are involuntary; it consists in having an equal amount before and after the transaction […]. If, then, first there is proportionate

[30] Aaron Levine, 'Price Controls in Jewish Law' in Aaron Levine, *Economic Morality and Jewish Law* (Oxford University Press 2012).
[31] Office of the Price Administration <http://www.archives.gov/research/guide-fed-records/groups/188.html#188.1> accessed 1 May 2026.
[32] Rockoff, 'Price Controls' in *The Concise Encyclopaedia of Economics, Library of Economics and Liberty* <http://www.econlib.org/library/Enc/PriceControls.html> accessed 1 May 2026.
[33] KV Nagarajan, 'The Code of Hammurabi: An Economic Interpretation' (2011) 2(8) International Journal of Business and Social Science 108.
[34] Diocletian's edict on maximum prices, in AD 285 <http://www.forumancientcoins.com/NumisWiki/view.asp?key=Edict+of+Diocletian+Edict+on+Prices> accessed 1 May 2026; Mark R Reiff, *Exploitation and Economic Justice in the Liberal Capitalist State* (Oxford University Press 2013).
[35] Reiff (n 34).
[36] Daryl Koehn and Barry Wilbratte, 'A Defense of a Thomistic Concept of the Just Price' (2012) 22(3) Business Ethics Quarterly 501.
[37] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1, recital 33.

> equality of goods, and then reciprocal action takes place, the result we mention will be effected. If not, the bargain is not equal, and does not hold; for there is nothing to prevent the work of the one being better than that of the other; they must therefore be equated […]. This is why all things that are exchanged must be somehow comparable. It is for this end that money has been introduced, and it becomes in a sense an intermediate; for it measures all things, and therefore the excess and the defect – how many shoes are equal to a house or to a given amount of food.[38]

The concept of prohibition of excessive / unfair prices and state-imposed price controls has indeed deep historical roots, from the time of Hammurabi, by way of Aristotle, through Jewish Halacha,[39] Christian[40] and Islamic[41] writings, and onwards to the Just Price framework developed by Albertus Magnus and his pupil, Thomas Aquinas, as well as other Scholastics.[42]

More recently, the ban on exacting excessive prices by Charles II in 1674, the so-called Maximum Laws during the reign of Robespierre, as well as laws prohibiting excessive prices on goods during times of war can be mentioned as historical examples,[43].[44] This connects with the scathing critique by Mestmäcker of Posnerian approaches,[45] who argues that some elements in the neoclassical legal-economic tradition do not have the necessary legal-historic perspective to understand how and why legal concepts are shaped and transformed and what 'values' are uncovered by a structured doctrinal analysis.

Fundamentally speaking, the question of controlling prices concerns the reach of state authority, an issue fiercely debated within liberal economic theory. Economists such as Adam Smith regard most forms of government intervention as 'superfluous, useless and harmful'.[46] Instead, the built-in forces in the market such as demand, surplus, and competition were supposed to form the 'invisible hand' that would serve to self-regulate prices when high profit margins in turn would invite competition and innovation.

With Smith, then, 'just price' theory becomes 'price' theory, moving away from the normative domain to one that is purely descriptive.[47] In view of Smith and also John Stuart Mill, state imposed price regulation was a futile and counter-productive exercise, to the detriment of 'industry and ingenuity'.[48] To Nozick, who defined state interventions as morally wrong, this proposes a libertarian night-watchmen state. To Rawls, who emphasises

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[38] Aristotle, *Nicomachean Ethics*, trans. W D Ross (Batoche Books 1999) Book V, 79. Emphasis added by the author.
[39] Dr Itamar Warhaftig, 'Consumer Protection: Price and Wage Levels' in Ezra Rosenfeld and Rav Binyamin Tabory (eds), *Crossroads: Halacha & the Modern World* (Urim Pubns 1999); Ephraim Kleinman, '"Just Price" in Talmudic Literature' (1987) 19(1) History of Political Economy 23.
[40] Biblical writings include Leviticus 19:9, Ezekiel 18:13, Deuteronomy 23:19, Leviticus 25:37 and Proverbs 28:8, to name a few.
[41] Muhammad Bashar, 'Price Control in an Islamic Economy' (1997) 9(1) Journal of King Abdulaziz University-Islamic Economics 29.
[42] John W Baldwin, 'The Medieval Theories of the Just Price – Romanists, Canonists, and Theologians in the Twelfth and Thirteenth Centuries' (1959) 49(4) Transactions of the American Philosophical Society 1.
[43] Barry E Hawk, 'Antitrust in History' (2018) 63(3) The Antitrust Bulletin 275.
[44] Edgar Watkins, 'The Law and the Profits' (1922) 32(1) The Yale Law Journal 29.
[45] Ernst-Joachim Mestmäcker, *A Legal Theory Without Law* (Mohr-Siebeck 2007).
[46] von Mieses 1923; <http://mises.org/etexts/mises/critique/section5.asp> accessed 1 May 2026.
[47] Reiff (n 34).
[48] Watkins (n 44).

social justice, state intervention is instead deemed necessary, the same as with Dworkin, causing the latter to criticise the Posnerian position of elevating 'wealth maximisation' as the end-result and an objective value to be pursued.[49]

Adam Smith worked partly in line with the virtue ethics of Plato and Aristotle but showed highly 'Kantian' tendencies in connecting the reason-experience-induction dots which were later completed by Kant. As Smith explains:

> It is by reason that we discover those general rules of justice by which we ought to regulate our actions: and it is by the same faculty that we form those more vague and indeterminate ideas of what is prudent, of what is decent, of what is generous or noble, which we carry constantly about with us, and according to which we endeavour, as well as we can, to model the tenor of our conduct. The general maxims of morality are formed, like all other general maxims, from experience and induction.[50]

Thus, the grandfather of political economy seems to realise the inherent importance of fairness in relation to efficiency and its universal implication.[51] Nevertheless, the notion of the Smithian 'invisible hand' as the means to engage market regulation has invited two diverging approaches on intervention. One affirms the self-correcting capacity of excessive prices, the other maintains the necessary and beneficial aspects of intervention. The debate between non-interventionist and interventionist approaches to competition law unfolds in the tension between the two.[52]

The non-interventionist school dismisses the subjection of excessive prices to antitrust intervention. Since new actors will challenge dominant ones while entering the market, excessive prices are not supposed to be upholdable on a long-term basis. Although intervention would lower prices and hence increase consumer welfare in the short run, the proponents of the non-interventionist school argue that new competitors would be less likely to enter the market, incentives and risk-taking would decrease, and dominant actors would be prevented from maximising their efficiency in order to obtain a higher profit margin. The non-interventionist school further objects to the capacity of a price-cost comparison to detect excessive prices, since audited financial data is not developed for the purpose of competition law and does not calculate investment in research and development, inflation, return on risk etc., this is not deemed viable.

Nor are comparisons to a competitive profit benchmark deemed 'economically sound', since this would require ex ante defining of what a competitive profit would be. Also, the experience and ability of authorities and courts to regulate prices and monitor markets are questioned, a problem escalated by the need for continued interventions and supervision of markets.[53] In sum, the non-interventionist school highlights the difficulties in assessing

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[49] Ronald Dworkin, 'Is Wealth a Value?' (1980) 9(2) Journal of Legal Studies 191.
[50] Adam Smith, 'Part VII. Of Systems of Moral Philosophy' in Adam Smith, *The theory of moral sentiments; or, an essay towards an analysis of the principles by which men naturally judge concerning the conduct and character, first of their neighbors, and afterwards of themselves, to which is added a dissertation on the origin of languages* (new ed.) (Henry G Bohn 1861).
[51] Manfred J Holler and Martin Leroch, 'Efficiency and Justice Revisited' (2010) 26 European Journal of Political Economy 311.
[52] Liyang Hou, 'Excessive Prices Within EU Competition Law' (2011) 7(1) European Competition Journal 48.
[53] Massimo Motta and Alexandre de Streel, 'Excessive Pricing in Competition Law: Never Say Never?' in

excessive prices and views enforcement as only one possible solution to the problem, while debating how lowered entry barriers can stimulate competition.

The interventionist school, which has been more triumphant in recent years — as seen in the string of excessive pricing cases brought and fines imposed[54] — takes the opposite view, asserting that excessive, unfair prices must be included in the jurisdiction of competition law due to the manifest and inherent harm they pose to consumer welfare through the undue rent transfer from consumers to the monopolist. They point both to the rather deep roots of the ban against 'unfair pricing' in legal history and to the concomitant reasoning whereby a monopolist can extract undue profits for a prolonged period of time, be it due to inelastic demand, barriers to entry, or other reasons leading to a defective competitive process.

On the law and economics of fairness as a concept, and in regard to the 'fairness' versus 'efficiency' debate, one might observe that notions of fairness have had much better empirical and experimental economic successes[55] than oft-invoked theoretical notions of self-interest[56] and rationality.[57] On the normative side, as aptly summarised by Klaus Mathis: 'In people's minds, justice – however it is defined – has an immanent value, which is very difficult to weigh up against an increase in economic efficiency'.[58] Regarding the division between fairness and efficiency, prevention of undue wealth transfer sits at the core of competition policy, as noted by Gerard:

> At the highest level, competition policy may indeed be theorised as an institution aimed at reconciling individual and collective rationality, i.e., each entrepreneur's efforts to maximise profits, on the one hand, and the welfare of society at large, on the other hand. To that extent, fair competition may entail that there are boundaries to profit maximisation strategies beyond which these are considered socially unacceptable by reference to certain standards of justice as articulated in anti-trust principles and applied by means of an array of legal tests and enforcement rules.[59]

Nevertheless, in the words of Frédéric Jenny '[…] the complementary concept of "fairness" is again a concept alien to economic analysis'[60] but this statement is only true given a narrow definition of 'economics'. One could also argue that economics might indeed

Swedish Competition Authority (ed), *The Pros and Cons of High Prices* (Kalmar: Swedish Competition Authority 2007) 15 ff.

[54] Behrang Kianzad, 'The Giant Awakens: Law and Economics of Excessive Pricing During the COVID-19 Crisis' in Klaus Mathis and Avishalom Tor (eds), *Law and Economics of the Coronavirus Crisis, vol 13* (Springer International Publishing 2022).

[55] Joseph Henrich et al, 'In Search of Homo Economicus: Behavioral Experiments in 15 Small-Scale Societies' (2001) 91 American Economic Review 73.

[56] Daniel Kahneman, Jack L Knetsch, and Richard H Thaler, 'Fairness and the Assumptions of Economics' (1986) 59(4) The Journal of Business 285.

[57] Daniel Kahneman, Jack L Knetsch and Richard H Thaler, 'Fairness as a Constraint on Profit Seeking: Entitlements in the Market' (1986) 76(4) The American Economic Review 728.

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

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

[60] Frédéric Jenny, 'Abuse of Dominance by Firms Charging Excessive or Unfair Prices: An Assessment' in Yannis Katsoulacos and Frédéric Jenny (eds), *Excessive Pricing and Competition Law Enforcement* (Springer International Publishing 2018) 5–70.

contain conceptual basis for fairness,[61] as the law for its part has indeed shown itself to be able to accommodate economic reasoning. The sheer number of economic papers on fairness in pricing and transactions, as well as Nobel prizes awarded to economists in one way or another addressing fairness-related issues (Kahneman, Stiglitz, Sen, et alia), speaks for itself.

Offering a contrary view to that of Jenny, in the words of 2001 Nobel Laureate in Economics Joseph Stiglitz:

> This fallacious idea is that you can separate equity from efficiency. It's sometimes referred to as the Second Welfare Theorem. We now know that those two issues can't be neatly separated in that way.[62]

The aforementioned evidence from behavioural and neuro-economics invariably demonstrate innate human morality and fairness preferences in transactions, and not a sense of 'utility maximisation' or proneness to 'efficiency'.[63] As also noted by Stucke regarding the supposed 'consensus' in Antitrust law and economics:

> Despite the push for a single economic antitrust goal, there is no consensus in the U.S. or worldwide on any well-defined goal. Four oft-cited economic goals (ensuring an effective competitive process, promoting consumer welfare, maximizing efficiency, and ensuring economic freedom) have failed to unify antitrust analysis. No consensus exists on what the four goals mean or how they are achieved.[64]

Returning to the matter of unfair pricing, and the intervention by the Sovereign, having crucial importance for the fairness-efficiency discussion, as submitted by Motta and de Streel: 'Due to the general formulation of Article 82, every dominant firm, however its market power has been acquired or maintained […] has the special responsibility not to set excessive prices'.[65]

Gal also comments along the same lines, connecting the European competition law 'as if' approach to Fairness and the influence of the Ordo-liberal School, noting:

> Thus, the Ordo-liberals […] stressed the goal of fairness, which was understood as protecting the individual's economic freedom of action as a value in itself against any impairment of market power. It led some Ordo-liberals to suggest that dominant firms had to act 'as if' they were operating in a competitive market.[66]

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[61] Kahneman, Knetsch, and Thaler, 'Fairness as a Constraint on Profit Seeking' (n 57).
[62] Joseph Stiglitz, 'Competition Policy, the Need for a More Nuanced View' (Interview) (2019) 2 Concurrences 16-17.
[63] Michael Koenigs et al, 'Damage to the Prefrontal Cortex Increases Utilitarian Moral Judgements' (2007) 446(7138) Nature 908; Gregory S Berns et al, 'The Price of Your Soul: Neural Evidence for the Non-Utilitarian Representation of Sacred Values' (2012) 367(1589) Philosophical Transactions: Biological Sciences 754; Alexander W Cappelen et al, 'Equity Theory and Fair Inequality: A Neuroeconomic Study' (2014) 111(43) Proceedings of the National Academy of Sciences 15368; Joshua D Greene et al, 'The Neural Bases of Cognitive Conflict and Control in Moral Judgment' (2004) 44(2) Neuron 389.
[64] Stucke (n 10).
[65] Harry First, 'Excessive Drug Pricing as an Antitrust Violation' (2019) 82(2) Antitrust Law Journal 59.
[66] Michal S Gal, 'Abuse of Dominance – Exploitative Abuses' in Ioannis Lianos and Damien Geradin (eds),

Already here we note the tension between Ordoliberal approaches to competition law — including notions of 'special responsibility' and 'fairness' to some extent — versus the neoclassical, welfarist ,and Chicagoan economic schools which not only do not always take exception to monopolies, but are wary of including any other notion in the analysis beyond 'efficiency'.

This normative position, relying on a Chicagoan Economic Analysis of Law in the Posner and Shavell tradition, scored its most important legal victory in a US Supreme Court case which was more centred around essential facilities and duty to deal than excessive pricing. In a majority judgement written by the late Antonin Scalia it was claimed that:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free market system. The opportunity to charge monopoly price – at least for a short period – is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth.[67]

The above has been abundantly cited in the European literature on excessive pricing, but also in some court proceedings and in the Advocate General Wahl's Opinion in the excessive pricing case *AKKA / LAA* before the CJEU in 2017.[68] Many European commentators have alluded to this US Supreme Court ruling and the expressed rhetoric, i.e. while they acknowledge the existence of monopoly pricing or excessive pricing — at least in theory and by way of valid and binding EU competition law — they do not recognise the practice to be an evil in and of itself to be enforced against by competition authorities, at least not when it relates to ensuring 'fairness in pricing'.

The equation of consumer welfare with total welfare,[69] and the ignoring of undue wealth transfer[70] and manifest consumer harm as being prima facie anti-competitive practices, are the necessary scaffolding holding the *Trinko* claim and interconnected assumptions together.

It should firstly be observed that *Trinko* did not concern the legality of monopoly profits as a purely exploitative case targeted at consumers, per se. As noted by Harry First[71] as well as Eleanor M Fox, the case treated the question of essential facilities and 'duty to deal' doctrine. Further, as demonstrated by Kirkwood and Lande, the original legislative intent behind the Sherman Act and American Antitrust tradition did not concern 'efficiency', but rather 'consumer welfare', defined in the true meaning of the term and not its Borkian version.[72] Justice Scalia further cited no precedent in support of his view on the virtues of monopolistic profits. *Trinko* is an oddity.

The scathing criticism mounted against *Trinko* by noteworthy US Antitrust scholars seems to have been largely ignored by those who routinely invoke *Trinko* and the wording

Handbook on European Competition Law (Edward Elgar Publishing 2013).

67 Verizon Communications, Inc v Law Offices of Curtis v Trinko, LLP 157 L Ed 2d 823, 836 (2004).

68 Opinion of Advocate General Wahl in Case C-177/16 EU:C:2017:286 para 117.

69 KJ Cseres, 'The Controversies of the Consumer Welfare Standard' (2007) 3(2) The Competition Law Review 121.

70 Lande (n 23).

71 First (n 65).

72 John B Kirkwood and Robert H Lande, 'The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency' (2008) 84(1) Notre Dame Law Review 191.

by the late Antonin Scalia as passages from some holy scripture in the many works on excessive pricing in European competition law.

It is also relevant to note that the Amicus Brief on the part of the respondent Verizon was written by none other than Robert Bork,[73] one of the chief engineers of the Chicagoan-turn in US Antitrust, whose nomination to the Supreme Court notably was not confirmed by the US Senate.

Finally, as noted by Giorgio Monti on the excessive quoting of the Scalia opinion in the literature on unfair, excessive pricing but also in European court proceedings:

> Since the express prohibition of excessive pricing in Article 102 suggests a diametrically opposite attitude to the one expressed here, it is hard to see why one should see *Trinko* as a helpful discussion for the purposes of EU Law, but it reveals the trend to assimilate much of the thinking (ideology?) that underpins Scalia's thinking into EU antitrust even when, as here, it runs against the statutory text.[74]

One would hope that future literature on European discourse on excessive and unfair pricing will avoid the conceptual confusion of invoking *Trinko*, as it does not advance our knowledge and is merely recasting a certain approach to antitrust economics which is doctrinally — to borrow expression from aforementioned Bork — is at war with itself due to manifest misconceptions.

The next section depicts various legal-economic perspectives on the matter of fairness and fairness in pricing.

3 UNFAIR, EXCESSIVE PRICING FROM A LEGAL-ECONOMIC PERSPECTIVE

Narrowing down the discussion of fairness in economics to the case at hand, namely 'fairness in pricing' for the purpose of discussion of Article 102a TFEU prohibition against unfair pricing, it should firstly be observed that there exists a substantial body of economic research on the matter of fairness notions related to pricing.

The modern economic research on the matter has mainly taken the form of behavioural and experimental research, with Kahneman et al. laying some of .the groundwork for this field of research in the mid 1980's. In behavioural science, fairness oftentimes denotes the social preference for equitable outcomes, largely alongside the views of fairness analysed in the previous section. Such preference for equitable outcomes can also manifest itself as 'inequity aversion', denoting people's tendency to dislike unequal payoffs in their own or someone else's favour, a matter which has been investigated by way of experimental games, such as the ultimatum, dictator, and trust games.[75]

Further economic research has targeted fairness in pricing and customer notions related to price increases, demonstrating that consumers are generally less accepting of price

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[73] Robert H Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books 1978).
[74] Giorgio Monti, 'Excessive Pricing: Competition Law in Shared Regulatory Space' <https://www.tilburguniversity.edu/sites/default/files/download/Monti%20Excessive%20pricing.pdf> accessed 1 May 2026.
[75] Ernst Fehr and Klaus M Schmidt, 'A Theory of Fairness, Competition, and Cooperation' (1999) 114 The Quarterly Journal of Economics 817.

increases as a result of a short-term growth in demand than a rise in costs.[76] Recent approaches in behavioural economics also contribute to our understanding of human biases towards fairness and aversion to unfairness, especially regarding transactions and pricing.

The work of Kahneman, Knetsch, and Thaler,[77] Piron and Fernandez,[78] Fehr and Schmidt,[79] Varian,[80] Ulen,[81] Sunstein and Jolls[82] et al., in combination with research on neuro-economics experiments,[83] further contributes to our normative understanding when trying to make sense of what role fairness should and could play in the law and economic analysis of unfair, excessive pricing.

The reliance on past prices when judging the appropriateness of current prices, and the use of current prices to predict future prices, have also been demonstrated by other researchers.[84] However, past prices are not the sole determinant regarding fair pricing perceptions, where prevailing competitive prices are also of importance.[85] As noted in one literature overview, 'it appears that people do not spontaneously or fully appreciate retailer costs when judging fair prices. Profit is viewed as constituting a large proportion of the selling price'.[86]

Interestingly, comparison with past prices, or prices charged for the same product in other markets, are two of the central assessment methods related to unfair and excessive pricing in European jurisprudence related to Article 102a TFEU.[87]

One of the behavioural and experimental approaches to observe fairness preferences and biases has consisted of experimental games, such as the Ultimatum Game, and its related derivation, the Dictator Game. Briefly explained, the Ultimatum Game consist of a setting where one player, called the proposer, is endowed with a set amount, such as $100. The proposer will then share this amount with another player, called the responder, by way of a proposal regarding division of the total sum in question. After the proposition is made, the responder has the choice to accept or reject the offer made by the proposer. If the responder accepts the offer, both players get to keep the proposed sum. However, if the responder rejects the offer, neither party gets to keep any of the proposed division.

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[76] Kahneman, Knetsch, and Thaler, 'Fairness as a Constraint on Profit Seeking' (n 57).
[77] Kahneman, Knetsch, and Thaler, 'Fairness as a Constraint on Profit Seeking' (n 57).
[78] Robert Piron and Luis Fernandez, 'Are Fairness Constraints on Profit-Seeking Important?' (1995) 16(1) Journal of Economic Psychology 73.
[79] Fehr and Schmidt (n 75).
[80] Hal R Varian, 'Distributive Justice, Welfare Economics, and the Theory of Fairness' (1975) 4 Philosophy & Public Affairs 223.
[81] Thomas S Ulen, 'Law and Economics, the Moral Limits of the Market, and Threshold Deontology' in Aristides N Hatzis and Nicholas Mercuro (eds), *Law and Economics: Philosophical issues and fundamental questions* (1st edn, Routledge 2015).
[82] Cass R Sunstein, Christine Jolls and Richard H Thaler, 'A Behavioural Approach to Law and Economics' (1998) 50 Stanford Law Review 1471.
[83] Cappelen et al, 'Equity Theory and Fair Inequality: A Neuroeconomic Study' (n 63); Mario F Mendez, 'The Neurobiology of Moral Behavior: Review and Neuropsychiatric Implications' (2009) 14(11) CNS Spectrums 608; Ming Hsu, Cédric Anen, and Steven R Quartz, 'The Right and the Good: Distributive Justice and Neural Encoding of Equity and Efficiency' (2008) 320(5879) Science 1092.
[84] Richard A Briesch et al, 'A Comparative Analysis of Reference Price Models' (1997) 24(2) Journal of Consumer Research 202.
[85] Kahneman, Knetsch, and Thaler, 'Fairness as a Constraint on Profit Seeking' (n 57).
[86] Lisa E Bolton, Luk Warlop and Joseph W Alba, 'Explorations in Price (Un)Fairness' (K.U.Leuven - Departement toegepaste economische wetenschappen, Research Report 0145, 2001) <https://lirias.kuleuven.be/1831171?&lang=en> accessed 1 May 2026.
[87] Jenny (n 60).

The players are aware of the rules of the game in advance, thus characterising the game as an 'ultimatum game'.[88]

Strict utility-maximising and rational choice based Game Theory would dictate that the proposer should offer a minimal sum, as the responder has the alternative between accepting a small sum, or nothing – where the small sum, however small, increases the responder's utility equal to the proposed sum, however marginal it might be, turning this into a 'Nash Equilibrium'.[89]

From the outset, the proposer, being aware of this fact, thus has no incentive to offer any 'fair' allocation. Surprisingly, the proposer more often than not opts to offer a rather fair allocation, and the responder tends to reject unfair offers, as noted:

> The key result of ultimatum experiments is that most proposers offer between 40% and 50% of the endowed amount, and that this split is almost always accepted by responders. When the proposal falls to20% of the endowment it is rejected about half of the time, and rejection rates increase as the proposal falls to 10% and lower.[90]

The fair allocation can be seen as evidence regarding fairness as constraint on pecuniary gaining, where people engage in fair sharing

> in order to avoid large deviations from what they consider a fair solution. This type of behaviour has been extensively documented in laboratory experiments with games such as the ultimatum game and the dictator game.[91]

The implication of fairness concerns for Game Theory and Equilibrium was highlighted by Rabin in 1993, noting:

> People like to help those who are helping them, and to hurt those who are hurting them […] one should care not solely about how concerns for fairness support or interfere with material efficiency, but also about how these concerns affect people's overall welfare.[92]

Earlier still, the seminal work by Kahneman, Knetsch, and Thaler in 1986,[93] which is of great importance for the context of the present work on excessive pricing, demonstrated

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[88] Mascha van't Wout and Johannes Leder, 'Ultimatum Game' in Virgil Zeigler-Hill and Todd K Shackelford (eds), *Encyclopedia of Personality and Individual Differences* (Springer International Publishing 2018).
[89] Nash Equilibrium is defined as 'Nash equilibrium, named after American Economist John Nash (1928-2015) is a solution to a non-cooperative game where players, knowing the playing strategies of their opponents, have no incentive to change their strategy. Having reached Nash equilibrium a player will be worse off by changing their strategy' – Economics Online, <https://www.economicsonline.co.uk/Definitions/Nash_equilibrium.html> accessed 1 May 2026.
[90] Daniel Houser and Kevin McCabe, 'Experimental Economics and Experimental Game Theory' in Paul W Glimcher and Ernst Fehr (eds), *Neuroeconomics: Decision Making and the Brain* (2nd edn, Elsevier 2014); see also Stéphane Debove, Nicolas Baumard, and Jean-Baptiste André, 'Models of the Evolution of Fairness in the Ultimatum Game: A Review and Classification' (216) 37(3) Evolution and Human Behavior 245; Nowak, Page and Sigmund (n 16).
[91] Alexander W Cappelen et al, 'The Pluralism of Fairness Ideals: An Experimental Approach' (2007) 97(3) American Economic Review 818; John von Neumann and Oskar Morgenstern, *Theory of Games and Economic Behavior (60th Anniversary Commemorative Edition)* (Princeton University Press 2007).
[92] Matthew Rabin, 'Incorporating Fairness into Game Theory and Economics' (1993) 83 The American Economic Review 1281.
[93] Kahneman, Knetsch, and Thaler, 'Fairness as a Constraint on Profit Seeking' (n 57).

that people are wary of pricing unfairness, where prior prices of the undertaking served as one benchmark for such fairness considerations.

Just a year earlier in 1985, the non-maximising tendencies (framed around non-rationality) and its implications for rationality and overall Economic Equilibrium was also investigated by Akerlof and Yellen.[94] Building on prior work by Artur Okun in 1981,[95] who had also observed that firms do not maximise prices despite facing excess demand (such as new models of automobiles or tickets for events which ex ante are known to generate excess demand), Kahneman et al. investigated fairness perceptions regarding (unfair)pricing.

The observed behaviour in the experimental games and the asserted human bias towards fairness and equity were labelled by some as altruism; however, the work by Fehr and Schmidt showed that this was not the case, noting:

> Altruism is consistent with voluntary giving in dictator and public good games. It is, however, inconsistent with the rejection of offers in the ultimatum game, and it cannot explain the huge behavioural differences between public good games with and without punishment. It also seems difficult to reconcile the extreme outcomes in market games with altruism.[96]

Maurice Stucke, putting forward a behavioural approach to competition law and policy, noted that '[…] antitrust policy is not divorced from subjective well-being. First, competition does not exist independently of legal and informal norms. Competition is defined in part by the prevailing legal and informal social, ethical, and moral norms',[97] thus underscoring the Kantian view of fairness advanced in the present work and reconnecting it with the claim that competition law must invariably rely on the ratio legis and ratio oeconomica of preventing undue wealth transfer, with fairness being a building block in both law and policy surrounding the prohibition and its legal and economic history.

Against this view of price gouging and excessive pricing as something inherently 'unfair' which would be the object and focus of Competition and Antitrust laws, the Economic Analysis of Law discipline invokes that meddling with prices and the normal functioning of the markets, even with benevolent intentions, will invariably have the end-result of making everyone worse off.

As the argument goes, since prices are central to the modern economy and a signal to entry to competitors, and the instrument which ensures efficient resource-allocation, fairness preferences related to pricing should be treated as externalities to the analysis.

The COVID-19 pandemic indeed offered an apt possibility to observe such responses from economists departing from welfarist and marginalist notions, which took issue with price control laws set up in different countries and states, which they castigated as missing the target of efficient allocation of scarce resources. Summarising the critique against price gouging laws, Weiss notes that:

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[94] George A Akerlof and Janet L Yellen, 'Can Small Deviations from Rationality Make Significant Differences to Economic Equilibria?' (1985) 75 The American Economic Review 708.
[95] Arthur Okun, *Prices and Quantities: A Macroeconomic Analysis* (Brookings Institution 1981).
[96] Fehr and Schmidt (n 75).
[97] Stucke (n 10).

> price gouging provides great benefit to those in desperate need, and simply reflects the value that buyers and sellers choose to place on the goods and services that they exchange. Consumers' willingness to pay high prices demonstrates that they value the goods more than the money they are giving up for them. Buyers consciously and voluntarily consent and enter into the exchange that will improve their lot. Therefore, price gouging is not greedy or brazen, but rather how goods and services get allocated in a free society and reflects the actual value of such goods and services. Unfettered markets respect individual freedom since they allow people to choose for themselves what value to place on the goods they exchange, rather than dictate the value of such goods. Thus, price gouging is not disrespectful or exploitative.[98]

This position is reliant on several assumptions which, when examined more closely, do not hold up. The first assumption relates to markets being more suitable, informed, and able, than the public authority, to determine the needs and preferences among the general population. The second relates to price increases actually bringing about an efficient allocation of resources, when it can simply be used for profiteering without having any positive results for the buyers.

Nor does this conceptualisation address the matter of initial endowments, i.e. who can afford the desired goods, no matter their 'utility'. Some will have to forego the goods, although they might be in greater 'need' of the said goods and thus value them higher than those able to afford them but having less 'need' but a higher ability to pay for the price increases.

Offering a rebuttal to the above, namely that the poor will have to forego goods due to price gouging, Lee argues that price controls will lead to prices actually going up more than they would if market forces were to be allowed, due to decreasing supply in turn caused by increased costs. Further, in relation to consumer surplus, Lee claims that:

> Consumers don't like high prices, but they receive what economists refer to as 'consumer surplus' when they make a purchase, wherein the total value they receive from a purchase exceeds the total value sacrificed. It should also be recognised that this consumer surplus is greater the more desperate consumers are for a product, as measured by the inelasticity of demand. Thus, by preventing prices from clearing markets, 'price gouging' laws impose the greatest loss of consumer surplus on the most desperate consumers, who are generally the poor.[99]

The above relies heavily on stylised notions which face not only theoretical but also empirical shortcomings, which will be expanded upon in the forthcoming chapters on substantive law and economics analysis of excessive pricing. It suffices to state that the poor citizen who is not able to buy water to satisfy his needs does not meditate on the theoretical and abstract 'consumer surplus' described in the theoretical welfarist model when the price of water goes up from $5 to $10 overnight or when the price of a life-saving medicine

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[98] Shira Weiss, 'Ethics of Price Gouging' in Shira Weiss, *Ethical Ambiguity in the Hebrew Bible: Philosophical Analysis of Scriptural Narrative* (Cambridge University Press 2018).

[99] Dwight R Lee, 'Making the Case against "Price Gouging" Laws: A Challenge and an Opportunity' (2015) 19 The Independent Review 583.

increases by several thousand percent. This returns the discussion to the present context of incommensurable goods and inelasticity of demand.

The main problem with positing high prices as beneficial because they would induce market entry is that this line of reasoning confuses ex ante prices with ex post prices; it is the latter that are of importance for a potential entrant, not the former.[100] Also, during a pandemic, the temporal element is of crucial importance, same with a life-saving, essential medicine which is being price-hiked by several thousand percent.

Further, there is an obvious wealth transfer from the consumer to the supplier, begging the question of why such an allocation would be more efficient than allowing the surplus to stay with the consumer. This sits alongside the same logic of individual freedom and choice, which is hard to maintain when demand is ipso facto inelastic. Claiming any 'efficiency' resulting from price gouging that bears no relation to any increase in costs is a circular and self-defeating argument, ignoring the non-economic preferences held by people and societies, which do act as constraints on profit-seeking and market freedom.[101]

Furthermore, the claim by Lee seems to contradict settled science on human preferences regarding fairness in pricing, and ultimately, trust in markets and the democratic basis for markets. Regarding the connection between economics and legal discipline regarding notions of fairness, Holler and Leroch note that:

> […] recent findings, mainly from the field of experimental economics, reintroduce aspects of 'fair pricing' and fairness in transactions into economic modelling. Other theories, evolutionary models for instance, take up the key findings and apply the economic rationale in order to find out why human traits which apparently run counter to individual self-interest may have survived...we date this discussion back to the days of Adam Smith and argue that he already set the basis for such a discussion. Apparently, Smith was well aware that principles of justice and the market may, at times, be contradictory. However, he also found that both served a common purpose.[102]

The legal framework prevalent in the European Union regarding fairness in pricing seems to reconnect more with the Just Price approach, and not a utilitarian or 'wealth maximisation' approach, with Article 102a TFEU ipso facto limiting the economic freedom of dominant undertaking in their pricing.

The present article hence asserts that the roots of the prohibition of excessive and unfair pricing in European competition law display clear elements of Natural Law and Kantian legal philosophy, in part relying on Roman Legal Norms of contract, tort, liability, and related matters, although the Just Price is more scholastic than Roman in its nature. Thus, anyone looking for the roots of the 'unfair pricing' is best advised to search for the roots of the prohibition in not only the Justum Pretium[103] (Just Price) and Scholastic writings,

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[100] Ariel Ezrachi and David Gilo, 'Are Excessive Prices Really Self-Correcting?' (2009) 5(2) Journal of Competition Law and Economics 249.
[101] See the work of Karl Polanyi on the matter of non-economic constraints: Gareth Dale, *Karl Polanyi: The Limits of the Market* (Polity Press 2010).
[102] Holler and Leroch (n 51).
[103] Nathan Isaacs, 'The Revival of the Justum Pretium' (1921) 6 Cornell Law Quarterly 381.

but also in the Kantian and Neo-Kantian legal-economic philosophy.[104]

Indeed, in the later years, it is the interventionist school which has prevailed in European competition law and policy, as seen in the avalanche of cases mainly in the pharmaceutical sector,[105] but price-based cases are also emerging in the digital and AI sectors, as well as within the context of COVID-19 crisis, as depicted in the next section.

4 COVID-19, UNFAIR PRICING AND THE EUROPEAN UNION

The COVID-19 pandemic triggered an explosion of demand for certain essential products – from protective masks and hand sanitiser to life-saving medicines – and, with it, instances of extreme price spikes. Public outrage at 'price gouging' became a global phenomenon in the spring of 2020. This section relays an earlier empirical inquiry[106] into how different jurisdictions responded, revealing starkly different legal frameworks and economic philosophies at play. The focus of the present section is, however, on European Union.

In the EU, unfair and excessive pricing by dominant firms is unequivocally prohibited by primary law – Article 102(a) TFEU – and has been recognised in seminal cases since the 1970s, from which there has been a consistent enforcement at both Union and Member State level.

The claim that there would exist a 'scarcity' of cases, in turn used by some commentators as evidence for a 'reluctance' on part of competition authorities, is a flawed one. This is evidenced merely by the fact that no less than 28 cases on Union level and more than 95 cases on Member state level exist between 1971–2021.[107] The claim of 'scarcity of cases' is thus wholly void and should be avoided in the context of unfair pricing cases in the European Union, in the same spirit that the quote from *Trinko* should be avoided as it does not advance our knowledge.

The European Court of Justice in *United Brands*[108] set out the seminal two-prong test for identifying an unfairly high price: first, the price must be excessive (disproportionate to the economic value of the product), and second, it must be 'unfair either in itself or when compared to competing products'.[109]

A string of national cases in the late 2010s (for example, the *Italian Aspen Pharma* case and the *UK Pfizer/Flynn* case involving cancer and thyroid drugs with overnight price increases of several hundred or thousand percent) signalled a renewed willingness by

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[104] Mark D White, 'With All Due Respect: A Kantian Approach to Economics' in Mark D White (ed), *The Oxford Handbook of Ethics and Economics* (Oxford University Press 2019).
[105] Kianzad, 'Towards Fair Pricing of Medicines?' (n 5).
[106] Kianzad, 'Excessive Pricing during the COVID-19 Crisis in the EU: An Empirical Inquiry' (n 12).
[107] Behrang Kianzad, 'Are Excessive Pricing Cases Few and Far between? A Quantitative Analysis of Fifty Years of European Jurisprudence 1971-2021' (Nominated to Concurrences Antitrust Writing Awards 2024) (2023) 3 Concurrences 1 <https://awards.concurrences.com/en/awards/2024/academic-articles/are-excessive-pricing-cases-few-and-far-between-a-quantitative-analysis-of> accessed 1 May 2026.
[108] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* EU:C:1978:22, see paras 248-252. Observe that the Court does notes difficulties in appreciation of costs in para 254, but does not consider this an 'insurmountable' challenge, as some scholars erroneously have claimed.
[109] See also Case 85/76 *Hoffmann-La Roche v Commission* EU:C:1979:36 para 90, reaffirming that charging a price which is excessive because it bears no reasonable relation to the value of the product is an abuse, re-affirming the *United Brands*.

European enforcers to tackle exorbitant pricing in situations of consumer harm.[110] These cases relied on the *United Brands* framework, comparing the contested prices against cost benchmarks and cross-market prices to conclude the firms had earned 'excessive and unfair' profits at the expense of consumers. It should be noted that these enforcements occurred against a backdrop of manifest doctrinal adversity by neoclassical and welfarist minded scholars.[111]

When the pandemic hit, the European Competition Network (ECN) – the coordinating body of EU and national competition authorities – swiftly issued a joint statement in March 2020, underscoring that authorities would not hesitate to take action against companies exploiting the crisis. The ECN highlighted the importance of ensuring that essential protective goods (such as face masks and sanitising gel) 'remain available at competitive prices' and warned that dominant firms should not abuse the situation by gouging customers.[112] In tandem with 'nudging'[113] and moral persuasion, several Member States activated or adopted emergency price regulation measures.

For instance, France imposed price caps on hand sanitiser in March 2020, fixing maximum prices (e.g. €2 for 100ml bottles) to prevent runaway pricing.[114] Romania announced it might introduce price caps if needed to curb excessive increases.[115] Malta directly regulated the price of face masks after investigating reports of fourfold increases in pharmacy retail prices.[116] These interventions, unusual in normal times, reflected the political

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[110] Behrang. Kianzad and Timo Minssen, 'How Much Is Too Much? Defining the Metes and Bounds of Excessive Pricing in the Pharmaceutical Sector' (2018) 2(3) European Pharmaceutical Law Review 133. See, e.g., Italian Competition Authority (AGCM), Decision No. 26185 (29 September 2016) – Aspen Pharmacare, finding that Aspen's exorbitant price increases (1500%–11000% on cancer medications) were unfair and abusive. The AGCM applied the United Brands test, comparing Aspen's prices to its costs and to prices in other EU countries, and concluded the prices were excessive and imposed unfairly on Italy's national health system. In the UK, the Competition and Markets Authority's case CMA v. Pfizer and Flynn Pharma (Case CE/9742-13, decision of 7 December 2016) likewise found that the prices for an anti-epileptic drug were unfairly excessive after a 2,600% overnight increase. (Though the CMA's original decision was overturned on appeal for insufficient analysis and has been re-examined, it reflected a willingness to pursue such cases). These cases show a resurgence of excessive pricing enforcement in Europe pre-COVID.

[111] Jenny (n 60); David S Evans and A Jorge Padilla, 'Excessive Prices: Using Economics to Define Administrable Legal Rules' (2005) 1(1) Journal of Competition Law & Economics 97; Motta and de Streel (n 53).

[112] European Competition Network, 'Joint Statement on the Application of Competition Law During the Corona Crisis' (23 March 2020). The ECN (comprising the European Commission and national competition authorities of the EU/EEA) stated that while the crisis might necessitate certain cooperation among companies to ensure supply, it remained vigilant against abuses: 'At the same time, it is of utmost importance to ensure that products considered essential to protect the health of consumers […] remain available at competitive prices. The ECN will therefore not hesitate to take action against companies taking advantage of the situation by cartelising or abusing their dominant position'.

[113] Behrang Kianzad and Timo Minssen, 'Sweden's Response to COVID-19: A tale of trust, recommendations, and odorous nudges' (*Harvard Law Blog*, 12 May 2020) <https://petrieflom.law.harvard.edu/2020/05/12/sweden-global-responses-covid19/> accessed 1 May 2026.

[114] French Government, Decree No. 2020-197 of 5 March 2020 (as amended by Decree No. 2020-281 of 20 March 2020), setting maximum retail prices for hydroalcoholic gels. For instance, 50ml bottles were capped at €2 and 100ml at €3. This measure was justified under the French Commercial Code's provisions allowing price regulation in exceptional circumstances.

[115] Romanian Competition Council, Press Release (24 March 2020), noting that if price spikes for essential products could not be contained via competition enforcement, the Council advises the government to use its legal powers to cap prices temporarily. Romania had passed emergency legislation allowing price caps on food and medical products during the state of emergency. In the end, Romania did not impose broad price caps, but the warning itself exemplified authorities leveraging regulatory backup powers to keep prices in check.

[116] Malta Competition and Consumer Affairs Authority, investigations in April 2020 found significant price

imperative to protect consumers from exploitation and to ensure broad access to essentials.

Notably, while EU competition law provides an ex post tool to attack unfair pricing by dominant firms, in the acute phase of the COVID-19 crisis most European authorities favoured swift, precautionary measures (like price ceilings and public warnings) over formal abuse-of-dominance cases. This pragmatic approach was likely due to the evidentiary and timing challenges of pursuing a full antitrust case during an ongoing emergency. A formal case under Article 102 TFEU can at times take years to pursue, whereas immediate price regulation can blunt harm in real-time.

Indeed, after the initial months of the crisis, some national authorities did open investigations (the Greek and Italian authorities, for example, looked into price spikes for healthcare products), but no major EU-level excessive pricing case was ultimately decided during the pandemic. The relative paucity of antitrust enforcement in this area could be criticised, as the Europe's existing law of Article 102a TFEU could and should have been used more aggressively to sanction pandemic profiteering, rather than relying on consumer protection laws or ad hoc regulations.[117]

The counterargument would make the case that competition agencies complemented their enforcement discretion with consumer protection tools better suited for the emergency: many EU countries empowered consumer protection authorities to police unjustified price hikes for essential goods regardless of dominance, thus filling the gaps that competition law's dominance requirement left open.

From a normative perspective, the EU's experience during COVID-19 underlines a tension: the law on the books embraces a fairness-oriented view that excessive pricing is an 'abuse' of monopoly power, yet enforcers often hesitate to apply it, much due to the influence of a Chicagoan, Neoclassical, and Welfarist influence, where many works on the matter of excessive pricing still cite the aforementioned US Supreme Court egregiously decided *Trinko* case, although here the Trinko forwarding of monopolistic prices run counter to the statutory text of Article 102a TFEU.[118] This hesitation can indeed be attributed to the influence of neoclassical law-and-economics thinking.[119]

Over the years, a number of scholars of the Neoclassical and Welfarist schools have warned that prosecuting high prices could chill investment or confuse the goal of antitrust.

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inflation on face masks. The Maltese government issued a legal notice (LN 112 of 2020) in April 2020 fixing maximum prices for face masks and face shields (e.g., a maximum retail price of €0.95 per mask) to prevent exploitation. These caps were gradually lifted later in 2020 when supply conditions improved.

[117] Kianzad, 'The Giant Awakens: Law and Economics of Excessive Pricing During the COVID-19 Crisis' (n 54).

[118] Eleanor M Fox, 'The Trouble with Trinko' (American Bar Association Antitrust Section Spring Meeting 2004); Spencer Weber Waller, 'Microsoft and Trinko: A Tale of Two Courts' (2006) 901(3) Utah Law Review 741; First (n 65); Kianzad, "the Giant Awakens", 2022; Bartalevich (n 26).

[119] A common argument in law and economics literature is that punishing high prices can deter firms from entering markets or investing in capacity (since the upside of profit is curtailed), ultimately harming consumers. See, for example, Frank H Easterbrook, 'Monopolistic Pricing and Related Defenses in Antitrust' (1984) 51 University of Chicago Law Review 567, and William J Baumol and Janusz Ordover, 'Use of Antitrust to Subvert Competition' (1985) 28 Journal of Law & Economics 247, which caution against overzealous price regulation by antitrust authorities. But see Ioannis Lianos, 'Pricing, Politics, and Equality: A Social Welfare Approach to Excessive Pricing' in Yannis Katsoulacos and Frédéric Jenny (eds), *Excessive Pricing and Competition Law Enforcement* (Springer International Publishing 2018), arguing that in certain contexts, especially involving essential goods, antitrust must incorporate social fairness considerations even if there is some risk to investment incentives. For an in-depth study on unfair pricing in European Competition Law, see Kianzad, 'Towards Fair Pricing of Medicines?' (n 5).

They pointed to the difficulty of distinguishing a genuinely abusive price from a high but permissible reward for innovation or risk-taking. However, the pandemic arguably weakened the force of these arguments. When faced with blatant profiteering on masks or disinfectant, even market-oriented policymakers recognised that short-term distributive justice and public trust in markets had to take priority over theoretical long-term efficiency considerations.

Europe's mixture of soft and hard responses can thus be seen as a pragmatic balancing act, using price caps and moral pressure to curb the worst abuses in the short run, while keeping the antitrust tool in reserve for egregious or clear cases where a dominant company's conduct had no conceivable merit. The black-letter prohibition of unfair pricing in EU law remained a powerful backdrop; a statement of principle that fairness mattered even when its enforcement was tempered by caution during the crisis.

The EU leaned on its black-letter legal basis for fairness but was cautious in its direct use, preferring interim regulatory fixes. The U.S. during the COVID-19 crisis had no such antitrust instrument on the federal level, yet it marshalled an array of consumer protection and emergency tools to achieve a similar immediate end: preventing outrageous exploitation and keeping supplies flowing. South Africa, in comparison,[120] leveraged competition law most directly to restore fairness in the market. These choices reflect underlying philosophies but also practical realities (legal competencies, readiness of tools, and political climate).

From a law-and-economics standpoint, as discussed in the previous section on unfair pricing in law and economics, the pandemic experience revives the argument that maintaining the resilience of markets in extreme conditions is an objective that competition policy should foster alongside traditional efficiency.

Resilience here means the ability of the market system to continue functioning and serve consumers under stress, without collapsing into chaos or sparking public outrage that can lead to even more heavy-handed controls. Unchecked price gouging might allocate goods efficiently to those willing to pay, but it can also undermine the social legitimacy of the market, triggering loss of confidence and demands for draconian intervention (as seen historically, extreme profiteering can lead to public disorder or calls for nationalisation).

Thus, one can argue that a degree of fairness – preventing the most egregious exploitative prices – contributes to the stability and resilience of the competitive process in the long run. This perspective bridges the gap between fairness and welfare: maintaining public trust through fair dealing can be efficiency-enhancing over time, avoiding backlashes and ensuring broader participation in the market.

The crisis also highlighted that the efficiency vs fairness dichotomy often presented in antitrust debates is too simplistic. In a pandemic, short-term allocative efficiency (pricing based solely on willingness to pay) conflicted with long-term dynamic efficiency and public health goals (ensuring widespread access to essentials).

Fairness-driven interventions, such as price caps or punishment of gougers, arguably improved outcomes by preventing wealth-based stratification in access to crucial goods and by incentivising cooperative solutions (e.g. companies repurposing production for essential goods at reasonable prices, knowing they would not be undercut by unscrupulous profiteers). In summary, the COVID-19 experience suggests that competition policy can incorporate

[120] Willem H Boshoff, 'South African Competition Policy on Excessive Pricing and Its Relation to Price Gouging during the COVID-19 Disaster Period' (2021) 89(1) South African Journal of Economics 112.

fairness norms in times of crisis without abandoning economic rationality – and that doing so may reinforce the system's resilience.

This sets the stage for considering how fairness is being woven into the fabric of competition-adjacent regulation in the digital era, to which we turn next.

5 RECONCILING REGULATORY FAIRNESS WITH COMPETITION LAW: TOWARD A UNIFIED APPROACH

It is instructive for the above discussion on law and economics of unfair pricing in European law to compare how 'fairness' is treated in some recent EU legislative frameworks – namely the Digital Markets Act, the AI Act, and the Data Act. All of the said acts elevate fairness as a central goal to be pursued, yet they do so in different contexts and terms, raising questions of coherence and harmonious application, and more importantly, convergence with Union competition law approach to fairness.

The DMA was explicitly enacted to ensure 'contestable and fair markets in the digital sector'. As noted, it liberally references fairness/unfairness vis-à-vis gatekeeper platforms. The DMA's fairness norm chiefly concerns the imbalance of power between dominant platforms and their business users or end-users. For example, Recital 33 DMA frames unfairness as a significant 'imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage'.

This reflects a notion of fairness as equitable exchange or proportionality in business relations. However, beyond listing certain prohibited 'unfair' practices (such as self-preferencing or tying), the DMA does not define fairness in general economic or legal terms. It leaves the interpretation of what is 'unfair' largely to context, guided by the regulation's objectives. The result is that fairness under the DMA is a principle to be inferred (reduce power asymmetries), rather than a rule with a clear test, creating a potential weakness and gaps in enforcement.

The EU AI Act in turn approaches fairness from an ethical and fundamental rights perspective. It references fairness in the context of Trustworthy AI principles, linking it mainly to non-discrimination. Annex III of the AI Act (drawing from the 2019 AI HLEG Ethics Guidelines) defines 'diversity, non-discrimination and fairness' broadly as a requirement that AI systems be developed and used in a way that includes diverse stakeholders, promotes equal access, and avoids unfair bias.

In essence, the AI Act equates fairness with the absence of unfair bias or discrimination (e.g. preventing AI-driven outcomes that violate equality laws). While laudable, this definition is narrow and primarily procedural – it ensures algorithms treat people fairly (without illegal bias), but does not speak to broader notions of fairness like equitable distribution of benefits or power.

This definition does not expand our knowledge at all, as it basically points back to existing non-discrimination law and ethical ideals without providing an operational metric for fairness in AI contexts. In short, the AI Act's fairness concept, though consistent with the recently proposed Digital Fairness Act's spirit (protecting individuals from unfair algorithmic harms), is relatively restrictive (focusing on bias) and abstract.

Finally, the Data Act elevates fairness in the realm of data sharing and digital value chains. It aims to ensure 'fair access to and use of data', particularly to prevent large data

holders from abusing their advantage over smaller firms or consumers. The term 'fair' appears 28 times in the Data Act, underscoring goals like equitable data-sharing arrangements and balanced opportunities in the data economy.

Notably, the Data Act does incorporate more concrete mechanisms for fairness: in Article 13 (and Recital 62), it defines certain contractual terms as 'unfair' in business-to-business (B2B) data-sharing contracts – effectively blacklisting clauses that gravely imbalance parties' rights (akin to how EU consumer law treats unfair contract terms). For instance, any term that unreasonably limits a small-to-medium enterprise's (SME's) use of data or strips them of legal remedies could be deemed void for unfairness.

The Act provides a list of clauses 'always considered unfair' and those 'presumed to be unfair', borrowing the technique of per se and presumptive unfairness from competition law (e.g. the concept of hardcore restrictions). This approach – specifying unfair terms ex ante – adds clarity, though it is context-specific to data contracts. Outside these clauses, the Data Act does not articulate a general theory of fairness, instead cross-referencing existing laws on unfair commercial practices for interpretation.

The Data Act, the DMA, and the AI Act all elevate 'fairness', but in varying dimensions (market power balance, algorithmic equality, and fair data access, respectively). They all broadly align with an Aristotelian 'equitable exchange' conception of fairness – i.e. that no party should be unduly exploited or left without recourse. Yet, they stop short of a common, holistic definition.

This divergence means that a practice considered 'unfair' under one regime might not neatly translate into another, potentially creating gaps or overlaps. For example, an exploitative personalised pricing strategy might fall under the recently proposed Digital Fairness Act's unfair personalisation ban and also trigger competition law or Data Act concerns – making it imperative that all define fairness coherently.

The above demonstrates at least a partial alignment on fairness across recent acts targeting digital and AI sectors with traditional Union Competition law is needed, as all seek to curb 'unfair' exploitation, imbalance, or bias. But we also note a lack of uniformity in language and scope across the said acts, where the Digital Fairness Act, but also the recently proposed Digital Omnibus Act, present the opportunity to unify these fairness norms. In particular, it should ensure that its notion of fairness complements and reinforces those in the DMA, the AI Act, and the Data Act, rather than conflicting.

The introduction of fairness-centric provisions in these digital regulations has in turn sparked debate on how they will coexist with and influence traditional competition law enforcement. Some critics worry that enshrining fairness in regulation could lead to double jeopardy or inconsistency – for instance, could a company be penalised under the DMA and also face an Article 102 TFEU case for essentially the same unfair conduct?

The European Commission has indicated that it will coordinate the two, possibly using competition law in cases not covered by the DMA, or where broader precedent or remedies are needed. From a positive perspective, the regulatory acts can be seen as pilot grounds for new concepts that might later be absorbed into competition analysis. Notably, the regulations themselves sometimes acknowledge competition law's legacy. The DMA's recitals note that certain practices it bans had been identified in past competition cases as problematic. The Data Act's impact assessment discusses how lack of data access can lead to market power and reduced competition. There is thus an inherent logic in aligning the interpretation of

fairness across these realms.

This author has suggested that the fairness norm in the DMA and the Data Act should be interpreted in light of the 'unfairness' prohibitions in Article 102 TFEU and unfair competition law discourse to ensure coherence and legal certainty.[121]

For example, if a question arises under the Data Act whether a certain term is unfair, one might analogise as to how competition law would view a similar restriction by a dominant firm. Conversely, competition authorities might take note of the regulatory benchmarks: if the Data Act says a data holder must give access on reasonable terms, a refusal by a dominant data holder outside the Act's scope might more readily be seen as an abusive, unfair refusal in the post-Act world, because the standard of industry fairness has shifted.

Another area of reconciliation is the use of behavioural economics in shaping these rules. As noted earlier, humans do care about fairness; similarly, small businesses dealing with giant platforms often voice fairness grievances ('the platform changed terms without notice', 'we have no choice but to accept'). The EU's Platform-to-Business (P2B) Regulation of 2019, which predates the DMA, already obliged platforms to have transparent and fair terms for business users. These regulatory developments feed into the competition narrative by highlighting persistent patterns of imbalance and possibly providing evidence of market failure that competition law can address if needed.

Ultimately, the push is toward a harmonious application of fairness across legal tools: ex ante regulation sets clear bright-line rules for the worst imbalances, while ex post competition law retains flexibility to tackle unforeseen or particularly egregious unfair practices that slip through.

The common thread is the conviction that markets should not just be free, but also fair and resilient. That philosophy marks a shift from the pure total welfare model towards a more holistic competition paradigm, which is addressed in the concluding section.

6 CONCLUSION: TOWARD A RESILIENCE-ORIENTED, FAIRNESS-ANCHORED COMPETITION LAW AND ECONOMICS PARADIGM ON UNFAIR AND EXCESSIVE PRICING

As it has been clarified, Fairness and its twin-concept, Justice, are abstract, man-made concepts which can be defined in numerous ways, their existence proven or denied, and their relevance attested or contested, reflecting the multifarious human approaches to the concepts throughout the recorded history of mankind.

The legal decree against 'unfairness' in pricing does not explain in of itself what is fair, fair to whom, and who can decide on the substantive content of the decree in question. Nor does our expanding modern understanding of inherent fairness biases reveal to a judge or competition authority how such insights regarding fairness preferences should be applied in

[121] Kianzad, 'Fairness, Digital Markets and Competition Law – Reconciling Fairness Norms in Digital Markets Act, Data Act and AI Act with Competition Law' (n 4); concepts like 'equitable exchange' in the Data Act or 'fair and contestable' in the DMA can draw from competition law precedents to achieve consistency and legal certainty. For instance, competition law's approach to what constitutes a reasonable price or non-discriminatory treatment can guide regulators in applying the DMA/Data Act provisions, ensuring a harmonised evolution of the fairness standard across the EU's legal framework.

a practical case, why the 'abstract' needs to be translated into a rational, practical, and enforceable standard of fairness along certain anchorage points.

Akin to many other areas of law, the legal discipline — by way of legal-dogmatic method, teleological interpretation, legal history by way of preparatory works, and stringent jurisprudence — strives to interpret and enforce valid law alongside the intent of the legislature, albeit allowing a certain degree of progression and expansion of knowledge, which iss in turn enriched by other disciplines, such as economics. Where neoclassical economic theory assumes humans to be rational, self-interested beings having perfect willpower, the findings of behavioural and experimental economics instead show that human behaviour is best described by traits such as bounded rationality, bounded self-interest, and bounded willpower.[122]

Removing, or relaxing, the strict rationality assumption,[123] which does not hold up neither normatively nor empirically, does not mean removing economics from law and economic analysis of competition law. It merely entails a more balanced approach to reality and human nature as it has shown itself to be when empirically and experimentally tested.[124]

The legal discipline routinely operates alongside a multitude of abstract concepts (although diverging in their level of abstraction), where some examples relevant to the present inquiry are the legal (but also equally economic) concepts of dominance, relevant market, market power and abuse — all abstract concepts enabling the unfair pricing prohibition under Article 102a TFEU.

Analogically speaking, although there is an 'economic' definition of what constitutes a relevant market (market shares above 40%), this mathematically defined economic concept of the relevant market neither prevents nor contradicts a contrary, more expansive 'legal' definition of the relevant market, where other factors beyond mere market shares are also considered. This approach is also evident from the latest guidance by the European Commission on definition of relevant market, e.g. in digital markets.[125]

Both firms and consumers take fairness considerations seriously regarding pricing. Therefore, reliance on a theory of harm alongside Dual Entitlement theory could offer a new way forward, as it is argued that this theory re-connects to the aforementioned Just Price theory.[126]

Modern insights from behavioural and experimental economics seem to reinforce the universal character of the concept of 'Just Price' and its opposite, i.e. unfair pricing, which can be read as codification of social preferences, having developed throughouthuman evolution by way of rational experience and practical reason. It would be counterintuitive for the prohibition to have survived so long an in such diverse cultural and historical settings if

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[122] Lande (n 23).
[123] Russel B Korobkin and Thomas S Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics' (2000) 88(4) California Law Review 1051, 1053.
[124] ibid.
[125] Communication from the Commission – Commission Notice on the definition of the relevant market for the purposes of Union competition law, C/2023/6789, OJ C, C/2024/1645.
[126] Julio Rotemberg, 'Fair Pricing' (2011) 9(5) Journal of the European Economic Association 952; Daniel Kahneman, Jack L Knetsch, and Richard H Thaler, 'Fairness as a Constraint on Profit Seeking: Entitlements in the Market' in Daniel Kahneman and Amos Tversky (eds), *Choices, Values, and Frames* (1st edn, Cambridge University Press, 2000); Holger Herz and Dmitry Taubinsky, 'What Makes a Price Fair? An Experimental Study of Transaction Experience and Endogenous Fairness Views' (2018) 16(2) Journal of the European Economic Association 316.

it runs counter to innate human preferences on transactions.

One practical example used as proxy to illustrate the normative tensions detailed above is the matter of unfair pricing during the COVID-19 crisis which was elevated to the global stage.

Many of the textbook assertions with regard to how markets function and what the role of competition law ought to be regarding excessive pricing were found not to pass a basic 'smell test', especially so during a pandemic.

They stand in conflict with how the law is being administered around Europe and globally as the string of cases in the recent decade demonstrates and, most importantly for the legal discipline, at odds with the legislative intent and the normative soul of European competition law — in turn reflecting the aforementioned inherent values and human biases.

The experience of the COVID-19 crisis demonstrated that markets are not infallible self-correcting mechanisms, especially under severe stress. A rigid adherence to neoclassical models during such times would have left consumers at the mercy of extreme price gouging and supply shortages. Instead, authorities around the world – even in traditionally laissez-faire systems – intervened to uphold a basic level of fairness in transactions.

Far from being an irrational or populist reaction, these interventions can be understood as efforts to preserve the integrity and resilience of the market system. By curbing the most outrageous abuses of market power during the emergency, regulators arguably helped maintain public trust and avoided even more disruptive outcomes (such as public disorder or overzealous price controls that could have disincentivised supply altogether). In EU competition circles, this might be viewed as a revival of the idea that competition law has a public interest dimension – safeguarding consumers not only from collusion and exclusion, but also from exploitation when circumstances render them vulnerable.

The advent of fairness as a leitmotif in digital market regulation signals that the EU is forging a path toward sustainable competition in high-tech sectors. Concepts like fairness and contestability in the DMA, or equitable access in the Data Act, highlight a policy choice: that the digital economy should be structured in a way that prevents the entrenchment of power imbalances and ensures robust opportunities for competitors and new entrants.

This is essentially about making the digital ecosystem resilient to dominance – preventing gatekeepers from so completely controlling the playground that innovation and competition wither. The fairness obligations placed on big platforms serve as circuit breakers against that kind of systemic fragility.

Incorporating fairness also addresses the social acceptability of the digital economy. There has been growing public concern about the outsized influence of tech giants, the opacity of algorithms, and the feeling that individuals and smaller businesses are at the mercy of decisions made by distant, powerful corporations. By instituting fairness norms (e.g. transparent and just terms, non-discrimination, and data portability), regulators aim to ensure the digital markets operate on principles that users and business partners perceive as just. Over time, this can enhance voluntary compliance and reduce conflict; a fair system is one that market participants are more likely to consider legitimate, and hence resilient.

The alignment of these fairness initiatives with competition law traditions suggests a normative reunification. For a time, the discourse of competition law (especially in the U.S.) divorced itself from moral or fairness considerations, styling itself as purely positive economic analysis. That era appears to be waning, at least in the EU and many other

jurisdictions. The language of fairness is no longer taboo; it is explicitly included in laws and speeches. This does not mean a free-for-all of arbitrary fairness claims – rather, it means a careful integration of fairness with empirical and economic analysis.

For example, determining an 'excessive, unfair price' still involves economic benchmarks and evidence, but the ultimate criterion – whether the price unfair in itself or when compared in light of *United Brands*– acknowledges a value judgment informed by both data and societal standards. Similarly, deciding what is a fair term in a data-sharing contract can be guided by looking at competitive outcomes (would this term persist in a competitive market?) and notions of good faith.

Importantly, the new paradigm is anchored in resilience. By resilience, is the text refers to the capacity of the market and its regulatory framework to adapt to shocks, to correct course when imbalances occur, and to sustain a healthy level of competition over time. A resilience-oriented competition policy is proactive in identifying systemic risks (like the concentration of data, or the potential for AI to facilitate collusion) and is willing to apply precautionary principles – even if that means departing from the wait-and-see approach of the past.

In conclusion, the twin crucibles of the pandemic and the digital revolution have forged a new trajectory for competition law. Excessive pricing enforcement, once considered a relic or an aberration by some, has been re-legitimised in the face of both the crisss of neoclassical economics and COVID-19, but also digital and AI market challenges, reminding us that at its origin, competition law was as much about preventing market abuses as about economic optimisation and efficiency. Meanwhile, fairness in digital markets is being codified in unprecedented ways, effectively writing into law a concept of fair play that had often been implicit or ignored in the internet economy.

A fair market – one where dominance does not equate to unrestrained power to exploit – may also be a more resilient and innovative market in the long run, as it encourages trust and participation. Conversely, a resilient market that can weather crises likely needs norms of fairness to prevent collapse into chaos or monopolisation when tested. European competition law, with its rich tradition and flexibility, appears poised to lead in this direction, blending its black-letter rules on unfair practices with the new ex ante tools to shape a competitive landscape that is not only vibrant and dynamic, but also fundamentally fair.

This represents a rethinking of competition paradigms for a crisis-driven age – one where the measure of success will not just be growth or low prices, but the endurance of competitive markets that deliver equitable benefits to consumers and businesses alike.

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