

Regulation as an input in abuse analysis under Article 102 TFEU: a conceptual framework and its limits

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Key Points

- The evolving interplay between competition law and regulation in digital markets requires close attention to how regulatory instruments inform abuse analysis under Article 102 of the Treaty on the Functioning of the European Union (TFEU). While recent case law has provided some guidance on using regulation as an input in finding conduct abusive, questions remain about the conditions and extent of this influence.
- This article conceptualizes three nonexclusive models of regulatory influence—regulation as a supporting principle, regulation as an adjusting factor, and regulation as an external benchmark—showing the blurry and ambiguous boundaries of each in the case law.
- The analysis cautions against the growing influence of regulation unbounded by limiting principles, which risks instrumentalizing competition law and undermining the analytical framework, and proposes a 'reality check' as a precondition for incorporating regulation as an input into abuse analyses.

1. Introduction

Digital markets have become the focus of intensified regulatory intervention across Europe and at the global level.¹ The EU has positioned itself as a pioneering force in regulating digital industries; in former commissioner Vestager's words, it became 'the cradle of tech regulation globally'.² Over the past decade, the EU has introduced a series of landmark regulatory instruments, including but not limited to the Digital Markets Act (DMA), Digital Services Act (DSA), Data Act, General Data Protection Regulation (GDPR), and the AI Act.³ These

instruments often recognize potential overlaps and synergies with competition law enforcement, including the well-known 'no prejudice clause', which preserves the parallel application of competition law and shows legislative intention to operate in conjunction with it.⁴ This is most notably the case for the DMA, which has been motivated by the perceived inadequacy of competition law enforcement in digital markets. This expanding room for interaction has attracted increased scholarly attention examining how regulatory instruments complement competition enforcement in digital markets.⁵ In the context of abuse enforcement, these discussions have focused primarily on institutional aspects; substantive implications remained largely confined to specific categories of abuse.

¹ For an overview of regulatory frameworks as of September 2024, see OECD, 'G7 Inventory of New Rules for Digital Markets', G7 Competition Policy Makers and Enforcement Summit, 2024. For an analysis of the increasing regulatory trend in digital markets, see OECD, 'Ex Ante Regulation and Competition in Digital Markets', OECD Roundtables on Competition Policy Papers, 2021, 11–12.

² Margrethe Vestager, 'Tearing Down Big Tech's Walls' (*Project Syndicate*, 9 March 2023) <<https://www.project-syndicate.org/commentary/eu-big-tech-legislation-on-digital-services-markets-by-margrethe-vestager-2023-03>> accessed 20 November 2024.

³ 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) OJ L 265/1 ('DMA'); Regulation (EU) 2022/2065 of 19 October 2022 on a Single Market For Digital Services and Amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L 277/ 1 ('DSA'); Regulation (EU) 2023/2854 of 13 December 2023 on harmonized rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 ('Data Act') [2023] OJ L; Regulation (EU) 2024/1689 of 13 June 2024 laying down harmonized rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858,

(EU) 2018/1139, and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797, and (EU) 2020/1828 [2024] OJ L 1689/1 ('AI Act'); Regulation (EU) 2016/679 of 27 April 2016 of the European Parliament and of the Council on the protection of natural persons about the processing of personal data and on the free movement of such data ('GDPR') [2016] OJ L 119/1.

⁴ See Section III.

⁵ OECD, 'Competition Enforcement and Regulatory Alternatives', OECD Roundtables on Competition Policy Papers, 2021; Viktoria HSE Robertson, 'The Complementary Nature of the Digital Markets Act and the EU Antitrust Rules' (2024) 12 JAE 325; Wolfgang Kerber and Louisa Specht-Riemenschneider, 'Synergies between Data Protection Law And Competition Law' (Verbraucherzentrale Bundesverband, 30 September 2021); Kati J Cseres, 'Intersection of Competition and Regulation in Abuse of Dominance and Monopolization', Amsterdam Law School Legal Studies Research Paper 36 (2021), 4.

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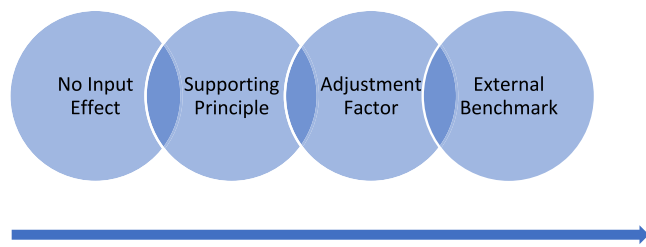


Figure 1 Modes of Regulatory Influence.

This article examines the substantive dimension holistically, asking how regulatory regimes influence the assessment of ‘abuse’ under Article 102 of the Treaty on the Functioning of the European Union (TFEU) with a specific focus on its potential consequences in digital markets. While recent case law has provided some guidance on using regulation as an input in finding conduct abusive, questions arise about the conditions and extent of this influence,⁶ and the precise role of regulation in shaping the substantive assessment of abuse under Article 102 TFEU remains undertheorized. This is evident in the much-discussed relevance of GDPR violation in *Meta*,⁷ the impact of regulatory duty in *Slovak Telekom*,⁸ and the General Court’s reference to the Open Internet Access Regulation in *Google Shopping*.⁹ Although these cases may appear isolated, they suggest a broader trend which, if not properly conceptualized, risks hindering the analytical coherence of Article 102 TFEU enforcement and leading to the instrumentalization of competition law. These risks are especially pronounced in digital markets, where theories of harm for addressing novel challenges may be underdeveloped, and regulation may serve as a subtle mechanism to filter normative choices. This article addresses this conceptual lacuna by proposing a structured typology of regulatory influence in abuse analysis and suggests a ‘reality check’ step as a precondition to using regulation as an input.

The article proceeds as follows: the following section explores the theoretical relationship between regulation and competition law. Section 2 addresses the practical aspects of the concurrent application of Article 102 TFEU and regulatory measures, with a focus on abuse of dominance enforcement in digital markets. Section 3 explores the terms of interaction and discusses the role of regulation as an input under Article 102 TFEU. In light of the case law, it identifies three nonexclusive categories of regulatory influence: (i) supporting principle, (ii) adjusting factor, and (iii) external benchmark. As illustrated above in Fig. 1, it is possible to conceptualize different types of influence as falling into categories based on their impact on Article 102 TFEU analysis. Finally, Section 4 addresses the risks associated with a lack of boundaries to regulatory influence and offers potential filters for incorporating regulation as an input in abuse analysis under Article 102 TFEU.

⁶ Heike Schweitzer and Simon de Ridder, ‘How to Fix a Failing Art. 102 TFEU: Substantive Interpretation, Evidentiary Requirements, and the Commission’s Future Guidelines on Exclusionary Abuses’ (2024) 15 Journal of European Competition Law and Practice 222, 242.

⁷ Case C-252/21 *Meta Platforms and Others* ECLI:EU:C:2023:537, 47.

⁸ Case C-165/19 P *Slovak Telekom v Commission* ECLI:EU:C:2021:239, para 57.

⁹ Case T-612/17 *Google Shopping* ECLI:EU:T:2021:763, para 180; Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union [2015] OJ L310/1 (‘Open Internet Access Regulation’).

2. The power couple or lone rangers? Theoretical perspectives on the relationship between regulation and antitrust

To understand the influence that regulation may exert on abuse analysis, it is essential to first understand the relationship between regulation and competition law enforcement. The relationship between these two instruments has been widely discussed in the literature, which largely perceives regulation and antitrust as separate legal tools which interact continuously.¹⁰ To better understand this interaction, it is crucial to further elaborate on the concept of regulation, which encompasses a broad range of market controls with varying scopes. For this purpose, one may traditionally distinguish between economic regulation¹¹ and social regulation.¹² It has been argued that the primary distinction between the two arises from the objectives they pursue: the former aims to tackle market failures that are economic in nature, whereas social regulation pursues and promotes public interest objectives, such as environmental protection and consumer laws.¹³ Another distinction, overlapping with the first, is between sector-specific regulation, which involves government intervention targeting a specific sector, and horizontal regulation, which applies across multiple sectors.¹⁴ To date, the relationship between regulation and competition law has focused primarily on the interaction between economic regulation and competition law.¹⁵ This can be attributed to the significant overlap between these two instruments.

Traditionally, there are two conventional ways to understand the interplay between regulation and competition law. One approach is to view them as alternatives,¹⁶ while the other sees them as complementary.¹⁷ The former implies a competitive relationship in which regulation displaces competition enforcement.¹⁸ In this scenario, regulation and competition are opposing alternatives for market control. Breyer explains that in this interplay antitrust (where feasible), is regarded as a better alternative.¹⁹ Conversely, from the complementary perspective, regulation and competition law are not mutually exclusive and can operate side by side.²⁰ The EU regime embraces the complementary approach, as evident in the consistent application of competition law in regulated sectors. The EU’s contribution to

¹⁰ Stephen Breyer ‘Antitrust, Deregulation, and the Newly Liberated Marketplace’ (1987) 75 CLR 1005, 1007; cf Pierre Larouche, *Competition Law and Regulation in European Telecommunications* (Hart Publishing 2000) 65.

¹¹ OECD, ‘Executive Summary of the Roundtable on Competition Enforcement and Regulatory Alternatives’ (2021) DAF/COMP/WP2/M(2021)1/ANN2/FINAL, 2; Niamh Dunne, *Competition Law and Economic Regulation: Making and Managing Markets* (Cambridge University Press 2015) 40: defines economic regulation as ‘state-imposed, positive, coercive alteration of or derogation from the operation of the free market in a sector, typically undertaken in order to correct market defects of an economic nature, and to be distinguished from regulation that pursues a predominantly social aim’.

¹² For further discussion of this distinction, see Alexandre de Stree, ‘Interaction between the Competition Rules and Sector-Specific Regulation’ in L Garzaniti and M O’Regan (eds), *Telecommunications, Broadcasting and the Internet - EU Competition Law & Regulation* (Sweet and Maxwell 2010) 868; Dunne (n 11) 35.

¹³ *ibid.*

¹⁴ Dunne (n 11) 35; Stree (n 12) 869.

¹⁵ OECD, ‘Competition Enforcement and Regulatory Alternatives’ (2021) 6–11; Stree (n 12); Larouche (n 10); Howard Shelanski, ‘Antitrust and Deregulation’ (2018) 127 Yale LJ 1922; Giorgio Monti, ‘Managing the Intersection of Utilities Regulation and EC Competition Law’ (2008) LSE Law, Society and Economy Working Papers 8/2008.

¹⁶ For further analysis, see Breyer (n 10) 1007; Frank H Easterbrook, ‘Antitrust and the Economics of Federalism’ (1983) 26 Journal of Law and Economics 23.

¹⁷ For further discussion of this approach, see Dunne (n 11) 54.

¹⁸ Breyer (n 10) 1007; Shelanski (n 15) 1928; Easterbrook, (n 16) 23: ‘Regulation displaces competition. Displacement is the purpose, indeed the definition, of regulation.’

¹⁹ Breyer (n 10) 1007.

²⁰ OECD (n 15) 11.

the OECD Roundtable on Competition Enforcement and Regulatory Alternatives explains this complementarity as analogous to ‘communicating vessels’.²¹ This approach is also reflected in the case law. In *Deutsche Telekom* the CJEU affirmed the complementary relationship by stating that ‘the competition rules laid down by the EC Treaty supplement in that regard, by an *ex post* review, the legislative framework adopted by the Union legislature for *ex ante* regulation of the telecommunications markets.’²² It is important to note that there may be different scenarios in which competition law can complement regulation through concurrent application. For instance, competition law may complement regulation to address insufficient, inadequate action or inaction by a regulatory authority. It may also function as a corrective mechanism to address regulatory outcomes which sit at odds with competition law.²³

There are limits to the concurrent application of competition law and regulation. The first limitation is where regulations preclude the application of competition law or remove the scope for autonomous conduct.²⁴ For the latter, the Court in *Deutsche Telekom* adopted a narrow approach, holding that Article 102 TFEU does not apply where ‘anti-competitive conduct is required of undertakings by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part’.²⁵ Furthermore, the scope of concurrent application is subject to the principle of *ne bis in idem*.²⁶

Unlike economic regulation, the relationship between social regulation and competition law has not been extensively discussed, as the distinction between their respective goals has generally been clearer, with less room for interaction. However, over the past decade, there has been a growing emphasis on the interaction between competition law and horizontal policies such as consumer protection, data protection, and environmental protection.²⁷ There are a multitude of reasons behind this shift, including the increased emphasis on noneconomic goals in competition law enforcement, as well as efforts to adopt a ‘more holistic approach’ demanded by other regulators.²⁸ Therefore, similar to economic regulation, in this symbiotic relationship, competition law may also be utilized to address the shortcomings of regulatory action. The German Facebook case is a contentious

example of this, where action by the competition authority has been perceived to be a result of systemic underenforcement of the GDPR.²⁹ However, the complementary relationship may be perceived as more controversial in the context of social regulation; due to traditionally more distinct objectives, the absorption of regulatory aims into competition law enforcement may be deemed more problematic.³⁰

3. Potential concurrent application of regulation and Article 102 TFEU in digital markets

In the wake of a plethora of regulations concerning digital markets, attention has been drawn to how the relationship between regulation and Article 102 TFEU enforcement will be shaped in practice. Given that the regulatory state is in flux, the following analysis is neither intended to be exhaustive nor to provide a complete account of the current framework of interaction. Instead, it aims to exemplify the potential overlap concerning abuse enforcement in digital markets. For this purpose, the discussion focuses on prominent regulations—namely the DMA, the GDPR, the DSA, and the AI Act to illustrate the practical aspects of their potential parallel application.

The DMA is at the forefront of creating the broadest scope for concurrent application with Article 102 TFEU enforcement in digital markets. While it pursues objectives distinct from competition law, substantive obligations under the DMA mirror past or ongoing Article 102 TFEU investigations.³¹ As made apparent in its Recital and Impact Assessment, the DMA is framed as a response to the limitations of Article 102 TFEU, intended to address perceived enforcement gaps.³² Despite this, it is not structured as an alternative to competition law enforcement.³³ Rather, its complementary nature is evident throughout the DMA. Article 1(6) of the DMA explicitly provides that it is ‘without prejudice to the application of Articles 101 and 102 TFEU’.³⁴ How this complementarity will play out in practice depends on various factors.

When there is a possibility that conduct falls under both instruments, parallel investigations are expected to be limited. Given that the Commission has sole authority to enforce the DMA, in such cases, the Commission will have two tools at its disposal.³⁵ Strategically, the Commission is likely to prefer pursuing cases under the DMA given that it introduces less complexity by dispensing with the need to establish dominance and/or a theory of harm, and also does not allow an efficiency defence and shifts the burden to gatekeepers.³⁶ On the other hand, if the DMA becomes the primary tool, this is likely to hinder the development of the case law under Article 102

²¹ European Union, ‘Competition Enforcement and Regulatory Alternatives’ (Note by the European Union), DAF/COMP/WP2/WD(2021)13, 2.

²² Case C-280/08/P *Deutsche Telekom AG v European Commission* ECLI:EU:C:2010:603, para 92; see also Robert O’Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (3rd edn, Hart Publishing 2020) 60–63.

²³ Niamh Dunne, ‘The Role of Regulation in EU Competition Law Assessment’, (2021) LSE Law, Society and Economy Working Papers 09/2021, 16 contends that this was arguably the case in *Deutsche Telekom*: ‘where Germany had failed to implement EU-level requirements of tariff rebalancing in the telecommunications sector’. See Case T-271/03 *Deutsche Telekom* EU:T:2008:101; *Deutsche Telekom* (n 22).

²⁴ OECD (n 15) 17–18.

²⁵ *Deutsche Telekom* (n 22), para 80.

²⁶ Article 50, Charter of Fundamental Rights of the European Union, [2016] OJ C202/2. See also Case C-117/20, *bpost SA v Autorité belge de la concurrence* EU:C:2022:202, paras 24–48; Case C-151/20, *Bundeswettbewerbshilfebehörde v Nordzucker AG and others* EU:C:2022:203, paras 39–58.

²⁷ OECD (n 15) 10: ‘More importantly, over the last decade the OECD Competition Committee has looked at a number of topics concerning the interaction between competition law and horizontal regulations such as environmental, consumer and data protection, and even fair business and working practice rules.’

²⁸ EDPS, ‘Privacy and Competitiveness in the Age of Big Data: The Interplay between Data Protection, Competition Law and Consumer Protection in the Digital Economy’ (2014) 37: ‘It may be sensible for the Commission and the EDPS at EU level together with national competition, consumer protection and data protection authorities to agree upon a more holistic approach to enforcement’ EDPB, ‘Position Paper on Interplay between Data Protection and Competition Law’ (2025) 4; Giovanni Buttarelli, ‘Privacy and Competition in the Digital Economy’ (Speech, European Parliament Privacy Platform, Brussels, 21 January 2015) <https://edps.europa.eu/sites/edp/files/publication/15-01-21_speech_gb_en.pdf> accessed 15 September 2024.

²⁹ On the underenforcement of the GDPR, see Kerber and Specht-Riemenschneider (n 5) 103–08.

³⁰ On the complementary relationship between horizontal regulation and competition law, see OECD (n 15) 12.

³¹ For an analysis linking the relevant DMA provisions with ongoing/past investigations, see Fiona Scott Morton and Cristina Caffarra, ‘The European Commission Digital Markets Act: A Translation’ (CEPR, 5 January 2021) <<https://voxeu.org/article/european-commission-digital-markets-act-translation>> accessed 17 March 2025.

³² Recital 5, DMA (n 3); European Commission, ‘Digital Markets Act Impact Assessment 1’ (2020) 33 <<https://op.europa.eu/en/publication-detail/-/publication/0a9a636a-3e83-11eb-b27b->> accessed 17 March 2026.

³³ Recital 11, DMA (n 3). On the complementary relationship, see Pierre Larouche and Alexandre de Stree, ‘The European Digital Markets Act: A Revolution Grounded on Traditions’ (2021) 12 *Journal of European Competition Law and Practice* 542, 543; Robertson (n 5).

³⁴ Article 1(6) DMA (n 3).

³⁵ Recital 91, DMA (n 3).

³⁶ Robertson (n 5) 327; Jacques Cremer and others, ‘Enforcing the Digital Markets Act: Institutional Choices, Compliance, and Antitrust’ (2023) 11 *JAE* 315, 347.

TFEU. For conduct by gatekeepers that falls outside the obligations of Articles 5 and 6 of the DMA, the instrument the Commission will use to implement novel duties is less predictable. However, from a policy perspective, such cases should be pursued under Article 102 TFEU first to gain a deeper understanding of the conduct at issue.³⁷ Therefore, although parallel enforcement is likely to be limited in practice, continuous bilateral influence is expected in the further development of both the DMA and Article 102 TFEU, particularly regarding rules for gatekeepers. Additionally, the DMA's influence may also extend beyond gatekeepers, with broader spillover effects anticipated for non-gatekeepers as well.

The interaction between data protection laws and competition law represents another significant area of overlap and is driven primarily by privacy and data access issues. This has created room for interaction, giving rise to both conflict and instances of concurrent application. The European Data Protection Supervisor (EDPS) has increasingly advocated for strengthening privacy enforcement by not only adopting a concurrent application of the two tools, but also pursuing a more holistic strategy and facilitating cooperation between authorities.³⁸ Parallel enforcement by competition authorities is desirable from a policy perspective, as competition law can help address systemic issues linked to the underenforcement of the GDPR.³⁹ Therefore, the current picture suggests parallel enforcement is likely to be the most efficacious scenario. At an institutional level, the practical aspect of this concurrent application has been clarified in *Meta*.⁴⁰ The CJEU held that where a data protection authority has ruled on the application of certain provisions of the GDPR regarding the same practice or similar practices, the competition authority cannot deviate from the interpretation of that data protection authority, and imposed a duty on the competition authority to consult and seek its cooperation.⁴¹

While the GDPR and the DMA were at the forefront of the discussion, there is also considerable scope for overlap arising from the concurrent application of various other regulatory instruments. While the DSA does not envision any procedure for parallel application, it indicates that 'in view of possible cross-cutting elements that may be of relevance for other regulatory frameworks at Union level', the European Board for Digital Services can cooperate with relevant bodies, *inter alia*, related to competition law.⁴² The AI Act also emphasizes the potential intersection with competition law and imposes a supervisory duty to report any relevant information uncovered during market surveillance activities to both the Commission and relevant national competition authorities.⁴³

³⁷ Cremer and others (n 36) 319; Pinar Akman, 'Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act' (2022) 47 EL Rev 85, 93: 'The "sufficient experience" that the DMA refers to must relate to the experience of the Commission and some national authorities.'

³⁸ EDPS (n 28) 29–32; Buttarelli (n 28) 4.

³⁹ Kerber and Specht-Riemenschneider (n 5) 103–08; EDBP, 'Lack of Resources Puts Enforcement of Individuals' Data Protection Rights at Risk' (13 September 2022) <https://www.edpb.europa.eu/news/news/2022/lack-resources-puts-enforcement-individuals-data-protectionrightsrisk_en#:~:text=However%2C%20the%20EDPB%20Secretariat%20is> accessed 15 March 2026.

⁴⁰ *Meta* (n 7), paras 56–58.

⁴¹ *ibid.* See also Inge Graef, 'Meta Platforms: How the CJEU Leaves Competition and Data Protection Authorities with an Assignment' 30 MJ (2023) 325, 333: 'It is therefore unlikely that competition authorities, and especially the European Commission, will still take up any of the data-related practices now covered by the DMA through using the GDPR as a benchmark for establishing an abuse of dominance, as the Bundeskartellamt has done.'

⁴² Recital 134, DSA (n 3).

⁴³ Article 74(2), AI Act (n 3).

Considering that the prevailing regulatory landscape is characterized by an escalating number of measures, it is crucial to acknowledge that the above examples are not exhaustive. They are instead intended to illustrate the potential concurrent application between regulation and Article 102 TFEU in digital markets. While in some cases this concurrence is evident, with some regulatory texts explicitly outlining procedures, the substantive impact of this interaction on the application of Article 102 TFEU is a distinct issue, and the remainder of this article aims to answer this question from the perspective of Article 102 TFEU.

4. Regulation as an input in assessing the abusive nature of the conduct under Article 102 TFEU

Once it is determined that there is room for increased interaction between competition enforcement and regulation in digital markets, the question then becomes how the existence of concurrently applicable regulation influences analysis of abuse under Article 102 TFEU. This question has both institutional and substantive aspects. The following analysis focuses on the latter. It aims to conceptualize how regulation acts as an input in abuse of dominance analysis under Article 102 TFEU case law to conceptualize the limits of regulatory influence.

In *Deutsche Telekom*, to approach the concurrent application of regulation and competition law, Advocate General Mazak used the 'two barriers' analogy, holding that Article 102 TFEU represents 'a second barrier' and it is for the Commission to decide whether the conditions of the second barrier were respected or not.⁴⁴ One possible understanding of the 'two barriers' analogy is that these two barriers coexist independently, and thus the existence of the regulation does not affect the analysis of the competition law ('no input effect'). In other words, to infringe both, the conditions of each should be satisfied separately. However, such an approach fails to take into account the interaction between these two barriers and overlooks the ways in which regulation can shape market conditions and affect the competitive dynamics among market participants.⁴⁵ Case law demonstrates that regulatory obligations can influence the assessment of abusive conduct under Article 102 TFEU.⁴⁶ For instance, in *Deutsche Telekom*, the CJEU held that legislation relating to the telecommunications sector is a 'relevant factor in the application of Article 82 EC to the conduct of that undertaking, whether for the purposes of defining relevant markets, assessing the abusive nature of such conduct or setting the amount of the fines'.⁴⁷ More recently, in *Slovak Telekom*, the Court held that 'it should be considered that a regulatory obligation can be relevant for the assessment of abusive conduct, for the purposes of Article 102 TFEU, on the part of a dominant undertaking that is subject to sectoral rules'.⁴⁸ At the same time, the Court has recognized

⁴⁴ Case C-280/08 *Deutsche Telekom* ECLI:EU:C:2010:212, Opinion of AG Mazak, para 21.

⁴⁵ For criticism of the 'two barriers' analogy, see also Dunne (n 23) 4.

⁴⁶ For discussion of the relevant case law, see OECD (n 15) 32. See also Dunne (n 23) 4.

⁴⁷ *Deutsche Telekom* (n 22), para 224.

⁴⁸ *Slovak Telekom* (n 8) para 57; see also Case T-851/14 *Slovak Telekom v Commission* ECLI:EU:T:2018:929, para 117: 'However, in the present case, since the legislation relating to the telecommunications sector defines the legal framework applicable to it and, in so doing, contributes to the determination of the competitive conditions under which a telecommunication undertaking carries on its business in the relevant markets, that legislation constitutes a relevant factor in the application of Article 102 TFEU to the conduct of that undertaking, in particular for assessing the abusive nature of such conduct.'

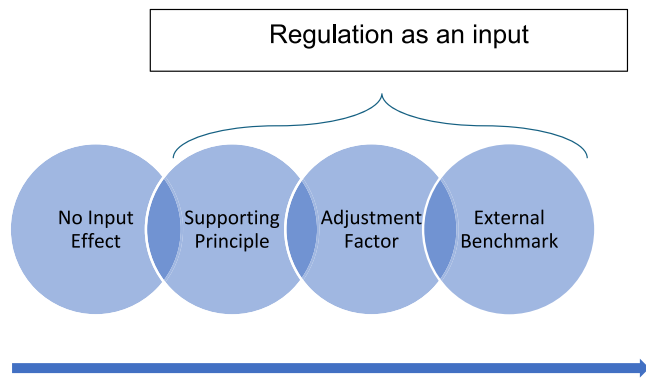


Figure 2 Types of Regulatory Input.

the limits of this interaction. On different occasions and recently in *Servizio Elettrico Nazionale*, the Court held that ‘the illegality of abusive conduct [under Article 102 TFEU] is unrelated to the characterisation of that conduct in other areas of law.’⁴⁹ Amid these seemingly conflicting positions, it is clear that a balance should be struck somewhere in between, where the relevance of regulation is acknowledged and the autonomy of Article 102 TFEU analysis is also preserved.

Recent case law prompted discussions about the possibility of different scenarios of regulatory influence.⁵⁰ On examination, three scenarios can be distinguished in which regulation has been used as (i) a supporting principle; (ii) an adjusting factor; and (iii) an external benchmark. Figure 2 illustrates the different modes of using regulation as an input based on their impact on abuse analysis, underscoring the fluidity of their boundaries and their intertwined nature. The following sections discuss each of the three scenarios.

A. Regulation as a supporting principle

The first category comprises recent case law in digital markets where regulation served as a ‘supporting principle’. Compared to other categories, the rationale for referring to a regulatory framework is ambiguous, with no measurable impact on determining whether conduct constitutes abuse under Article 102 TFEU. Such an ambiguous reference to regulation was present in *Google Shopping*, where the General Court relied on the Open Internet Access Regulation ‘for the sake of completeness’ in finding Google’s conduct abusive.⁵¹ The Court further stated that, although the situation differs from the case at hand, the nondiscrimination obligation imposed under the Open Internet Access Regulation ‘cannot be disregarded when analysing the practices of an operator like Google on the downstream market, given

⁴⁹ Case C–377/20 *Servizio Elettrico Nazionale* ECLI:EU:C:2022:379, para 67; C 457/10 P. See also Case C–457/10 *AstraZeneca AB and AstraZeneca plc v European Commission* ECLI:EU:C:2012:770, para 132.

⁵⁰ Schweitzer and de Ridder (n 6) 7; Daniel Mandrescu, ‘Applying Article 102 TFEU to Multisided Online Platforms: Discrimination, Leveraging and Undefined Abuses of Dominance’ in L Calzolari and others (eds), *Public and Private Enforcement of EU Competition Law in the Age of Big Data* (Giappichelli 2024) 87, 112–114.

⁵¹ *Google Shopping* (n 9), para 180: ‘It may be observed moreover, for the sake of completeness, that even in a situation that differs from that of the present case, the Court of Justice has ruled, with regard to internet access providers, that the EU legislature had intended, by Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (OJ 2015 L 310, p 1), to impose on those operators a general obligation of equal treatment, without discrimination, restriction or interference with traffic, from which derogation is not possible in any circumstances by means of commercial practices.’

the undisputed ultra-dominant position of Google.’⁵² On appeal, this ambiguous reference has also been challenged by the appellants.⁵³ The CJEU responded that reference to Open Internet Access Regulation ‘did not derive from the reasoning of the decision at issue’, and that the conduct at issue fell outside the scope of competition on the merits regardless of the said considerations.⁵⁴ On one hand, as emphasized by the CJEU, the reference to ‘for the sake of completeness’ clearly limits the regulatory duty’s influence, indicating that the duty imposed on Google does not stem from it.⁵⁵ On the other hand, it is unclear why such an obligation, which does not assist in understanding the duty imposed on Google, has been referenced. This ambiguity poses challenges in its further implications in digital markets.⁵⁶ Indeed, referencing inapplicable regulations to support findings on abuse further paves the way for spillover effects of the DMA obligations to non-gatekeepers by impacting the interpretation and enforcement of Article 102 TFEU.

Similarly, more recently, in the context of the Commission’s *App Store Practices* decision, there has been an ambiguous reference to the DMA.⁵⁷ In finding Apple’s anti-steering provisions constitute unfair trading conditions under Article 102(a) TFEU,⁵⁸ in response to Apple’s argument, the Commission first stated the obvious: that the DMA and Article 102(a) TFEU, despite both concerning fairness, pursue different objectives within a complementary relationship.⁵⁹ Going a step further, the Commission stated that ‘the fact that Article 5(4) of Regulation (EU) 2022/1925 generally prohibits, due to their unfair character, the imposition by gatekeepers of anti-steering rules further supports the Commission’s view that such conditions imposed by a dominant undertaking should be qualified as unfair.’⁶⁰ Again, with the language it used and by only bringing up the DMA as a response to Apple’s argument, it is clear from the decision that the unfairness analysis under Article 102(a) TFEU did not derive from the specific provisions of the DMA.⁶¹ However, it opens the door for the potential influence of the DMA in interpreting Article 102 TFEU, even in cases where it is not applicable.

Despite the language used in both instances to downplay regulatory influence, this kind of influence also deserves scrutiny as the scope of the ‘supporting principle’ remains open-ended. Firstly, if it is irrelevant to the assessment of abuse, its impact, aside from creating an unnecessary complication, is ambiguous. Secondly, if it exerts any influence, the lack of clarity as to the degree of such influence suggests that in practice it may lead to effects similar to those outlined in the following two scenarios.

B. Regulation as an adjustment factor

A series of ‘refusal to supply’/‘margin squeeze’ cases have addressed the interplay between sector-specific regulations and Article 102

⁵² *ibid.*

⁵³ Case C–48/22 P *Google and Alphabet v Commission (Google Shopping)* ECLI:EU:C:2024:726, para 131.

⁵⁴ *ibid.*, paras 195–98.

⁵⁵ *ibid.*

⁵⁶ For similar concerns, see Friso Bostoën, ‘The General Court’s *Google Shopping* Judgment Finetuning the Legal Qualifications and Tests for Platform Abuse’ (2022) 13 *Journal of European Competition Law and Practice* 2, 84–85.

⁵⁷ *Apple – App Store Practices* (music streaming) (Case COMP AT.40437) Commission Decision C(2024) 1307 final (*App Store Practices*), paras 551, 552.

⁵⁸ *ibid.*, para 1028.

⁵⁹ *ibid.*, para 551.

⁶⁰ *ibid.*, para 552.

⁶¹ See also Giorgio Monti, ‘Exploitative Abuse “Takeaways from the Apple App Store Practices Decision” (2024) SSRN, 12–13 <<https://ssrn.com/abstract=485330>> accessed 23 September 2024.

TFEU.⁶² Within this context, *Slovak Telekom* exposed room for the potential novel impact of regulation. In *Slovak Telekom*, sector-specific regulation required the provision of unbundled access to operator's local loop, transforming the conditions of the applicable test, and this, arguably, led the Court to conclude that the obligation to provide access was undisputed, thereby making 'indispensability' analysis superfluous.⁶³ While the practical impact of the regulation was straightforward, understanding how regulatory influence is conceptualized is critical for its future applications.

A closer examination of the literature reveals nuanced interpretations of the Court's ruling in *Slovak Telekom*, highlighting the complexity of its broader implications. Some commentators argue that regulation has played a determinative role in this instance, as regulatory obligations have delineated the boundaries of competition on the merits.⁶⁴ On the other hand, the OECD policy paper on Competition Enforcement and Regulatory Alternatives frames the regulatory influence as regulation 'replacing or providing a proxy for one of [the] elements [of competition law doctrine]'.⁶⁵ This article takes a more nuanced view and argues a position closer to, but still distinct from, the proxy approach, suggesting that regulatory influence in *Slovak Telekom* can be summarized as an adjusting factor that alters the balancing equation in this specific context.

It is important first to understand the Court's multilayered rationale for ruling out the indispensability requirement in *Slovak Telekom*. One argument is that when there is an *ex ante* duty, balancing exercises have already been made by the regulators, and duplicating the analysis in the context of antitrust law is therefore unnecessary.⁶⁶ The same rationale has been echoed in the Guidance Paper, which states, 'where regulation compatible with Community law already imposes an obligation to supply on the dominant undertaking and it is clear, from the considerations underlying such regulation, that the necessary balancing of incentives has already been made by the public authority when imposing such an obligation to supply'.⁶⁷ This rationale aligns with conceptualizing the influence as a proxy for the indispensability condition.

Yet the proxy approach presupposes that the balancing exercise by the regulator can substitute for the Article 102 TFEU assessment, without an examination of how well the underlying legislative goals align. This will result in inconsistent outcomes by replacing the abuse

analysis with regulator's analysis without ensuring that it serves as a valid substitute for a thorough assessment under Article 102 TFEU.⁶⁸ Indeed, this was argued by the applicant in *Slovak Telekom*, who claimed that regulatory duty cannot replace the balancing done under Article 102 TFEU, as regulation and Article 102 TFEU have different objectives.⁶⁹ The General Court was quick to dismiss this argument, holding that although regulation and competition policy may have different objectives, this was irrelevant to the influence that regulation may exert and the CJEU did not elaborate further on the arguments on appeal.⁷⁰ This approach is problematic, as relying on the regulator's balancing act is likely to disrupt the inherent consistency of Article 102 TFEU, particularly in cases of social regulation, where significant differences in underlying legislative aims may exist.⁷¹

A possible reading of *Slovak Telekom*, rather than seeing regulation substituting the balancing act under competition law, is to conceptualize it as an adjusting factor under Article 102 TFEU. Regardless of whether the goals align, the existence of such a duty changes the traditional balancing act under Article 102 TFEU analysis. An opposite approach would force competition law to ignore the existing 'economic and legal context' and try to enforce antitrust laws by considering the conditions that would have prevailed in the absence of regulation.⁷² Indeed, in both *Lithuanian Railways* and *Slovak Telekom*, the Court endorsed this practical aspect as well, holding that imposing the regulatory obligation meant that the dominant undertaking could not refuse to give access.⁷³ This, in turn, impacted the existing balancing act under Article 102 TFEU. Indeed, the CJEU in *Slovak Telekom* also held that since access had already been granted, the remedy in such cases will be 'less detrimental to the freedom of contract of the dominant undertaking and to its right to property'.⁷⁴ This constituted a reason to avoid a more stringent requirement of indispensability. However, as discussed below, it is critical to situate this argument within its context. The holding in *Slovak Telekom* is increasingly relevant for access issues in digital markets, as the Court's approach to regulatory influence has important implications for development of legal tests applicable to access obligations under the evolving regulatory framework.⁷⁵

C. Regulation as an external benchmark

For the final category, the cornerstone of the discussion is the Bundeskartellamt's Facebook decision, which opened a door to debate

⁶² For example, see *Deutsche Telekom* (n 22), para 224; Case T-336/07 *Telefónica and Telefónica de España v Commission* ECLI:EU:T:2012:172, para 289; Cases T-486/11 *Orange Polska* ECLI:EU:T:2015:1002; C-123/16 P *Orange Polska* ECLI:EU:C:2018:590.

⁶³ *Slovak Telekom* (n 8), para 57; *Slovak Telekom* (n 48), para 121: 'Given that the relevant regulatory framework clearly acknowledged the need for access to the applicant's local loop, in order to allow the emergence and development of effective competition in the Slovak market for high-speed internet services, the demonstration, by the Commission, that such access was indeed indispensable for the purposes of the last condition set out in paragraph 41 of the judgment of 26 November 1998, Bronner (C-7/97, EU:C:1998:569), was not required.'

⁶⁴ Pablo Ibanez Colomo, *The New EU Competition Law* (Hart Publishing 2023) 172: '*Slovak Telekom* shows not only that competition law can come into play when there is regulation in place, but that a breach of the sector-specific regime can also amount to a competition law violation. In other words, the mere fact that the firm has failed to comply with its regulatory duties can also trigger the application of Articles 101 and 102 TFEU.'

⁶⁵ OECD (n 15) 34.

⁶⁶ OECD (n 15) 34. See also Case T-814/17 *Lietuvos geležinkeliai v Commission* ECLI:EU:T:2020:545, para 92: 'Where there is a legal duty to supply, the necessary balancing of the economic incentives, the protection of which justifies the application of the exceptional circumstances developed in the judgment of 26 November 1998, Bronner (C 7/97, EU:C:1998:569), has already been carried out by the legislature at the point when such a duty was imposed.'

⁶⁷ European Commission, 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' [2009] OJ C45/7, para 82.

⁶⁸ For a detailed analysis, see O'Donoghue and Padilla (n 22) 680.

⁶⁹ *Slovak Telekom* (n 48), paras 145–46.

⁷⁰ *ibid*, para 152.

⁷¹ For a further discussion of the relevance of an *ex ante* obligation to supply, see O'Donoghue and Padilla (n 22) 680. Similarly, see Damien Geradin, 'Refusal to Supply and Margin Squeeze: A Discussion of Why the "Telefonica Exceptions" Are Wrong' (2010) TILEC Discussion Paper 009/2011, 8.

⁷² For the role regulation as part of the economic and legal context, see Colomo (n 64) 156; Dunne (n 23) 6.

⁷³ Case C-42-21 *Lietuvos geležinkeliai AB* ECLI:EU:C:2023:12, para 88; *Slovak Telekom* (n 8) para 57.

⁷⁴ *Slovak Telekom* (n 8), para 51.

⁷⁵ For an analysis of the implications of *Slovak Telekom* in digital markets, see Inge Graef, 'The Future of Refusals to Deal and Margin Squeezes in the Face of Sector-Specific Regulation' TILEC Discussion Paper 2022-012 (2022), 13; Daniel Mandrescu, 'Why You (Often) Don't Need the Essential Facility Doctrine in the Digital Economy? – Interpreting Lithuanian Railways and Slovak Telekom' (*Lexxion*, 3 December 2020) <<https://www.lexxion.eu/en/coreblogpost/why-you-often-dont-need-the-essential-facility-doctrine-in-the-digital-economy-interpreting-lithuanian-railways-and-slovak-telekom/>> accessed 24 August 2024; Jan Blockx, 'The Expected Impact of the DMA on the Antitrust Enforcement of Unilateral Practices' (2023) 14 *Journal of European Competition Law and Practice* 325.

on the use of regulation as a benchmark in finding abuse.⁷⁶ In finding Facebook's terms abusive, Bundeskartellamt used the violation of GDPR as a benchmark for determining the abusive nature of its data collection policy.⁷⁷ This has been criticized by some, and this theory of harm has been interpreted as being motivated primarily by a 'desperate need to plug a regulatory gap on the data protection side which could not be filled by the relevant sector-specific regulators in Germany'.⁷⁸ In its preliminary ruling, the CJEU confirmed the relevance of data protection laws, stating that 'the compliance or non-compliance of that conduct with the provisions of the GDPR may, depending on the circumstances, be a vital clue among the relevant circumstances of the case in order to establish whether that conduct entails resorting to methods governing normal competition'.⁷⁹

It is necessary to note here that the implications of *Meta* are likely to go beyond the data protection/competition law interface. The wording of the Court is broad enough to encompass the existing and emerging plethora of European regulations.⁸⁰ Given the potential extensions of the case, there is a need for a deeper understanding of the possibility of a non-competition law violation serving as a standalone theory of harm.

Earlier case law confirms that there is room for the use of regulation as an input, thus limiting its effect to incidental use. The possible reliance on external tools to establish abuse has already been explored in the case law (albeit in limited circumstances).⁸¹ Notable is the case *Allianz Hungaria*, wherein the Court held that the existing obligations under national laws could be a factor in determining the existence of by object violation.⁸² Another frequently referenced case is *AstraZeneca*, where the Court found that misleading representations made to public authorities to obtain supplementary protection certificates and misusing regulatory procedures to delay the authorization of generic products resulted in the restriction of competition falling outside the scope of 'competition on the merits' under Article 102 TFEU.⁸³ It has been argued that *AstraZeneca* establishes the relevance

of intellectual property laws in assessing the abusive nature of the conduct.⁸⁴

However, as well as highlighting the relevance of other branches of law, neither of the abovementioned case law justifies an automatic link between antitrust laws and regulation. *Allianz Hungaria* is not directly comparable to the case at hand, as it concerned the external influence of domestic law in the context of Article 101 TFEU. In *AstraZeneca* the focus was on the fact that the dominant undertaking circumvented the relevant regulatory process.⁸⁵ The broader implications of the case are also questionable, as the Court noted that not every misrepresentation and rejection of a patent automatically amounts to abuse and emphasized that its findings are limited to the facts of the case.⁸⁶ More importantly, in *AstraZeneca*, the Court clearly overruled the possibility of the automatic link by stating that 'the illegality of abusive conduct under Article 82 EC is unrelated to its compliance or non-compliance with other legal rules'.⁸⁷

The judgment of the CJEU in *Meta* offered further clarification on the role played by data protection laws in establishing abuse.⁸⁸ The Court noted the role of regulation as 'a vital clue' in assessment of conduct falling within competition on the merits.⁸⁹ This does, however, leave a question mark over what a 'vital clue' would entail in practice. Advocate General Rantos was more cautious in stating that 'the lawful or unlawful nature of conduct under Article 102 TFEU is not apparent from its compliance or lack of compliance with the GDPR or other legal rules' and noncompliance with the GDPR when 'not taken in isolation but considering all the circumstances of the case, may be a vital clue'.⁹⁰ This approach was welcomed and timely in the context of the ongoing discussion regarding the influence of data protection laws. However, although the CJEU seems to limit the role of the GDPR in establishing abuse, there remains ambiguity regarding what a 'vital clue' will entail in practice. Without limiting principles, such an approach may risk creating automatism and result in consequences not significantly different from pursuing a regulation-based theory of harm.

5. In need of limiting principles for regulatory influence

The previous sections introduced three distinct scenarios of regulatory influence, all contributing to a broader trend of increasing reliance on regulation in Article 102 TFEU analysis, yet with little clarity regarding their boundaries. Specifically, the second and third scenarios suggest that regulation is not merely an *ad hoc* consideration in abuse assessments but is increasingly invoked as an interpretative input in determining the abusive nature of conduct. The significance of this development is best understood in light of the broader policy context and the ongoing discussion regarding the inadequacy of Article 102 TFEU in digital markets, i.e., the concerns over lengthy proceedings and the effectiveness of abuse enforcement, and the need to adjust

⁷⁶ Bundeskartellamt, Facebook Exploitative Business Terms Pursuant to Section 19(1) GWB For Inadequate Data Processing Decision No B6-22/16 (6 February 2019) ('Bundeskartellamt Facebook Decision').

⁷⁷ *ibid.*, para 526: 'The principles of data protection law underlying the GDPR are thus a suitable standard for measuring the appropriateness of the data processing terms of a dominant supplier, all the more so since they must be taken into account anyway as a higher-ranking constitutional law that specifies constitutionally guaranteed rights.' and para 551: 'However, the stipulated control of data processing policies cannot mean that, in its task of monitoring the scope of data processing, the competition authority should disregard the principles of general data protection law and develop its own benchmark or other tools instead.'

⁷⁸ Dunne (n 23) 15.

⁷⁹ *Meta* (n 7), para 47.

⁸⁰ *Meta* (n 7), para 48: 'in the context of the examination of an abuse of a dominant position by an undertaking on a particular market, it may be necessary for the competition authority of the Member State concerned also to examine whether that undertaking's conduct complies with rules other than those relating to competition law'. See also Anne C Witt, 'Meta v Bundeskartellamt- Data-Based Conduct between Antitrust Law and Regulation' (2024) 12 JAE 345, 351.

⁸¹ For further discussion of the relevant case law, see Marija Stojanovic, 'Can Competition Law Protect Consumers in Cases of a Dominant Company Breach of Data Protection Rules?' (2020) 16 ECJ 531, 553; Maximilian N Volmar and Katharina O Helmdach, 'Protecting Consumers and Their Data through Competition Law? Rethinking Abuse of Dominance in Light of the Federal Cartel Office's Facebook Investigation' (2018) 14 ECJ 195, 209.

⁸² Case C-32/11 *Allianz Hungária Biztosító Zrt and Others v Gazdasági Versenyhivatal* [2013] ECLI:EU:C:2013:160, para 46, 47: 'it will be necessary to determine whether, taking account of the economic and legal context of which they form a part, the vertical agreements at issue in the main proceedings are sufficiently injurious to competition on the car insurance market as to amount to a restriction of competition by object. That could in particular be the case where, as is claimed by the Hungarian Government, domestic law requires that dealers acting as intermediaries or insurance brokers must be independent from the insurance companies.'

⁸³ Case T-321/05 *AstraZeneca v Commission* ECLI:EU:T:2010:266, paras 61-113 and 114-141, Case C-457/10, *AstraZeneca AB and AstraZeneca plc v European Commission* ECLI:EU:C:2012:770.

⁸⁴ Stojanovic (n 81) 553.

⁸⁵ Case C-457/10 *AstraZeneca* (n 83), para 99. See also, Dunne (n 23) 13; O'Donoghue and Padilla (n 22) 774; Giorgio Monti and Alexandre de Streel, 'Exploitative Abuses: The Scope and The Limits of Article 102 TFEU' Robert Schuman Centre for Advanced Studies Centre for a Digital Society Working Paper RSC 2023/62,19; Peter J van de Waardt, 'Meta v Bundeskartellamt: Something Old, Something New' (2023) 8 European Papers 1077, 1091.

⁸⁶ Case C-457/10 *AstraZeneca* (n 83), para 99.

⁸⁷ *ibid.*, para 132.

⁸⁸ *Meta* (n 7), para 47.

⁸⁹ *ibid.*

⁹⁰ Case C-252/21 *Meta Platforms and Others* ECLI:EU:C:2022:704, Opinion of AG Rantos, para 23.

traditional enforcement tools to account for novel concerns. Within this context, leveraging regulatory wisdom allows for the implementation of proxies, short-cuts, decreasing decision costs,⁹¹ and enhancing competition law's capability to adapt its tools to intervene in novel concerns.⁹² Specifically, in areas characterized by novel or complex conduct, most notably in digital markets, this approach allows competition authorities to import an external tool where traditional tools remain underdeveloped. Exploitative data collection practices illustrate this dynamic: scholarly debates have long grappled with defining the relevant theory of harm to address privacy-driven concerns and quantifying privacy losses to provide a workable benchmark under Article 102 TFEU analysis. Yet as the *Meta* ruling clarified, developing an independent benchmark may not always be necessary where violation of privacy laws can inform the benchmark for assessing exploitative conduct. Accordingly, one can see the potential tendency to resort to regulation as an input in abuse analysis.

However, if not treated with caution, using regulation as an input poses two main risks. First, an expansive interpretation of *Meta* risks treating regulation as a source of liability, repurposing regulatory violations as abuse, and opening the door to the instrumentalization of competition law.⁹³ Such instrumentalization of competition law may lead to promoting objectives beyond competition law's reach.⁹⁴ Second, following *Slovak Telekom* and relevant case law, there is a risk of subtly circumventing the applicable intervention thresholds by eroding the limiting principles within Article 102 TFEU. The remainder of this section addresses these two concerns, along with considerations for limiting the influence of regulation.

A. Securing the limits of Article 102 TFEU enforcement

The above analysis shows how the broad interpretation of what constitutes a 'vital clue' in *Meta* risks creating automatism by repurposing any regulatory violation as abuse. The key question is whether any noncompliance would be relevant in assessing the abusive nature of the conduct. Pushing this question a little further, Dunne asks, '[I]f a leading courier company gains a competitive advantage over rivals by requiring drivers to break the speed limit and ignore traffic lights, should this be construed as an unfair method of competition for the purposes of Article 102?'⁹⁵ Conventional wisdom, as Schweitzer and de Ridder also argue, is that 'a link to the goals of EU competition law, and hence some potential to adversely affect competition, is an indispensable precondition.'⁹⁶ Therefore, the first step is that there

⁹¹ See also OECD (n 15) 38.

⁹² For example, Ariel Ezrachi and Viktoria HSE Robertson, 'Can Competition Law Save Democracy? Reflection on Democracy's Tech-Driven Decline and How to Stop It' (2024) 13 JAE 315, 323 suggests relying on regulation as external benchmarks constitutes midway approach in integrating democracy-driven concerns into antitrust enforcement.

⁹³ For similar concerns, see Dunne (n 23) 11; OECD (n 15) 38, Cseres (n 5) 13.

⁹⁴ *ibid.*

⁹⁵ Dunne (n 23) 11. For similar criticism, see Giuseppe Colangelo and Mariateresa Maggolino 'Antitrust *Über Alles*. Whither Competition Law After *Facebook*?' (2019) 42 World Competition Law and Economics Review 355, 359.

⁹⁶ Schweitzer and de Ridder (n 6) 242; David Gabathuler and Eduardo Martinez Rivero, 'Communications (Telecoms and Internet)' in Jonathan Faull and Ali Nikpay (eds) *The EU Law of Competition* (3rd edn, OUP 2014) para 13.166: 'A continuous breach of regulatory rules may in specific circumstances amount to an infringement of Article 102. Since regulation integrates certain objectives of competition law, it may indeed be the case that a certain course of behaviour infringes both sets of rules. This requires a demonstration that the resulting breaches are consistent with a pattern of behaviour the effect of which is to exclude efficient competitors from the market. In other words, if non-compliance with regulation results in the effects that Article 102 intends to prevent, such behaviour may also infringe competition law.' See also Guidelines on the application of Article 102 of the Treaty

should be a standalone theory of harm under Article 102 TFEU other than the violation of the relevant regulation. The scope of the *Meta* judgment and use of data protection law as a benchmark should be understood within those limits.

However, the relevance of certain regulatory tools can be predetermined to act as a benchmark under existing theories of harm, as is the case with GDPR after the *Meta* judgment. Even so, it is important to recognize that not every GDPR violation would likely be of relevance for Article 102 TFEU analysis.⁹⁷ Therefore, the link between relevant regulations and the theory of harm should at least be subjected to a case-by-case 'reality check'⁹⁸ requiring the authority to ensure the harm Article 102 TFEU intends to remedy is present. The scope of this analysis will depend on the regulatory instrument at stake.

B. The risk of altering balancing under Article 102 TFEU

The second risk is linked to the second category of influence, where the existence of regulation alters the inner balancing of Article 102 TFEU analysis, unduly eroding the applicable limiting principles.

Within this context, first, limitations to regulation's role as 'an adjustment factor' can be derived within the context in which it emerged. In *Slovak Telekom*, and later in *Lithuanian Railways*, the Court sustained its earlier positions and held that 'the obligation imposed on the appellant to give access to the local loop cannot relieve the Commission of the requirement of establishing that there is abuse within the meaning of Article 102 TFEU.'⁹⁹ Additionally, from the holding of *Slovak Telekom*, it is unclear what constitutes the gravity of the decision, whether it is the existence of regulation or the constructive nature of the refusal resulting from regulatory obligation. The Draft Guidelines classify both constructive refusal and failure to meet regulatory access obligations as 'access restrictions', and note by citing *Slovak Telekom* that the legal test for refusal to supply does not apply in either case.¹⁰⁰ However, it is hard to directly infer such an outcome. In *Slovak Telekom*, as emphasized by the Court, Slovak Telekom could not refuse access to its local loop; thus, the practices at issue related to the conditions for such access.¹⁰¹ Similarly, upon closer examination, it becomes evident that the emphasis placed on these two elements varies across the literature.¹⁰²

Even where regulation acts as an 'adjusting factor' altering the conditions for existing legal tests, an additional step of legal analysis should also be implemented for future cases. This can also be seen

on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings (2024) ('Draft Guidelines'), para 55(c).

⁹⁷ See also van de Waerdt (n 85) 1077,1098.

⁹⁸ For the analogy of 'reality check' (in a different context), see Case C-228/18 *Gazdasági Versenyhivatal v Budapest Bank Nyrt and Others*, Opinion of AG Bobek, para 49.

⁹⁹ *Slovak Telekom* (n 8) para 57; see also Case C-42/21 P, *Lithuanian Railways* (n 73) para 88: 'the existence of a regulatory obligation on the dominant undertaking to grant access to the infrastructure in question cannot relieve the Commission of the requirement to establish the existence of an "abuse" within the meaning of Article 102 TFEU.'

¹⁰⁰ Draft Guidelines (n 96), paras 166(b) and 166(c).

¹⁰¹ *Slovak Telekom* (n 8), para 59: 'Nevertheless, as the practices at issue did not constitute refusal of access to the appellant's local loop but related to the conditions for such access, for the reasons referred to in paragraphs 45 to 51 of the present judgment, the conditions set out by the Court of Justice in paragraph 41 of the judgment in *Bronner*, referred to in paragraph 44 of the present judgment, did not apply in the present case.'

¹⁰² Some scholars argue the irrelevancy of *Bronner* conditions in either case; see Niamh Dunne, 'Dispensing with Indispensability' (2020) 16 Journal of Competition Law and Economics 74, 85–90; cf Pablo Ibanez Colomo, 'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping' (2020) 10 Journal of European Competition Law and Practice 532, 540–542.

as a ‘reality check’ requiring an assessment, in view of the legal and economic context, of how existing regulatory duty affects the balancing that the legal test aimed to strike under Article 102 TFEU. To achieve this, it is insufficient to rely on the blanket assumption that where the relevant duty is already subject to regulation, the error costs of prohibiting the behaviour under competition law are low.¹⁰³ As explained, the ruling in *Slovak Telekom* should not be implemented as a bypass rule and should not be directly transferable to other instances without further analysis. The incentives may vary significantly depending on the nature of the existing regulation at stake. Instead, in light of the regulatory duty, the authority should demonstrate with thorough analysis how the existence of this duty altered the relevant interests at stake.

6. Conclusion

In an increasingly regulated landscape, understanding the evolving interplay between competition law and regulation requires close attention to how regulatory instruments inform abuse analysis under Article 102 TFEU. Reliance on regulation can enhance enforcement adaptability, provide concrete benchmarks in underdeveloped areas, and reduce the decision costs of complex cases, addressing key

concerns about the inadequacy of Article 102 TFEU enforcement in digital markets. Yet without clearly defined conceptual boundaries, excessive influence poses a real risk, potentially instrumentalizing competition law to pursue regulatory objectives and undermining its integrity. This article identifies three modes by which regulation can shape the assessment of abusive conduct—as a supporting principle, an external benchmark, and an adjusting factor—highlighting the ambiguity surrounding their scope and conditions of application. In response, the article proposes a ‘reality check’ as a precondition for using regulation as an input, requiring a demonstrable link between the relevant regulatory provision and the applicable theory of harm, or showing how it alters the applicable legal test by taking into account the underlying incentives at stake. While leveraging regulatory insights can help address novel challenges, this should not override or replace essential debates about the appropriate scope or goals of competition law, nor serve as a subtle mechanism to filter normative choices through regulatory instruments. Such discussions must remain central to competition law itself, with regulation serving only as a tool to inform its internal logic. Overall, the article underscores that the integration of regulatory considerations into substantive abuse analysis must remain within clearly defined limits and calls for a cautious and principled approach.

¹⁰³ Schweitzer and de Ridder (n 6) 242: ‘However, where the relevant conduct by a dominant undertaking is illegal under non-competition rules, the error costs of prohibiting it (also) under competition law are low. As such, this would not justify activating the competition law enforcement machinery.’