GOOGLE ANDROID: BEHAVIOURAL THEORIES OF HARM IN THE LIGHT OF NEW JUDGMENTS AND REGULATORY TOOLS

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Abstract: This contribution takes a look at the recent Google Android judgement of the General Court as a case study of antitrust informed by behavioural economics – the study of not fully rational economic agents. It contrasts the General Court's pragmatic approach to economic evidence to the U.S. Supreme Court's willingness to delve into economic theory, where the latter can prove more of an obstacle to the development of behavioural antitrust. It further concedes that cases relying on behavioural theories of harm can prove to be less predictable from a legal standpoint. This, nevertheless, does not obviate older legal tests, which might just need to be reformulated as requiring an analysis of effects, in line with the General Court's rhetoric on the necessity to avoid false convictions in such cases. Lastly, the contribution argues that the relevance of behavioural antitrust will not fade in its entirety with new regulatory tools addressing similar issues.

Keywords: competition law; antitrust; theory of harm; behavioural economics; behaviouralism; Google Android

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I. INTRODUCTION

In the basic models that could be encountered in introductory microeconomic courses, it is often assumed that the agents involved are rational. While the notion of rationality within these models may often be understood in a rather technical sense,[3] a rational agent should generally make decisions that are the most beneficial to them in

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1 Any views or opinions expressed in this contribution are mine alone and do not necessarily reflect the positions of people or institutions that I may be associated with in a professional or personal capacity. The manuscript was improved by the helpful insights of anonymous reviewers. Parts II and III of this contribution are based on my forthcoming dissertation. Any errors contained in this contribution are my own.

2 This paper has been written as part of the 2023 Cooperatio/LAWS programme at the Faculty of Law, Charles University.

3 See e.g., the definition by GRAVELLE, H. – REES, R. *Microeconomics*. 3rd ed. Harlow: Prentice Hall, 2004, p. 6, which is rather specific and seems to yield an understanding of rationality within the terms of a microeconomic model. Economic agents selecting the optimal outcome in terms of a specific objective function, like utility or profit, within the constraints of relevant restrictions seems to be the core of most understandings of the notion of rationality within economic theory.

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terms of a given metric. Such an assumption is admittedly elegant. It is also sometimes not true. The economic discipline interested explicitly in imperfect and/or lacking rationality of economic agents (and drawing inspiration from psychological research to do so) is called behavioural economics. Being a well-established discipline for quite some time,[4] it has likewise influenced the study of law and economics, including the area of competition law.

The application of behavioural economics in competition law enforcement is not a new topic in academia. Indeed, especially scholars studying antitrust in the United States were interested in this question at least since the early 2000s.[5] The analysis of competition law through the lens of behavioural economics and the related question of applying behavioural economics as a tool of its enforcement have not remained confined to academic journals. On the contrary, practitioners take interest in the topic.[6] Theories of harm based in behavioural economics (behavioural theories of harm for short) are thus a phenomenon that is recognised and receives attention. It is worthwhile to ask about the distinguishing features of such theories of harm as well as their possible pitfalls. This is likely clear from the viewpoint of a competition authority that intends to enforce competition law notwithstanding the nature of the mechanism of harm to competition. Perhaps less intuitively, the legal aspects of behavioural theories of harm should be studied from the viewpoint of their legal repercussions, even though they are not a legal category *per se*. Should the shift in the underlying economic reasoning also translate into a legally relevant pattern, any increase in the number of behavioural theories of harm put forward will affect both the legal reasoning within the decisions relying on such theories of harm and the subsequent judicial review.

Thus, the General Court's decision of 14 September 2022 in Case T-604/18 *Google Android* provides for an interesting case study. The Commission's decision under scrutiny[7] relied in part on the effects of a "status quo bias" – a well-known concept in behavioural economics. The basic idea of status quo bias is a contradiction of the expectation of rational choice theory that rational agents should only base their decisions on factors relevant from the viewpoint of their preferences. On the contrary, the notion of "status quo bias" describes how factors like holding on to a previous decision or simply doing nothing rather than something can be influential in human decision making. In a famous paper by William Samuelson and Richard Zeckerhausen, a mere shift in framing of otherwise identical choices to design one as the *status quo* had a measurable

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[4] Daniel Kahneman, one of the best-known scholars in this area, won the 2002 Nobel Prize for *"having integrated insights from psychological research into economic science, especially concerning human judgment and decision-making under uncertainty"*.

[5] See the notable example of TOR, A. The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy. *Michigan Law Review*. 2002, Vol. 101, No. 2, pp. 482–568.

[6] For example, the OECD held a roundtable on this topic in June 2022 with plans to delve deeper into the problematic in the future. See the background note, OECD. *Integrating Consumer Behaviour Insights in Competition Enforcement: OECD Competition Policy Roundtable Background Note* [online]. OECD, 2022 [cit. 2023-01-31]. Available at: www.oecd.org/daf/competition/integrating-consumer-behaviour-insights-in-competition-enforcement-2022.pdf.

[7] Commission Decision C(2018) 4761 final of 18 July 2018 relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.40099 – Google Android).

effect.[8] *Google Android* can then be seen as an application of the concept of "status quo bias" in competition law. Specifically, one of the pillars of the Commission decision was Google's requirement, according to which it was for original equipment manufacturers to pre-install the Google Search and Chrome apps in order to be able to also use its app store – Play Store. These pre-installation requirements were supposed to be a source of a competitive advantage for Google thanks to said "status quo bias". Many users would simply rely on the pre-installed apps without further exploring available competing apps with similar functionalities.

This contribution discusses the judgement and tests it against some of the predictions made in relation to behavioural theories of harm in earlier literature. It must be noted at the outset that the results of a single case study are not to be automatically generalized. Nevertheless, it can be a source of interesting insights into (so far largely theoretical) discussions on the legal repercussions of behavioural economics in competition law.

The second part of this contribution briefly compares the judgement to the *Kodak* decision by the U.S. Supreme Court and demonstrates the contrast between the General Court's pragmatic approach to economic evidence and the Supreme Court's willingness to delve into economic orthodoxy. The third part discusses the question of a possible drop in enforcement predictability and the ongoing applicability of older legal tests within behaviourally informed competition law, and the fourth part argues that the perspective of behavioural economics in competition law will remain relevant even in the background of new EU legislative acts. The conclusion contains a brief summary of this contribution and suggestions for further research.

II. A LACK OF EXPLICIT STATEMENTS ON ECONOMIC ORTHODOXY

This section deals with the General Court's bearing (or lack thereof) on the question of behavioural economics in competition law in possibly the most general, paradigmatic, sense. Even though the letter of the law may formally remain the same over time, the approach to its reasoning does not happen in an intellectual void. Instead, one can recognise shifts in paradigms applicable to the enforcement of competition law.[9]

The General Court's *Google Android* decision, though, does not contain as clear discussions of economic theory (further also referred to as "economic orthodoxy") as the ones one can find e.g., in the U.S. Supreme Court's *Kodak* decision[10] that was highlighted as a case relevant to the question of behavioural economics in competition law by Avishalom Tor.[11] In *Kodak*, the Supreme Court dealt with a case where Kodak,

[8] SAMUELSON, W. – ZECKHAUSER, R. Status Quo Bias in Decision Making. *Journal of Risk and Uncertainty*. 1988, Vol. 1, No. 1, pp. 7–59.

[9] ŠMEJKAL, V. Doktrinální souboj o evropský antitrust – odkud kam směřuje soutěžní politika a právo EU? [The doctrinal battle over European antitrust – where is EU competition policy and law going from here?]. *Právník*. 2014, Vol. 153, No. 2, p. 90.

[10] *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992).

[11] TOR, A. Understanding Behavioral Antitrust. *Texas Law Review*. 2014, Vol. 92, No. 3, p. 587.

a copying equipment manufacturer, took steps to limit the availability of replacement parts for its equipment, which negatively impacted the ability of independent service organisations to compete with it in the area of servicing its equipment. The issue dealt with in the judgment was the relevance of Kodak's market power in the service and parts market, when it lacked market power in the primary equipment market.[12] Avishalom Tor notes that *"the assumption of consumer rationality played a significant, if somewhat implicit, role in the disagreement between the opinions of the majority and the dissent"*.[13] I agree with the statement, I would even add that the problem of consumer rationality is visible rather plainly in the judgment, and especially so in the dissenting opinion by Justice Scalia. While Kodak contended that its lack of market power in the primary equipment market meant that it would be disciplined by the market forces in this primary equipment market, should it raise prices in the service and parts market. In its majority Opinion, the Supreme Court rejected this reasoning. It stated, among other things, that this logic would imply that a lowering of prices in the services and parts market should strengthen Kodak's position in the primary equipment market. Nevertheless, Kodak took steps to limit the independent service organisations' ability to compete with lower prices, thus increasing the prices in this market. Despite this, there was no evidence of Kodak's equipment sales dropping.[14] A rational consumer might have wanted to factor in this increase in maintenance costs when buying Kodak's equipment. I therefore argue that the reasoning in this point of the judgment is behavioural in its nature, even though the majority opinion might not use this terminology. Indeed, Justice Scalia, dissenting, criticised this implicit reliance on customer irrationality by noting that *"a rational consumer considering the purchase of Kodak equipment will inevitably factor into his purchasing decision the expected cost of aftermarket support"*.[15] While some consumers, admittedly, are not acting rationally, he contends that the Supreme Court "[has] *never before premised the application of antitrust doctrine on the lowest common denominator of consumer"*.[16] We can thus see an instance of the U.S. Supreme Court engaging directly in the underlying economic reasoning of the case at hand. Such explicit statements are perhaps not all that often seen in the decisions of the Court of Justice of the European Union.

The main takeaway from the *Google Android*, in terms of economic orthodoxy, may be that it largely upheld the Commission's decision, instead of objecting to its underlying economic reasoning. In relation to the existence (and effects) of a "status quo bias", the General Court first held admissible the evidence submitted to demonstrate a consensus as to the understood meaning of the term "status quo bias" (para. 97). It then accepted that the test for to tying practices used in the *Microsoft* judgement[17] was applicable to the case at hand as well (paras 284 to 295). In reviewing the condition

[12] 504 U.S. 451 (1992), p. 455.
[13] TOR, *c. d.*, p. 588.
[14] 504 U.S. 451 (1992), p. 472.
[15] Ibid., p. 495.
[16] Ibid., p. 496.
[17] I.e., that (i) the tying and tied products are two separate products, (ii) the undertaking concerned is dominant in the market for the tying product, (iii) the undertaking concerned does not give customers a choice to obtain the tying product without the tied product, (iv) the practice in question "forecloses competition",

of competition foreclosure, the General Court examines the evidence put forward to substantiate the relevance of pre-installation[18] of Google's applications in the light of the purported "status quo bias" (paras 320 through 418). The General Court discusses here the existence of a significant competitive advantage conferred on Google by the pre-installation conditions in question, and while Google argued *inter alia* against the existence of a "status quo bias" (para. 323), the court concludes this part of the judgement by noting that Google failed to refute the Commission's findings regarding the advantage to Google conferred by said pre-installation conditions (para. 418). In this segment, the General Court does not discuss the point of principle regarding consumer rationality (or a lack thereof), as the U.S. Supreme Court dealt with at least indirectly in *Kodak*. Instead, among other things, the General Court looks at quantitative coverage of Google's pre-installation conditions within devices sold on the European and global market (paras 336 through 339) and analyses evidence submitted to confirm or to contradict the disputed advantage as such.

Thus, the *Google Android* decision shows that the General Court remains at least agnostic in relation to the economic reasoning underlying the theories of harm contained in the contested decision. Unlike the "behavioural" *Kodak* case decided by the U.S. Supreme Court, the more general questions of economic orthodoxy did not appear to be similarly important in the proceedings before the General Court in *Google Android*. Instead, tacitly accepting a not necessarily rational consumer as a benchmark, the General Court focused on the existence and magnitude of the effect of pre-installation conditions giving rise to the "status quo bias".

The difference in the described approaches can of course be attributed at least in part to the fact that the legal system within the United States is considered to rely on economic reasoning to a large extent,[19] while this is not necessarily the case in the legal tradition of continental Europe.[20] Furthermore, some of the elements of the case being similar to the older *Microsoft* judgement,[21] there might thus be even less need to tackle questions of principle in a judgment that follows a famous precedent, albeit not the newest one.

Nevertheless, even in the absence of an analysis based on law and economics, court cases are based on real life events that more likely than not entail an economic dimension. This holds even more so in the area of competition law. Courts can then, at best, choose not to engage with the economic dimension of the problem that is present.

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and that practice is not objectively justified. See Case T-201/04, *Microsoft v. Commission*, EU:T:2007:289, para. 869, and the test rephrased in its entirety by the General Court in *Google Android*, para. 284.

[18] Understood here rather loosely, as discussed by the General Court in paras 327 through 335 of the judgement.

[19] KENDALL, K. The Use of Economic Analysis in Court Judgments: a Comparison between the United States, Australia and New Zealand. *UCLA Pacific Basin Law Journal*. 2011, Vol. 28, No. 2, p. 115.

[20] POSNER, R. A. The Future of the Law and Economics Movement in Europe. *International Review of Law and Economics*. 1997, Vol. 17, No. 1, p. 5. It has to be noted that judge Posner continues to argue why he believes this might change. Some developments in this sense can be discussed on the background of the "more economic approach" that is mentioned below, although these discussions often seem to be more closely linked to closer scrutiny of the actual effects of a conduct, in my opinion. This should be distinguished from judges and lawyers directly and explicitly engaging with questions of economic theory.

[21] See Case T-201/04, *Microsoft v. Commission*, EU:T:2007:289.

A more charitable view, however, would be that of a court that does not engage in questions of economic orthodoxy if it does not find it necessary. Instead, it can focus on pragmatically reviewing the evidence put forward with the knowledge that it is simultaneously concurring to its theoretical underpinning.[22]

III. THE ROLE OF LEGAL TESTS AND PREDICTABILITY IN BEHAVIOURAL CASES

Some ten years ago, the Commissioner of the U.S. Federal Trade Commission Thomas Rosch noted that the usage of behavioural economics in competition law leads some to raise concerns in relation to the predictability of competition law and that painstaking empirical analysis of behavioural economics can reduce the usefulness of tidy neoclassical models.[23] I have myself argued in the past that behavioural economics can call into question the usage of established tests, possibly lower the predictability of enforcement and, generally, lead to more cases that are more complicated on the factual level.[24]

What can the *Google Android* decision tell us about these concerns and predictions? It is useful to begin with the question of the applicable test, which I consider related to Commissioner Rosch's note on the possibly reduced usefulness of neoclassical models. Already within the administrative proceedings, the Commission decided to examine the effects of Google's tying practice, although older case law of the EU's courts would suggest that this is not necessary. The Commission did so by referring to the General Court's *Microsoft* judgement.[25] The General Court then upheld this test by openly discussing the relevance of the exclusionary effect of a conduct that is in breach of Article 102 TFEU in the abstract (paras 280 through 282) and essentially reiterating a part of the *Microsoft* judgement's reasoning in relation to tying, where the General Court pointed to specific circumstances warranting an analysis of effects, notably that third party media players (that would compete with the tied product) were often distributed free of charge (paras 286 through 287 of the *Google Android judgement*). Thus, a *"close examination of actual effects* […] *was required"* (para. 295).

Although the case entailed tying, a presumptively anti-competitive conduct in principle, both the Commission and the General Court agreed that it had to be opened to

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[22] After all, courts might want to focus on the usage of economic evidence rather than using economic theory as a policy tool, as noted by HUFFMAN, M. A Look at Behavioral Antitrust from 2018. *CPI Antitrust Cronicle* [online]. 19.1.2019, p. 6 [cit. 2023-01-31]. Available at: https://papers.ssrn.com/abstract=3309341.

[23] ROSCH, T. Behavioral Economics: Observations Regarding Issues That Lie Ahead. In: *FTC.gov* [online]. 9.6.2010, p. 8–9 [cit. 2023-01-31]. Available at: https://www.ftc.gov/sites/default/files/documents/public_statements/behavioral-economics-observations-regarding-issues-lie-ahead/100609viennaremarks.pdf.

[24] JAKAB, M. Proč současný antitrust potřebuje psychologa? [Why does the current antitrust need a psychologist?]. In: GERLOCH, A. – ŽÁK KRZYŽANKOVÁ, K. (eds.). *Právo v měnícím se světě*. Praha: Vydavatelství a nakladatelství Aleš Čeněk, 2020, pp. 702–712.

[25] Case T-201/04, *Microsoft v. Commission*, EU:T:2007:289, para. 867. See recital 749 of the Commission's Decision.

a more thorough analysis of effects in this situation. This is in line with the notion that behavioural theories of harm might test the confines of some of the older tests based on some form of economic reasoning (be it correct or not)[26] or even evade them altogether. I consider this a necessary corollary to the fact that behavioural economics has to rely on empirically observed realities which replace what would simply be assumptions in some of the classical models. Once again, the General Court was following an already existing precedent. At the same time, it added grounding to the rationale for delving into an analysis of effects and called it "required". The rationale presented the General Court is twofold: an examination of effects should minimise risks of a type I error, i.e., a penalisation of a conduct that is not actually anti-competitive, and the determination of the conduct's gravity for the purposes of a potential fine (para. 295). This is not without significance. In one of the early reactions, academic competition lawyer Pablo Colomo noted that he would be hesitant to call tying a presumptively unlawful practice in the future.[27] And while one could not say that this for and only for behavioural theories of harm. I nevertheless argue that this is going to be a common trait of behavioural theories of harm because of the empirical nature of required evidence.

At the same time, this might not necessarily be an end for tests rather than a limited usefulness of presumptively unlawfulness of certain types of conduct in an enforcement landscape that focuses more heavily on behavioural theories of harm. In *Google Android*, the General Court still applied a modified test for tying which, at least in the given case, also required the Commission to show the effects of the conduct. The applicable tests are, in fact, a part of the typology of anti-competitive conducts used by lawyers, courts and competition authorities. It can be expected that they will continue to play an important role in the framing of problems. Perhaps, this does not only apply from the viewpoint of enforcement, but also from the viewpoint of the management of undertakings that engage in anti-competitive conduct. I would assume after all, that the sequence of decisions that lead to the engagement in an anti-competitive conduct will also often follow some structured rationale. Behavioural economics might still be a factor encouraging competition authorities to build cases relying on more novel theories of harm, as happened for example in *Google Shopping*.[28] At the same time, in situations that fit into older notions of anti-competitive behaviour, their influence might rather be a shift towards an analysis of effects.

It should be noted that this shift is not taking place in a vacuum. There are ongoing discussions of the so-called "more economic approach" within EU competition law. While the understanding of this notion by different authors might vary, crucially, it is

[26] When it comes to tying, doubts have been raised about its presumptive unlawfulness, and especially so in connection to the digital economy. See e.g., PADILLA, A. J. – POLO, M. Tying in Platform Software: Reasons for a Rule-of-Reason Standard in European Competition Law. *World Competition*. 2002, Vol. 25, No. 4, pp. 509–514.

[27] COLOMO, P. The notion of abuse after the Android judgment (Case T-604/18): what is clearer and what remains to be clarified (I). In: *Chillin'Competition* [online]. 28.9.2022 [cit. 2023-01-31]. Available at: https://chillingcompetition.com/2022/09/28/the-notion-of-abuse-after-the-android-judgment-case-t%e2%80%91604-18-what-is-clearer-and-what-remains-to-be-clarified-i/.

[28] Commission Decision C(2017) 4444 final of 27 June 2017. See also the judgement of the General Court of 10 November 2021 in Case T-612/17 *Google and Alphabet v. Commission (Google Shopping)*. I previously discussed the behavioural nature of this case in JAKAB, *c. d.*, fn. 24.

likewise often linked to the call for the Commission (and the courts) to scrutinise the pro- and anti-competitive effects of a certain conduct in more detail, rather than focusing on fitting the conduct in question into a formal test.[29] I argue that this phenomenon is separate from that discussed above, although both may coincide in certain areas. While the "more economic approach" is a general shift in the approach to and reasoning underlying the enforcement of competition law, behavioural theories of harm necessitate a closer engagement with the effects of a conduct by virtue of stepping outside of most established analytical frameworks. They essentially require authorities and claimants to present evidence showing that the behaviour of a group of agents will systematically differ from what would be expected on the basis of conventional analysis.

This leads directly to the other criticism cited by Thomas Rosch: the lack of legal certainty. As he himself countered, though, pre-Chicagoan U.S. antitrust law could be considered quite clear and predictable in terms of its outcomes thanks to its reliance on *per se* rules. Finding it contradictory to use the same reasoning to now argue against the behavioural approach on the basis of its unpredictability, he argues that behavioural economics can reveal situations where antitrust law acts predictably at the cost of aggressive enforcement.[30] I can agree with this. Indeed, the commonly accepted roles of competition law are to protect either competition itself or the consumer welfare achieved through competition. In this context, economic theory is a tool, not a goal itself. Economic models can act as a useful simplification of real-world scenarios, but they should not stand in the way of reality.

The above line of reasoning could be summarised as an attempt to minimise type II errors, or a failure to take action against a conduct that is anti-competitive. It is perhaps a large part of the motivation behind opening inquiries into conduct entailing novel theories of harm, atypical markets, etc. On the other hand, it does not appear that the General Court would place much emphasis on this other type of error in enforcement. This is not surprising. Within the EU's system of enforcement of competition law by public authorities, it is the Commission who opens investigations and thus can play a pro-active role in determining the aggressiveness of enforcement. The EU's courts are in a position to decelerate such initiatives through strict scrutiny or allow for them by being accepting to the shifts in the Commission's administrative practice.

Thus, from a viewpoint of judicial oversight, I find it reasonable that the General Court instead explicitly mentioned the issue of type I errors in connection with the analysis required for establishing a breach in the case at hand. The case before it, while relying on an older precedent, showed anomalies that might distinguish it from typical tying cases on which the EU courts' case law developed. Furthermore, a focus on a proper analysis of a conduct's harmfulness and severity may counteract the lowered predictability of the law. The tension between attempts to minimise type I and type II

[29] WITT, A. The European Court of Justice and the More Economic Approach to EU Competition Law – Is the Tide Turning? *The Antitrust Bulletin*. 2019, Vol. 64, No. 2, p. 210. See also COLANGELO, G. – MAGGIOLINO, M. Intel and the Rebirth of the Economic Approach to EU Competition Law. *IIC. International Review of Intellectual Property and Competition Law* [online]. 2018, Vol. 49, No. 6, p. 697 [cit. 2023-01-31]. Available at: https://link.springer.com/article/10.1007/s40319-018-0723-1.

[30] ROSH, *c. d.*, p. 9.

errors cannot be done away with. Nevertheless, when it might not be *prima facie* clear if a certain undertaking's conduct is unlawful or not, extra energy invested into ascertaining that it is indeed harmful and achieves a certain degree of seriousness is also energy invested into legitimising such an intervention.

To conclude, the *Google Android* decision is compatible with the notion that behavioural theories of harm could lead to enforcement that is somewhat less predictable. This can be illustrated with the fact that the General Court explicitly confirmed the necessity to show exclusionary effects of conduct like the one prohibited by the Commission's decision. At the same time, it shows that the older tests applied to scrutinize potentially anti-competitive conducts may be modified, but this does not necessarily deprive them of their meaning. Of course, new methods of analysing potentially anti-competitive conduct can still give rise to novel theories of harm.

IV. WHAT WILL BE THE INFLUENCE OF NEW REGULATORY FRAMEWORKS

Going beyond the general implications of the usage of behavioural theories of harm within competition law, it is useful to place this discussion within the broader context of the legal order. As I mentioned in the introduction, "behavioural law and economics" does not extend exclusively to competition law. As a matter of fact, some regulatory instruments on the EU level attempt to counter issues linked to so-called "behavioural exploitation", the precondition of which could be described as a conduct that *"is trying to exploit a predictable irrationality in* [consumers'] *transactional decision-making*[.]*"*[31] One of the relatively recent regulatory attempts to address such behaviour can be seen in the new *Digital Services Act* (DSA),[32] which attempts to address so-called "dark patterns", which will presumably coincide with cases of behavioural exploitation (see recital 67 of the DSA, Article 25 DSA then lays down binding rules). Researcher Frédéric Marty discusses this overlap between the subject-matter of the *Google Android* judgement and the regulatory efforts described above (among other instruments, both binding and soft-law in nature).[33]

This parallel is not a coincidental one. After all, the proposals of the DSA and the Digital Markets Act (DMA)[34] were adopted by the Commission in order to address is-

[31] LAUX, J. – WACHTER, S. – MITTELSTADT, B. Neutralizing online behavioural advertising: algorithmic targeting with market power as an unfair commercial practice. *Common Market Law Review*. 2021, Vol. 58, No. 3, p. 735.

[32] Regulation (EU) 2022/2065 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act).

[33] MARTY, F. Pré-installations, biais de statu quo et consolidation de la dominance: Les enseignements de l'arrêt du Tribunal de l'U.E. dans l'affaire Google Android. *CIRANO – Cahier scientifique*. 2022, No. 29, p. 9.

[34] 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).

sues, that the contemporary legal framework (including competition law) did not seem to be able to address satisfactorily.[35]

Nevertheless, these new rulebooks are *ex ante* regulatory instruments in nature. Moreover, the more market-oriented DMA states explicitly that it will apply in parallel to EU competition law (see Article 1(6) DMA), while the stated purpose of the DSA pursues more general societal goals of ensuring a *"safe, predictable and trusted online environment"* (see Article 1(1) DSA). With these new tools that are *ex ante* in nature, regulators can undertake quicker intervention in comparison to competition law.[36] Does it make sense to continue in developing a behaviourally informed competition enforcement framework under these conditions?

I believe it does. Besides the fact that the relevant regulatory frameworks can pursue goals differing from the values protected by competition law, I am not aware of a case where sector-specific regulation would render competition enforcement redundant. On the contrary, the fairly high number of the Commission's Article 102 TFEU prohibition decisions aimed against telecommunication undertakings[37] after 2000 can show that even regulation does not necessarily obviate the use of competition law.

Admittedly, the decisions cited above were adopted before the recent clarifications of the *ne bis in idem* principle under Article 50 of the Charter of Fundamental Rights of the European Union made by the Grand Chamber of the Court of Justice. These might be considered as a restriction of the authorities' ability to intervene on the basis of both competition law and regulation, as the *bpost* judgment clarified that the *ne bis in idem* principle should follow the *idem factum* approach (i.e., two proceedings regarding the same facts) in the area of competition law.[38] Although the fact that restrictions of the *ne bis in idem* principle that do not encroach upon its essence[39] are generally considered to be proportionate when fulfilling certain requirements led some commentators to question the efficacy of such protection,[40] there is a broader point to be made. While the precise interplay between the new rulebooks and established competition law will certainly need to be clarified in the future, competition law will remain useful at least in cases of any conduct that is problematic for competition but possibly legal or hard to address under the new regulatory frameworks.

Competition law can serve as a tool addressing issues that are hard to tackle through regulation. While its *ex post* intervention may take many years and can thus seem

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[35] European Commission. *Shaping Europe's Digital Future*. 2020, COM(2020) 67 final, p. 9.

[36] To stay with the Commission's *Google Android* decision, the origin of the proceedings was a complaint filed in March 2013, while the Commission's decision comes from July 2018. The judicial scrutiny is still ongoing. While the General Court's judgement was issued in September 2022, the appeals proceedings can change the outcome of the case are currently pending (see case C-738/22 P – *Google and Alphabet v. Commission*), ten years after the initial complaint.

[37] See e.g., AT.37451 Deutsche Telekom, AT.37451 Wanadoo, AT.38784 Telefonica S.A. (broadband), AT.39523 Slovak Telekom, and other decisions (see Commission Art. 82 EC / Art. 102 TFEU prohibition decisions in sector J.61 – Telecommunications).

[38] Case C-117/20 *bpost*, EU:C:2022:202, paras 33 through 35.

[39] Meaning that the two proceedings should not be regarding the same offense or pursue the same objective. See para 43 of the *bpost* judgment.

[40] See VAN CLEYNENBREUGEL, P. BPost and Nordzucker: Searching for the Essence of Ne Bis in Idem in European Union Law. *European Constitutional Law Review*. 2022, Vol. 18, No. 2, p. 374.

unwieldy, its strength lies in its versatility. As mentioned above, the Commission can build cases on novel theories of harm and thus identify issues in conduct that might be hard to capture by a more specific set of rules. At the same time, its response has the potential to be tailored to the specific case. Understandably, this comes at the cost of time and a good deal of resources invested into the analysis of the problem at hand, as well as subsequent judicial scrutiny. Behaviourally informed competition law then seems to exacerbate this issue. In order to achieve a fast reaction to a perceived issue, competition law (or antitrust to say the least) might not be the best-suited tool. Yet, it can still inform the behaviour of undertakings in the long run, thus setting a standard of what practices can be deemed problematic. I have argued previously that behaviourally informed antitrust can fulfil its deterrent role, although there is no clear agreement on the subject.[41] Even in the most pessimistic scenario, though, experience from antitrust enforcement both on the EU and national level was an important factor that fed into preparatory works for the DMA proposal,[42] leading to an innovative regulatory framework to tackle issues uncovered by these earlier attempts.

IV. CONCLUSION

In the most recent occurrence of judicial scrutiny of a behavioural theory of harm, the General Court mostly upheld the Commission's analysis of the issue at hand. At the same time, while discussing the importance of examining the effects of conduct in a case like *Google Android*, it did not delve into many questions of principle regarding the underlying economic theory. Pragmatically speaking, this means that the General Court will likely not stand in the way of similar theories of harm as a matter of principle. The decision also shows the potential usefulness of older legal tests which, while not necessarily bringing the same degree of legal certainty as in the "classical" cases on which they were developed, still serve as a useful tool to structure the reasoning underlying the decision.

Furthermore, although some legislative acts on the EU level are also attempting to deal with the issue of behavioural exploitation, this does not obviate behaviourally informed competition law. There is experience with competition law being applied in highly regulated markets. Furthermore, the relatively abstract nature of Articles 101 and 102 TFEU allows competition law to be a very versatile tool. Although its enforcement can take years, I believe it nevertheless proves useful in the long run.

As this contribution deals with a single judgement, attempts at generalisations should be made with caution. This being said, the General Court's *Google Android* judgement might indicate that to study behaviourally informed competition law, one has to delve into the Commission's decision making itself. At least as far as the

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41 JAKAB, M. Benefits and Limitations of a Behaviourally Informed Regulatory Framework for Digital Market. *Prague Law Working Papers* [online]. 2022, No. 3, pp. 7–8 [cit. 2023-01-31]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4275031.

42 See the Impact Assessment Report accompanying the DMA proposal, SWD(2020) 363 final, especially its Section 5.2.2 and Annex 5.6.

relevance of behavioural economics goes, the General Court remained agnostic to the niceties of economic theory and looked at economic evidence instead of using economics as a policy tool.[43] If this shows to be a trend, in the Commission's decision-making practice then lie the answers to questions regarding both the prevalence and qualitative features of behavioural theories of harm. Further research may be needed to answer these questions.

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[43] As noted by HUFFMAN, *c. d.*, p. 6.