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Dynamic Competition, Exclusionary and Exploitative Abuses, and Article 102 TFEU:

Towards a Concept of Systemic Market Power?

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Abstract: In this paper, we comment on the debate about guidelines for Art. 102 TFEU in the face of the challenges brought by digital ecosystems and abuse of dominance in related markets. We take the perspective of dynamic competition economics and derive four recommendations for the future enforcement of abuse control and related merger control: (i) we advocate to abandon the as-efficient-competitor standard embraced in the late 2000s, (ii) we emphasize the relevance on focusing on exploitative abuses as well as on exclusionary ones, (iii) we suggest to implement a concept of systemic market power as a guideline to enforcement, and (iv) we argue that the same enhanced market power standard should also be applied in the corresponding merger control. While going beyond pure guideline recommendations and focusing on a dynamic-economic view, we are convinced that these steps are necessary to move towards a more effective competition policy towards abuse of digital dominance.

Keywords: abuse of market power, Art. 102 TFEU, digital ecosystems, antitrust, European competition policy, as-efficient-competitor standard, exclusionary abuse, exploitative abuse, dynamic competition, merger control

JEL-Codes: K21, L41, L40, L12, L14, L81, L86

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[+] A revised version of this paper is forthcoming in *Concurrences*.

1. Background

Article 102 of the Treaty on the Functioning of the European Union (TFEU) prohibits the abuse of a dominant position by undertakings. The enforcement of Article 102 TFEU has been instrumental in disciplining the behavior of dominant companies, which are prohibited from engaging in conduct that could harm genuine and undistorted competition, and can therefore be seen as "the cornerstone of civilizing economic power".[1] However, in contrast to other competition law instruments, the European Commission ('Commission') has not yet issued any Guidelines on the application of Article 102 TFEU but has only published a so-called Guidance Paper on Enforcement Priorities in the area of exclusionary conduct in 2008.[2]

In March 2023, the Commission launched a Call for Evidence regarding the development of future Guidelines on exclusionary abuses[3], intended to replace the enforcement priorities guidance. The Commission justifies its initiative with current market developments, including increasing market concentration at the macroeconomic level and the growing importance of digital markets and services. In such fast-moving (digital) markets, which often exhibit strong (direct and indirect) network effects, the Commission's objective is to ensure effective enforcement of Article 102 TFEU in order to prevent the tipping of markets.[4] Another reason for the development of Guidelines is the evolution of the EU court's case law, which the new Guidelines are supposed to be taking into account.[5] The feedback received already by the Commission is publicly available on the 'Have-your-say'-page of the initiative,[6] however, rather mixed in the respective focus.

In this paper, we would like to focus on dynamic competition concepts by making four points: first, the current practice of abuse control suffers from the weaknesses of concepts like the As-Efficient-Competitor-test, which should be abandoned. Second, the balance between priority on exclusionary and on exploitative abuse of market power should be re-adjusted. Third, abuse control should embrace a concept of systemic market power. And, fourth, the balance between the complementary concepts of abuse and merger control should be modified. Section 2 deals

[1] R. Podzsun & T. Rohner, Making Article 102 TFEU Future-Proof – Learnings from the Past, Comments for the European Commission's 2023 Call for Evidence regarding Guidelines on Article 102 TFEU, 2023, p.3.

[2] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7.

[3] European Commission (2023), EU competition law – guidelines on exclusionary abuses by dominant undertakings, URL: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13796-EU-competition-law-guidelines-on-exclusionary-abuses-by-dominant-undertakings_en (last accessed March 5, 2024).

[4] European Commission (2023), Competition policy brief, Issue 1, March 2023.

[5] European Commission (2024), Application of Article 102 TFEU, URL: https://competition-policy.ec.europa.eu/antitrust-and-cartels/legislation/application-article-102-tfeu_en (last accessed March 5, 2024); Podzsun & Rohner (fn. 1).

[6] European Commission (fn. 3).

with the first two points while section 3 addresses the latter two issues. Section 4 summarizes our policy recommendations.

2. Dynamic Competition in (Digital) Ecosystems and the Focus on Exclusionary Abuses

The 2008 Guidance by the Commission on enforcement priorities in applying Article 102 TFEU[7] constituted a shift in enforcement practices: its goal was to move away from a rather formalistic approach, based on per se criteria, to an effects-based approach based on the actual and potential effects of a given conduct through in-depth case-by-case analysis. However, the record of this strategic shift is mixed: one the one hand, in 32 judgements, EU courts have confirmed the approach and contributed to further specifying its underlying concepts and practices.[8] Furthermore, it fitted well into international trends in competition policy at that time. On the other hand, there is a widespread impression that the effects-based approach in its extreme case-by-case conduct assessment design (without strong rebuttable presumptions or other more rule-based elements) has weakened the side of competition enforcement by unintentionally driving up evidence standards – both in merger control and in the abuse of dominance cases.[9] Together with a strong dynamic of economic development especially in markets with network effects, omnipresent (and probably irreversible) tipping points, and relevant but complex non-horizontal effects, this may have contributed to the widespread identification of decreasing competition intensity across industries and continents.[10]

If both merger control – the prevention of the emergence of market power – and abuse control – the combat of the unavoidable market power – lack enforcement effectiveness, the process of competition and social welfare become harmed by the emergence and persistence of sclerotic markets characterized by market power. In particular, the emergence and diffusion of digital ecosystems have increased the importance of the tool abuse control whereas the enforcement of the tool became weaker. There is good reason for re-invigorating abuse control – and this requires a number of steps away from the principles of the 2008 guidelines.

[7] European Commission (fn. 2).

[8] European Commission (fn. 4).

[9] Inter alia, O. Budzinski, An Institutional Analysis of the Enforcement Problems in Merger Control, European Competition Journal 6 (2), 2010, 445-474; European Commission (fn. 4).

[10] G. Gutiérrez & T. Philippon, Ownership, Concentration, and Investment, AEA Papers and Proceedings, 108, 2018, 432-437; G. Grullon, Y. Larkin & R. Michaely, Are U.S. Industries Becoming more Concentrated? Review of Finance, 23(4), 2019, 697-743; D. Autor et al., The Fall of the Labor Share and the Rise of Superstar Firms, Quarterly Journal of Economics, 135(2), 2020, 645–709; J. De Loecker, J. Eeckhout & G. Unger, The Rise of Market Power and the Macroeconomic Implications, The Quarterly Journal of Economics, 135(2), 2020, 561-644; P. Affeldt, T. Duso, K. Gugler & J. Piechucka, Market Concentration in Europe: Evidence from Antitrust Markets, 2021, CESifo Munich, http://hdl.handle.net/10419/232463; M. Bajgar et al., Industry Concentration in Europe and North America, Industry and Corporate Change, 2023, https://doi.org/10.1093/icc/dtac059; G. Koltay, S. Lorincz & T. Valletti, Concentration and Competition: Evidence from Europe and Implications for Policy, Journal of Competition Law & Economics, 19(3), 2023, 466-501.

2.1 The Flaws of the As-Efficient-Competitor Standard

A particular topic is the embracing of the as-efficient-competitor standard (AEC-standard) and the specific economic thinking underlying this concept. Somewhat simplistic, the AEC-standard declares that the exclusion of competitors is only anticompetitive if these competitors are at least as efficient as the dominant company. Or, in other words, the AEC-standard "made use of the notion of foreclosure of as-efficient competitors from a cost perspective as a proxy to identify anticompetitive effects warranting intervention".[11] In contrast to previous thinking, the AEC-standard does not care whether the instruments used to exclude a competitor are part of competition on the merits. Instead, it "only" matters whether the competitor is sufficient efficient or not – which represents a very consequent and radical interpretation of the effects-based approach. It should be noted that the economic concept is more nuanced than this simplified description and includes "the possibility that competition from not-(yet)-as efficient competitors may play a role"[12] – along with different notions of efficiency (beyond pure static cost efficiency). However, the experience with the AEC-standard shows that while its fundamental, simplified notion gets propelled into the limelight, its nuances and differentiations tend to get neglected, eroded, and overlooked.[13] Thus, there is an inherent tendency towards "an unduly strict and dogmatic application of such a standard".[14]

The AEC-standard relies on a particular economic thinking that sensitively relies on a static perspective with ambitious assumptions about information and knowledge. From a static perspective, competition is viewed to represent a state of efficiency, in pure model worlds with assumptions of perfect information. Here, indeed, the existence of a less-efficient competitor reduces overall efficiency and provides no welfare effect to consumers or society. However, from a dynamic perspective, things look a bit different: competition as a process of an interplay between creative forces testing new solutions on the market (innovation including disruptive innovations[15]) and adaptive forces eroding advantages of successful innovations and re-enforcing the incentives of the creative forces to innovate, while bringing elements of innovation themselves (imitation including gradual innovation) generates coordination knowledge and safeguards a permanent decentralized coordination function of the market economy.[16] This permanently ongoing coordination in an ever-changing world is a fundamental

[11] European Commission (fn. 4), p.5.

[12] European Commission (fn. 4), p.5.

[13] European Commission (fn. 4); R. Inderst, Leitlinien zu Artikel 102 AEUV: Diskussion, Bundeskartellamt 2023.

[14] European Commission (fn. 4), p.5; see also H. Schweitzer, Leitlinien zu Artikel 102 AEUV – Neue Maßstäbe für die Missbrauchsaufsicht? Bundeskartellamt 2023; F. Wagner-von Papp, Abkehr vom AEC-Test: 'It is better to be vaguely right than exactly wrong', Bundeskartellamt 2023.

[15] G. Federico, F. Scott Morton & C. Shapiro, Antitrust and Innovation: Welcoming and Protecting Disruption, Innovation Policy and the Economy, 20(1), 2020, 125-190.

[16] Inter alia, J. M. Clark, Competition as a Dynamic Process, Washington, D.C. 1961; N. Petit & D. Teece, Innovating Big Tech firms and Competition Policy: Favoring Dynamic over Static Competition, Industrial and

source of social welfare since the complex task of generating the relevant knowledge cannot be centralized.[17]

Taking such a view (which can only be sketched in this brief contribution) yields important caveats for the AEC-thinking: in the process of dynamic competition, there is not one unique efficient solution. Instead, many ways lead to similar levels of (dynamic) efficiency. Furthermore, knowledge and information are not given and the room of (strategic) options for the companies is neither given nor determined.[18] Instead, information and knowledge is only created through competition as a process of mutual learning[19]: companies experiment with goods (commodities, services, contents, etc. – including how they are produced, designed, presented, distributed, advertised, etc.) – and learn from their successes and failures. Since real-world dynamic competition (typically: oligopolistic competition) involves mutual observation (strategic interdependence), this learning process is driven by both a company's own experimentation and those of its competitors, with this mutual learning character speeding up the process of generating coordination knowledge and, thus, social welfare.

Combining the dynamic perspective with more allocative-oriented theory yields a number of virtues of less-efficient competitors for social welfare:

- Innovation: the current state of efficiency does not necessarily correlate to the innovation capabilities of a company. It is well possible that the currently less-efficient company will be more innovative and, thus, become more efficient in the future, eventually overtaking the currently more efficient company. If competition policy allows the currently more efficient company to exclude the currently less efficient company, the dynamic welfare effect is negative. Efficiency levels may change in the course of time and static efficiency does not necessarily equal dynamic efficiency.[20]
- Mutual learning: even less-efficient companies provide market solutions that offer scope for learning about coordination knowledge. The welfare-increasing process of mutual learning does not depend on equal efficiency and lower-efficiency companies may well contribute to enhancing coordination knowledge through mutual learning.
- Safeguarding diversity of choice: if goods are heterogeneous, (cost) efficiency does not perfectly correspond to consumer preferences. (Some) Consumers may prefer the good

Corporate Change, 30, 2021, 1168-1198; W. Kerber, Towards a Dynamic Concept of Competition that Includes Innovation, OECD 2023, DAF/COMP/WD(2023)42.

[17] F. A. von Hayek, The Use of Knowledge in Society, The American Economic Review, 35(4), 1945, 519-530

[18] J. M. Buchanan & V. Vanberg, The Market as a Creative Process, Economics & Philosophy, 7(1), 1991, 167-186.

[19] Kerber (fn. 16).

[20] Heiden et al. propose a dynamic as-efficient competitor test to account for this aspect; see B. Heiden, N. Petit, T. Schrepel & S. Ünekbas, A Dynamic Formulation for the AEC Test, Submission to the European Commission 2023.

or the supply by the lower efficient competitor and lose consumer welfare if these choice options are removed by exclusionary practices.

- Satisfying special consumer needs: in heterogeneous markets, niche competitors may be important for providing regional, time-of-offer-related, or product-design-related or other types of niches.[21]

- Fairness considerations: while not being a typical economic reasoning, it should not be ignored that the (perceived) "allowance" to drive competitors out of the market "just because" they are less-efficient stands at crossroads with major social perceptions of fairness. Next to being a value in its own, a violation of social fairness standards may contribute to eroding the social acceptance of market coordination – and thus may have negative economic effects in the course of time.

Generally, a snapshot of efficiency at a certain point in time does not tell a lot about the evolution of relative efficiency among competitors in the future and during a dynamic competition process. Next to the today less-efficient competitor improving on efficiency (see list above), additional factors from a dynamic competition perspective regarding the probable efficiency-development of the dominant/powerful company come into play:

- Market power sets incentives to cash-in profits and focus on barriers to new competition, thus eroding efficiency. As Hicks framed it: the best of all monopoly profits is a quiet life.[22] Thus, both cost efficiency and dynamic efficiency are likely to erode with persistent market power.

- Growing size leads to the emergence of X-inefficiencies (i.e. costs of growing intra-company bureaucracy; increasing costs of management). In the course of time, efficiency advantages rooted in the size of a company have an inherent tendency to get reduced. Since efficiency advantages of market dominators are frequently relying on size advantages, this usually neglected dynamic aspect is of relevance.

- Market power is economic power which can alternatively be used to secure public support and protection of this power through lobbyism. Powerful companies experience incentives to switch their focus and investment away from innovation and performance (i.e. away from efficiency-seeking) and towards rent-seeking.[23]

Altogether, currently less efficient competitors are likely to play an important role in the competition process from a dynamic perspective. However, this does not imply every non-

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[21] European Commission (fn. 4).

[22] J. R. Hicks, Annual Survey of Economic Theory: The Theory of Monopoly, Econometrica, 3(1), 1935, 1-20.

[23] Inter alia, R. Tollison, Rent-Seeking: A Survey, Kyklos, 35(4), 1982, 575-602; R. Tollison, The Economic Theory of Rent-Seeking, Public Choice, 152(1-2), 2012, 73-82; for recent empirical evidence see B. Cowgil, A. Prat & T. Valletti, Political Power and Market Power, CEPR Discussion Paper 2021, http://dx.doi.org/10.2139/ssrn.4390776.

efficient company is relevant or prospectively valuable. Accordingly, markets inherently drive "too-inefficient" companies out of the market – and this happens even without a powerful company helping/accelerating this process. Since a dominant company has no incentive to just exclude the "too-inefficient" companies, there is no economic reason to expect their "help" to select the right ones being pushed out of the market. Quite in contrast, from a dynamic welfare perspective, dominant companies actually experience a perverted incentive to exclude especially those competitors which entail the prospect of becoming more efficient/more competitive in the future – because the other ones will be gone anyway and do not present a threat to their power.

2.2 The Relevance of Exploitative Abuses

In the modern business world, the industrial organization of digital ecosystems plays a relevant role, particularly when it comes to market power and its abuse – as the GAFAM[24] companies and the related antitrust cases have amply demonstrated. Maybe in contrast to more traditional forms of industrial organization, the power centres of these digital ecosystems do not necessarily focus on exclusionary abuse. Instead, they often experience incentives to engage in exploitative abuse – towards their consumers (private users) but also towards their other customers (business users).[25]

In contrast to linear/vertical supply chains, marketplace providers and communication platform providers in digital ecosystems, for instance, organize their business to consist of multiple demand groups (platform economics): they sell services to consumers, to shop owners, to advertisers, to providers of ancillary services, etc. If such a company enjoys market power within such an ecosystem, it often has no interest to exclude shops from its marketplace or advertisers, providers of ancillary services, etc. due to the indirect network effects at work. However, a powerful ecosystem company experiences incentives to appropriate rents that actually belong to its business users, hence, to squeeze or exploit the business users – but just to the point that they are not leaving.

Therefore, exploitative abuse in business-to-business relations becomes more important in the digital world and the de facto focus on exclusionary abuse in competition policy seems to be an inadequate relict from the pre-digital past. This includes phenomena like "constructive refusal and unfair access conditions" following the so-called Bronner-criteria.[26] However, it would be as least as important to focus on exploitative abuses through, inter alia, unfair access conditions without exclusionary intent or effects.

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[24] Google (Alphabet), Amazon, Facebook (Meta), Apple and Microsoft.

[25] See on the whole section P. Bougette, O. Budzinski & F. Marty, Self-Preferencing and Competitive Damages: A Focus on Exploitative Abuses, The Antitrust Bulletin, 67(2), 2022, 190-207.

[26] European Commission (fn. 4), pp.7-8.

3. Ecosystems Framework: Systemic Market Power and the Twin Relation between Abuse and Merger Control

The use of the term and concept of *ecosystems* in competition law and policy – both, in academia and in practice – has grown tremendously in recent years.[27] However, despite the increasing use of the term by policymakers and competition authorities, the understanding of the term still varies.[28] In some cases the term is used to describe business models, e.g., of the so-called GAFAM firms, in some other cases it is used to refer to the companies themselves or even to entire markets (e.g., the market for app stores).

From an economic point of view, the market structures covered by the ecosystem concept are complex conglomerate and lateral systems in which the existing intermediary power within individual platforms as well as across platforms can create a system of multiple economic dependencies. These allow, for example, various forms of self-preferencing and leveraging of market power, the strategic creation of incompatibilities and the creation or strengthening of barriers to market entry, without the firm having a dominant position in any of the individual markets involved. This makes it difficult to address these issues using 'classic' market power theories. These particular forms of new digital conglomerates[29] usually consist of one or more digital platforms that enable the creation or strengthening of cross-market power by internalizing the complementary nature of their products and services.[30]

The specific type of market power occurring within digital ecosystems can be referred to as *systemic market power* and represents a fourth form of market power, alongside relative (i.e., superior bargaining power), absolute (i.e., single-firm dominance), and collective (i.e., tacit collusion-like equilibria) market power, that needs to be particularly considered in digital

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[27] Inter alia, J. Fuller, M. Jacobides & M. Reeves, M., The myths and realities of business ecosystems, Sloan Management Review Digital Article, February 2019; M. Jacobides & L. Lianos, Ecosystems and competition law in theory and practice, Industrial and Corporate Change, 30, 2021, 1199-1229; V. Robertson, Antitrust market definition for digital ecosystems, Concurrences N° 2-2021; P. Hornung, The Ecosystem Concept, the DMA, and Section 19a GWB, in: Journal of Antitrust Enforcement, 2023, https://doi.org/10.1093/jaenfo/jnad049.

[28] Inter alia, Autoriteit Consument & Markt (2019), Report: Market study into mobile app stores, URL: https://www.acm.nl/sites/default/files/documents/2019-04/marktstudies-appstores.pdf (last accessed March 6, 2024); European Commission (2022), Final report - sector inquiry into consumer Internet of Things, SWD(2022) 10 final, URL: https://competition-policy.ec.europa.eu/system/files/2022-01/internet-of-things_final_report_2022_en.pdf (last accessed March 6, 2024); CMA (2022), Mobile ecosystems – Market study final report, URL: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1138104/Mobile_Ecosystems_Final_Report_amended_2.pdf (last accessed March 6, 2024); Bundeskartellamt (2022), Fusionskontrolle im digitalen Zeitalter – Herausforderungen und Entwicklungsperspektiven, URL: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrecht_2022_Hintergrundpapier.pdf?__blob=publicationFile&v=3 (last accessed March 6, 2024).

[29] J. Mendelsohn, Reconsidering Conglomerates – How are digital conglomerates different from those in the past? Theory and implications, The Competition Law Review, 15(1), 2023, 83-103.

[30] M. Bourreau, Some Economics of Digital Ecosystems, OECD 2020, DAF/COMP/WD(2020)89.

ecosystems.[31] When determining the market power of ecosystem firms, their power as an intermediary and rule maker must be taken into account.[32] This power arises from the interdependencies between the products and services offered, which are consciously internalized by the firms. Abuse control must therefore consider not only the conditions of competition in narrowly defined markets, but above all the economic power arising from these broader, cross-market interoperabilities, interconnections and interdependencies.

Due to their (economic) specificities, the Commission sees the emergence of digital ecosystems as one of the reasons for the development of the Guidelines for Article 102 TFEU.[33] In order to address this development, we advocate taking into account *systemic market power* in the context of abuse control in ecosystem markets, since market power in such structures is particularly difficult to grasp using the 'classical' concepts.[34] This has been partially implemented by German policymakers with the introduction of Section 19a GWB. The new instrument gives the Federal Cartel Office (FCO) the power to determine that certain firms are of "paramount significance for competition across markets", which goes beyond traditional concepts of market power. This determination is based on a non-exhaustive list of criteria, such as the existence of a dominant position of the firm on one or more markets, the access of the firm to competition-relevant data, and the importance of the firm for the business activities of third parties, in particular for their access to upstream and downstream markets. The criteria are applied across all relevant markets, which means that relevant sources of power of digital firms are considered as a whole: for example, a firm could be in a dominant or powerful position in market A, have data resources on market B, and have relative power vis-à-vis upstream firms in market C, all of which can be taken into account in determining its potential cross-market power. If a firm is found to be in such a position, the FCO can prohibit the firm in question from engaging in certain conduct that is considered to be particularly harmful to competition in digital (platform/ecosystem) markets.[35] A similar approach to the determination of *cross-market power or systemic market power* would also be conceivable and desirable for abuse control in the context of the application of Article 102 TFEU and would better cover the market realities within digital ecosystems.

A consistent implementation of this concept also implies considering *systemic market power* in the context of merger control. Similar to abuse control, merger control suffers from enforcement

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[31] O. Budzinski, S. Gaenssle & A. Stöhr, Outstanding Relevance across Markets: A new Concept of Market Power? Concurrences N° 3-2020, 38-43.

[32] H. Schweitzer, J. Haucap, W. Kerber & R. Welker, Modernising the Law on Abuse of Market Power - Summary of the Report's Recommendations, 2018, URL: https://www.bmwk.de/Redaktion/DE/Downloads/Studien/modernisierung-der-missbrauchsaufsicht-fuer-marktmaechtige-unternehmen-zusammenfassung-englisch.html (last accessed March 6, 2024).

[33] J. Crémer, Y.-A. de Montjoye & H. Schweitzer, Competition policy for the digital era, Final report 2019, pp.2-3; European Commission (fn. 4).

[34] Budzinski et al. (fn. 31).

[35] A. Stöhr & J. Mendelsohn, Durchsetzung des § 19a GWB: Erste Erfahrungen und Verhältnis zum Digital Markets Act, forthcoming in: B. Becker (ed.), Wettbewerb auf digitalen Märkten, Nomos 2024.

deficits with respect to non-horizontal mergers and acquisitions with more systemic/conglomerate anticompetitive effects. Competition authorities have been watching this development with concern for some time, particularly in digital ecosystems.[36] Ex-post abuse control and ex-ante merger control interact systematically: merger control is designed to prevent the emergence of market power through external growth, while abuse control is designed to sanction the exploitation of market power that emerged nevertheless (e.g., through internal growth). Thus, the logic of competition rules requires that the consideration of *systemic market power* in the context of abuse control is accompanied by a corresponding adjustment in merger control, so that abuse control sanctions the exploitation of *systemic market power*, while merger control prevents the emergence of *systemic market power* through external firm growth. This extension would also imply a (re)harmonization of ex-post and ex-ante approaches within the competition rules, balancing the complementary concepts of abuse and merger control with regard to the concept of *systemic market power*.

4. Conclusion

Focusing on a dynamic understanding of competition as a knowledge-generating process, we conclude four recommendations for European competition policy.

(1) The as-efficient-competitor thinking and the related standards and tests should be abandoned. As reasoned above in section 2, we go further than the suggestion of a rephrasing as being made by the Commission[37] because we see more economic harm than good from this approach (which has its merits in particular constellations) – or, more precisely, from the way it will likely keep being handled.

(2) The balance between enforcement priorities on exclusionary and on exploitative abuses of market power should be re-adjusted in the face of the ubiquitous problems in digital ecosystems. A new focus on exploitative abuses is warranted.

(3) Abuse control should embrace a concept of systemic market power in order to account for dynamic economic thinking as well as the roles of digital ecosystems. The nature of market power and its abuses changes in dynamic digital ecosystems and can only partly be grasped by more traditional market power concepts.

(4) The balance between the complementary concepts of abuse and merger control should be kept in mind and re-adjusted in the sense that potentially harmful market power positions are already prevented (as far as possible) through a more active and more modern merger control (see section 3). This includes preventing the emergence of powerful positions within digital ecosystems.

[36] V. Robertson, Digital Merger Control: Adapting Theories of Harm, European Competition Journal, 2024, DOI: 10.1080/17441056.2024.2307163.

[37] European Commission (fn 4).