

# Regulating Tech Titans

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*In 2025, regulating tech giants like Google and Amazon has emerged as a key issue on the U.S. government's agenda, with antitrust law returning to the forefront. Meanwhile, across the Atlantic, Europe has introduced a new law, the Digital Markets Act (DMA), which regulates large online platforms, identified as "gatekeepers". The DMA requires gatekeepers to adhere to specific obligations and prohibitions, typically subject to antitrust case-by-case scrutiny, to ensure fairness and contestability in digital markets. The European historical intellectual framework underpins the core features of the DMA, including its legal framework, approach, scope, and purpose. Since 2021, several antitrust bills have proposed a U.S. version of the DMA, aiming to reform antitrust law by adopting a similar legal framework, approach, scope, and purpose. However, this raises critical questions: Does the U.S. antitrust historical intellectual framework support the adoption of the DMA? Would a DMA type approach be successful in the United States? The conclusion from this comparative historical analysis of the DMA's foundations is no. In making this claim, this Article lays out a roadmap for understanding the deep roots of the DMA in European history and tradition and why the U.S. approach to competition diverges in its foundations.*

*This Article makes three important contributions: First, it provides a historical comparative analysis between the intellectual frameworks of the United States and European Union (EU) by mapping out the roots of two very different antitrust traditions. Second, the Article unveils the ordoliberal ideology underlying the DMA, which fundamentally differs from the neoclassical way of thinking about and enforcing competition in the United States. Third, it gleans insights that American antitrust could learn from contrasting European approaches to regulating competition consistent with its core values.*

*The Article concludes by arguing that implementing a law like the DMA for U.S. antitrust law would be like forcing a square peg into a round hole. However, Europe does*

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*serve as a useful laboratory for the United States from which to draw important lessons. As Europe has adapted consistent with its framework, so too must the United States.*

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## INTRODUCTION

The Tech Titans debate is on.<sup>1</sup> Large technological companies—Amazon, Google, Facebook (Meta), Apple, and Microsoft—are bringing about a revival of private monopolies in the United States, causing a disruption not seen since the days of Standard Oil and AT&T. But, far from being the fundamental government tool to contain monopolies in critical U.S. industries, antitrust became almost nonexistent. In 2017, the renowned Judge Richard A. Posner declared antitrust

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1. See, e.g., Kaia Hubbard, *JD Vance Says Big Tech Has “Too Much Power,”* CBS NEWS (Jan. 26, 2025), <https://www.cbsnews.com/news/jd-vance-interview-big-tech-too-much-power/> [perma.cc/ZLH3-9GFK]; John Hendel, *The MAGA Culture War Comes for Silicon Valley*, POLITICO (Dec. 12, 2024), <https://www.politico.com/news/2024/12/12/trump-war-big-tech-00000205>; Cecilia Kang & David McCabe, *U.S. Antitrust Case Against Google Is Just the Start*, N.Y. TIMES (May 3, 2024), <https://www.nytimes.com/2024/05/03/technology/google-apple-amazon-meta-antitrust.html> [perma.cc/7CW5-P55H]; Margrethe Vestager, Opinion, *A Whack-a-Mole Approach to Big Tech Won't Do, Says Europe's Antitrust Chief*, ECONOMIST (June 4, 2024), <https://www.economist.com/by-invitation/2024/06/04/a-whack-a-mole-approach-to-big-tech-wont-do-says-europes-antitrust-chief> [web.archive.org/web/20250523085118/https://www.economist.com/by-invitation/2024/06/04/a-whack-a-mole-approach-to-big-tech-wont-do-says-europes-antitrust-chief].

simply dead.<sup>2</sup> Fast forward to today, and the Big Tech antitrust problem has emerged as a vital issue for the U.S. Congress and government.<sup>3</sup>

On the other side of the Atlantic, in 2020 Europe proposed a new law—the Digital Markets Act (DMA)<sup>4</sup>—to regulate digital companies because they are big. This law enables the government to bypass the traditional economic case-by-case antitrust assessment, including market definition and consumer harm, by imposing a set of prohibitions and obligations by default on digital companies that reach a certain size. Companies subject to the DMA are identified as “gatekeepers” of digital markets. In September 2022, the DMA became law<sup>5</sup> and Amazon, Google, Facebook (Meta), Apple, Microsoft, ByteDance, and Booking have been identified as gatekeepers subject to DMA prohibitions and obligations.<sup>6</sup> Importantly, these gatekeepers are largely American companies.

Beginning in June 2021, several antitrust bills mirroring the DMA have been introduced in the U.S. Congress.<sup>7</sup> Challenges of importing the DMA to America start with the core features identified in the DMA: *approach*, *scope*, *legal framework*, and *purpose*. The DMA *approach* increases government power in regulating markets and big businesses rather than assessing anticompetitive conduct—the DMA *scope* of regulated firms. The DMA adopts a legal framework based on formalism, which is the DMA *legal framework* to ensure contestability and fairness in the digital

2. On Judge Posner’s assertion that “Antitrust is dead, isn’t it?,” see David Dayen, *This Budding Movement Wants to Smash Monopolies*, NATION (Apr. 4, 2017), <https://www.thenation.com/article/archive/this-budding-movement-wants-to-smash-monopolies/> [perma.cc/KY6D-WN3K]; Asher Schechter, *Richard Posner: “The Real Corruption Is the Ownership of Congress by the Rich,”* PROMARKET (Mar. 28, 2017), <https://www.promarket.org/2017/03/28/richard-posner-real-corruption-ownership-congress-rich/> [perma.cc/3ZYL-5HQV].

3. See, e.g., Max Zahn, *Why Is the Biden Administration Going After Big Tech?*, ABC NEWS (Mar. 22, 2024), <https://abcnews.go.com/Business/biden-administration-after-big-tech/story?id=108385698> [perma.cc/F6YZ-W5G4]; Nicol Turner Lee, Bill Baer, Tom Wheeler & Nancy L. Rose, *TechTank Podcast: What to Expect from the Biden Administration on Antitrust Regulation and Big Tech*, BROOKINGS (May 3, 2021), <https://www.brookings.edu/articles/what-to-expect-from-the-biden-administration-on-antitrust-regulation-and-big-tech-the-techtank-podcast/> [perma.cc/2Y9V-2LM7]; Shira Ovide, *Congress Agrees: Big Tech Is Broken*, N.Y. TIMES (Oct. 7, 2020), <https://www.nytimes.com/2020/10/07/technology/congress-big-tech.html> [perma.cc/W5U2-X5XR].

4. *Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act)*, COM (2020) 842 final (Dec. 15, 2020).

5. 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 O.J. (L 265) [hereinafter DMA].

6. European Commission Press Release IP/23/4328, Digital Markets Act: Commission Designates Six Gatekeepers (Sept. 5, 2023); European Commission Press Release IP/24/2561, Commission Designates Booking as a Gatekeeper and Opens a Market Investigation into X\* (May 12, 2024).

7. See American Innovation and Choice Online Act, S. 2992, 117th Cong. (2021); American Innovation and Choice Online Act, H.R. 3816, 117th Cong. (2021); Platform Competition and Opportunity Act of 2021, H.R. 3826, 117th Cong. (2021); Augmenting Compatibility and Competition Enabling Service Switching (ACCESS) Act of 2021, H.R. 3849, 117th Cong. (2021); Ending Platform Monopolies Act, H.R. 3825, 117th Cong. (2021); State Antitrust Enforcement Venue Act of 2021, H.R. 3460, 117th Cong. (2021); Open App Markets Act, H.R. 7030, 117th Cong. (2021). See also, *Reining in Dominant Digital Platforms: Restoring Competition to Our Digital Markets: Hearing Before the S. Comm. on Jud., Subcomm. on Competition, Pol’y, Antitrust, and Consumer Rts.*, 118th Cong. 10 (2023) (statement of Fiona Scott Morton); Fiona Scott Morton & Cristina Caffarra, *The European Commission Digital Markets Act: A Translation*, VOX EU (Jan. 5, 2021), <https://cepr.org/voxeu/columns/european-commission-digital-markets-act-translation> [perma.cc/3YFF-S9HH].

sector—the DMA’s *purpose*. The DMA aims to complement European competition law<sup>8</sup> with new *ex ante* (preemptive) regulation to address competition concerns in digital markets.<sup>9</sup>

This Article challenges the notion that the DMA is a viable blueprint for regulating large digital platforms in the United States. The DMA core features thrive in Europe because it is deeply rooted in its intellectual historical framework and way of thinking and regulating competition. The Article maps out the historical roadmap of the DMA core features, tracing the DMA ideological roots within the European framework. It examines three major European schools of thought developed starting in the mid-nineteenth century—the German Historical School, the Austrian School of Economics, and Ordoliberalism—seeking the foundations of the DMA.

This analysis underscores how all DMA core features can be found in Ordoliberalism, which influenced the way of thinking and enforcing competition in Europe. The ordoliberal ideology promotes a strong state in the economy<sup>10</sup> by using a formalistic legal framework to regulate big firms to pursue purposes such as fairness and contestability in markets (the DMA core features). Further, this Article investigates whether the DMA core features and Ordoliberalism can be found in the U.S. antitrust intellectual framework. The Article offers two primary claims. First, the European DMA solution to regulate tech titans is unaligned with the American antitrust intellectual framework and compounded by a strong legal common law and economic neoclassical tradition representing the antithesis of the DMA. Second, Europe has adapted its legal framework to the digital economy cognizant of its legal and competition law tradition. Rather than falling into the fallacy of a legal transplant,<sup>11</sup> the United States should adapt its antitrust enforcement accordingly.

This study is important not only because the United States feels pressure to understand whether it is falling behind with the regulation of Tech Titans,<sup>12</sup> but also

8. DMA, recital 11. *See also*, Jaques Crémer, Gregory S. Crawford, David Dinielli, Amelia Fletcher, Paul Fletcher, Paul Heidhues, Monika Schnitzer & Fiona M. Scott Morton, *Fairness and Contestability in the Digital Markets Act*, 40 YALE J. ON REG. 973, 975 (2023).

9. HEIKE SCHWEITZER, EUROPEAN COMMISSION EXPERT STUDY, THE NEW COMPETITION TOOL: ITS INSTITUTIONAL SET-UP AND PROCEDURAL DESIGN 9 (2020).

10. *See, e.g.*, Flavio Felice & Massimiliano Vatiello, *Ordo and European Competition Law*, in 32 RESEARCH IN THE HISTORY OF ECONOMIC THOUGHT AND METHODOLOGY 147, 149–51 (2014).

11. For a discussion of the literature on legal transplants from a cultural perspective see Julio Carvalho, *Law, Language, and Knowledge: Legal Transplants from a Cultural Perspective*, 20 GERMAN L.J. 21, 22, 45 (2019) (“Legal transplants are bound to be unsuccessful, for they convey an erroneous conception of law, language, and legal knowledge.”). *Id.* at 45. Pierre Legrand, *The Impossibility of ‘Legal Transplants’*, 4 MAASTRICHT J. EUR. & COMP. L. 111, 114–117 (1997) (citing Max Weber). The aim of a comparative study should be “to identify and define the individuality of each development, the characteristics which made the one conclude in a manner so different from that of the other. This done, one can then determine the causes which led to these differences.” *Id.* at 111. “A rule is necessarily an incorporate cultural form. As an accretion of cultural elements, it is supported by impressive historical and ideological formations.” *Id.* at 116. On legal transplants, see also O. Kahn-Freund, *On the Use and Misuses of Comparative Law*, 37 MODERN L. REV. 1, 27 (1974); Toby S. Goldbach, *Why Legal Transplants?*, 15 ANN. REV. L. SOC. SCI. 583 (2019).

12. *See* Steven Pearlstein, *Here’s the Inside Story of How Congress Failed to Rein Big Tech*, WASH. POST (July 6, 2023), <https://www.washingtonpost.com/opinions/2023/07/06/congress-facebook-google-amazon-apple-regulation-failure/> [perma.cc/9XH2-ZLC2]; Anu Bradford, *What Is at Stake if Antitrust Regulation Fails?*, NETWORK L. REV. (Sept. 6, 2023), <https://www.networklawreview.org/a-nu-authoritarian-governments/> [perma.cc/ZFA4-VJDL].

because these companies, being almost entirely American, are felt to be the responsibility first and foremost of the United States. The Trump-Vance administration has made reining in Big Tech a top priority,<sup>13</sup> with J.D. Vance supporting the approach championed by former Federal Trade Commission (FTC) Chair Lina Khan.<sup>14</sup> Moreover, European laws concerning digital markets like the General Data Protection Regulation (GDPR) have already demonstrated their impact in the United States and worldwide.<sup>15</sup> Furthermore, relevant U.S. institutions, including the FTC during the Biden–Harris administration, have endorsed this European rule-based approach type. The FTC’s now-vacated rule banning worker noncompete agreements served as a symbolic example of this U.S. move toward more formalism in competition law.<sup>16</sup> Understanding the rationale and foundations underlying this approach to regulating competition is crucial for the United States.

The following analysis highlights the differing core values shaping American and European competition enforcement, offering a framework for reforming regulation in the digital economy. Lastly, while the United States and Europe serve as the primary models for antitrust jurisdictions worldwide, a historical comparative analysis of how their foundational principles are shaping the current international debate on Big Tech is absent. This Article fills this void.

In addition to the DMA, Europe has already condemned Google in two antitrust cases that resulted in €6.5 billion in fines.<sup>17</sup> Apple has been fined €1.8 billion for abusing its dominant position over the distribution of streaming apps, accepting commitments to settle the Apple Pay proceeding.<sup>18</sup> The European

13. Hanna Panreck, *Vice President JD Vance Reveals Big Tech ‘Very Much on Notice’ after CEO’s Inaugural Donations*, FOX NEWS (Jan. 26, 2025), <https://www.foxnews.com/media/vice-president-jd-vance-reveals-big-tech-very-much-notice-after-ceos-inaugural-donations> [perma.cc/BD5Z-X7HK]; Stephanie Lai, *Big Tech Companies ‘Have Too Much Power,’ Vance Says, Repeating a Conservative Grievance*, BOSTON GLOBE (Jan. 26, 2025), [https://www.bostonglobe.com/2025/01/26/business/vance-big-tech-free-speech/?p1=SectionFront\\_Feed\\_ContentQuery&p1=SectionFront\\_Feed\\_ContentQuery](https://www.bostonglobe.com/2025/01/26/business/vance-big-tech-free-speech/?p1=SectionFront_Feed_ContentQuery&p1=SectionFront_Feed_ContentQuery) [perma.cc/EA6D-GXD9]; *Trump VP Pick JD Vance Supports Big Tech Antitrust Crackdown*, ECON. TIMES (July 16, 2024), <https://economictimes.indiatimes.com/tech/technology/trump-vp-pick-jd-vance-supports-big-tech-antitrust-crackdown/articleshow/111775036.cms?from=mdr> [perma.cc/6TRD-9QLQ].

14. See, e.g., Alicia Diaz & Bloomberg, *JD Vance Backs \$5,000 Child Tax Credit and Reiterates Support for FTC’s Lina Khan*, FORTUNE (Aug. 11, 2024), <https://fortune.com/2024/08/11/jd-vance-5000-child-tax-credit-support-ftc-lina-khan-tech-regulation/> [perma.cc/3Q2K-YT34]; Forbes Breaking News, *The Thing About Lina Khan I Really Like Is . . . : JD Vance Offers Praise to FTC Chair*, YOUTUBE (Aug. 20, 2024), <https://www.youtube.com/watch?v=V1B5RBbMphA> [perma.cc/K3SZ-TA7E].

15. See, e.g., Garrett Johnson, *Economic Research on Privacy Regulation: Lessons from the GDPR and Beyond* 29 (Nat’l Bureau of Econ. Rsch., Working Paper No. 30705, 2002), <https://www.nber.org/papers/w30705.pdf> [perma.cc/SD9J-QFRQ].

16. Press Release, Fed. Trade Comm’n, *FTC Announces Rule Banning Noncompetes* (Apr. 23, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes> [perma.cc/H624-SZTX]; Justin Lindeboom, *Two Challenges for Neo-Brandeisian Antitrust*, 68 ANTITRUST BULL. 392, 403–04 (2023).

17. Case C-48/22P, *Google LLC v Comm’n*, 2024 ECLI:EU:C:2024:726 (Sept. 10, 2024); Case T-604/18, *Google LLC v. Commission*, ECLI:EU:T:2022:541 (Sept. 14, 2022) (upholding adjusted fine of €4.1 billion), appeal pending, Case C-738/22 P, 2023 O.J. (C 83) 11 (filed Nov. 30, 2022).

18. Case AT.40437, *Apple – App Store Practices (music streaming)*, Commission Decision, [https://ec.europa.eu/competition/antitrust/cases1/202419/AT\\_40437\\_10026012\\_3547\\_4.pdf](https://ec.europa.eu/competition/antitrust/cases1/202419/AT_40437_10026012_3547_4.pdf) (Mar. 4, 2024) (provisional non-confidential version) (imposing fine of €1.8 billion). European Commission Press Release IP/24/3706, *Commission Accepts Commitments by Apple Opening Access to ‘Tap and*

Commission settled two antitrust cases against Amazon with commitments and opened a competition law case against Meta's Facebook Marketplace.<sup>19</sup> Similar litigation is underway in the United States. On August 5, 2024, Judge Amit P. Mehta of the U.S. District Court for the District of Columbia recognized that Google abused a monopoly over the search business.<sup>20</sup> On April 17, 2025, Judge Leonie Brinkema of the U.S. District Court for the Eastern District of Virginia found that Google violated antitrust law by willfully acquiring and maintaining monopoly power in the publisher ad server and ad exchange markets.<sup>21</sup> The Department of Justice is also prosecuting Apple for monopolization conduct,<sup>22</sup> highlighting the significance of the debate over regulating Tech Titans.<sup>23</sup>

This Article proceeds as follows: Part I outlines the U.S. antitrust primary issues in regulating tech titans and the European DMA solution. Part II maps out the origin of the DMA core features within the European intellectual framework by laying out a historical roadmap of the DMA ideology and framework. Part III searches for the DMA core features and intellectual framework in the United States by examining the U.S. antitrust schools—Harvard, Chicago, and Post-Chicago rooted in neoclassical economics—and the Brandeis and Neo-Brandeis fight against bigness. It demonstrates how different approaches to competition reflect each society's core values and framework.

The Article concludes by drawing some lessons for the United States from the European laboratory.

## I. THE DMA SOLUTION FOR REGULATING TECH TITANS

Large digital platforms, such as Amazon and Google, are reviving in a digital economy both the threat of monopolies like Standard Oil and the antitrust paradox that Judge Robert Bork famously coined in the '70s. But what solved the antitrust paradox at that time—the consumer welfare standard—is now accused of enabling Tech Titans to expand without measure, raising a new antitrust paradox in a digital

Go' Technology on iPhones (July 11, 2024), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_24\\_3706](https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3706) [perma.cc/8JZ5-MZ57].

19. Cases AT.40462, Amazon Marketplace, and AT.40703, Amazon Buy Box, Commission Decision (Dec. 20, 2022), [https://ec.europa.eu/competition/antitrust/cases1/202310/AT\\_40703\\_8990760\\_1533\\_5.pdf](https://ec.europa.eu/competition/antitrust/cases1/202310/AT_40703_8990760_1533_5.pdf) [perma.cc/T8RP-LGKE]. European Commission Press Release IP/22/7728, Antitrust: Commission Sends Statement of Objections to Meta Over Abusive Practices Benefiting Facebook Marketplace (Dec. 19, 2022), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_7728](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7728) [perma.cc/3JK2-4DNG].

20. See David McCabe, 'Google Is a Monopolist,' *Judge Rules in Landmark Antitrust Case*, N.Y. TIMES (Aug. 5, 2024), <https://www.nytimes.com/2024/08/05/technology/google-antitrust-ruling.html> [web.archive.org/web/20240805190623/https://www.nytimes.com/2024/08/05/technology/google-antitrust-ruling.html].

21. U.S. v. Google LLC, No. 1:23-cv-00108 (E.D. Va. Apr. 17, 2025), David McCabe, *Google Broke the Law to Keep Its Advertising Monopoly, a Judge Rules*, N.Y. TIMES (Apr. 17, 2025), <https://www.nytimes.com/2025/04/17/technology/google-ad-tech-antitrust-ruling.html> [web.archive.org/web/20250417155528/https://www.nytimes.com/2025/04/17/technology/google-ad-tech-antitrust-ruling.html].

22. U.S. v. Apple Inc., No. 2:24-cv-04055 (D. N.J. Mar. 21, 2024). Julia Shapero, *Judge Rejects Apple's Bid to Dismiss DOJ Antitrust Case*, THE HILL (July 1, 2025), <https://thehill.com/policy/technology/538007-apple-federal-judge-antitrust-case/>.

23. FTC v. Amazon.com Inc., No. 2:23-cv-01495-JHC (W.D. Wash. Sept. 26, 2023); FTC v. Facebook Inc., 581 F. Supp. 3d 34 (D. D.C. 2022).

economy, what has been referred to as “Amazon’s Antitrust Paradox.”<sup>24</sup> The antitrust consumer welfare standard requires a showing of consumer harm to prosecute a monopoly, which is difficult to identify when digital platforms offer services for free or at low prices.<sup>25</sup> Furthermore, several companies use Amazon to sell their products or rely on Amazon for their business, showing why digital platforms tend to concentrate<sup>26</sup> without the necessarily anticompetitive conduct that is required to violate antitrust law.<sup>27</sup>

Looking for ways to effectively regulate Tech Titans, the United States expressed interest in a European DMA-type solution and *ex ante* regulatory approach.<sup>28</sup>

#### A. The Amazon Antitrust Paradox

Several key historical phases cemented the consumer welfare standard for antitrust enforcement in the United States. In 1890, when the first federal antitrust law was designed, it was intentionally written with language that courts could interpret and adapt in a common law spirit.<sup>29</sup> This led antitrust enforcement to change over time. For leading antitrust scholars, economics is “a powerful, neutral tool”<sup>30</sup> to enforce antitrust since antitrust concerns markets, which are grounded on economic theories and concepts.<sup>31</sup>

In 1933, Harvard Professor Edward Chamberlin introduced the theory of monopolistic competition, and in 1940, John Maurice Clark developed the concept of workable competition, followed by flourishing economic studies that became the

24. Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710 (2017).

25. *Id.* at 720–22. See also Darren Bush, *Consumer Welfare Theory as an Ethical Consideration: An Essay on Hipsters, Invisible Feet, and the “Science” of Economics*, 63 ANTITRUST BULL. 509 (2018); Zephyr Teachout, Opinion, *The Death of the Consumer Welfare Standard*, PROMARKET (Nov. 7, 2023), <https://www.promarket.org/2023/11/07/zephyr-teachout-the-death-of-the-consumer-welfare-standard/> [perma.cc/VP7H-WYGG]; Martha C. White, *Momentum Is Building for Antitrust Reform. Here’s What That Means for Big Tech*, TIME (Nov. 12, 2021), <https://time.com/6116953/antitrust-reform-big-tech-congress-biden/> [web.archive.org/web/20211112181939/https://time.com/6116953/antitrust-reform-big-tech-congress-biden/].

26. Khan, *supra* note 24, at 784; U.S. DEPT OF JUST. & FED. TRADE COMM’N, MERGER GUIDELINES § 2.9 (2023), <https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf> [perma.cc/9JXL-7FNZ].

27. See *U.S. v. Grinnell Corp.*, 384 U.S. 563, 570 (1966).

28. See, e.g., Sean Heather, *Striking Similarities: Comparing Europe’s Digital Markets Act to the American Innovation and Choice Online Act*, U.S. CHAMBER OF COM. (June 17, 2022), <https://www.uschamber.com/antitrust/striking-similarities-dma-american-innovation-act> [perma.cc/2PGY-N32W]; Rohit Chopra & Lina Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. CHI. L. REV. 357 (2020).

29. Wayne D. Collins, *Trust and the Origins of Antitrust Legislation*, 81 FORDHAM L. REV. 2279, 2340 (2013); The Sherman Act “was rooted squarely in the old common law doctrines.” HANS B. THORELLI, *FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* 1 (1955).

30. See, e.g., Herbert Hovenkamp, *The Looming Crisis in Antitrust Economics*, 101 B.U. L. REV. 489, 490, 544 (2021); see also Phillip Areeda, *Introduction to Antitrust Economics*, 52 ANTITRUST L.J. 523 (1983).

31. See, e.g., Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, 35 ANTITRUST 33 (2021) (“Our antitrust statutes talk explicitly about economic concepts: monopolization, restraint of trade, and lessening of competition.”); Hovenkamp, *supra* note 30, at 492 (“The antitrust laws speak of the conduct they prohibit in economic terms, such as ‘restraint of trade,’ ‘monopoly,’ and lessening of ‘competition.’”).

lodestar of U.S. antitrust enforcement.<sup>32</sup> From the first phase in which antitrust economics focused on the market structure by computing the number of companies and identifying barriers to entry in a market to assess competition,<sup>33</sup> the field evolved by emphasizing price and consumer welfare considerations. The first approach, defined as structuralism, was developed at Harvard School and prevailed until the 1970s.<sup>34</sup> The second approach, focused on the effects of companies' conduct on consumers looking at price, is the hallmark of the Chicago Antitrust School.<sup>35</sup>

In 1978, Judge Robert Bork's famous book, *The Antitrust Paradox*, emphasized the role of a welfare standard, which he labeled as consumer welfare, in enforcing antitrust law.<sup>36</sup> This standard refers to the welfare or surplus that both consumers and producers enjoy, and became increasingly popular; court after court throughout the United States started embracing it.<sup>37</sup>

But digital market dynamics are challenging this standard.<sup>38</sup> Many digital companies offer products free of charge to consumers by profiting from advertisements.<sup>39</sup> Are these companies exempt from antitrust liability because they do not charge consumers a price? In other words, it is increasingly difficult to assess consumer welfare by using consumer price as a benchmark<sup>40</sup> in an economy run by

32. See, e.g., George W. Stocking, *The Rule of Reason, Workable Competition, and Monopoly*, 64 YALE L. J. 1107, 1109 (1955); Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696 (1986); Herbert Hovenkamp, *The Invention of Antitrust*, 96 S. CAL. L. REV. 129, 167 (2022); Herbert Hovenkamp, *United States Competition Policy in Crisis: 1890-1955*, 94 MINN. L. REV. 311, 321 (2009).

33. Edward S. Mason & Thomas S. Lamont, *The Harvard Department of Economics from the Beginning to World War II*, 97 Q. J. ECON. 383, 423–24 (1982); see also G. E. HALE & ROSEMARY D. HALE, MARKET POWER: SIZE AND SHAPE UNDER THE SHERMAN ACT 131 (1958).

34. Hovenkamp, *The Invention of Antitrust*, *supra* note 32, at 164–68, 346–59.

35. See, e.g., George J. Stigler, *The Economists and the Problem of Monopoly*, 72 AM. ECON. REV. 1, 18 (1982). ROBERT BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 382 (1978). RICHARD A. POSNER, ANTITRUST LAW 9–32 (2d ed. 2001).

36. BORK, *supra* note 35, at 107. See also, Randal C. Picker, *The Arc of Monopoly: A Case Study for Computing*, 87 U. CHI. L. REV. 523, 524 (2020); Daniel Francis, *Making Sense of Monopolization*, 84 ANTITRUST L. J. 779, 786 (2022). See also Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?* 45 J. CORP. L. 101 (2019).

37. See, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979); Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L. J. 835 (2014); Hovenkamp, *United States Competition Policy in Crisis*, *supra* note 32, at 360–66.

38. See GEORGE J. STIGLER CENTER FOR THE STUDY OF THE ECONOMY & THE STATE, THE UNIVERSITY OF CHICAGO BOOTH SCHOOL OF BUSINESS, COMMITTEE FOR THE STUDY OF THE DIGITAL PLATFORMS, MARKET STRUCTURE AND ANTITRUST SUBCOMMITTEE, REPORT 11 (2019), <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf> [perma.cc/V2J3-ESYF]; UNLOCKING DIGITAL COMPETITION: REPORT OF THE DIGITAL COMPETITION EXPERT PANEL (2019), [https://assets.publishing.service.gov.uk/media/5c88150ee5274a230219c35f/unlocking\\_digital\\_competition\\_furman\\_review\\_web.pdf](https://assets.publishing.service.gov.uk/media/5c88150ee5274a230219c35f/unlocking_digital_competition_furman_review_web.pdf) [perma.cc/6PN5-KE4P]; Elizabeth Warren, Opinion, *Here's How We Can Break up Big Tech*, MEDIUM (Mar. 8, 2019), <https://medium.com/@tamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c> [perma.cc/DR3F-RSBN]. See also, Filippo Lancieri & Patricia Morita Sakowski, *Competition in Digital Markets: A Review of Expert Reports*, 26 STAN. J. L. BUS. & FIN. 65, 149 (2021).

39. *How Do Internet Companies Profit With Free Services?*, INVESTOPEDIA (Dec. 22, 2022), <https://www.investopedia.com/ask/answers/040215/how-do-internet-companies-profit-if-they-giv-e-away-their-services-free.asp#:~:text=sources%20of%20revenue-,Profit%20Through%20Advertisi,ng,messages%20to%20specific%20consumer%20groups> [perma.cc/X4J2-LVCC].

40. See, e.g., Khan, *supra* note 24.

advertisement. In addition, digital markets are characterized by network effects.<sup>41</sup> Network effects are clear in social networks like Facebook (Meta). The more users adopt Facebook (Meta), the more people are attracted to join the same platform.<sup>42</sup> In other words, digital markets can “create a tendency toward concentration,”<sup>43</sup> leading to a winner-take-all situation without the need to engage in anticompetitive conduct, which is required to violate antitrust law. Furthermore, digital markets are challenging to define as they are very dynamic, and antitrust analysis of monopolistic conduct requires identifying a monopoly in a defined market.<sup>44</sup> These factors all contributed to a reduction in antitrust regulation and created a new antitrust crisis.<sup>45</sup>

In 2017, what had become a quiet, almost dead<sup>46</sup> antitrust field was shaken up. Former Chairwoman of the FTC Lina Khan rebranded Judge Bork’s “Antitrust Paradox” of 1978, in “Amazon’s Antitrust Paradox.”<sup>47</sup> She argues that the consumer welfare standard is ill-adapted to capture Amazon’s anticompetitive practices, including predatory pricing and vertical practices, by rejecting it.<sup>48</sup> Amazon would be a market gatekeeper that controls access of third-party sellers to consumers and leverages its platform to promote and sell its own products, becoming increasingly dominant.<sup>49</sup>

A year later, in 2018, Columbia Law Professor Tim Wu published “The Curse of Bigness: Antitrust on the New Gilded Age,”<sup>50</sup> reviving Justice Louis Brandeis’s fight against businesses from the early nineteenth century. From Barry Lynn’s Open Markets Institute, the Neo-Brandeis movement, which revives a sentiment against bigness, expanded to include key antitrust figures, including Khan and Wu.<sup>51</sup> In

41. See *U.S. v. Microsoft Corp.*, 253 F.3d 34, 49–50 (D.C. Cir. 2001); *Ohio v. Am. Express Co.*, 585 U.S. 529 (2018). See also, Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. ECON. PERSP. 93 (1994); *What Is the Network Effect?*, WHARTON UNIV. PA. (Jan. 17, 2023), <https://online.wharton.upenn.edu/blog/what-is-the-network-effect/>; KENNETH GILLINGHAM & MARTEN OVAERE, NETWORK EFFECT BENEFITS FROM ELECTRICITY GRID CONNECTIONS, TODAY AND INTO THE FUTURE, POLICY BRIEF (Sept. 2020), [https://cbey.yale.edu/sites/default/files/2020-10/Network\\_Effect\\_Benefits\\_from\\_Grid.pdf](https://cbey.yale.edu/sites/default/files/2020-10/Network_Effect_Benefits_from_Grid.pdf) [perma.cc/7SZA-SECA]; PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION §772h (4th & 5th eds. 2022); Herbert Hovenkamp, *Antitrust Interoperability Remedies*, 123 COLUM. L. REV. 1, 21 (2023); Jeffrey Prince, Daniel D. Sokol & Feng Zhu, *Ensuring Antitrust Actually Promotes Competition in the Digital Economy: Evaluating Proposed Remedies in the Google Case 8* (Univ. S. Cal. Ctr. for L. & Soc. Sci., Rsch. Paper No. 2508, 2025), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=5275782](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5275782).

42. See *Microsoft Corp.*, 253 F.3d at 49–50.

43. U.S. DEP’T. OF JUST. & FED. TRADE COMM’N, MERGER GUIDELINES 24 (2023), <https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf> [perma.cc/VU4X-RCYW].

44. See, e.g., JACQUES CRÉMER, YVES-ALEXANDRE DE MONTJOYE & HEIKE SCHWEITZER, COMPETITION POLICY FOR THE DIGITAL ERA, EUROPEAN COMMISSION FINAL REPORT 45 (2019), <https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1> [perma.cc/V5QL-TCLK].

45. See, e.g., Daniel Crane, *The New Crisis in Antitrust (?)*, 83 ANTITRUST L.J. 253 (2020).

46. See Dayen, *supra* note 2.

47. Khan, *supra* note 24, at 714.

48. *Id.* at 710.

49. *Id.* at 803.

50. TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018).

51. See BARRY C. LYNN, CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION (2010); MATT STOLLER, GOLIATH: THE 100-YEAR WAR BETWEEN MONOPOLY POWER AND DEMOCRACY (2019); Lina M. Khan, *The New Brandeis Movement: America’s*

2021, Wu was appointed as the White House special assistant to the President for technology and competition policy;<sup>52</sup> while Khan went from working with Lynn at the Open Markets Institute to being sworn in as the FTC Chairwoman during the Biden administration.<sup>53</sup> Regulating Tech Titans has officially become a central issue in the U.S. political economy, with the Amazon Antitrust Paradox coming into full view under the Neo-Brandeis leadership, which has received endorsement from the current Trump-Vance administration.<sup>54</sup>

The Neo-Brandeis movement promotes vigorous antitrust enforcement against Tech Titans by revitalizing Brandeis's fight against big powerful companies that took place in the early 20th century and by largely rejecting the consumer welfare standard. It endorses an *ex ante* type approach to regulating competition<sup>55</sup> through a legal framework like the DMA.

The Neo-Brandeis movement emerged at a time when the competition issue in digital markets got Congress's full attention. In June 2019, the U.S. House of Representatives' Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law, chaired by Representative David Cicilline, started a sixteen-month investigation. Interestingly, Lina Khan served as a key staff member of the Cicilline Committee, whose investigation led to the release of the so-called Cicilline Report in October 2020.<sup>56</sup> The report found that Amazon, Apple,

*Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131 (2018); Daniel Crane, *How Much Brandeis Do the Neo-Brandeis Want?*, 64 ANTITRUST BULL. 531 (2019); Francis, *supra* note 36, at 788; Steven Pearlstein, *The Education of Lina Khan, Whose Superpower is Busting Monopolies*, WASH. POST (May 14, 2024), <https://www.washingtonpost.com/opinions/2024/05/14/lina-khan-antitrust-ftc/> [perma.cc/X6A4-BQG6]; Zephyr Teachout, *Zephyr Teachout: "The Long Future of the Neo-Brandeisian Movement, in Three Parts,"* NETWORK L. REV. (July 24, 2024), <https://www.networklawreview.org/teachout-future-neobrandeis/> [perma.cc/8VV7-RDB9].

52. See Cecilia Kang, *A Leading Critic of Big Tech Will Join the White House*, N.Y. TIMES (Mar. 5, 2021), <https://www.nytimes.com/2021/03/05/technology/tim-wu-white-house.html> [perma.cc/7PH5-5YAV].

53. See David McLaughlin & Josh Wingrove, *Khan Named FTC Chair by Biden in Victory for Tech's Critics*, BLOOMBERG (June 15, 2021), <https://www.bloomberg.com/news/articles/2021-06-15/big-tech-antagonist-khan-confirmed-by-senate-to-ftc-seat> [perma.cc/228U-V9SG].

54. See Rebecca Klar, *Vance: Biden FTC Chief is 'Doing a Pretty Good Job'*, THE HILL (Feb. 27, 2024), <https://thehill.com/policy/technology/4491363-vance-biden-ftc-chief-is-doing-a-pretty-good-job/> [perma.cc/2Y3L-TXH4]; CNBC Television, *Sen. JD Vance: I Agree with Lina Khan on Big Tech*, YOUTUBE (Sept. 12, 2024), <https://www.youtube.com/watch?v=w7MA2EkpRXM> [perma.cc/T6VQ-YGWF]; Diaz & Bloomberg, *supra* note 14; Elizabeth Nolan Brown, *J.D. Vance Thinks Lina Khan Is Doing a Great Job*, REASON (July 16, 2024), <https://reason.com/2024/07/16/reminder-j-d-vance-thinks-lina-khan-is-doing-a-great-job/> [perma.cc/BHX8-PGYC]; Josh Sisco, *Vance Hints that FTC's Khan is Good for Trump's Antitrust Agenda*, POLICOPRO (Feb. 27, 2024), <https://subscriber.politicopro.com/article/2024/02/vance-hints-that-ftcs-khan-is-good-for-trumps-antitrust-agenda-00143551> [perma.cc/9GR2-MMG4].

55. See Thomas A. Lambert & Tate Cooper, *Neo-Brandeisianism's Democracy Paradox*, 49 J. CORP. L. 347(2023); Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357 (2020).

56. The report was released in October 2020. SUBCOMMITTEE ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, 116TH CONGRESS, INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS (2020), <https://ruralpolicyaction.us/wp-content/uploads/2023/03/competition-in-digital-markets.pdf> [perma.cc/3EJG-DJJ9]. The report was adopted by the House Judiciary Committee in April 2021, and published it in July 2022. SUBCOMMITTEE ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES, 117TH CONGRESS, INVESTIGATION OF COMPETITION IN DIGITAL

Facebook (now Meta), and Google were holding durable market power in their respective markets and often enjoying a gatekeeper position that enabled them to stifle innovation in critical digital markets. The report recommended updating antitrust laws to effectively address anticompetitive conduct in the digital realm, including empowering antitrust agencies, the FTC and the Antitrust Division of the DOJ, with greater authority and resources. Interestingly, the report anticipated many of the remedies enshrined in the DMA, such as data portability and interoperability, which require digital market gatekeepers to enable users to transfer their data easily between services so as to reduce lock-in effects.<sup>57</sup>

In 2021, President Joe Biden issued an executive order to promote competition in the U.S. economy with special attention to the monopolization concerns in the technology sector.<sup>58</sup> Since June 2021, several bills introducing a U.S. version of the DMA to regulate *ex ante* Tech Titans have been introduced into Congress.<sup>59</sup> These bills use the term “covered platforms”<sup>60</sup> instead of “gatekeepers,” but the underlying concept remains the same.

The following Table A lists the provisions identifying similar prohibitions and obligations imposed on “gatekeepers” in the DMA and on “covered platforms” in the U.S. antitrust bills. Section B includes a description of the following prohibitions and obligations.

PROHIBITIONS - OBLIGATIONS	EU DMA	U.S. ANTITRUST BILLS
Interoperability	Recital (55), (57), Art. 6(7)	H.R. 3849, Section 4, 6(c), 7(c)
Data portability	Recital (59), (96), Art. 6(9)	H.R. 3849, Section 3, 7(c)
Prohibition of self-preferencing	Recital (52), Art. 6(5), (11)	S. 2992, Section 3 H.R. 3816, Section 2

MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS 318 (2022), <https://www.congress.gov/117/cprt/HPRT47832/CPRT-117HPRT47832.pdf> [perma.cc/6TB2-QV6Y].

57. *Id.* at 326.

58. Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021).

59. For the list of the U.S. antitrust bills, see *supra* note 7. See also, Randy Picker, *The House’s Recent Spate of Antitrust Bills Would Change Big Tech as We Know It*, PROMARKET (June 29, 2021), <https://www.promarket.org/2021/06/29/house-antitrust-bills-big-tech-apple-preinstallation/> [perma.cc/TQ92-7VNP]; Caitlin Chin-Rothmann, *Breaking Down the Arguments For and Against U.S. Antitrust Legislation*, CTR. FOR STRATEGIC & INT’L STUD. (Apr. 22, 2022), <https://www.csis.org/analysis/breaking-down-arguments-and-against-us-antitrust-legislation> [perma.cc/8XQF-N2E4]; Sean Heather, *Striking Similarities: Comparing Europe’s Digital Markets Act to the American Innovation and Choice Online Act*, U.S. Chamber of Commerce (June 17, 2022), <https://www.uschamber.com/antitrust/striking-similarities-dma-american-innovation-act> [perma.cc/PN4B-FBYV].

60. See, e.g., JAY B. SYKES, CONG. RSCH. SERV., R46875, ANTITRUST REFORM AND BIG TECH FIRMS 52 (2023), <https://crsreports.congress.gov/product/pdf/R/R46875> [web.archive.org/web/20250331091846/https://www.congress.gov/crs-product/R46875]; S.2992, 117th Cong. § 5(6) (2021); H.R. 3816, 117th Cong. § 2(d) (2021); H.R. 3849, 117th Cong. §5(6) (2021); H.R. 3825, 117th Cong. § 5(5) (2021).

Non-discrimination	Recital (61) (62), Art. 6(12)	H.R. 3816, Section 2 S. 2992, Section 3
Prohibition or limitations in data collection and use	Art. 5(2)	H.R. 3849, Section 4.4(f)
Merger prohibition -Obligation to inform about concentrations	Recital (71), (75), Art. 14	H.R. 3826, Section 2
Structural remedies (e.g., divestiture of assets)	Recital (75), Art. 18 (1)	H.R. 3825, Section 2

Table A. Gatekeeper and Covered Platform Obligations and Prohibitions

Given the similarities between the EU DMA and the U.S. antitrust bills, it is important to investigate whether a DMA-type solution to regulate Tech Titans is a viable option for the United States.

#### B. The European Solution—The Digital Markets Act (DMA)

The same competition challenges with digital markets and Tech Titans, including the consumer welfare standard and market definition outlined in Section I.A, were identified in Europe,<sup>61</sup> which responded by introducing a new law—the DMA. In September 2022, the European legislature enacted the DMA, bypassing the traditional antitrust economic case-by-case analysis. The DMA aims to complement European competition law by ensuring fairness and contestability in digital markets through *ex ante* regulation.<sup>62</sup> It targets companies active in core platform services that reach a certain size, classified as gatekeepers.<sup>63</sup>

At present, gatekeepers have been identified in Amazon, Apple, Google, Meta, Microsoft, ByteDance, and Booking. Gatekeepers must comply with the DMA prohibitions and obligations, and “any justification on economic grounds”<sup>64</sup> that gatekeepers might wish to raise is discarded under the DMA. The DMA remedies

61. See, e.g., CRÉMER, DE MONTJOYE & SCHWEITZER, *supra* note 44; Bundeskartellamt, *Market Power of Platforms and Networks* (Working Paper, B6-113/15, 2016), [https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Langfassung.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Langfassung.pdf?__blob=publicationFile&v=2) [perma.cc/HMC4-NLQK]; FEDERAL MINISTRY FOR ECONOMIC AFFAIRS AND CLIMATE ACTION, A NEW COMPETITION FRAMEWORK FOR THE DIGITAL ECONOMY, REPORT BY THE COMMISSION ‘COMPETITION LAW 4.0’ (2019), <https://www.bmwk.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.html> [perma.cc/98VH-ZS2H].

62. DMA, recital 10, 11.

63. DMA, recital 14–22.

64. DMA, recital 23.

listed in Table A include data portability, meaning enabling users to obtain and reuse their personal data in different platforms and services, and interoperability. This remedy typically requires the release of information by a company to enable others to create compatible products.<sup>65</sup> Structural remedies, such as the divestiture of companies' assets, are contemplated in case of a gatekeeper's non-compliance.<sup>66</sup>

The DMA prohibitions include self-preferencing, referring to platforms like Amazon and Google Search that would give preference to their products over those of competitors. While this practice is usually subject to analysis of market power and competitive harm,<sup>67</sup> it becomes a *per se* violation for gatekeepers in Europe through the DMA.<sup>68</sup> Other prohibitions refer to non-discrimination terms, as gatekeepers have to apply conditions that are fair, reasonable and non-discriminatory.<sup>69</sup>

Therefore, the DMA imposes the same remedies and prohibitions to regulate different digital markets, such as Amazon (e-commerce), Apple (smartphones), Google (online search), Microsoft (software), Facebook (Meta) and ByteDance (social media), and Booking (online travel agencies), to address competition concerns.<sup>70</sup> In other words, the DMA is not a proper sector-specific regulation like the telecommunication, healthcare, or financial regulation. While these regulations exist to ensure safety, access to public services, investor protections, and more in specific markets, antitrust law aims to secure competition across all markets.

The DMA applies to core digital services, including social networks, intermediation, advertising, browsers, search engines, video-sharing platforms, number-independent interpersonal communication services (NI-ICS) like WhatsApp, and operating systems. In contrast, no equivalent regulation has ever existed for core physical markets that specifically targets size, aside from antitrust merger regulation.<sup>71</sup> In other words, the DMA is an *ex ante* regulation that attains purposes typically pursued by competition law by serving as its complement. It differs in both scope and goals from sector-specific regulation.

Unlike antitrust law, the DMA does not require the definition of a market or the evaluation of market power, nor does it require proving consumer harm. The DMA identifies gatekeepers by absolute size without assessing market shares of specific products. Consider Google Search and Google Gmail, or the Microsoft

65. DMA, art. 6. The DMA also increases notification obligations for gatekeepers to the Commission in case of mergers. *See* art. 14(1).

66. DMA, recital 75.

67. *See, e.g.*, Herbert Hovenkamp, *Antitrust and Self-Preferencing*, 38 ANTITRUST 5, 11 (2023); Roberto Rustichelli, *Self-Preference*, COMPETITION L. DICTIONARY (2024), [https://www.concurrences.com/en/dictionary/self-preference-111802#:~:text=Among%20exclusionary%20abuses%20of%20dominant,downstream%20or%20adjacent\)%2C%20to%20the](https://www.concurrences.com/en/dictionary/self-preference-111802#:~:text=Among%20exclusionary%20abuses%20of%20dominant,downstream%20or%20adjacent)%2C%20to%20the) [perma.cc/WLJ3-2ZSK].

68. DMA, art. 6(5) ("The gatekeeper shall not treat more favourably [sic], in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party."). *See also*, Martin Peitz, *How to Apply the Self-Preferencing Prohibition in the DMA*, 14 J. EUR. COMPETITION L. & PRAC. 310 (2023).

69. DMA, art. 6(11).

70. *See, e.g.*, *A Competition Policy Fit for New Challenges*, at 2, 3, 19 COM (2021) 713 final (Nov. 18, 2021); HEIKE SCHWEITZER, *THE NEW COMPETITION TOOL: ITS INSTITUTIONAL SET-UP AND PROCEDURAL DESIGN: EXPERT REPORT 4–6* (2020).

71. Merger regulation typically identifies mergers requiring notification based on thresholds related to company size. However, unlike the DMA, market definition plays a crucial role in the assessment of mergers.

Windows operating system and Microsoft Bing search engine. Google and Microsoft's market shares in these products are very different. The DMA distinguishes among ten core platform services, but without engaging in market definition or assessment of market characteristics, including in terms of market concentration. And size is different from market power. Harvard Professor Edward Mason used the example of the local brick markets, which were “highly concentrated, but not in the hands of huge corporations”<sup>72</sup> to emphasize this point.

But where does the DMA derive its principles? To address this question, I have identified four core features that form the foundations of the DMA. First, the DMA empowers the European Commission to enforce a new law in the digital sector by increasing the state's role in the economy (DMA approach). Second, the DMA adopts formalism as a legal framework (DMA legal framework) that discharges any economic efficiency considerations.<sup>73</sup> Third, the DMA applies to digital undertakings based on their size rather than conduct (DMA scope of regulated firms, or simply DMA scope). Fourth, the DMA aims to secure fairness and contestability<sup>74</sup> in the digital sector (DMA purpose).

Then, I have explored the roots of the DMA core features within the European intellectual framework.

## II. SEARCHING FOR THE DMA CORE FEATURES IN THE EUROPEAN INTELLECTUAL FRAMEWORK—A HISTORICAL ROADMAP

In Europe, firms and lawyers “spend more time fighting their way through the doctrinal formalisms than relying on the valuable compass of economics.”<sup>75</sup> (Barry E. Hawk)

Part II examines three important European schools of political economy, showing how each of them did or did not contribute to establishing the DMA core features in the European intellectual framework by tracing a historical roadmap of the DMA ideology and foundations. In other words, this Part explores what European schools advocate for strong state power in the economy (DMA approach), using formalism (DMA legal framework) to target big companies (DMA scope) in pursuit of fairness and contestability (DMA purpose), and why.

The DMA aims to address competition concerns by complementing EU competition law; thus, this analysis also investigates how each school influenced the concept of competition and competition law in Europe (the DMA framework). This study highlights how competition in Europe acquires a different meaning than in the United States, which stems from different social, economic, and legal frameworks. The conducted historical analysis will be used to map out lessons that the United States can glean from various European competition approaches to critically inform its antitrust framework and understand why the United States enforces competition differently.

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72. EDWARD S. MASON, *ECONOMIC CONCENTRATION AND THE MONOPOLY PROBLEM* 18 (1957).

73. DMA, recital 23.

74. DMA, recital 34.

75. Barry E. Hawk, *System Failure: Vertical Restraints and EC Competition Law*, 32 *COMMON MKT. L. REV.* 973, 986 (1995).

The first school that I analyze is the German Historical School, which dominated European economic thought from the early 20th century until World War II.<sup>76</sup> The Historical School's hallmark was the establishment of a state-regulated system aiming at pursuing collectivism, grounded in historical context.<sup>77</sup> The second school that I analyze is the Austrian School of Economics, which emerged as a counterpoint to the German Historical School.<sup>78</sup> It advocated individualism through a deductive method.<sup>79</sup>

The third school that I analyze is Ordoliberalism, which joined the Austrian fight against collectivism but used a different approach. Austrian economists and ordoliberals recognized the importance of competition in the economy, as it enables economic freedom by empowering individuals in markets rather than collectivity. However, while Austrian economists believed competition did not require specific rules and regulatory frameworks, ordoliberals consider that competition could thrive only with a strong legal framework. The name Ordoliberalism stems from the Latin word for "order," and it connotes the idea that economic freedom must be structured and ensured within a framework of rules and regulations that guarantee competition and prohibit monopolies.<sup>80</sup>

#### A. *The Historical School and a Collective Economy*

In this Section, I will show how we can find the DMA approach, legal framework, and purpose of fairness in the German Historical School but not the DMA scope and contestability as an objective. The Historical School<sup>81</sup> recognized the need for a strong state in regulating the economy (DMA approach) to address ethical economic issues, such as fairness (DMA purpose). However, this school pursued ethical economic objectives to increase collective welfare.<sup>82</sup> With this in mind, historical economists positively viewed not only big businesses under state

76. LUDWIG VON MISES, NOTES AND RECOLLECTIONS: WITH THE HISTORICAL SETTING OF THE AUSTRIAN SCHOOL OF ECONOMICS 2 (Bettina Bien Greaves ed., 2013). JOSEPH A. SCHUMPETER, HISTORY OF ECONOMIC ANALYSIS 807–14 (1954).

77. See, e.g., Eugen von Philippovich, *The Verein Für Sozialpolitik*, 5 Q. J. ECON. 220, 224, 228 (1891).

78. Kiichiro Yagi, *Carl Menger and the Historicism in Economics*, in METHODOLOGY OF THE SOCIAL SCIENCES, ETHICS, AND ECONOMICS IN THE NEWER HISTORICAL SCHOOL: FROM MAX WEBER AND RICKERT TO SOMBART AND ROTHACKER 235, 240 (Peter Koslowski ed., 1997). See also, SCHUMPETER, *supra* note 76, at 844.

79. See, e.g., LUDWIG VON MISES, HUMAN ACTION A TREATISE ON ECONOMICS xi, 38, 64, 68 (1998).

80. See, e.g., Stefan Kolev, *Ordoliberalism and the Austrian School*, in THE OXFORD HANDBOOK OF AUSTRIAN ECONOMICS 419, 420, 424–36 (Christopher J. Coyne & Peter Boettke eds., 2015).

81. See Walter Eucken, *Overcoming Historicism*, 138 J. CONTEXTUAL ECON. 347 (Mark McAdam, Stefan Kolev & Erwin Dekker trans., 2018). See also Martin Rempe, *From Statistics to Development: The Historical School of Economics and the International Statistical Institute*, 30 EUR. REV. HIST. 33, 34 (2023). See also SCHUMPETER, *supra* note 76, at 809–13. Panayotis G. Michaelides & John G. Milios, *Joseph Schumpeter and the German Historical School*, 33 CAMBRIDGE J. ECON. 495, 498 (2009). BIRSEN FILIP, *The German Historical School of Economics and Its Intellectual Sources*, in THE EARLY HISTORY OF ECONOMICS IN THE UNITED STATES, THE INFLUENCE OF THE GERMAN HISTORICAL SCHOOL OF ECONOMICS ON TEACHING AND THEORY 9, 10 (2023). ERIK GRIMMER-SOLEM, THE RISE OF HISTORICAL ECONOMICS AND SOCIAL REFORM IN GERMANY 1864-1894 208 (2003).

82. See BIRSEN FILIP, THE EARLY HISTORY OF ECONOMICS IN THE UNITED STATES, THE INFLUENCE OF THE GERMAN HISTORICAL SCHOOL OF ECONOMICS ON TEACHING AND THEORY 54, 61–68, 71, 80 (2024).

control but also cartels, seen as agreements among weak firms to regulate the demand and supply of goods by mitigating price wars.<sup>83</sup> In other words, this school did not recognize the concept of competition and contestability pursued in the DMA.

The concept of empowering the state to manage the economy (DMA approach) arose in the mid-nineteenth century in response to the practical challenges of the Industrial Revolution, such as the urbanization phenomenon and the rapid growth of the working class.<sup>84</sup> Furthermore, Germany was undergoing a unification process.<sup>85</sup> Theories of classic economists developed at that time were considered too abstract and not useful to tackle these practical socioeconomic problems.<sup>86</sup> In contrast to classic economists, including David Ricardo and Adam Smith, who developed deductive theories based on the idea that economic agents are driven by self-interest maximization,<sup>87</sup> the Historical School influenced the creation of a powerful state that manages the economy<sup>88</sup> (DMA approach) aiming to achieve common welfare<sup>89</sup> using history and statistical studies.<sup>90</sup> Similar to the DMA pursuing purposes such as fairness,<sup>91</sup> problems tackled by the German Historical School were never purely economic<sup>92</sup> and considered ethical and religious principles over mathematical and physical rules (DMA purpose).<sup>93</sup>

In other words, influenced by the Historical School and following the failure of a laissez-faire economy advocated by classic economists, the late nineteenth and early twentieth centuries marked a shift in the approach to regulating the economy. The problem of economic power concentrated in private hands was addressed by “transferring that power”<sup>94</sup> to the state in support of collectivism. The state became “the centre and the ventricle of all institutions,”<sup>95</sup> that could best serve the interests

83. GRIMMER-SOLEM, *supra* note 81, at 311.

84. FILIP, *supra* note 82, at 47. *See also* Thorstein Veblen, *Gustav Schmoller's Economics*, 16 Q.J. ECON. 69, 89 (1901). (“[T]he gravest social effect of the machine industry has been the creation of a large class of wage laborers.”); Grimmer-Solem, *supra* note 81, at 171.

85. STUART T. MILLER, *The Unification of Germany 1862-71*, in *MASTERING MODERN EUROPEAN HISTORY* 205 (1988). In 1871, the newly formed German Empire exhibited expansionistic ambitions. FILIP, *supra* note 82, at 10. GUSTAV VON SCHMOLLER, *THE MERCANTILE SYSTEM AND ITS HISTORICAL SIGNIFICANCE, ILLUSTRATED CHIEFLY FROM PRUSSIAN HISTORY* 37 (1895).

86. GRIMMER-SOLEM, *supra* note 81, at 122–23; YUICHI SHIONOYA, *THE SOUL OF THE GERMAN HISTORICAL SCHOOL: METHODOLOGICAL ESSAYS ON SCHMOLLER, WEBER, AND SCHUMPETER* 2 (2005).

87. FILIP, *supra* note 82, at 55.

88. *See, e.g.*, Philippovich, *supra* note 77, at 225, 228. Karl Häuser, *Historical School and “Methodenstriel”*, 144 J. INST. THEORETICAL ECON. 532, 534, 537 (1988).

89. FILIP, *supra* note 82, at 48. *See also* Veblen, *supra* note 83, at 90–91. Häuser, *supra* note 88, at 535, 540.

90. Häuser, *supra* note 88, at 536–37. Veblen, *supra* note 84, at 79. Grimmer-Solem, *supra* note 81, at 144, 160. Schumpeter, *supra* note 76, at 807–10. *See also* Gustav Schmoller, *The Idea of Justice in Political Economy*, 4 ANNALS AM. ACADEMY POL. & SOC. SCI. 697, 734–736 (1894). “The State is the centre and the heart in which all institutions empty and unite. . . . Above all it exercises as legislator and administrator the greatest indirect influence on law and custom, on all social institutions.” *Id.* at 734.

91. *See* Crémer et al., *supra* note 8.

92. GRIMMER-SOLEM, *supra* note 81, at 9. Schmoller, *supra* note 90, at 706–07 (1894).

93. Schmoller, *supra* note 90, at 723.

94. WALTER EUCKEN, *THIS UNSUCCESSFUL AGE* 35 (1951).

95. Manfred Prisching, *Schmoller's Theory of Society*, 1 ACCADEMIA EDITORIALE 117, 134 (1993) (citing GUSTAV SCHMOLLER, *Der Staat ist das Centrum und die Herzkamer aller Institutionen*, in *DEN ALIE MÜNDENDEN UND ZUSAMMENLAUFEN* 244 (1890)). *See also* Schmoller, *supra* note 90, at 734.

of the collectivity.<sup>96</sup> In this historical framework, cartel agreements were viewed as a positive collective effort and would soon become a hallmark of the German economy.<sup>97</sup>

Under the National Socialist German Workers' Party (Nazi) regime, Adolf Hitler passed several cartel laws.<sup>98</sup> On July 15, 1933, Hitler introduced a statute for compulsory cartelization, which enabled the government to force independent entities to join a cartel,<sup>99</sup> as well as regulate the capacity of present plants or prevent the creation of new ones.<sup>100</sup> Cartels became an important vehicle for the Nazi concentrated economy.<sup>101</sup> Historical economists who also promoted a collective economy through cartels were accused of being the “German socialists of the chair,” and “the pacemakers of the two World Wars,”<sup>102</sup> by serving the new rulers—the Nazis.

In summary, under the influence of the Historical School, Germany created a state-regulated system that fostered a concentration of power in the hands of the state. This is important because it motivated the rise of the Austrian School<sup>103</sup> and Ordoliberalism, which promoted competition as a means to ensure economic and human freedom.<sup>104</sup>

The economic system was the result of the action of coordinated individuals rather than the sum of individual actions. GRIMMER-SOLEM, *supra* note 81, at 209. In other words, the Historical school tackled the issue of private economic power by “transferring the power to state central planning offices while maintaining private ownership.” EUCKEN, *supra* note 94.

96. Schmoller, *supra* note 90, at 723.

97. In 1900, there were about 400 cartels in Germany, and about 550–560 cartels by 1911. Wilfried Feldenkirchen, *Competition Policy in Germany*, 21 BUS. ECON. HISTORY 257, 258 (1992). See also Knut Wolfgang Nörr, *Law and Market Organization: The Historical Experience in Germany From 1900 to the Law Against Restraints of Competition (1957)*, 151 J. INST. & THEORETICAL ECON. (JITE) 5, 7 (1995). GRIMMER-SOLEM, *supra* note 81, at 242. See also DAVID J. GERBER, LAW AND COMPETITION IN THE TWENTIETH-CENTURY EUROPE: PROTECTING PROMETHEUS 74–76 (2001). In 1925, there were 2,500 cartels in Germany. EUCKEN, *supra* note 94 (“There took place a fight of industry away from competition into the realm of state control and cartels.”). See also FRANZ NEUMANN, HERBERT MARCUSE & OTTO KIRCHHEIMER, SECRET REPORTS ON NAZI GERMANY: THE FRANKFURT SCHOOL CONTRIBUTION TO THE WAR EFFORT 267 (2013).

98. Franz Böhm, *Decartelization and De-concentration: A Problem for Specialists or a Fateful Question?*, in BIRTH OF AUSTERITY: GERMAN ORDOLIBERALISM AND CONTEMPORARY NEOLIBERALISM 123 (Thomas Briebricher & Frieder Vogelmann eds., Michelle Everson trans., 2017).

99. Feldenkirchen, *supra* note 97, at 259.

100. NEUMANN, MARCUSE & KIRCHHEIMER, *supra* note 97, at 273. William Conrad Kessler, *The New German Cartel Legislation: July 15, 1933*, 24 AM. ECON. REV. 477, 478–79 (1934). Ivo E. Schwartz, *Antitrust Legislation and Policy in Germany—A Comparative Study*, 105 U. PA. L. REV. 617, 641 (1957). William C. Kessler, *German Cartel Regulation Under the Decree of 1923*, 680, 681 (1936).

101. NEUMANN, MARCUSE & KIRCHHEIMER, *supra* note 97, at 269. See also Schwartz, *supra* note 100. Kessler, *German Cartel Regulation Under the Decree of 1923*, *supra* note 100, at 681.

102. LUDWIG VON MISES, SOCIALISM: AN ECONOMIC AND SOCIOLOGICAL ANALYSIS 580 (1951). See also Ludwig von Mises, *Historicism*, in NOTES AND RECOLLECTIONS: WITH THE HISTORICAL SETTING OF THE AUSTRIAN SCHOOL OF ECONOMICS 6 (Bettina Bien Greaves ed., 2013) (“The Historical School of Economic State Science did not produce a single thought. It did not write a single page in the history of sciences. For eighty years it served only diligently to propagandize Nazism.”).

103. See Stefan Kolev & Erwin Dekker, *Carl Menger’s Smithian Contributions to German Political Economy*, 36 REV. AUSTRIAN ECON. 247, 248, 262 (2023).

104. See Eucken, *supra* note 81; Ludwig von Mises, *Historicism*, in NOTES AND RECOLLECTIONS: WITH THE HISTORICAL SETTING OF THE AUSTRIAN SCHOOL OF ECONOMICS (Bettina Bien Greaves ed., 2013). See also Joshua Rahtz, *Two Types of Separation: Ludwig von Mises and German Neoliberalism*, 83 J. HIST. IDEAS 293, 303 (2022); Wernhard Möschel, *The Proper Scope of*

*B. Fighting Collectivism—The Austrian School*

This section shows that no DMA core features can be found in the Austrian School of Economics. However, Austrian economists, similar to ordoliberals, did recognize the importance of competition and individualism in the economy to ensure economic and human freedom. But in contrast to ordoliberals, Austrian economists believed that a legal framework (e.g., the DMA) was unnecessary. In other words, Austrian economists and ordoliberals aimed to overcome the Historical School, fighting against a pure historical inductive method and collectivism that led to totalitarianism,<sup>105</sup> by using different approaches.<sup>106</sup>

The Austrian School of Economics officially started as an antagonist to the German Historical School with the publication of Carl Menger's *Investigations into the Method of the Social Sciences with Special Reference to Economics*<sup>107</sup> in 1883.<sup>108</sup> In contrast to historical economists, Austrian economists believed that theories were necessary to understand economics as “statistics can only relate to the past.”<sup>109</sup> Most importantly, the Austrian School believed that the state should not interfere with the role of the market system (contrary to DMA approach); rather, the state should safeguard people's lives, property, and health from potential fraudulent and violent aggression.<sup>110</sup>

The Austrian economist Ludwig von Mises describes the market as supreme in ordering the social system and giving it purpose<sup>111</sup> and the consumer as the captain of markets by determining what must be produced, and in what quantities and quality. Consumers assign each person their rightful position in society<sup>112</sup> and competition implies “the opportunity to serve the consumers in a better or cheaper

*Government Viewed from an Ordoliberal Perspective: The Example of Competition Policy*, 157 J. INST. THEORETICAL ECON. 3 (2001).

105. See Raimondo Cubeddu, *The Theory of Human Action*, in THE PHILOSOPHY OF THE AUSTRIAN SCHOOL 90–94 (1993); FRIEDRICH A. HAYEK, THE ROAD OF SERFDOM 24, 60 (1944). Stavros Ioannides, *Austrian Economics, Socialism and Impure Forms of Economic Organization*, 12 REV. POLITICAL ECON. 45, 46, 49 (2000). In Mises' *Economic Calculation in the Socialist Commonwealth*, socialism is described as “the most tragic experiment in human history.” Yuri N. Maltsev, *Foreword to LUDWIG VON MISES, ECONOMIC CALCULATION IN THE SOCIALIST COMMONWEALTH* vii (1990).

106. See LUDWIG VON MISES, HUMAN ACTION A TREATISE ON ECONOMICS 266 (1998). See also FRIEDRICH A. HAYEK, HISTORY AND POLITICS 24 (2003); Adam Martin, *Austrian Methodology: A Review and Synthesis*, in THE OXFORD HANDBOOK OF AUSTRIAN ECONOMICS 32 (Christopher J. Coyne & Peter Boettke eds., 2015); Cubeddu, *supra* note 105, at 66. Rahtz, *supra* note 104, at 295–96, 301–03; Karl Häuser, *Historical School and “Methodenstriet”*, 144 J. INST. THEORETICAL ECON. 532, 534 (1988).

107. MISES, *supra* note 76, at 128. Joseph A. Schumpeter recognized that the influence of the Austrian school “did not assert itself perceptibly until after 1900.” SCHUMPETER, *supra* note 76, at 849. See also Richard M. Ebeling, *An Austrian Interpretation of the Meaning of Austrian Economics: History, Methodology, and Theory*, in WHAT IS SO AUSTRIAN ABOUT AUSTRIAN ECONOMICS? 43, 44 (Steven Horwitz, Pierre Desrochers & Roger Koppl eds., 2010).

108. See Kiichiro Yagi, *Carl Menger and the Historicism in Economics*, in METHODOLOGY OF THE SOCIAL SCIENCES, ETHICS, AND ECONOMICS IN THE NEWER HISTORICAL SCHOOL: FROM MAX WEBER AND RICKERT TO SOMBART AND ROTHACKER 240–41 (Peter Koslowski ed., 1997). Kolev & Dekker, *supra* note 103, at 254.

109. Walter Eucken & T. W. Hutchison, *On the Theory of the Centrally Administered Economy: An Analysis of the German Experiment. Part I*, 15 ECONOMICA 79, 83 (1948).

110. See Cubeddu, *supra* note 105, at 76, 77, 83, 98.

111. MISES, *supra* note 106, at 258.

112. *Id.* at 270.

way,”<sup>113</sup> which does not need a state to be enforced.<sup>114</sup> This approach is the opposite of the DMA legal framework, which sets rules to pursue fairness and contestability by discharging any economic evaluations. This point clarifies why also the DMA scope and DMA purpose are missing in the Austrian School.<sup>115</sup>

Frederich A. Hayek is another important Austrian economist, who was very critical to collectivism with a focus on socialism. Hayek and Mises explained that socialism inevitably led to totalitarian policy and economic waste, and any form of impure capitalism is also inherently inefficient by threatening human freedom.<sup>116</sup> In a socialist economy, the lack of competition prevents the creation of incentives and markets for capital goods based on supply and demand, thus rendering their value challenging to define.<sup>117</sup>

In summary, a deductive method, individualism, and the idea of the market “as supreme” in ordering the social system with consumers as their captain are the hallmarks of the Austrian School of Economics, which never dominated European economic thinking.<sup>118</sup> The DMA core features, grounded in the state’s role in regulating markets to pursue fairness and contestability through formalism by targeting big businesses, seem antithetical to the Austrian School’s focus on limited government intervention. However, the Austrian way of conceptualizing competition and its relation to human freedom influenced ordoliberals,<sup>119</sup> who set the tone for competition law in Europe.

Both the Austrian School of Economics and Ordoliberalism were part of the neoliberal schools formalized in 1938 during the “Walter Lippman Colloquium.”<sup>120</sup> Neoliberals believed in autonomous entrepreneurial action and the free interaction of individuals in the marketplace as opposed to a centralized state economy. Ordoliberalism became particularly successful after World War II and the decline of the Historical School associated with the Nazi regime, which left Germany with an economy to rebuild.<sup>121</sup> The role of the state and the social component of

113. *Id.* at 276.

114. *See, e.g.*, THE OXFORD HANDBOOK OF AUSTRIAN ECONOMICS 35, 36 (Peter J. Boettke & Christopher J. Coyne eds., 2015). Peter G. Klein, *Foreword* to CARL MENGER, PRINCIPLES OF ECONOMICS 7–10 (1976); CARL MENGER, PRINCIPLES OF ECONOMICS 55, 112 (1976); Martin, *supra* note 106, at 13, 37.

115. MISES, *supra* note 106, at 270. *See also* ANTHONY JAMES NICHOLLS, FREEDOM WITH RESPONSIBILITY: THE SOCIAL MARKET ECONOMY IN GERMANY 1918-1963 31 (2000).

116. FRIEDRICH AUGUST VON HAYEK, THE ROAD TO SERFDOM 24 (1944); Ioannides, *supra* note 105, at 46.

117. *Id.* at 49.

118. *See* LUDWIG VON MISES, THE HISTORICAL SETTING OF THE AUSTRIAN SCHOOL OF ECONOMICS 5, 7, 13, 17, 18 (Bettina Bien Greaves ed., 2013).

119. *See* William Callison, *The Historical Context of Ordoliberalism’s Theoretical Development*, in THE OXFORD HANDBOOK OF ORDOLIBERALISM 40, 43 (Thomas Biebricher, Peter Nedergaard & Werner Bonefeld eds., 2022).

120. *Id.* at 45. The French organizer of the colloquium Louis Rougier opened the works, observing that “[t]he moral drama of our time . . . concerns the (willing) blindness of the men of the left, who dream of a democratic politics and economic planning, without understanding that economic planning implies a totalitarian state and that a liberal socialism is a contradiction in terms.” *Id.* (citing Louis Rougier, quoted in OLA INNSET, REINVENTING LIBERALISM: THE POLITICS, PHILOSOPHY, AND ECONOMICS OF EARLY NEOLIBERALISM (1920-1947) 47 (2020)).

121. William Callison, *Ordoliberalism’s Trans-Atlantic (Un)Intelligibility: From Friedman and Eucken to Geithner and Schäuble*, in ORDOLIBERALISM, LAW AND THE RULE OF ECONOMICS 53 (Josef Hien & Christian Joerges eds., 2017); JAMES C. VAN HOOK, REBUILDING GERMANY: CREATION OF THE SOCIAL MARKET ECONOMY, 1945-1957 xv, 1 (2004).

markets<sup>122</sup> remains important for ordoliberalism, a distinction that sets them apart from the Austrian School of Economics.

### C. Ordoliberalism is the DMA Intellectual Framework

This Section provides an overview of the ordoliberal influence in the DMA core features and the European competition law that the DMA aims to complement (the DMA framework). Ordoliberalism focuses on a socio-economic meaning of competition, which includes fairness and contestability (DMA purpose) and a strong state to secure it (DMA approach) through rules (DMA legal framework) to regulate economic power in a modern industrialized economy (DMA scope).

Ordoliberalism emerged as a neoliberal school<sup>123</sup> in the 1930s, aiming to overcome the Historical School<sup>124</sup> but differently from the Austrian School. The Ordoliberal school believed that the only way to ensure people's freedom was by securing an economic order by using competition, the so-called rules of the game, through a strong neutral state (DMA approach). In other words, the state acts as a kind of referee, necessary to preserve the rules of the game.<sup>125</sup> The ordoliberal formalistic approach of thinking in terms of order and rules of the game to guarantee economic order (DMA legal framework) resonates with Kant's concept of order as a foundation for human freedom.<sup>126</sup> For Kant, human freedom involves adhering to a rational and just order that ensures one person's liberty does not infringe upon another's sphere of autonomy.<sup>127</sup>

122. See KENNETH DYSON, *Patron Saints: (3) Theological Foundations of Ordo and Religious Traces*, in CONSERVATIVE LIBERALISM, ORDO-LIBERALISM, AND THE STATE: DISCIPLINING DEMOCRACY AND THE MARKET 210 (2021); Manuel Wörsdörfer, *Walter Eucken: Foundations of Economics*, in THE OXFORD HANDBOOK OF ORDOLIBERALISM 91, 102 (Thomas Biebricher, Peter Nedergaard & Werner Bonefeld eds., 2022); Volker R. Berghahn, *Ordoliberalism, Ludwig Erhard, and West Germany's 'Economic Basic Law'*, 2 EUR. REV. INT'L STUD. 37, 41 (2015) ("The state was to provide a constitutional framework, a liberal ordo, within which capitalist enterprises had the space to thrive in secure competition and that would prevent the 'establishment of monopolistic power entities.'").

123. ALAN PEACOCK & HANS WILLGERODT, GERMAN NEO-LIBERALS AND THE SOCIAL MARKET ECONOMY 9, 10 (1989); KENNETH DYSON, CONSERVATIVE LIBERALISM, ORDO-LIBERALISM, AND THE STATE: DISCIPLINING DEMOCRACY AND THE MARKET 3 (2021). See also Stefan Kolev, *Ordoliberalism's Embeddedness in the Neoliberalism of the 1930s and 1940s*, in ORDOLIBERALISM AND EUROPEAN ECONOMIC POLICY: BETWEEN REALPOLITIK AND ECONOMIC UTOPIA 24 (Malte Dold & Tim Krieger eds., 2020); Callison, *supra* note 121, at 46. Neoliberalism was a response to the defeat of liberalism. SCHUMPETER, *supra* note 76, at 761.

124. Eucken, *supra* note 81, at 347. DYSON, *supra* note 123, at 11.

125. See Walter Eucken & Keith Tribe, *Competition as the Basic Principles of Economic Constitution*, in THE BIRTH OF AUSTERITY: GERMAN ORDOLIBERALISM AND CONTEMPORARY NEOLIBERALISM 81, 94 (Thomas Biebricher & Frieder Vogelmann eds., Michelle Everson trans., 2017). The state was seen as a necessary gardener, who nurtures the overall design of a garden without controlling each element. Laurent Warlouzet, *The EEC/EU as an Evolving Compromise between French Dirigism and German Ordoliberalism (1957-1995)*, 57 J. COMMON MKT. STUD. 77, 81 (2019). Nils Goldschmidt & Hermann Rauchenschwandtner, *The Philosophy of Social Market Economy: Michel Foucault's Analysis of Ordoliberalism*, (Albert-Ludwigs-Universität Freiburg, Institut für Allgemeine Wirtschaftsforschung, Abteilung für Wirtschaftspolitik, Freiburg i. Br., Working Paper No. 07/4, 2007), [https://www.econstor.eu/bitstream/10419/4374/1/07\\_4bw.pdf](https://www.econstor.eu/bitstream/10419/4374/1/07_4bw.pdf) [perma.cc/87C3-GSE4].

126. See DYSON, *supra* note 123, at 107, 108, 175.

127. See, e.g., Manuel Wörsdörfer, *Individual Versus Regulatory Ethics, An Economic-Ethical and Theoretical-Historical Analysis of German Neoliberalism*, 3-4 OECONOMIA 523 (2023); Manuel Wörsdörfer, *Brandeis and Eucken: Two Pioneers of the Modern 'Big Tech and Antitrust Debate'*, HIST. ECON. IDEAS (forthcoming Aug. 31, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=45](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=45)

Ordoliberalism developed more as a philosophical dynamic (non-static) concept<sup>128</sup> than just a school of law and economics. It formulated a broader concept of competition that was never purely economic, consistent with the DMA purpose.<sup>129</sup> The focus of Ordoliberalism was on cartels, as during the Nazi regime there was a cartel-run economy that the German Historical School justified in its promotion of collectivism. But ordoliberals also fought big businesses as anti-democratic (DMA scope).<sup>130</sup>

Originating in the German town of Freiburg, Ordoliberalism developed in different strands<sup>131</sup> over at least three generations.<sup>132</sup> It was far from being a monolithic concept. The ordoliberal strands contributed in different ways to shape the DMA core features and framework (the EU competition law) and will be discussed separately in the following paragraphs. Walter Eucken and Franz Böhm are the fathers of the first ordoliberal branch, the so-called Freiburg School,<sup>133</sup> focusing on the intersection between law and economics and the idea that markets need a legal framework (DMA legal framework) to secure competition.<sup>134</sup> Non-Freiburg wings included economists, such as Wilhelm Röpke and Alfred Müller-Armack. The Non-Freiburg strand favored even more state interventions (DMA approach), paying particular attention to social market aspects (DMA purpose), including wealth distribution.<sup>135</sup> All ordoliberal strands agree that monopolies should be prevented (DMA scope) to ensure a concept of competition that is beyond economics and defined as a process, which includes contestability and fairness (DMA purpose).

The second generation of ordoliberals included Ernst-Joachim Mestmäcker,<sup>136</sup> who was a key figure in the Competition Division of the European Commission,

44273 [web.archive.org/web/20250503100329/https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=4544273].

128. DYSON, *supra* note 123, at 49 (“The founding Ordo-liberals were strictly steadfast in their moral principles; intellectually formidable in their range of learning and depth of reflection. . . . Walter Eucken was a prime example of this kind of philosopher-economist.”).

129. Wernhard Möschel, *Competition Policy from an Ordo Point of View*, in GERMAN NEO-LIBERALS AND THE SOCIAL MARKET ECONOMY 148–49 (Alan Peacock & Hans Willgerdodt eds., 1989). See also MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLEGE DE FRANCE, 1978-1979* 160 (2008). Ordoliberal “interventionism is pursued as the historical and social condition of possibility for a market economy, as the condition enabling the formal mechanism of competition to function so that the regulation the competitive market must ensure can take place correctly without the negative effects that the absence of competition would produce.” *Id.*

130. See Böhm, *supra* note 98, at 124, 128, 134.

131. See ORDOLIBERALISM: A GERMAN ODDITY? 33 (Thorsten Beck & Hans-Helmut Kotz eds., 2017); Federico Bruno, *Ordoliberal Ideas on Europe: Two Paradigms of European Economic Integration*, 49 HIST. EUR. IDEAS 737 (2023).

132. Bruno, *supra* note 131, at 739; DYSON, *supra* note 123, at 6, 10.

133. See, e.g., THE ROAD FROM MONT PÉLERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE, WITH A NEW PREFACE 112 (Philip Mirowski & Dieter Plehwe eds., 2015).

134. Stefan Kolev, “Power Is Evil in Itself”: *The Ordoliberal Quest for a Privilege-Free Order*, PROMARKET (Mar. 28, 2021), <https://www.promarket.org/2021/03/28/ordoliberal-privilege-free-order-walter-eucken-franz-bohm-germany/> [perma.cc/UVG6-3A8G].

135. DYSON, *supra* note 123, at 6–8; ORDOLIBERALISM AND EUROPEAN ECONOMIC POLICY: BETWEEN REALPOLITIK AND ECONOMIC UTOPIA 1 (Malte Dold & Tim Krieger eds., 2020). Manuel Wörsdörfer, *Von Hayek and Ordoliberalism on Justice*, 35 J. HIST. ECON. THOUGHT 291, 305 (2013).

136. See Malte Dold, *W7 PL7, Ordoliberalism and the Freiburg School*, YOUTUBE (Apr. 20, 2024), <https://www.youtube.com/watch?v=t3nkBySsT9g> [perma.cc/83XC-W747]. Christian Joerges, *Ernst-Joachim Mestmäcker: A Vision of European Economic Constitutionalism*, in THE OXFORD

the European antitrust regulator. Viktor Vanberg is the leading representative of the third contemporary generation of ordoliberals, focusing on the concept of consumers as citizens with sovereignty in defining the rules.<sup>137</sup>

### 1. The Freiburg School and the Economic Order

As this Section reveals, although all DMA core features can be found in the Freiburg School, the DMA legal framework (formalism) and scope are its focus.

This school originated in the German town of Freiburg in the 1930s through the work of Walter Eucken (an economist and philosopher)<sup>138</sup> and Franz Böhm (a lawyer).<sup>139</sup> Eucken and Böhm developed the notion of economic (market) order and the rules of the game that the state had to preserve through a legal framework (DMA approach and legal framework). The premise of an economic order was a constitutional order.<sup>140</sup> In other words, the Freiburg School established the concept that the “market was embedded in a constitutional framework.”<sup>141</sup>

While Böhm, as a lawyer, focused on the legal aspects of how to enforce competition through law and its constitutional meaning, Eucken developed the economic discussion. Eucken advanced a new scientific method—the morphological scheme—rather than a simple theory of markets, that he used to frame the discussion on competition, monopolies, and cartels.

#### a. The Problem of Economic Power and How to Ensure Economic Order

The problem that the DMA aims to tackle is related to a small number of large firms in the new digital sector “with considerable economic power”<sup>142</sup> (the DMA scope). The problem of the Freiburg School was precisely the problem of economic

HANDBOOK OF ORDOLIBERALISM 179, 184 (Thomas Biebricher, Peter Nedergaard & Werner Bonefeld eds., 2022).

137. Malte Dold, *Viktor Vanberg: The Constitution of Markets and Public Choice*, in THE OXFORD HANDBOOK OF ORDOLIBERALISM 193, 193, 194, 201, 203 (Thomas Biebricher, Peter Nedergaard & Werner Bonefeld eds., 2022). Viktor Vanberg, «Ordnungstheorie» as *Constitutional Economics – The German Conception of a «Social Market Economy»*, 39 ORDO: JAHRBUCH FÜR DIE ORDNUNG VON WIRTSCHAFT UND GESELLSCHAFT 17, 28 (1988). Dyson, *supra* note 123, at 118, 119, 123.

138. See J. W. N. Watkins, *Walter Eucken, Philosopher-Economist*, 63 ETHICS 131 (1953); Manuel Wörsdörfer, *Walter Eucken: Foundations of Economics*, in THE OXFORD HANDBOOK OF ORDOLIBERALISM 91, 92 (Thomas Biebricher, Peter Nedergaard & Werner Bonefeld eds., 2022). Raphaël Fèvre, *A Political Economy of Power: Ordoliberalism in Context, 1932-1950* 6 (2021).

139. See Wörsdörfer, *supra* note 138, at 92; David J. Gerber, *Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the “New” Europe*, 42 AM. J. COMPAR. L. 25 (1994); Gerber, *supra* note 97, at 234.

140. Vanberg, *supra* note 137; Fèvre, *supra* note 138, at 12.

141. DORIS HILDEBRAND, *THE ROLE OF ECONOMIC ANALYSIS IN THE EC COMPETITION RULES: THE EUROPEAN SCHOOL* 10 (2d ed. 2002).

142. DMA, recital 3.

power<sup>143</sup> in a modern industrialized economy.<sup>144</sup> Competition represented a fundamental means for the disempowerment of big businesses and for preserving human rights;<sup>145</sup> competition is seen as a process within an economic order. But to enforce competition ensuring economic order, the Freiburg school argued you need some kind of rules.<sup>146</sup>

Ordoliberalism emphasizes the vital role of rules in the economic, social, and political context (the DMA approach). Rules enable dealing with not only private power but also preventing governments and administrations from being the target of rent-seeking by interest groups and the vehicle for consolidating privileges and inequality.<sup>147</sup> In other words, competition was a necessary process within the economic order<sup>148</sup>—the premise of a democratic system.<sup>149</sup>

*b. The Morphological Scheme Explaining Competition in an Exchange Economy*

Eucken, trained in economics and philosophy, developed the morphological<sup>150</sup> scheme, which is interesting in explaining how competition is framed as a necessary process to achieve an economic order and objectives,<sup>151</sup> such as contestability and fairness that we find in the DMA. It also clarifies the concept of monopolies and the concern about economic power. In other words, this

143. Ordoliberals focused on market power because the private market economic power concentration was inconsistent with a democratic society, in addition to raising economic issues. “[M]arket power distorts the allocation of resources as prices no longer fulfill their role as indicators of scarcity. [T]he existence of private market economic power concentration is not only economically problematic but also incompatible with a democratic society. In Eucken’s own words, the policy of the state should aim at dismantling economic power concentrations or limiting their functioning.” Frank Maier-Rigaud, *On the Normative Foundations of Competition Law – Efficiency, Political Freedom and the Freedom to Compete*, in THE GOALS OF COMPETITION LAW 144, 149 (Daniel Zimmer ed., 2012). Wörsdörfer, *supra* note 122, at 292.

144. EUCKEN, *supra* note 94, at 40.

145. Böhm, *supra* note 98, at 124 (“The concentration of power in the hands of individuals or groups of individual market participants is a particularly serious and intractable problem for politics and law . . . the free market is predicated on the assumption that all economic actors are powerless.”); DYSON, *supra* note 123, at 7. *See also* FÈVRE, *supra* note 138, at 154. There was also a moral sense of the rules and order that stemmed from Catholic Church, which influenced the ordo-liberalism way of thinking of an economic order. DYSON, *supra* note 123, at 213–14, 217 (2021). *See also* Esmond Birnie, *Christianity and the Social Market Economy in Britain, Germany and Northern Ireland*, 5 J. IRISH CHRISTIAN STUDY CTR. 34, 35 (1994); James Chappel, *Catholicism and the Economy of Miracles in West Germany, 1920-1960*, 42 NEW GERMAN CRITIQUE 9 (2015). It was only in 1948, that “Ordoliberalismus” was used in print to refer to the specific variant of liberalism related to the Catholic review *Ordo*. Bob Jessop, *Ordoliberalism and Neoliberalization: Governing Through Order and Disorder*, 45 CRITICAL SOCIO. 967, 969 (2019).

146. *See* DYSON, *supra* note 123, at 103.

147. *Id.* at 82–83. *See also* Vanberg, *supra* note 137, at 31. The government “is a very particular form of power” that must be neutral and rules are instrumental for a sustainable liberal order serving to give the government credibility. Böhm, *supra* note 98, at 121. *See also* Fèvre, *supra* note 138, at 159. Eucken saw the economy as an “economic order” (*Wirtschaftsordnung*), necessary to appreciate the “economic process” (*Wirtschaftsablauf*). *Id.* at 93–94.

148. *See* Böhm, *supra* note 98, at 121. “Under competitive economic conditions, each and every individual has the right to enter the market to make offers and demands as he will.” *Id.* at 126. VAN HOOK, *supra* note 121, at 233, 244.

149. Böhm, *supra* note 98, at 128.

150. Rahtz, *supra* note 104, at 301 (“By 1940, Eucken had developed a ‘morphology’ of market forms, much like Weber’s ideal types.”).

151. WALTER EUCKEN, THE FOUNDATIONS OF ECONOMICS 117–59 (1951).

discussion helps define the ordoliberal influence in the DMA scope and contestability as a purpose.

Eucken identified several forms of markets<sup>152</sup>: monopoly, partial monopoly, competition, oligopoly, and partial oligopoly.<sup>153</sup> Eucken considered a market as competitive if ruled by an anonymous price,<sup>154</sup> in which no company is simply following the plan of another company by implying more than one firm.<sup>155</sup> Otherwise, a market is non-competitive.<sup>156</sup> The DMA speaks about tackling a few large undertakings in digital services with “the ability to easily set commercial conditions and terms in a unilateral and detrimental manner,”<sup>157</sup> which seems consistent with Eucken’s notion of competition and non-competitive markets. It also shows contestability as a premise of competition in line with the DMA purpose.

As far as monopolies, Eucken called for their dissolution when “this can create the conditions of perfect competition.”<sup>158</sup> Conversely, prohibiting monopolies when this “would lead to a supplier oligopoly in place of what had previously been united in one independent firm,”<sup>159</sup> would not make much sense and government regulation would be required.

Particularly important for our discussion on the DMA is the Freiburg School’s idea of fighting monopolies by creating rigorous monopoly regulations to deter their creation (the DMA scope).<sup>160</sup> By heavily regulating large digital companies, the DMA seems to comport with this concept of preventing monopolies through regulation.

Eucken recognized that oligopolies represent a transitory form of market that would soon become a cartel or an individual or collective monopoly, meant as “[a] number of individual economic units [that] make an agreement and come to the

152. Generally, Eucken believed that the influence of a firm on the price of a good or service determines the form of a market. *Id.* at 136.

153. The oligopoly is a form of market close to that of partial monopoly, in which there is a dominant large seller or buyer, and smaller firms work along with him by simply following the prices set by the large seller or buyer. Small firms do not pursue any market strategy of their own. The main difference between a partial monopolist and an oligopolist is that the partial monopolist is aware that the small firms simply act in accordance with its prices. *Id.* at 147–48. Eucken also defined the “partial oligopoly” referring to the situation in which two large companies do not consider one another’s strategy/reactions, as well as those of their customers and the prospective reactions of all the small retailers. *Id.* at 148.

154. *Id.* at 139.

155. Fèvre, *supra* note 138, at 129–30.

156. Eucken believed that any analysis and definition of competition and monopoly should begin from data. More precisely, Eucken observed that it should “start from the central point of actual economic life, that is, from the economic plans and their data,” because “whether a supplier or demander is in competition or oligopoly can be ascertained in any concrete case from what each one in the market takes as given in his economic plan.” EUCKEN, *supra* note 151, at 145, 147.

157. DMA, recital 13.

158. Eucken & Tribe, *supra* note 125, at 90.

159. *Id.* See also Böhm, *supra* note 98, at 130.

160. See, e.g., Lars P. Feld & Daniel Nientiedt, *Examining the Ordoliberal Tradition in Classical Liberal Thought* (Walter Eucken Inst., Working Paper No. 23/5, 2023), [https://www.eucken.de/app/uploads/Discussionpaper\\_2305.pdf](https://www.eucken.de/app/uploads/Discussionpaper_2305.pdf) [perma.cc/TKC3-SCZM]. The authors citing Eucken argued that “[h]e names two principles as to how the state should approach economic policy-making. First, it should aim to ‘dissolve economic power groups or restrict their functions’ (Eucken, 1952/2004, p. 334). Second, the state should concentrate on improving the framework of general and abstract legal rules in which economic transactions take place.” *Id.*

market as a monopolist.”<sup>161</sup> Without addressing the oligopoly issue in detail,<sup>162</sup> Eucken believed that with an authoritative oversight of monopolies, oligopolies would not have incentives to become a monopoly tending to behave as if in competitive conditions.<sup>163</sup>

Furthermore, Eucken considered that in certain industries, such as the iron and steel-making industries, monopolies are unavoidable<sup>164</sup> and need to be regulated<sup>165</sup> to ensure that they behave “as if” complete competition exists.<sup>166</sup> Otherwise, there is no competitive order, like with patent law. Eucken considered patent law “irreconcilable with the competitive order” by triggering “a strong trend toward the establishment of monopolies and concentrations of industry.”<sup>167</sup>

This discussion is important to show the scope of ordoliberalism in targeting big firms focusing on the concentration of economic power, regardless of how that power was achieved, including cases where companies gained dominance through superior skills and inventions eligible for patent protection. The DMA targets big businesses by rejecting any economic efficiency evaluation, consistent with this idea.<sup>168</sup>

## 2. The Non-Freiburg Ordoliberal School and the Social Market Economy

The Non-Freiburg Ordoliberal School is relevant to our discussion of the DMA because this strand introduced the concept of a social market economy emphasizing the ethical and social aspects of markets (DMA purpose) and the need for a strong state (DMA approach) to tackle “the cult of the colossal.”<sup>169</sup> What Foucault refers to as the “philosophy of the social market economy”<sup>170</sup> is important in the following discussion about the influence of the Non-Freiburg School on European Competition Law (the DMA framework).

The social market economy concept would justify laws, such as the DMA, which was enacted due to “the negative societal and economic implications”<sup>171</sup> of

161. EUCKEN, *supra* note 151, at 149.

162. *Id.* at 249. According to Eucken, “[c]artels develop out of the oligopolistic struggles of a few firms.” *Id.*

163. Walter Eucken, *Die Wettbewerbsordnung und ihre Verwirklichung* [translation: The Competitive Order and its Implementation], 2 ORDO, JAHRBUCH FÜR DIE ORDNUNG VON WIRTSCHAFT UND GESELLSCHAFT 1–99 (1949), *abridged version translated and reprinted in* 2(2) COMPETITION POLY INT’L 219, 244–45 (2006). *See also* Christian Ahlborn & Carsten Grave, *Walter Eucken and Ordoliberalism: An Introduction from a Consumer Welfare Perspective*, 2 COMPETITION POLY INT’L 197, 205–06 (2006).

164. Eucken & Tribe, *supra* note 125, at 90.

165. *Id.* *See also* Fèvre, *supra* note 138, at 168 (Eucken formulated ‘regulative principles,’ which included “[c]ontrol of monopolistic market structures”—cornerstone of his economic policy/plan).

166. *See* PETER BEHRENS, THE ORDOLIBERAL CONCEPT OF “ABUSE” OF A DOMINANT POSITION AND ITS IMPACT ON ARTICLE 102 TFEU 20 (2015), [https://cars.wz.uw.edu.pl/images/studia\\_szkolenia/146/artikul\\_Behrens.pdf](https://cars.wz.uw.edu.pl/images/studia_szkolenia/146/artikul_Behrens.pdf) [perma.cc/78B4-C39S]. Government regulation should be defined on a case-by-case basis through a rigorous scientific investigation. Conversely, when monopolies are avoidable, they would be broken up.

167. Eucken & Tribe, *supra* note 125, at 236.

168. DMA, recital 23.

169. WILHELM RÖPKE, THE SOCIAL CRISIS OF OUR TIME 66 (1950) (“The cult of the colossal means kowtowing before the merely ‘big’—which is thus adequately legitimized as the better and more valuable—it means contempt for what is outwardly small.”).

170. *See* Goldschmidt & Rauchenschwandtner, *supra* note 125, at 8.

171. DMA, recital 6.

weak contestability and assumed unfair practices. The Non-Freiburg School advocates for a social market economy included Wilhelm Röpke, Alfred Müller-Armack, Alexander Rüstow,<sup>172</sup> and Ludwig Erhard, the minister of economics and the father of the German economic miracle.<sup>173</sup>

In the early years of World War II, Wilhelm Röpke, arguing that the premise for a human and well-functioning economic order was the identification of its moral and spiritual foundations,<sup>174</sup> developed a socioeconomic philosophy to identify such foundations.<sup>175</sup> Röpke was politically very influential.<sup>176</sup> But it was Alfred Müller-Armack who coined the term social market economy in 1946.<sup>177</sup>

The term social market economy was inspired by the ordoliberal notion that a strong state<sup>178</sup> had to ensure private contract autonomy, free movement of people, and individual property rights, to name a few.<sup>179</sup> Armack's idea was to add a welfare pillar to the market, aligning with the Freiburg School's concept of a market economy where social and economic objectives hold equal weight.<sup>180</sup> Here we can identify the DMA purpose of fairness.<sup>181</sup> The concept of a market caring for social issues, including the redistribution of wealth, found great support among politicians including the German Minister of Economics, Ludwig Erhard, and political

172. See, e.g., CHRISTIAN L. GLOSSNER, THE MAKING OF THE GERMAN POST-WAR: POLITICAL COMMUNICATION AND PUBLIC RECEPTION OF THE SOCIAL MARKET ECONOMY AFTER WORLD WAR TWO 47 (2010); see also THE ROAD FROM MONT PÈLERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE, WITH A NEW PREFACE, *supra* note 133, at 115 (“Röpke, Rüstow, and Müller-Armack further developed the groundwork for the ‘new’ economic liberalism from a sociological point of view.”); Raphaël Fèvre, *Wilhelm Röpke: The Social Crisis of Our Time*, in THE OXFORD HANDBOOK OF ORDOLIBERALISM 124 (Thomas Biebricher, Peter Nedergaard & Werner Bonefeld eds., 2022); Bruno, *supra* note 131, at 738–39.

173. See DYSON, *supra* note 123, at 353; Fèvre, *supra* note 138, at 6, 7. VAN HOOK, *supra* note 121, at xv.

174. FÈVRE, *supra* note 138, at 151–52; Fèvre, *supra* note 172, at 122.

175. In 1929, Röpke became a full Professor at the University of Marburg before migrating to Turkey where he was a Professor at the University of Istanbul. Fèvre, *supra* note 172, at 123. In 1937, he moved to Switzerland where he stayed until his retirement as chair of international economics at the Graduate Institute of International Studies. *Id.* His works were translated into multiple languages, which helped with spreading his ideas all over the world. Stefan Kolev, Nils Goldschmidt & Jan-Otmar Hesse, *Debating Liberalism: Walter Eucken, F. A. Hayek and the Early History of the Mont Pèlerin Society*, 33 REV. AUSTRIAN ECON. 433, 436 (2020).

176. Callison, *supra* note 119, at 44.

177. Makoto Tezuka, *The Economic Reconstruction Plan of Alfred Müller-Armack: What is the Social Market Economy?*, in THE GERMAN HISTORICAL SCHOOL: THE HISTORICAL AND ETHICAL APPROACH TO ECONOMICS 202 (2000); ORDOLIBERALISM: A GERMAN ODDITY?, *supra* note 131; Angela Wigger, *Debunking the Myth of the Ordoliberal Influence in Post War European Integration*, in ORDOLIBERALISM, LAW AND THE RULE OF ECONOMICS 161, 168 (Josef Hien & Christian Joerges eds., 2017).

178. See, e.g., THE ROAD FROM MONT PÈLERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE, WITH A NEW PREFACE, *supra* note 133, at 111 (“The main pillar of Ordoliberalism became the ‘strong state,’ which would supersede the weak party and intervention state. . . . In doing so, Rüstow and Müller-Armack in particular referred affirmatively to Carl Schmitt’s theory of the state.”).

179. Josef Hien, *The Social Market Economy and Ordoliberalism—A Difficult Relationship*, in THE OXFORD HANDBOOK OF ORDOLIBERALISM 333, 335 (Thomas Biebricher ed., 2022).

180. *Id.* “Some commentators argued that Müller-Armack’s thought led to the initiation of a new branch of ordoliberals thinkers, known as Cologne school.” *Id.* at 335–36.

181. Müller-Armack’s social market economy concept was incorporated into the Christian Democratic Union (CDU) agenda, which was the ruling party of Germany after World War II. Tezuka, *supra* note 177, at 202; GLOSSNER, *supra* note 172, at 97.

parties.<sup>182</sup> The concept of a social market economy was open enough to enable different political parties to interpret it in a way that could serve their objectives,<sup>183</sup> which were consistent with the DMA purpose. Erhard became a key political figure in the ordoliberal movement,<sup>184</sup> capable of putting the social market economy concept into action.<sup>185</sup> Müller-Armack became Secretary of the Ministry of Economic Affairs under Erhard.<sup>186</sup>

However, the political success of the social market economy raised skepticism among those ordoliberals attached to the Freiburg tradition, who saw the risk of sprawling social security expansion, which strayed away from the original German ordoliberal market economy.<sup>187</sup> The ordoliberal Otto Schlecht noted that “already in the immediate post-war period, the expansion of social security ‘let the bureaucracy grow to a moloch that degraded the autonomous citizen to an administrated citizen,’”<sup>188</sup> drifting into the same rent-seeking society that ordoliberals aimed to combat. Nevertheless, ordoliberals influenced the introduction of the European competition law.

### 3. Mapping Out the Ideology Underlying EU Competition Policy Through Ordoliberal Strands and Generations

As already mentioned, this Article examines not only the DMA core features but also the intellectual framework underlying the concept of competition and competition law that the DMA complements (DMA framework). This Section shows the influence of the ordoliberal ideology underlying the concept of competition and its regulation in Europe.<sup>189</sup>

Ordoliberalism is often cited as one of the main influences in the development of the European competition law.<sup>190</sup> The ordoliberal influence is clear from the fact

182. Berghan, *supra* note 122, at 47; Katja Seidel, *DG IV and the Origins of a Supranational Competition Policy: Establishing an Economic Constitution for Europe*, in *THE HISTORY OF THE EUROPEAN UNION: ORIGINS OF A TRANS- AND SUPRANATIONAL POLITY 1950–1972* 129, 132 (Wolfram Kaiser, Brigitte Leucht & Morten Rasmussen eds., 2009).

183. Hien, *supra* note 179, at 336–37.

184. *Id.* at 336; Wigger, *supra* note 177, at 168; GLOSSNER, *supra* note 172, at 51; Vanberg, *supra* note 137, at 17. “The term Social Market Economy (Soziale Marktwirtschaft) has become widely known as a label for the economic policy that has been implemented in post–World War II West Germany by its first Minister of Economic Affairs, Ludwig Erhard.” *Id.*

185. Hien, *supra* note 179, at 336, 339. *See also* Möschel, *supra* note 129, at 142; *THE ROAD FROM MONT PÉLERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE, WITH A NEW PREFACE*, *supra* note 133, at 114.

186. Wigger, *supra* note 177, at 168. *Responsibilities as a Ministry for European Affairs*, FED. MINISTRY FOR ECON. AFFS. & CLIMATE ACTION, <https://www.bmwk.de/Redaktion/EN/Dossier/bmwi-als-europaministerium.html> [perma.cc/ZB2F-WBBU] (last visited May 21, 2024).

187. Hien, *supra* note 179, at 336. (“According to the Ordoliberal critics, the Godesberger Program of the SPD with its famous catchphrase ‘competition as much as possible, planning as much as necessary’ led the way towards what would in the 1970s become a ‘welfare-collectivistic understanding of the social market economy’ as one of the Ordo editors put it.”).

188. *Id.*

189. HILDEBRAND, *supra* note 141, at 10; Felice & Vatiery, *supra* note 10, at 155.

190. Many other scholars subscribe to the idea that EU competition law “is the most bridgehead of Ordoliberalism in the European treaties. Dardot and Laval call competition policy one of the ‘main ordoliberal principles’ in Europe.” Quinn Slobodian, *Ordoliberals on Federalism and Europe*, in *THE OXFORD HANDBOOK OF ORDOLIBERALISM* 473, 476 (Thomas Biebricher ed., 2022); Massimiliano Vatiery, *Ordoliberal Competition*, 18 *CONCORRENZA & MERCATO* 371 (2010).

that European competition law provisions are enshrined in the founding Treaty of the European Economic Community (EEC Treaty), what we now call the European Union. The EEC Treaty represents a quasi-constitution in Europe; thus, having such competition law provisions enshrined in a treaty as important as a constitution demonstrates the ordoliberal influence in European competition law.

Competition policy was part “of the general economic policy of the [European Economic] Community,”<sup>191</sup> and the idea of “market was embedded in a constitutional framework.”<sup>192</sup> Several scholars share the view of seeing Europe as the joint efforts of its member states to develop the rules of the ordoliberal economic game.<sup>193</sup>

Furthermore, the EEC Treaty established a competition system “subject to the principle of fairness in the market place”<sup>194</sup> consistent with the DMA purpose and Ordoliberalism. However, a common mistake that scholars, such as Professor Peter Behrens, noted is to reduce Ordoliberalism to the Freiburg School which, as explored in the previous Sections, is inaccurate.<sup>195</sup> Ordoliberalism is not a monolithic term, and it is continually evolving.

In 1957, at the time of the EEC Treaty, Ordoliberalism was different from the Freiburg School.<sup>196</sup> The Non-Freiburg ordoliberal strand advocating the idea of a social market economy, as coined by Müller-Armack and implemented by Erhard, had a major practical influence on the European competition law. Müller-Armack was State Secretary for Europe when Erhard was Economic Affairs Minister in Germany from 1949 to 1963.<sup>197</sup> Müller-Armack worked on the Messina (Spaak) Report that preceded the EEC Treaty of 1957.<sup>198</sup> The Spaak Report introduced the idea of including in the EEC Treaty provisions preventing agreements in restraint of trade and abuse of dominant position conduct that would compromise the creation of the European Common Market.<sup>199</sup> Apparently, Müller-Armack sought to extend in Europe the anti-cartel policy that was implemented in Germany at the advice of ordoliberals.<sup>200</sup> However, European Competition law is also described as a compromise between German Ordoliberalism and French dirigisme, as both

191. HILDEBRAND, *supra* note 141, at 10.

192. *Id.*

193. Kolev, *supra* note 123, at 2.

194. HILDEBRAND, *supra* note 141, at 14. *See* Treaty of Rome, Mar. 25, 1957, 298 U.N.T.S. 3 (now Preamble of the TFEU) (recognizing that “the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition”).

195. Peter Behrens, *The Ordoliberal Concept of “Abuse” of a Dominant Position and its Impact on Article 102 TFEU* 8 (2015), [https://cars.wz.uw.edu.pl/images/studia\\_szkolenia/146/artykul\\_Behrens.pdf](https://cars.wz.uw.edu.pl/images/studia_szkolenia/146/artykul_Behrens.pdf) [perma.cc/AB2X-YKWB]. Ordoliberalism was more a philosophical concept rather than a precise economic theory based on a Kantian way of thinking.

196. *See also* Bruno, *supra* note 131, at 739. At that time the Freiburg School had to respond to the critics of the draft of the German Competition Law, called the Josten draft, considered the maximum expression of “the ideas of Ordoliberalism,” which was withdrawn. Nörr, *supra* note 97; Wigger, *supra* note 177, at 171.

197. *Responsibilities as a Ministry for European Affairs*, *supra* note 186.

198. ARNAUD LECHEVALIER, EUCKEN UNDER THE PILLOW: THE ORDOLIBERAL IMPRINT ON SOCIAL EUROPE 59–60 (2022), <https://shs.hal.science/halshs-03781875/document> [perma.cc/Y8JE-W3U2].

199. *See* Seidel, *supra* note 182, at 130.

200. *See* KATJA SEIDEL, THE PROCESS OF POLITICS IN EUROPE: THE RISE OF EUROPEAN ELITES AND SUPRANATIONAL INSTITUTIONS 155–58 (2010).

movements advocated for a social market economy.<sup>201</sup> But at that time Germany had the most comprehensive competition law and was able to secure the appointment of the first European Commissioner for Competition, Hans von der Groeben,<sup>202</sup> with strong ties to ordoliberals<sup>203</sup> who drafted much of the Spaak Report.<sup>204</sup>

Another influential ordoliberal figure in the European competition law was Ernst-Joachim Mestmäcker, a pupil of Böhm<sup>205</sup> and leader of the second generation of ordoliberals.<sup>206</sup> In 1962, Hans von der Groeben recruited Mestmäcker as special adviser of the Commission for Competition policy and harmonization law from 1961 to 1970.<sup>207</sup> Mestmäcker elaborated on the idea that the European integration and project as the Treaty of Rome of 1957 can be seen as an economic constitution in line with the ordoliberal thinking of Eucken and Böhm.<sup>208</sup> In Europe, von der Groeben and his collaborators, which included Freiburg-trained Ivo Schwarz and Ernst-Joachim Mestmäcker, formulated a broader concept of competition aligned with the ordoliberal economic constitution concept.<sup>209</sup>

The leading figure of the contemporary generation of Ordoliberalism is Viktor Vanberg,<sup>210</sup> an economist who renewed the ordoliberal method through the work

201. Warlouzet, *supra* note 125, at 77; Ernst-Joachim Mestmäcker, *Towards a Concept of a Workable European Competition Law Revisiting the Formative Period*, in THE HISTORICAL FOUNDATIONS OF EU COMPETITION LAW 191, 198 (Kiran Klaus Patel & Heike Schweitzer eds., 2013). David J. Gerber and Pinar Akman are two scholars taking the opposite side in assessing the ordoliberal influence on EU competition law. While David J. Gerber argued that Ordoliberalism had a great influence on the EU competition law provisions, Pinar Akman dismissed almost entirely any ordoliberal role in the formation of the EU competition law. GERBER, *supra* note 97, at 264; Pinar Akman & Hussein Kassim, *Myths and Myth-Making in the European Union: The Institutionalization and Interpretation of EU Competition Policy*, 48 J. COMMON MKT. STUD. 111, 126 (2010); Wigger, *supra* note 177, at 168.

202. Warlouzet, *supra* note 125, at 82; Mestmäcker, *supra* note 202, at 192. Hans von der Groeben “loved to tell the story that nobody had wanted his job. It was left to him as the junior member of the Commission without prior ministerial rank.” *Id.*

203. Slobodian, *supra* note 190, at 476; GERBER, *supra* note 97, at 264; Seidel, *supra* note 182, at 132 (“Competition became a DG in its own right, led by Von Der Groeben, a former senior civil servant in Erhard’s economics ministry. Social market economy, a term coined by Erhard’s state secretary Alfred Müller-Armack, and the ordoliberalism of the so-called Freiburg School had framed this ministry’s policy-making and became equally important for policy-making in DG IV.”).

204. Wigger, *supra* note 177, at 174.

205. DYSON, *supra* note 123, at 107.

206. ORDOLIBERALISM, LAW AND THE RULE OF ECONOMICS 5, 183 (Josef Hien & Christian Joerges eds., 2017).

207. Seidel, *supra* note 182, at 136 (“Groeben was keen to involve academics and other experts in policy-making. Competition law being a rather recent area of economic policy in Europe, he thought that consulting with external experts and seeking their advice was all the more important. Consequently, he recruited Ernst-Joachim Mestmäcker, a former student of Böhm’s . . . . [T]his consultancy was institutionalized when he became a special adviser to DG IV in 1962.”); SEIDEL, *supra* note 200, at 136.

208. Tim Krieger & Daniel Nientiedt, *The Renaissance of Ordoliberalism in the 1970s and 1980s*, CONST. POLIT. ECON. 8 (2023). *See also* Kolev, *supra* note 123, at 2.

209. SEIDEL, *supra* note 200, at 132, 136. Over generations, Ordoliberalism continues to adjust its concepts to practical experience. Mestmäcker, the leader of the second generation of ordoliberals, helped with cultivating ordoliberal tradition through a third generation of legal scholars, including Heike Schweitzer, Volker Emmerich, and Wernhard Möschel. *See* DYSON, *supra* note 123, at 108.

210. *See* Bruno, *supra* note 131, at 739. “Freiburg 3” was linked to the influence of Buchanan’s (1979, 1991) constitutional economics, mediated through the presence of his former colleague Vanberg in Freiburg (1988, 1997). DYSON, *supra* note 123, at 123.

of James M. Buchanan on constitutional political economy.<sup>211</sup> Building on Buchanan's insights, Viktor Vanberg<sup>212</sup> enriched Ordoliberalism by introducing the principles of consumer and citizen sovereignty in defining the rules and framework of economic and political activities.<sup>213</sup> He saw both democracy and liberalism built on voluntary agreement as the same source of legitimacy.<sup>214</sup> However, the influence of this third generation of Ordoliberalism is less clear in our analysis of the DMA framework.

In summary, the DMA core features and European competition law are ideologically grounded in Ordoliberalism, which provides a view of competition that is formal in its scope and not purely economic. Competition represents a fundamental means to ensure an economic order, using formalism and a constitutional framework. The DMA's purpose of securing contestability comports with the ordoliberal idea of economic justice and "performance-based competition,"<sup>215</sup> implying "that every entrepreneur, in a dynamic process, [is] subject to pressure from his competitors."<sup>216</sup> Second, the DMA's aim to pursue fairness in markets seems consistent with the ordoliberal idea of a social market economy,<sup>217</sup> although the Historical school already saw the economy in moral/ethical (not purely economic) terms. Third, the DMA idea of establishing an authoritative oversight framework, which disincentivizes the creation of monopolies and is in favor of *ex ante* intervention (DMA approach and scope), also comports with Ordoliberalism by recognizing that when competition in markets is not possible, the government should regulate competition in such markets through regulation.

Finally, the DMA formalism in enforcing competition principles rather than relying on case-by-case economic efficiency evaluations (as the United States does) is consistent with the ordoliberal rationale of thinking in terms of order. Therefore, the DMA core features are all founded on Ordoliberalism, which is also the historical ideology underlying European competition law (the DMA framework).

### III. THE UNSUCCESSFUL QUEST FOR DMA FOUNDATIONS WITHIN THE U.S. ANTITRUST INTELLECTUAL FRAMEWORK

"American lawyers come to [the antitrust] branch with the advantage of greater exposure to economic thinking than is common in Europe, but

211. Victor J. Vanberg, *Constitutional Political Economy* (Freiburg Discussion Papers on Const. Econ., Working Paper No. 15/6, 2015) (noting that this should be the focus of economists); JAMES M. BUCHANAN, *THE ECONOMICS AND THE ETHICS OF CONSTITUTIONAL ORDER* 49 (1991). Mingyu Liu, *Structural and Functional Analysis of Buchanan's Constitutional Contract*, 11 HUMANS. SOC. SCIS. COMM'NS 1, 6 (2024). Vanberg, *supra* note 137, at 17, 28.

212. Vanberg, *supra* note 137, at 17, 28 ("There are certainly sufficient affinities to allow for a fruitful dialogue between the tradition of Ordnungstheorie and the yet emerging paradigm of Constitutional Economics.").

213. Malte Dold, *Viktor Vanberg: The Constitution of Markets and Public Choice*, in *THE OXFORD HANDBOOK OF ORDOLIBERALISM* 193, 194, 203 (Thomas Biebricher ed., 2022); see also Brigitte Young, *Ordoliberalism as an 'Irritating German Idea'*, in *ORDOLIBERALISM: A GERMAN ODDITY?* 31, 34 (Thorsten Beck & Hans-Helmut Kotz eds., 2017).

214. Dold, *supra* note 213, at 203. Young, *supra* note 213, at 34.

215. FÈVRE, *supra* note 138, at 173.

216. *Id.*

217. In Europe competition law is "subject to the principle of fairness in the market place." HILDEBRAND, *supra* note 141, at 14.

must be careful not to be deceived by words like ‘competition,’ which bears different connotation in the European context.”<sup>218</sup> (Valentine Korah, 1978)

This Part, in comparing Ordoliberalism with the U.S. antitrust intellectual framework, seeks to identify whether the DMA core features inhere in U.S. antitrust principles and to evaluate whether a law like the DMA would be supported in the United States by a similar way of thinking about competition.

The ordoliberal theoretical framework of competition starkly differs from the U.S. antitrust intellectual framework. Traditionally, competition in the United States does not acquire a social, ethical, or formal meaning, as it has developed through a neoclassical, economic-based tradition.<sup>219</sup> The Supreme Court also stressed that U.S. antitrust law does not establish rules on fair and ethical competition.<sup>220</sup> The United States never experienced a Nazi totalitarian regime justifying a constitutional and social meaning of competition, nor is U.S. antitrust law based on a civil law system like Europe. The policy goal of creating a single market inherent in European competition law<sup>221</sup> is also missing in America.

The analysis conducted in this Part is fundamental for the United States to appreciate why and how the European formalistic approach and ordoliberal theoretical framework diverge from the U.S. economic approach and framework. This is particularly important as, in recent years, the United States saw the introduction of several antitrust bills mirroring the DMA to reform U.S. antitrust law,<sup>222</sup> and the rise of a more formalistic way to enforce competition, which looks very ordoliberal.<sup>223</sup> On June 23 and 24, 2021, a variety of bills were introduced in the House of Representatives which substantially repurpose the same *ex ante* approach and remedies enshrined in the DMA.<sup>224</sup> Similar to the DMA, these bills

218. Valentine Korah, *Interpretation and Application of Article 86 of the Treaty of Rome: Abuse of a Dominant Position Within the Common Market*, 53 NOTRE DAME L. REV. 768, 798 (1978).

219. See, e.g., GEORGE STIGLER, MEMOIRS OF AN UNREGULATED ECONOMIST 91–101 (1988).

220. See, e.g., Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993); Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1184 (2008).

221. HILDEBRAND, *supra* note 141, at 10; RICHARD WHISH & DAVID BAILEY, COMPETITION LAW § 2.09 (8th ed. 2015); ELEANOR M. FOX, THE COMPETITION LAW OF THE EUROPEAN UNION IN COMPARATIVE PERSPECTIVE (2009); *EU Competition Law and Its Territorial Reach*, in BELLAMY & CHILD: EUROPEAN UNION LAW OF COMPETITION (Vivien Rose & David Bailey eds., 7th ed. 2003). See also Mario Monti, European Commissioner for Competition Policy, *Strengthening the European Economy Through Competition Policy*, INST. INT’L MONETARY AFFS. (Oct. 29, 1999), [https://europa.eu/rapid/press-release\\_SPEECH-99-146\\_en.htm?locale=en](https://europa.eu/rapid/press-release_SPEECH-99-146_en.htm?locale=en) [perma.cc/X9YQ-PJUJ] (“The competition rules have been since the very beginning a cornerstone of European integration and of the Treaty of Rome.”).

222. See Sean Heather, *Striking Similarities: Comparing Europe’s Digital Markets Act to the American Innovation and Choice Online Act*, U.S. CHAMBER COMMERCE (June 17, 2022), <https://www.uschamber.com/antitrust/striking-similarities-dma-american-innovation-act> [perma.cc/DP5B-WNH6].

223. See Lambert & Cooper, *supra* note 55, at 32 (describing Lina Khan’s “contested view that Section 6(g) of the [FTC] act authorizes the Commission to promulgate legislative rules to prevent unfair methods of competition”).

224. See American Innovation and Choice Online Act, S. 2992, 117th Cong. (2022); American Innovation and Choice Online Act, H.R. 3816, 117th Cong. (2022); Platform Competition and Opportunity Act of 2021, H.R. 3826, 117th Cong. (2021); Augmenting Compatibility and Competition Enabling Service Switching (ACCESS) Act of 2021, H.R. 3849, 117th Cong. (2021); Ending Platform Monopolies Act, H.R. 3825, 117th Cong. (2021); State Antitrust Enforcement Venue Act of 2022, H.R. 3460, 117th Cong. (2022); Open App Markets Act, H.R. 5017, 117th Cong. (2021). See also Randy Picker, *The House’s Recent Spate of Antitrust Bills Would Change Big Tech as We Know It*, PROMARKET (June

would empower the government through the FTC (DMA approach) to regulate *ex ante* formalistically (DMA legal framework) large digital platforms identified as covered platforms using thresholds based on companies' size (DMA scope). Covered platforms are subject to essentially the same obligations and prohibitions enshrined in the DMA, including interoperability<sup>225</sup> and data portability.<sup>226</sup>

To date, none of these U.S. antitrust bills have passed, including the American Innovation and Choice Online Act introduced in 2022.<sup>227</sup> In the United States, an *ex post* case-by-case antitrust approach has been preferred.<sup>228</sup> However, the U.S. common law approach has been criticized as being antitextual and “in favor of big business.”<sup>229</sup> Additionally, U.S. lawmakers and regulators feel pressure to understand whether the United States is falling behind Europe in regulating Tech Titans,<sup>230</sup> which interestingly are almost entirely American companies. The current administration has made reining in tech giants a top priority on its agenda.<sup>231</sup>

29, 2021), <https://www.promarket.org/2021/06/29/house-antitrust-bills-big-tech-apple-preinstallation/> [perma.cc/8FKC-F8LW]; Rachel Lerman, *Big Tech Antitrust Bills Pass First Major Hurdle in House Even as Opposition Grows*, WASH. POST (June 24, 2021), <https://www.washingtonpost.com/technology/2021/06/24/tech-antitrust-bills-pass-house-committee/> [perma.cc/NXH5-RTG9]; Cecilia Kang & David McCabe, *House Lawmakers Are Considering 6 Bills Aimed at Big Tech*, N.Y. TIMES (June 23, 2021), <https://www.nytimes.com/2021/06/23/technology/big-tech-antitrust-bills.html> [perma.cc/UL5Z-TQRY].

225. Regulation 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 2019/1937, and 2020/1828, recitals (55), (57), art. 6, 2022 O.J. (L 265) 1; H.R. 3849, 117th Cong. § 4, 6(c) (2021).

226. Commission Regulation 2022/1925, recitals (59), (60), (96), art. 6, 2022 O.J. (L 265) 1; H.R. 3849, 117th Cong. § 3, 7(c) (2021).

227. American Innovation and Choice Online Act, H.R. 3816, 117th Cong. (2022). *See also* Steven Pearlstein, *Here's the Inside Story of How Congress Failed to Rein in Big Tech*, WASH. POST (July 6, 2023), <https://www.washingtonpost.com/opinions/2023/07/06/congress-facebook-google-amazon-apple-regulation-failure/> [perma.cc/SHG4-7NKS].

228. Since 2020, the DOJ sued Google twice and filed an antitrust complaint against Apple in 2024. In September 2023, the FTC filed a suit against Amazon, which follows the complaint filed against Facebook (now Meta) for monopolization conduct. State attorneys general are also filing antitrust lawsuits at the state level against Big Tech, in addition to participating in the federal trials along with the DOJ and the FTC. *See* McCabe, *supra* note 20; *FTC v. Amazon.com Inc.*, No. 2:23-cv-01495-JHC (W.D. Wash. filed Sept. 26, 2023).

229. According to Daniel Crane, courts would have “not merely abandoned statutory textualism or other modes of faithful interpretation out of a commitment to a dynamic common-law process. Rather, they have departed from text and original meaning in one consistent direction—toward reading down the antitrust statutes in favor of big business.” Daniel A. Crane, *Antitrust Antitextualism*, 96 NOTRE DAME L. REV. 1205, 1207 (2021).

230. In May 2024, Senator Klobuchar reintroduced legislation to strengthen the U.S. antitrust law, named *The Competition and Antitrust Law Enforcement Reform Act*, reiterating Congress's interest in antitrust reform. Lauren Berg, *Klobuchar Reintroduces Sweeping Antitrust Reform Bill*, LAW360 (May 16, 2024), <https://www.law360.com/articles/1838212> [perma.cc/UVC8-H8VZ]; Press Release, Senator Amy Klobuchar, *Klobuchar Reintroduces Bill to Promote Competition and Improve Antitrust Enforcement* (May 16, 2024), <https://www.klobuchar.senate.gov/public/index.cfm/news-releases?ID=E7191BDE-A125-4405-B8B4-DEC0F18BB622> [perma.cc/Y5NH-W2SQ].

231. *See, e.g.*, Christiano Lima-Strong, *Trump is Empowering Conservatives Critical of Big Tech*, WASH. POST (Nov. 19, 2024), <https://www.washingtonpost.com/politics/2024/11/19/trump-big-tech-critics/> [perma.cc/DZN3-K5YD]; Marica Brown, *Trump's Unexpected Antitrust Approach*, POLITICO (Jan. 15, 2025), <https://www.politico.com/newsletters/politico-nightly/2025/01/15/trumps-unexpected-antitrust-approach-00198532> [web.archive.org/web/20250504102949/https://www.politico.com/web/20250504102949/https://www.politico.com/newsletters/politico-nightly/2025/01/15/trumps-unexpected-antitrust-approach-00198532].

Furthermore, former FTC Chair Lina Khan, publicly endorsed by the Trump-Vance administration,<sup>232</sup> has advocated for the introduction of new rules to address competition concerns.<sup>233</sup> Khan called for the rejection of economic standards like the consumer welfare standard in favor of a DMA *ex ante*-type approach. This raises the question of whether such an approach represents a viable path for antitrust reform in the U.S. digital economy and how American antitrust might advance in the digital economy.

The following analysis addresses this question by searching for the DMA core features identified in Ordoliberalism and European framework in the U.S. antitrust tradition and framework. It compares the DMA (ordoliberal) and U.S. intellectual frameworks developed in different legal and economic contexts. Section A describes the rise of Neoclassicism and the establishment of a neoclassical economic intellectual framework in the United States in contrast to Ordoliberalism. It shows why in the United States, competition and markets acquired a different meaning than in Europe. Section B searches for the DMA core features and ordoliberal ideology in Brandeis's approach to fighting against big businesses in the early twentieth century that the present Neo-Brandeis movement is endorsing. It proceeds with searching for the DMA core features by comparing Ordoliberalism with the Harvard, Chicago, and Post-Chicago antitrust schools and the recent Neo-Brandeis movement. This analysis demonstrates how no DMA core features can be found in the U.S. antitrust schools based on Neoclassicism rather than Ordoliberalism.<sup>234</sup> The Neo-Brandeis movement, which is endorsing an ordoliberal type of approach to antitrust, is not exactly a school. Different from Ordoliberalism or the other schools examined in this article, the Neo-Brandeis movement does not offer similar theoretical or empirical foundations.

#### A. The Neoclassical Intellectual Framework

When the first U.S. federal antitrust law was enacted in 1890, neoclassical economics was emerging in the United States, profoundly shaping the understanding of competition and markets through the lens of cost-price relationships.<sup>235</sup> In 1890, while the German Historical School, which criticized classic deductive economics, was flourishing in Europe (particularly in Germany), neoclassical economics emerged in the United States as the dominant intellectual framework for economic policy and analysis.<sup>236</sup>

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232. See Diaz & Bloomberg, *supra* note 14; Forbes Breaking News, *supra* note 14; Klar, *supra* note 54; Nolan Brown, *supra* note 54; Sisco, *supra* note 54.

233. See, e.g., Lambert & Cooper, *supra* note 55, at 34; Chopra & Khan, *supra* note 55, at 357.

234. Interestingly, Friederich Hayek founded the Mont Pelérin Society of liberal intellectuals in 1947, which included Walter Eucken, Röpke, Frank Knight, Aaron Director, George J. Stigler, and Milton Friedman among the attendees of its meetings. Stefan Kolev, Nils Goldschmidt & Jan-Otmar Hesse, *Debating Liberalism: Walter Eucken, F. A. Hayek and the Early History of the Mont Pèlerin Society*, 33 REV. AUSTRIAN ECON. 433 (2019); Callison, *supra* note 119, at 47. See also STIGLER, *supra* note 219, at 144–46. CALLISON, *supra* note 121, at 53.

235. Herbert Hovenkamp, *United States Competition Policy in Crisis: 1890–1955*, 94 MINN. L. REV. 311, 314, 317, 321, 367 (2009); see also James Tobin, *Neoclassical Theory in America: J. B. Clark & Fisher*, 75 AM. ECON. REV. 28 (1985).

236. FRANK H. KNIGHT, *THE ETHICS OF COMPETITION AND OTHER ESSAYS* 148–49 (1969) (“In Germany utility theory encountered opposition from the historical school, which was rapidly attaining dominance.”).

Neoclassical economics developed as an extension of Smith, Ricardo, and other classical economists, incorporating the insights of the marginalist revolution, which emphasized utility and consumer-based decision-making. The great British marginalist economist Alfred Marshall<sup>237</sup> and the American economist John Bates Clark, who independently discovered the principle of marginal analysis,<sup>238</sup> deeply influenced the concept of markets and competition in the United States.<sup>239</sup>

Interestingly, Clark studied in Germany under one of the most important Historical School professors—Karl Knies—and his first book, *The Philosophy of Wealth*, was clearly the product of his German training; it described the Ricardian economic system as “the apotheosis of selfishness.”<sup>240</sup> However, Clark went through a real conversion. His following book, *The Distribution of Wealth*, presented a comprehensive utility theory and theoretical framework of perfect competitive equilibrium,<sup>241</sup> becoming an icon of neoclassical theory.<sup>242</sup> Clark argued that market concentration frequently led to greater efficiency.<sup>243</sup> Contrary to Europe’s approach, historicism was not adopted in the United States, although influential.<sup>244</sup> Even though many U.S. economists like Clark and Richard Ely went to study in Germany at the end of the nineteenth century,<sup>245</sup> as Germany was the only country offering a systematic academic training in political economy,<sup>246</sup> neoclassic economics dominated in the United States.

Neoclassicism emerged aiming to address the abstraction of classicism by implementing more robust mathematics.<sup>247</sup> It developed under the influence of

237. Herbert Hovenkamp, *The Invention of Antitrust*, 96 S. CAL. L. REV. 129, 146 (2022); DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* 174 (1991).

238. SCHUMPETER, *supra* note 76, at 868.

239. See ROSS, *supra* note 237, at 177 (“Marginalism won its success in England and America not just because it embodied a sophisticated economic theory but because it met the standards of sophistication operative in those cultures.”).

240. Tobin, *supra* note 235, at 29; YUVAL P. YONAY, *THE STRUGGLE OVER THE SOUL OF ECONOMICS: INSTITUTIONALIST AND NEOCLASSICAL ECONOMISTS IN AMERICA BETWEEN THE WARS* 40 (1998).

241. See *John Bates Clark*, BRITANNICA MONEY, <https://www.britannica.com/money/John-Bates-Clark#ref72160> [perma.cc/2EKR-VRQ3]; KNIGHT, *supra* note 236, at 148–49.

242. Tobin, *supra* note 235, at 35–36. In his first book, *The Philosophy of Wealth* (1886), Clark attacked the classic theory considering the Ricardian system “the apotheosis of selfishness.” JOHN BATES CLARK, *THE PHILOSOPHY OF WEALTH* (1886).

243. A CENTURY OF THE SHERMAN ACT: AMERICAN ECONOMIC OPINION, 1890–1990 viii (Jack C. High & Wayne E. Gable eds., 1992). See also Allyn A. Young, *The Sherman Act and the New Antitrust Legislation: I*, 23 J. POL. ECON. 201, 214 (1915) (“[I]t is often urged that to attempt to maintain competition by prohibiting attempts to monopolize is illogical, since monopoly is the goal of competition, and achieved monopoly is merely the result of thoroughly successful competition.”); George Gunton, *The Economic and Social Aspect of Trusts*, 3 POL. SCI. Q. 385, 408 (1888).

244. See ROSS, *supra* note 237, at 200.

245. Charles F. Dunbar, *The Reaction in Political Economy*, 1 Q. J. ECON. 1, 18 (1886).

246. See Edward S. Mason & Thomas S. Lamont, *The Harvard Department of Economics from the Beginning to World War II*, 97 Q. J. ECON. 383, 391 (1982); RALPH HENRY GABRIEL, *THE COURSE OF AMERICAN DEMOCRATIC THOUGHT* 246–47 (2d ed. 1940). “Since the middle of the 1870’s aggressive young economists, who had the invite to go abroad for study . . . and won doctor’s degrees in German universities” returned to America with enthusiasm. SCHUMPETER, *supra* note 76, at 864.

247. See Hovenkamp, *supra* note 237, at 116; HERBERT HOVENKAMP, *THE OPENING OF AMERICAN LAW: NEOCLASSICAL LEGAL THOUGHT, 1870–1970* 206 (2014). See also Eli Cook, *The Neoclassical Club: Irving Fisher and The Progressive Origins of Neoliberalism*, 15 J. GILDED AGE & PROGRESSIVE ERA 246, 250 (2016); SCHUMPETER, *supra* note 76, at 868–72 (explaining that John B. Clark, Frank W. Taussig, and Irving Fisher “stood out as economists in the technical sense”).

Marshall,<sup>248</sup> who realized that markets were more complex than what Cournot described.<sup>249</sup> Rather than a single market isolated from the rest of the economy, Marshall realized that it was necessary to group similar competing commodities within a single market and to focus on business firm behavior and market performance.<sup>250</sup> This led to the concept of the relevant market, which is the premise for assessing competition<sup>251</sup> that is still valid today. In practice, marginalism transformed classic economic theories by focusing on marginal utility<sup>252</sup> and the idea that market value mainly depends on demand, as the marginal utility of a good or service decreases with each additional unit consumed.<sup>253</sup> The marginalist revolution replaced “a reasonable strong classical consensus with a complex variety of theories about how competition works.”<sup>254</sup> Markets appeared much more different from one another than the classical economic conception, and competition and economics in general, as inherently dynamic with more frequent deviations than previously thought.<sup>255</sup>

In other words, at the time of the Sherman Act, the Historical School had developed in Germany, rejecting a deductive approach by giving preference to ethical and religious principles over mathematical and physical rules. It aimed to overcome classic economics using history. In the United States, Neoclassicism emerged by incorporating new theoretical frameworks and adopting more robust mathematics to define markets and competition.<sup>256</sup>

Although economists did not generally see any good in the Sherman Act in 1890,<sup>257</sup> the U.S. antitrust law was never exempted from economic policy evaluation.<sup>258</sup> According to the Austrian economist and Harvard Professor, Joseph Schumpeter, “starting from near zero economics in 1870,”<sup>259</sup> the United States

248. Schumpeter defined Marshall as the great successor of Adam Smith and the period in which Marshall changed science developing new techniques as “the Marshall Age.” Hovenkamp, *supra* note 235, at 324. *See also* SCHUMPETER, *supra* note 76, at 830, 833.

249. *Id.* at 315–17. *See also* Hovenkamp, *supra* note 237, at 122. ALFRED MARSHALL, *PRINCIPLES OF ECONOMICS* (1890) (“Under the influence of Cournot, and in a less degree of von Thünen, [he] was led to attach great importance to the fact that [] observations of nature, in the moral as in the physical world, relate not so much to aggregate quantities, as to increments of quantities, and that in particular the demand for a thing is a continuous function, of which the ‘marginal’ increment is, in stable equilibrium balanced against the corresponding increment of its cost of production.”).

250. HOVENKAMP, *supra* note 247, at 206.

251. Hovenkamp, *supra* note 237, at 122, 147, 157.

252. *See, e.g.*, GEORGE J. STIGLER, *THE THEORY OF PRICE* 46 (3rd ed. 1966) (“Utility theory made its way into economics almost a century ago.”).

253. ROSS, *supra* note 237, at 174.

254. Hovenkamp, *supra* note 235, at 367.

255. *See* Thomas Anthony Buchanan Corley, *Emergence of the Theory of Industrial Organization, 1890–1990*, 19 *BUS. ECON. HIST.* 83, 84 (1990).

256. *See* ROSS, *supra* note 237, at 200 (“Historical economics was widely criticized in America for having generated only formless empirical details.”).

257. *See* GREGORY J. WERDEN, *THE FOUNDATIONS OF ANTITRUST: EVENTS, IDEAS, AND DOCTRINES* 157 (2020). The progressive economist Richard Ely argued that antitrust legislation “has produced harm and can produce nothing but harm.” *Id.* at 162; Hovenkamp, *supra* note 235, at 321.

258. Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, in *THE POLITICAL ECONOMY OF THE SHERMAN ACT: THE FIRST ONE HUNDRED YEARS* 136 (E. Thomas Sullivan ed., 1991); Allyn A. Young, *The Sherman Act and the New Anti-Trust Legislation: III*, 23 *J. POL. ECON.* 417 (1915). *See also* STIGLER, *supra* note 219, at 93.

259. SCHUMPETER, *supra* note 76, at 864.

experienced a significant acceleration with important economists, including the neoclassical icon John B. Clark.<sup>260</sup>

In 1887, Clark published an article on *The Limits to Competition*, raising the question of whether the model of perfect competition needed to be updated.<sup>261</sup> It sparked a flourishing debate about competition, monopolies, and trusts. His son, John Maurice Clark, developed the fundamental concept of workable competition,<sup>262</sup> which “offered a way of merging multiple market imperfections”<sup>263</sup> that did not always need to be corrected in a neoclassical (rather than ordoliberal) spirit. The model of workable competition deeply influenced U.S. antitrust policy, supporting the concept that antitrust should be the primary regulator of competition.<sup>264</sup> Competition was the objective, not a mechanism within the rules of the game as advocated by ordoliberals. Therefore, the DMA core features advocating for a new legal framework to address competition concerns find little support in the United States.

Before exploring the development of antitrust economics in the United States through the Harvard and Chicago Schools, the investigation of whether the ordoliberal ideology and DMA core features can be found in Brandeis’s thinking is important for two main reasons. First, Brandeis deeply influenced the antitrust thinking in the early twentieth century, especially as a Justice of the Supreme Court. Second, the present Neo-Brandeis movement is reviving Brandeis’s way of thinking of antitrust law and the idea that *Big is Bad*, which seems ordoliberal.<sup>265</sup>

#### B. Is Brandeis’s “Big is Bad” Ordoliberal?

Addressing this question requires comparing ordoliberal purpose, scope, legal framework, and approach underlying the DMA (DMA core features) with Louis Brandeis’s thinking, which deeply affected the intellectual framework of U.S. antitrust law in the early twentieth century.

Louis Brandeis was an influential lawyer close to politicians, including Governor Robert La Follette and President Woodrow Wilson.<sup>266</sup> During the 1913 Presidential election, Brandeis became Wilson’s key adviser and was later appointed by Wilson as a Supreme Court Justice in 1916, a position he held until 1939.<sup>267</sup>

260. *Id.* at 863–64. *See also* ROSS, *supra* note 237, at 172–74 (“The rapid victory of marginalism owed a great deal to its resonance with the historical and political aims of American economics . . . not simply as an analytical tool, but as a liberal world view.”).

261. WERDEN, *supra* note 257, at 140.

262. *See* Edward S. Mason, *The Current Status of the Monopoly Problem in the United States*, 62 HARV. L. REV. 1265, 1267 n.6 (1949).

263. Hovenkamp, *supra* note 235, at 342.

264. *Id.* at 321.

265. *See* DYSON, *supra* note 123, at 298.

266. WERDEN, *supra* note 257, at 169; MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 328, 341 (2009); Richard John, *Reframing the Monopoly Question*, in ANTIMONOPOLY AND AMERICAN DEMOCRACY 66 (Daniel A. Crane & William J. Novak eds., 2024).

267. *See* UROFSKY, *supra* note 266, 341–47. ALFRED LIEF, BRANDEIS: THE PERSONAL HISTORY OF AN AMERICAN IDEAL 317 (1936). *See also* Allyn A. Young, *The Sherman Act and the New Anti-Trust Legislation: II*, 23 J. POL. ECON. 305, 313 (1915). In discussing the new antitrust legislation, the Clayton Act and the Federal Trade Commission Act of 1914, Professor Young emphasized how much of the debate at that time concerned the phrase “unfair competition,” considered too vague and uncertain in meaning to afford a reasonable criterion either for the commission or for business enterprises. *Id.* at 314.

Brandeis was the architect of the administrative antitrust agency established in 1914—the FTC.<sup>268</sup> Brandeis dedicated his career to prosecuting big businesses on behalf of democratic beliefs, writing some important opinions and seminal contributions on antitrust issues. Probably his most famous antitrust work is the book *The Curse of Bigness*,<sup>269</sup> praised by some scholars as the democratic meaning of antitrust,<sup>270</sup> contested by others for promoting populism.<sup>271</sup>

The truth is that Brandeis was a key figure in the U.S. Progressive Movement, which shaped the way of thinking about antitrust in the early twentieth century, based on the idea that big businesses were antithetical to a democratic system (in a way that looks ordoliberal).<sup>272</sup> Here, we can identify the DMA scope. However, although some scholars draw a parallel between ordoliberals and Brandeis’s thinking, there is no proof of a concrete connection between Brandeis and ordoliberals.<sup>273</sup> German philosophy likely influenced Brandeis, including Hegel and Kant, as Brandeis studied in Germany after high school.<sup>274</sup> However, Brandeis had a legal background, and he did not develop economic theories or frameworks like Eucken’s morphological scheme to justify a fight against bigness, or a philosophical concept close to Ordoliberalism, although he shares a hostility against powerful firms. Brandeis’s economic considerations were mainly based on Taylor’s *Scientific Management* approach,<sup>275</sup> emphasizing standardization of work methods, division of work, and incentive systems for workers. Brandeis considered efficiency “a product of management, not firm size.”<sup>276</sup>

Thus, Brandeis’s appreciation of economic reasoning in competition<sup>277</sup> and definition of monopolies was far from Ordoliberalism as described by Eucken in the context of the morphological scheme. In addition, while ordoliberals recognized that when monopolies were necessary, they needed to be heavily regulated (DMA legal framework),<sup>278</sup> Brandeis thought that in any business “there must be a size-limit of greater efficiency . . . [and] there is [a] point where it would become too

268. See, e.g., UROFSKY, *supra* note 266, at 394.

269. LOUIS D. BRANDEIS, *THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS* (Osmond K. Fraenkel ed., 1934).

270. See Khan, *supra* note 24, at 714; WU, *supra* note 50, at 38, 77.

271. See, e.g., D. Daniel Sokol, *Antitrust’s “Curse of Bigness” Problem*, 118 MICH. L. REV. 1259, 1277 (2020).

272. See, e.g., Jeffrey Rosen, *The Curse of Bigness*, NAT’L CONST. CTR. (June 3, 2016), <https://constitutioncenter.org/blog/the-curse-of-bigness> [perma.cc/BF6U-8NMX]; Andrei Cherny, *The Course of Bigness*, DEMOCRACY J. (2007), <https://democracyjournal.org/magazine/4/the-course-of-bigness> [perma.cc/9HTW-3QAT]; DYSON, *supra* note 123, at 7.

273. Brandeis’s “advocacy of breaking up big business and of regulated as opposed to unfettered competition echoed the thinking of Franz Böhm.” DYSON, *supra* note 123, at 298.

274. *Louis D. Brandeis: An Inspiring Life, Early Life*, BRANDEIS UNIV., <https://www.brandeis.edu/library/archives/exhibits/ldb-100/early-life/index.shtml> [perma.cc/3TB9-TUV5] (last visited Jan. 21, 2026).

275. See Herbert Hovenkamp, *The Slogans and Goals of Antitrust Law*, 25 N.Y.U. J. LEGIS. & PUB. POL’Y 705, 730 (2023).

276. *Id.*

277. Despite Brandeis’s close ties with economists such as Harvard Professors Charles Dunbar and Francis Taussig, Brandeis did not show great consideration for an economic interpretation of competition. See ALLON GAL, BRANDEIS OF BOSTON 9–13 (1980) (“During their years at Harvard, Louis and Frank (Taussig) developed an enduring friendship.”). Charles Dunbar’s son, William H. Dunbar, became partner of Brandeis’s law firm in 1887. *Id.* at 13.

278. DYSON, *supra* note 123, at 298, 299.

large for efficient and economic management.”<sup>279</sup> In other words, big businesses find no justifications in Brandeis.

Furthermore, Brandeis’s hostility against bigness developed long before the beginning of Ordoliberalism in the 1930s. Moreover, while the focus of ordoliberals was on the concentration of power through cartels due to the German cartelization economy that prevailed until World War II, Brandeis was sympathetic to some cartels.<sup>280</sup>

In summary, although Brandeis’s fight against bigness on behalf of democracy is reminiscent of Ordoliberalism and the DMA scope and purpose, there is no trace in Brandeis of the ordoliberal thinking in terms of order or rules of the game justifying the DMA legal framework and approach. The ordoliberal idea that a regulatory system to oversee monopolies could be used to deter monopolistic situations that can be found in the DMA (DMA legitimacy) is also missing in Brandeis. Therefore, Brandeis’s view of competition would not support a DMA-type solution in the United States.

In the United States, Brandeis’s concept of *Big is Bad*<sup>281</sup> was superseded by the Harvard and Chicago schools based on neoclassical economic tradition.

### C. Harvard Structuralism

The only DMA core feature that might be found in the Harvard School of Economics is the DMA scope; thus, the fight against big businesses. However, this fight in the Harvard School was based on an economic assessment, including market definition, which is lacking in the DMA. Beginning in the 1940s, antitrust economics became critical in enforcing antitrust with the Harvard School’s initial leadership and neoclassical roots. This Section demonstrates that no DMA core features can be found in the Harvard School.

In the early twentieth century, Harvard School of Economics became a leading U.S. university in economics. Its economics department originated in 1871 when Charles F. Dunbar was appointed as chair of the new Harvard Political Economy department. Dunbar mainly used British economists’ books to teach political economics, and he opposed “any infusion of emotion into economics.”<sup>282</sup> Harvard Professor Joseph Schumpeter included Dunbar among “[t]he men who prepared the ground”<sup>283</sup> for economics in the United States “starting from near zero at 1870.”<sup>284</sup> In 1922, the economists Williams, Chamberlin, Mason, Harris, Taylor and Usher were appointed assistant professors and Schumpeter became permanent faculty in 1932.<sup>285</sup> Harvard emerged as a hub for neoclassical economics.<sup>286</sup>

279. BRANDEIS, *supra* note 269, at 116.

280. Hovenkamp, *supra* note 275, at 742.

281. Louis Brandeis argued that he had “considered and do consider that the proposition that mere bigness cannot be an offense against society is false.” LOUIS D. BRANDEIS, *THE BRANDEIS GUIDE TO THE MODERN WORLD* 19 (Alfred Lief ed., 1941).

282. MARY O. FURNER, *ADVOCACY AND OBJECTIVITY, A CRISIS IN THE PROFESSIONALIZATION OF AMERICAN SOCIAL SCIENCE, 1865–1905* 112 (1975). *See also* GAL, *supra* note 277, at 13.

283. SCHUMPETER, *supra* note 76, at 865.

284. *Id.* at 864.

285. *Id.*

286. *See* YONAY, *supra* note 240, at 57.

In 1933, Harvard Professor Edward Chamberlin published the *Theory of Monopolistic Competition*,<sup>287</sup> which, along with Joan Robinson's *Economics of Imperfect Competition*<sup>288</sup> and John M. Clark's 1940 article *Toward a Concept of Workable Competition*, set "the stage for a tremendous outpouring of writing in the 1930s and 1940s on the theory of the firm, the structure and functioning of markets, economic concentration, and antitrust policy."<sup>289</sup> Clark's contribution emphasized the conditions of market structure<sup>290</sup> and his concept of workable competition implied "a fairly large number of sellers and buyers, no one of whom [would have] occupied a large share of the markets, the absence of collusion among either group, and the possibility of market entry by new firms."<sup>291</sup> This concept deeply affected the notion of competition and antitrust policy developed at Harvard.

The Harvard School of Economics led the antitrust economic discussion from the middle of the twentieth century to the 1960s.<sup>292</sup> The economic antitrust approach embraced at Harvard starkly contrasts with the DMA formalistic approach discharging any economic considerations (no DMA approach). The key component of the Harvard School was market definition due to its emphasis on market structure, which is completely missing in the DMA.<sup>293</sup>

Between the 1940s and 1950s, Harvard structuralism developed through the work of Edward S. Mason and Joe S. Bain, who applied Clark's and Chamberlin's theoretical insights in the context of antitrust policy focusing on market structure.<sup>294</sup> Mason and Bain developed the Structural-Conduct-Performance (SCP) paradigm, also called the "Mason/Bain paradigm,"<sup>295</sup> under which the market determines the conduct rather than the opposite. Thus, markets needed to be defined to assess market power and potentially enforce antitrust law to ensure competition based on a structural approach. In other words, antitrust intervention should be driven by the market structure, as anticompetitive conduct is more likely in concentrated markets.<sup>296</sup> Key elements in the structure analysis of a market to assess competition were barriers to entry that prevented competition,<sup>297</sup> including economies of scale. This cornerstone of the Harvard School was entirely missing in Brandeis's thinking.

287. EDWARD CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* (1933).

288. JOAN ROBINSON, *THE ECONOMICS OF IMPERFECT COMPETITION* (1933).

289. Mason & Lamont, *supra* note 33, at 423; *see also* G. E. HALE & ROSEMARY D. HALE, *MARKET POWER: SIZE AND SHAPE UNDER THE SHERMAN ACT* 131 (1958).

290. Mason, *supra* note 262, at 1267; *see also* HOVENKAMP, *supra* note 247, at 212.

291. Mason, *supra* note 262, at 1268.

292. *See, e.g.*, HOVENKAMP, *supra* note 247, at 213; Thomas A. Piraino Jr., *Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21<sup>st</sup> Century*, 82 *IND. L.J.* 345, 348 (2007).

293. HOVENKAMP, *supra* note 247, at 122.

294. EDWARD S. MASON, *ECONOMIC CONCENTRATION AND THE MONOPOLY PROBLEM* 1 (1957) ("A re-examination of the position of large firms in American and other industrial economies, and the monopolistic and other consequences thereof, may be said to have begun with almost simultaneous appearance in 1932–33 of Chamberlin's *Theory of Monopolistic Competition*, Robinson's *The Economics of Imperfect Competition*, and Berle and Means' *The Modern Corporation and Private Property*.").

295. Hovenkamp, *supra* note 235, at 350; *See also* Hovenkamp, *supra* note 237, at 214.

296. *See, e.g.*, Piraino, *supra* note 292, at 349.

297. Bain's studies on the SCP paradigm culminated in a book, *Conditions of Entry and the Emergence of Monopoly*, published in 1956, where Bain identified economies of scale, technology advantages and related cost product differentiation, along with product differentiation as barriers to

Most importantly for our discussion, Mason observed that big size does not imply monopoly power, using the example of the local brick markets, which were “highly concentrated, but not in the hands of huge corporations.”<sup>298</sup> According to Mason, the apostles of bigness failed to consider that “commodities compete with other and physically different commodities,” and considering all close substitutes in defining a market was “a commonplace of textbook economics.”<sup>299</sup> This all starkly contrasts with the DMA structure that contemplates the overall digital sector, including products ranging from smartphones to online shopping and excludes competing physical different commodities.

Beginning from the 1940s, Harvard’s structural approach persuaded several courts. For instance, in *United States v. Alcoa*, the court found the aluminum company monopolized the aluminum manufacturing market mainly based on market structure considerations.<sup>300</sup> Similarly in *Philadelphia National Bank*,<sup>301</sup> the Supreme Court recognized that “[w]ithout attempting to specify the smallest market share which would be considered to threaten undue concentration, we are clear that 30% presents that threat.”<sup>302</sup> Between the 1960s to 1970s, the Harvard structural approach also fostered legislative proposals, including the Concentrated Industries Act and Professors Kaysen and Turner’s legislative proposal, although they never turned into law.<sup>303</sup> The DMA purpose of fairness that can be found in Ordoliberalism is lacking in the Harvard doctrine. In the Harvard School, competition is treated as an economic (not ethical) term and there is no reference to a constitutional meaning of competition. The ordoliberal idea of thinking in order and providing a legal framework to secure economic order through rules (the DMA approach) is also not present in the Harvard Antitrust School.

In summary, the Harvard School focused on developing economic analytical tools to assess and pursue competition as a goal rather than as a means to secure the economic order in ordoliberal terms. It supported a case-by-case approach rather than philosophical and rule-based economic constitutionalism. Harvard

entry. Joe S. Bain, *The Condition of Entry and the Public Policy*, in A CENTURY OF THE SHERMAN ACT: AMERICAN ECONOMIC OPINION, 1890–1990 41 (Jack C. High & Wayne E. Gable eds., 1992).

298. *Id.* at 18.

299. MASON, *supra* note 294, at 376.

300. Edward S. Mason, *The Rise of Structure Conduct Performance*, in A CENTURY OF THE SHERMAN ACT: AMERICAN ECONOMIC OPINION, 1890–1990 33 (Jack C. High & Wayne E. Gable eds., 1992); *U.S. v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945) (noting that Congress, at that time, enacted a special law that entitled the U.S. Court of Appeals for the Second Circuit to hear the case sitting “as the Supreme Court”). *See also* Spencer Weber Waller, *The Story of Alcoa: The Enduring Questions of Market Power, Conduct, and Remedy in Monopolization Cases*, in ANTITRUST STORIES 121, 131 (Eleanor M. Fox & Daniel A. Crane eds., 2007).

301. *U.S. v. Philadelphia Nat’l Bank*, 374 U.S. 321 (1963).

302. *Id.* at 365. *See also* Piraino, *supra* note 292, at 349. The defendants’ arguments about the potential positive effects of the merger on their Philadelphia customers became irrelevant. *See also* HOVENKAMP, *supra* note 247, at 216 (“In merger law the SCP paradigm entailed that mergers could be analyzed simply by determining the market shares of the firms involved, as the Court held in its 1963 Philadelphia Bank decision.”).

303. In 1959, Kaysen and Turner proposed a law to condemn “unreasonable market power” permitting the dissolution of the company found to enjoy such a market power. *See* CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 110–19, 266–72 (1959); *see also* Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562, 1593 (1968); Robert H. Bork, *Lawyers’ Views: Antitrust and the Theory of Concentrated Markets*, 46 ANTITRUST L.J. 873 (1977).

advocated economic evaluations to assess anticompetitive conduct focused on market structure. In other words, at the end of this analysis, no DMA core features are identified in the Harvard framework. Even the concept of market contestability that can be assumed in Harvard structuralism does not resemble the contestability referred to in the DMA. While Harvard assesses contestability by defining a market, no market definition is required in the DMA.

The Harvard approach continued to lead the antitrust government action and persuade U.S. courts until around the 1970s and the rise of the Chicago School.

#### *D. The Chicago School Consumer Welfare Standard*

The absence of DMA and ordoliberal foundations in the Harvard School just described is even more evident in the Chicago School, which is known for being libertarian and noninterventionist. This Section shows how the Chicago School, by embracing a more rigorous version of neoclassical economics focused on the role of consumer welfare and performance,<sup>304</sup> distances itself even further from Ordoliberalism. Thus, no DMA core features can be identified in the Chicago School.

In the 1950s in Chicago, an antitrust school emerged as a distinctive approach to enforcing antitrust law,<sup>305</sup> described as “a full assault on the New Deal/Chamberlain/Bain conception of the frailty of markets.”<sup>306</sup> The Chicago School critics against SCP focused on the insights that (i) there is no connection between industry concentration and anticompetitive effects, (ii) the SCP does not take into account possible endogenous effects on structure, and (iii) there is “confusion in the concept of ‘barrier to entry.’”<sup>307</sup>

The Chicago School developed in Chicago through the insights of Aaron Director, though Frank Knight likely set its tone.<sup>308</sup> Knight was notably opposed to both central economic planning and the idea that a competitive economy inherently promotes ethical outcomes.<sup>309</sup> The Chicago School developed focusing on

304. Herbert J. Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PA. L. REV. 1843 (2020). *See also* Richard A. Epstein, *The Neoclassical Economics of Consumer Contracts*, 92 MINN. L. REV. 803, 806 (2008).

305. Richard A. Posner, *The Chicago Law School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 947 (1979).

306. HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 85 (5th ed. 2015).

307. Posner, *supra* note 305, at 929.

308. *See, e.g.*, STIGLER, *supra* note 219, at 162–166 (“The Chicago orientation had three main facets. The first was that the goal of efficiency is pervasive in economic life, where efficiency means producing and selling goods at the lowest possible cost . . . . This goal is sought as vigorously by monopolists as by competitors, and monopoly power is of no value in explaining many phenomena which have efficiency explanations . . . . A second main theme of the Chicago School of industrial organization is that it is virtually impossible to eliminate competition from economic life. If a firm buys up all of its rivals, new rivals will appear . . . . A third facet of the Chicago School’s work was on the theory of public regulation. . . . [B]y 1980 there remained scarcely a trace of the two Harvard traditions of Chamberlin and Mason in the current work of economists.”).

309. In the 1930s, Frank H. Knight saw competition and ethics often in conflict by dispelling the myth that antitrust law should achieve ethical goals. KNIGHT, *supra* note 236, at 74–75 (“[W]e appear to search in vain for any really ethical basis of approval for competition as a basis for an ideal type of human relations.”).

economic efficiencies evaluation and consumer welfare as the antitrust standard to assess competition (no DMA purpose).<sup>310</sup>

In other words, government intervention was rarely justified (no DMA approach).<sup>311</sup> Economic efficiency<sup>312</sup> was considered the purpose of antitrust law, with the neoclassical price theory model providing the best policy tool for maximizing economic efficiency in the real world.<sup>313</sup> As a result, antitrust developed in Chicago aiming to prevent allocative loss, ensuring consumers can access goods they value more than the cost of production.<sup>314</sup> Most markets were considered competitive, although containing few sellers (no DMA scope).

Important representatives of the Chicago School included Director's students and colleagues George J. Stigler, Judge Robert Bork, Judge Frank H. Easterbrook, and Judge Richard A. Posner.<sup>315</sup> In 1946, Director started teaching a course in price theory for law students, as he saw antitrust policy from a price theory perspective.<sup>316</sup> The Chicago School focused on the effects of companies' conduct on markets (consumer welfare) rather than on market structure because market power was not considered necessarily a bad thing.<sup>317</sup> Nobel laureate George Stigler observed that breaking up firms because they take advantage of economies of scale is an unconvincing solution.<sup>318</sup> The end result would increase both the number of firms and costs, and traditionally neither judges nor economists are able to determine what is the perfect number of firms required for preserving competition.<sup>319</sup> Differently from Bain, Stigler argued that economies of scale implied economic efficiency<sup>320</sup> rather than a barrier to entry.<sup>321</sup>

Harold Demsetz was even more critical of Harvard's SCP doctrine,<sup>322</sup> by observing that because market structure is endogenous, a correlation between

310. See STIGLER, *supra* note 252, at 2.

311. See Ariel Katz, *The Chicago School and the Forgotten Political Dimension of Antitrust Law*, 87 U. CHI. L. REV. 413, 414 (2020); HOVENKAMP, *supra* note 306, at 88; Eleanor M. Fox, *The Battle for the Soul of Antitrust*, 75 CALIF. L. REV. 917, 918 (1987).

312. Economic efficiencies included two relevant parts: allocative efficiency and productive efficiency. HOVENKAMP, *supra* note 306, at 86.

313. *Id.* Judge Robert Bork observed that "Congress was very concerned that the [antitrust] law should not interfere with business efficiency." Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 12 (1966).

314. Frank H. Easterbrook, *The Chicago School and Exclusionary Conduct*, 31 HARV. J.L. & PUB. POL'Y 439, 440 (2008).

315. Daniel A. Crane, *A Neo-Chicago Perspective on Antitrust Institutions*, 78 ANTITRUST L.J. 43, 44 (2012).

316. WERDEN, *supra* note at 257, at 184.

317. HOVENKAMP, *supra* note 247, at 217.

318. See Herbert Hovenkamp, *Antitrust and the Costs of Movement*, 78 ANTITRUST L.J. 67, 79 (2012).

319. See Arthur R. Burns, *The Effectiveness of the Antitrust Laws*, in PROBLEMS OF THE MODERN ECONOMY: AN INTRODUCTION TO THE MAJOR CURRENT ISSUES OF ECONOMIC POLICY 53 (Edmund S. Phelps, Bela Balassa, William G. Bown, Edward C. Budd, Edwin Mansfield, Arthur M. Okun & Gustav Ranis eds., 1966).

320. George J. Stigler, *The Economies of Scale*, 1 J.L. & ECON. 54, 54 (1958) ("The central thesis of this paper is that the determination of the optimum size is not difficult if one formalizes the logic that sensible men have always employed to judge efficient size.")

321. Contrary to the structuralist position, the Chicago School did not consider advertising as a barrier to entry, rather a concrete service that consumers will pay for if advertising reduces his costs of search. George J. Stigler, *The Economists and the Problem of Monopoly*, 72 AM. ECON. REV. 1, 8 (1982).

322. ALAN J. DEVLIN, REFORMING ANTITRUST 87 (2021).

concentration and high profits does not prove causation.<sup>323</sup> The doctrine of market concentration is grounded in the statistical correlation that would exist between profit rates and concentration; multiple studies have contradicted this assumption.<sup>324</sup> Some research even identified a negative association between price-cost margins and concentration.<sup>325</sup> Furthermore, deconcentration is likely to increase costs,<sup>326</sup> and there is no clear evidence to justify a policy of deconcentration.<sup>327</sup>

Therefore, neoclassical economics finds full expression in the Chicago School, which starkly distances itself from the ordoliberal ideology by focusing on economic efficiency considerations and company performance rather than on formalistic economic order logics. A practice that is harmful to consumers is necessary to identify an antitrust violation, and consumer welfare became the antitrust standard, which remains valid today (no DMA legal framework). U.S. courts became sympathetic to this new antitrust approach focused on economic effects and consumer welfare.<sup>328</sup> The Sherman Act was a “consumer welfare prescription,”<sup>329</sup> the Supreme Court of the United States recognized.<sup>330</sup>

In summary, we can easily identify several differences in comparing the Chicago School approach with Ordoliberalism when looking for the DMA ordoliberal core features and framework. Therefore, like the Harvard School, the Chicago School also lacks the intellectual foundations to support the DMA. Similar to Harvard, the focus is on defining competition as a goal through clear economic standards that can assist courts and firms in understanding what is competitive and what is anticompetitive and needs to be prosecuted objectively. These standards are rooted in Neoclassicism and economic analytical tools that diverge from Ordoliberalism and formalism. In other words, the key issue dealt with by the U.S. antitrust schools (the U.S. antitrust intellectual framework) is not so much about the role of the state in regulating competition and managing markets (DMA approach). It is about how to provide judges and antitrust bodies tools to assess competition and regulate markets based on the idea that people operate in their best interests to maximize their utility.<sup>331</sup>

323. Harold Demsetz, *Two Systems of Belief About Monopoly*, in *INDUSTRIAL CONCENTRATION: THE NEW LEARNING* 177 (Harvey J. Goldschmid, H. Michael Mann & J. Fred Weston eds., 1974).

324. Harold Demsetz, *Economics as a Guide to Antitrust Regulation*, 19 *J. L. & ECON.* 371, 375, 381 (1976); see also Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 *J. POL. ECON.* 807 (1975). Posner observed that studies of public policy toward monopolies tend to ignore the social costs involved in obtaining monopoly power. *Id.* at 807, 811.

325. See, e.g., Paul A. Pautler, *Evidence on Mergers and Acquisitions* 54 (Fed. Trade Comm'n, Bureau of Econ., Working Paper No. 243, 2001), [https://www.ftc.gov/sites/default/files/documents/reports/evidence-mergers-and-acquisitions/wp243\\_0.pdf](https://www.ftc.gov/sites/default/files/documents/reports/evidence-mergers-and-acquisitions/wp243_0.pdf) [perma.cc/T4LT-4ZYH].

326. Demsetz, *supra* note 324, at 375.

327. *Id.* at 379.

328. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

329. *Id.*

330. Punishing predatory pricing—thus cutting the price to drive rivals out of the market, for example—became difficult, if not impossible, to prosecute as the Court required the proof for recoupment. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221 (1993) (recognizing that without the recoupment requirement, “predatory pricing produces lower aggregate prices in the market” and because “consumer welfare is enhanced,” there is no anticompetitive conduct).

331. See STIGLER, *supra* note 252, at 2.

### E. *The Post-Chicago School*

After Chicago, the combination of Harvard and Chicago studies and perspectives was not contradicted by the so-called Post-Chicago School, which took “the best that the Chicago School had to offer as a point of departure,” by developing an antitrust policy concerned with market imperfections.<sup>332</sup> In other words, economic analysis to assess antitrust conduct became more sophisticated by including new hypotheses of anticompetitive conduct under specific circumstances. However, the greater complexity attained by the Post-Chicago School did not convince many courts,<sup>333</sup> as well as many Chicago antitrust scholars, who “stuck” with the Chicago School. In any case, the Post-Chicago School represents a “swing in antitrust’s ideological pendulum,” Professor Hovenkamp noted.<sup>334</sup>

In comparing the Post-Chicago School with the DMA ideological framework, and thus Ordoliberalism, the inconsistency seen between Ordoliberalism and the Chicago School and the absence of any DMA foundations persists as in the Post-Chicago School. No reference to fairness (DMA purpose), thinking in order (DMA legal framework), or attack on economic power in itself (DMA scope) is present in the Post-Chicago School. Therefore, no DMA core features can be found in the Post-Chicago School, which shared the Harvard and Chicago mission in focusing on the economics of competition and market dynamics useful to enforce antitrust law and regulation objectively and in an economic sense.

### F. *The Neo-Brandeis Form-Based Approach*

In contrast to the examined U.S. antitrust schools of economics based on Neoclassicism, the recent Neo-Brandeis movement endorses the DMA ordoliberal core features, which favor a legal *ex ante* approach (formalism) and consider competition as a process and markets through a social-ethical lens.<sup>335</sup> However, unlike Ordoliberalism, the movement lacks a theoretical framework comparable to the ordoliberal concepts of “order” and “rules of the game” to support formalism in regulating competition, or Eucken’s morphological scheme for interpreting various market forms. Furthermore, the Neo-Brandeis movement is not supported by the history and legal context underlying ordoliberalism,<sup>336</sup> which constitutes the foundations of its formal-based approach to competition. In Europe, competition

332. Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 258 (2001). See also Francis, *supra* note 36, at 786; Mark Glick & Darren Bush, *The Chicago School, the Post-Chicago School, and the New Brandeisian School of Antitrust: Who Is Right in Light of Modern Economics?*, 30 GEO. MASON L. REV. 935, 952 (2023).

333. Hovenkamp, *supra* note 332, at 277–78 (“The hallmark of post-Chicago economics is increased complexity, and the worst way to deal with complexity is to throw the issue to the jury.”). See also Herbert Hovenkamp, *The Reckoning of Post-Chicago Antitrust*, in POST-CHICAGO DEVELOPMENTS IN ANTITRUST LAW 7 (Antonion Cucinotta, Roberto Pardolesi & Roger Van den Bergh eds., 2002) (“The Supreme Court’s 1992 *Kodak* decision has become a rallying cry for post-Chicago antitrust.”); Glick & Bush, *supra* note 332, at 954.

334. Hovenkamp, *supra* note 332, at 267.

335. Lina M. Khan, *The Ideological Roots of America’s Market Power Problem*, 127 YALE L. J. F. 960, 971 (2018); *Assistant Attorney General Jonathan Kanter Delivers Remarks at New York City Bar Association’s Milton Handler Lecture*, U.S. DEP’T OF JUSTICE (May 18, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association> [perma.cc/DF6V-VZU2]; Lambert & Cooper, *supra* note 55, at 32; Khan & Chopra, *supra* note 55, at 357.

336. See, e.g., DYSON, *supra* note 123, at 49, 53, 56, 58, 68.

law represented a pillar in the creation of the European single market, a goal foreign to the United States; Europe is based on a civil rather than a common law system. The U.S. Supreme Court rejected an ethical (moral) interpretation of competition, while fair competition is rooted in the treaty that founded what is now called the European Union.<sup>337</sup>

In contrast to many Neo-Brandeisians, ordoliberals do not reject consumer welfare, but instead offer a different interpretation by incorporating consumer welfare within a constitutional framework.<sup>338</sup> Ordoliberals developed the concept of *Odnungspolitik* meant as the main method to shape the market process through a constitutional framework and regulating competition.<sup>339</sup> They evoked the concept of consumer sovereignty<sup>340</sup> through the notion of *Leistungswettbewerb*, which implies the idea:

of a market order framed by rules that aim at making producers responsive to consumer interests or, as Wilhelm Röpke put it, that seek to ensure “that the only road to business success is through the narrow gate of better performance in service of the consumer.” To establish an order of *Leistungswettbewerb* means to adopt rules for the market game that make consumer preferences the ultimate controlling force in the process of production.<sup>341</sup>

In other words, ordoliberals embraced the principle of consumer sovereignty as the ultimate goal of the rules for the market game, a principle notably absent in the Neo-Brandeis movement, which largely dismisses consumer welfare as a primary objective of antitrust.<sup>342</sup>

Therefore, despite the similar formalistic approach to competition and shared commitment to combating economic concentration for social-ethical reasons, the Neo-Brandeis movement and Ordoliberalism are fundamentally different in their underlying foundations.

In summary, this historical comparative analysis establishes a framework for understanding the core values of U.S. antitrust law by contrasting them with the foundational principles underpinning the DMA and EU competition law. It offers a basis for advancing U.S. antitrust reform in the digital economy, aiming to regulate Tech Titans while avoiding an EU-style solution.

The following table highlights the core values of U.S. and EU antitrust laws, shaped by their distinct historical contexts and antitrust traditions.

337. The Treaty of Rome was “[d]etermined to lay the foundations of an ever-closer union among the peoples of Europe . . . recognising that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition.” *Id.*

338. Viktor J. Vanberg, *Consumer Welfare, Total Welfare and Economic Freedom – On the Normative Foundations of Competition Policy*, in COMPETITION POLICY AND THE ECONOMIC APPROACH: FOUNDATIONS AND LIMITATIONS 58 (Joseph Drexler, Wolfgang Kerber & Rupprecht Podszun eds., 2011).

339. *Id.*

340. *Id.*

341. *Id.* (“As a constitutional ideal for framing market process the concept of *Leistungswettbewerb* has apparent affinity to the principle of consumer sovereignty . . . . [B]ecause we produce in order to consume, we should give priority to consumer rather than to producer interests when choosing the rules of the economic game.”).

342. See, e.g., Khan, *supra* note 51, at 132.

Core Values	EU Core Values	U.S. Core Values
Framework	Formalism	Economic Analysis
Approach	Government Regulation	Common Law
Scope	Regulating Competition	Effects on Competition
Purpose	Fairness	Economic Efficiency

Table B. EU and U.S. Antitrust Law Core Values

## CONCLUSION

Competition is vitally important and essential for economic freedom. The United States and Europe have vibrant economies and have successfully navigated the enforcement of competition for about a hundred years through different approaches that reflect each society's core values and framework. It is obvious how the roots of these two main competition law jurisdictions deeply reflect core values through their choices—how each has managed competition.

In Europe, the way of thinking about and enforcing competition is traditionally based on a formalistic European legal framework and a meaning of competition that goes beyond pure economic evaluations. Competition law was a pillar in the creation of the European single market, acquired a quasi-constitutional meaning, and was enforced formalistically. In contrast, in the United States, antitrust law has no constitutional or ethical dimension, nor has it been traditionally enforced through formalism. U.S. antitrust schools shaped the meaning and approach of antitrust law by defining standards based on neoclassical economics.

In the present digital economy, Europe has adapted its regulatory framework to govern Tech Titans consistent with its legal and economic tradition by introducing the DMA. The DMA legal framework, approach, scope, and purpose (the DMA core features) are rooted in the European ordoliberal way of thinking about competition and a historical and legal framework, which is foreign to the U.S. antitrust tradition and its legal and economic context.<sup>343</sup> The adoption of a DMA-type solution in the United States faces all the challenges associated with transplanting a well-framed legal regime from one jurisdiction to another in the hope that it will have similar outcomes.<sup>344</sup> Nevertheless, Europe remains an important laboratory from which the United States can understand the rationale of why Europe enforces competition in a different way and draw valuable lessons from it.

First and foremost, the United States would be wise to constructively adapt its antitrust law framework to face the challenges created by the digital economy, just as Europe has done with the DMA in line with its own regulatory tradition. This approach would imply maintaining a case-by-case common law approach and

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343. See Commission Regulation 2022/1925, recital (79), 2022 O.J. (L 265) 1. See also European Union [EU], *Competition Enforcement and Regulatory Alternatives – Note by the European Union*, at 13, OECD Doc. DAF/COMP/WP2/WD(2021)13 (May 31, 2021) (“The DMA is the outcome of a broad policy reflection within the EU on the need to tackle issues of fairness and contestability in digital markets.”); *Commission Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act)*, at 1–2, 8, COM (2020) 842 final (Dec. 15, 2020). Alexandre de Stree & Pierre Larouche, *The European Digital Markets Act Proposal: How to Improve a Regulatory Revolution*, 2 CONCURRENCES 46, 62 (2021).

344. See, e.g., Carvalho, *supra* note 11, at 22, 45; Legrand, *supra* note 11, at 114, 115–117.

leveraging a century of antitrust economics experience as the basis for reform, avoiding the broad-brush approach *Big is Bad* rejected almost a century ago.<sup>345</sup>

Second, in Europe, the Austrian School of Economics and Ordoliberalism aimed to address similar concerns about the concentration of power that the Neo-Brandeis movement has raised in the United States, and it continues to fuel the present debate on how to rein in Tech Titans. The leaders of Ordoliberalism and the Austrian School of Economics were concerned that a democratic system could be distorted and controlled by interest groups and powerful private individuals seeking special treatment from politicians.<sup>346</sup> They criticized a centralized state economy and collectivism as the antithesis of economic and individual freedom. In other words, both private and public concentration of power is antidemocratic—an issue that could not be more timely. As a way of addressing such concerns, these European schools developed the concept of competition as a dynamic process necessary to ensure economic freedom, thus free interactions of individuals in the marketplace. This seems consistent with the Supreme Court’s interpretation of the Sherman Act.<sup>347</sup> However, Ordoliberalism added something more, recognizing the need to safeguard competition much like constitutional principles that protect fundamental rights in a democratic system.<sup>348</sup>

This European concept remains relevant today and supports a quasi-constitutional principle—a superstatute for competition in the United States—to safeguard economic freedom while addressing the risks of government capture by interest groups and centralization of power, whether in private or public hands.<sup>349</sup> This principle does not need to be enforced through rulemaking or ethical imperatives as in Europe, consistent with its legal framework and core values. Rather than following in Europe’s footsteps, the United States has the opportunity to adapt its antitrust approach in a digital context by revising its analytical tools<sup>350</sup> according to its core values and antitrust tradition.

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345. See Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, 35 ANTITRUST 33, 42, 43 (2021).

346. Daniel Nientiedt & Ekkehard A. Köhler, *Liberalism and Democracy – A Comparative Reading of Eucken and Hayek*, 40 CAMBRIDGE J. ECON. 1743, 1754–55 (2016). Eucken and Hayek shared a liberal perspective centered on individual freedom as a private sphere or protected domain of action, achievable when general rules grant the same liberties to all. *Id.* at 1755, 1757–58.

347. See, e.g., *Standard Oil Co. of N.J. v. U.S.*, 221 U.S. 1, 55 (1911); *N. Pac. R. Co. v. U.S.*, 356 U.S. 1, 4 (1958). See also Eleanor M. Fox, *The End of Antitrust Isolationism: The Vision of One World*, 1992 U. CHI. LEGAL F. 221, 237.

348. Böhm, *supra* note 98, at 122; Vanberg, *supra* note 137, at 17, 22.

349. Nientiedt & Köhler, *supra* note 346, at 1753–54. In the U.S., see for example, WU, *supra* note 50, at 17, 19. Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 381 (1965); William N. Eskridge, Jr. & John A. Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1217, 1232 (2001); Thomas B. Nachbar, *The Antitrust Constitution*, 99 IOWA L. REV. 57, 66 (2013); *contra* Daniel A. Crane, “*The Magna Carta of Free Enterprise*” Really?, 99 IOWA L. REV. BULL. 17, 23 (2013).

350. See Roscoe Pound, *Foreword to CLARE E. GRIFFIN, AN ECONOMIC APPROACH TO ANTITRUST PROBLEM*, at vii, ix (1951).

