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## **In fairness we (should not) trust. The duplicity of the EU competition policy mantra in digital markets.**

Abstract: Fairness is not foreign to competition law and fairness considerations are not new to it. However, the endemic uncertainty on its notion has traditionally made fairness unsuitable to act as a stand-alone applicable legal standard. Indeed, antitrust enforcers have usually been reluctant to engage with the unfairness of terms and conditions. Nonetheless, against the perceived undue corporate power and market concentration in the digital economy, fairness has recently gained center stage in the policy debate, especially in Europe where recent regulatory interventions have been declared to be aimed at promoting fairness in digital markets. Against this background, the paper attempts to demonstrate that the vagueness and ambiguity associated with its meaning may make fairness particularly attractive to policy makers and that, accordingly, the revival of fairness risks being simply functional to grant them more discretion and room for intervention.

Keywords: Competition policy; Digital platforms; Fairness; Efficiency

JEL codes: K20, K21, L40, L50

### **I. Introduction**

Within the lively debate sparked by the emergence of digital markets and platform business models, a particular role has been assigned to fairness as guiding principle of competition law enforcement. The motivation behind the revival of fairness is the dissatisfaction with the profit allocation in digital services and, against the undue corporate power and market concentration, fairness is invoked as the cure for bigness.

This is particularly apparent in the EU, where recent legislative initiatives are explicitly declared to be aimed at promoting fairness in the digital economy. Such request is invoked against the gatekeeping position earned by a few large online platforms (Big Techs), which allow them to exert an intermediation power vis-à-vis business users. Serving as an important gateway for business users to reach end users, these platforms often represent unavoidable trading partners and may exploit their superior bargaining power by imposing unfair contracting terms and conditions. Moreover, since they usually also perform a dual role, being simultaneously intermediaries and traders operating on their own platforms, they may have the incentive to discriminate to their own benefit (so called self-preferencing).<sup>1</sup> Risks generated by imbalances of bargaining power and conflict of interest have induced several policy makers and legislators around the world to introduce or envisage provisions aimed at ensuring an even playing field and neutralizing the competitive advantages of large intermediation platforms. According to

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<sup>1</sup> Giuseppe Colangelo, *Antitrust unchained: the EU's case against self-preferencing*, 72 GRUR International 538 (2023).

this line of reasoning, Big Techs are required to treat both their rivals and their guests on the platform fairly.

Fairness has therefore become part of the larger debate on the role of competition law in the digital economy, which questions the consumer welfare standard's justification for a more aggressive intervention. The claim is that ignoring the many goals of competition law systematically biases antitrust toward underenforcement.<sup>2</sup> The very same label of consumer welfare standard is questioned as it is considered a “distraction” and a “catch phrase.”<sup>3</sup> Against the pure efficiency-oriented Chicago school approach, the idea of promoting a holistic approach which would require combining competition law with other fields of law in order to take into account broad social interests and ethical goals such as labor protection, wealth inequalities, and sustainability has instead progressively gained support.<sup>4</sup>

However, fairness considerations like the debate over the soul of antitrust, are not new to competition law.<sup>5</sup> We are reminded that the history of US antitrust laws shows a profound concern with economic liberty, not merely as an economic concept, but as a concept connected to the freedom of a country.<sup>6</sup> After all, “[i]f efficiency is so important in antitrust, then why doesn't that word, “efficiency,” appear anywhere in the antitrust statutes?”<sup>7</sup> By this view, antitrust has been described as a body of law designed to promote

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<sup>2</sup> Jonathan Kanter, *Remarks at New York City Bar Association's Milton Handler Lecture*, (2022) <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association>. All the links have been last accessed on Nov. 23, 2022.

<sup>3</sup> *Ibid.*

<sup>4</sup> See, e.g., Amelia Miazad, *Prosocial Antitrust*, 73 *Hastings Law Journal* 1637 (2022); Dina I. Waked, *Antitrust as Public Interest Law: Redistribution, Equity and Social Justice*, 65 *The Antitrust Bulletin* 87 (2020); Ioannis Lianos, *Polycentric Competition Law*, 71 *Current Legal Problems* 161 (2018); Lina M. Kahn & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and its Discontents*, 11 *Harvard Law & Policy Review* 235 (2017). See also Margrethe Vestager, *Fairness and Competition Policy*, (2022) [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_22\\_6067](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_6067), arguing that properly functioning markets become an instrument of social change and progress as, for instance, “keeping markets open to smaller players and new entrants benefits female entrepreneurs and entrepreneurs with a migrant background”; and European Commission, *Amendments to the Communication from the Commission Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, C(2023) 1923 final, para. 1, stating that the enforcement of competition rules “can moreover contribute to achieving objectives that go beyond consumer welfare, such as plurality in a democratic society.”

<sup>5</sup> Eleanor M. Fox, *The Battle for the Soul of Antitrust*, 75 *California Law Review* 917 (1987).

<sup>6</sup> Kanter, *supra* note 2. See also Alvaro M. Bedoya, *Returning to Fairness*, (2022) 2, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/returning\\_to\\_fairness\\_prepared\\_remarks\\_commissioner\\_alvaro\\_bedoya.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/returning_to_fairness_prepared_remarks_commissioner_alvaro_bedoya.pdf), noting that “when Congress convened in 1890 to debate the Sherman Act, they did not talk about efficiency.” See also Waked, *supra* note 4, framing antitrust as public interest law and arguing that the focus on efficiency-only goals is inconsistent with the history of antitrust. For an analysis of the conceptual link between competition, competition law, and democracy in the EU and the U.S., see Elias Deutscher, *The Competition-Democracy Nexus Unpacked—Competition Law, Republican Liberty, and Democracy*, (forthcoming) *Yearbook of European Law*, arguing that the idea of a competition-democracy nexus can only be explained by the republican concept of liberty as non-domination. In a similar vein, see Oisín Suttle, *The puzzle of competitive fairness*, 21 *Politics, Philosophy & Economics* 190 (2022) distinguishing competitive fairness from equality of opportunity, sporting fairness (e.g. the level playing field) and economic efficiency, and arguing that the justification of competitive fairness is under the republican ideal of non-domination, namely the status of being a free agent protected from subjection to arbitrary interference.

<sup>7</sup> Bedoya, *supra* note 6, 8.

economic justice, fairness, and opportunity.<sup>8</sup> Therefore, the North Star of antitrust law is to protect the competitive process in service of both prosperity and freedom. Rather than being applied solely to promote efficiency, the most appropriate focus for antitrust economics should be the protection of the process of competition among a significant number of rivals in free and open markets.<sup>9</sup> And at the heart of the competitive process is the guarantee that “everyone participating in the open market -consumers, farmers, workers, or anyone else-” has the opportunity to choose freely among alternative offers.<sup>10</sup>

This is also evident in the EU where competition law has been always sensitive to the appeal of social, political, and ethical objectives as the so-called “more economic approach” was adopted only in the late ‘90s.<sup>11</sup> Further, the idea of ensuring equal opportunities in the marketplace by guaranteeing a level playing field among firms has been advanced and incorporated in EU antitrust law by the Freiburg School of ordoliberalism.<sup>12</sup> From this perspective, fairness would include the protection of economic freedom, rivalry, competitive process, and small- and medium-size firms.<sup>13</sup>

Nonetheless, it should not be overlooked that, by affirming the need to anchor antitrust enforcement to objective criteria, the rise of the Chicago school has been a response to limits and drawbacks of non-economic goals which have animated competition law since its inception. Moreover, the endemic uncertainty surrounding its notion has made fairness traditionally unsuitable to act as a stand-alone applicable legal standard.<sup>14</sup> The very same doubts are raised by some US scholars against the possibility of replacing the consumer welfare standard with the concept of competitive process.<sup>15</sup> Finally, the debate on the

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<sup>8</sup> See, e.g., Louis B. Schwartz, “Justice” and Other Non-Economic Goals of Antitrust, 127 University of Pennsylvania Law Review 1076 (1979); and John J. Flynn, *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy*, 125 University of Pennsylvania Law Review 1182 (1977).

<sup>9</sup> Eleanor M. Fox, *Modernization of Antitrust: A New Equilibrium*, 66 Cornell Law Review 1140 (1981).

<sup>10</sup> Kanter, *supra* note 2. See also Bedoya, *supra* note 6, 5, stating that “[w]hen antitrust was guided by fairness, these farmers’ families were part of a thriving middle class across rural America. After the shift to efficiency, their livelihoods began to disappear.”

<sup>11</sup> See also Anu Bradford, Adam S. Chilton, & Filippo Maria Lancieri, *The Chicago School’s Limited Influence on International Antitrust*, 87 University of Chicago Law Review 297 (2020), arguing that the influence of the Chicago School has been more limited outside of the U.S..

<sup>12</sup> Niamh Dunne, *Fairness and the Challenge of Making Markets Work Better*, 84 Modern Law Review 230, 236 (2021).

<sup>13</sup> Christian Ahlborn & Jorge Padilla, *From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law*, in Claus-Dieter Ehlermann & Mel Marquis (eds.), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart Publishing, 2008), 55, 61-62. See Vestager, *supra* note 4, stating that “[f]airness is what motivated us to take a look at the working conditions of the solo self-employed. ... And fairness is what we considered first in our design of the Temporary Crisis Framework - avoiding subsidy races while ensuring those most affected by the crisis can receive the support they need.”

<sup>14</sup> See, e.g., Dunne, *supra* note 12, 237; Maurits Dolmans & Wanjie Lin, *How to Avoid a Fairness Paradox in EU Competition Law*, in Damien Gerard, Assimakis Komninou, & Denis Waelbroeck (eds.), *Fairness in EU Competition Policy: Significance and implications*, GCLC Annual Conference Series, Bruylant (2020), 27-76; Francesco Ducci & Michael Trebilcock, *The Revival of Fairness Discourse in Competition Policy*, 64 The Antitrust Bulletin 79 (2019); Harri Kalimo & Klaudia Majcher, *The Concept of Fairness: Linking EU Competition and Data Protection Law in the Digital Marketplace*, 42 European Law Review 210 (2017).

<sup>15</sup> See Einer Elhauge, *Should The Competitive Process Test Replace The Consumer Welfare Standard?*, (2022) <https://www.promarket.org/2022/05/24/should-the-competitive-process-test-replace-the-consumer-welfare-standard/>; and Herbert Hovenkamp, *The Slogans and Goals of Antitrust Law*, (2022)

dichotomy between fairness and efficiency risks to fail in spotting the role of innovation in delivering consumer welfare gains, hence the need for competition policy to consider dynamic competition.<sup>16</sup>

If, as a matter of principle, at first glance fairness can be equated with considerations of distribution or justice, the existence of many different and sometimes contradictory definitions makes its content undefined and incomplete.<sup>17</sup> Despite its appealing features, fairness appears a subjective and vague moral concept, hence useless as a tool in decision-making. Behavioral economics has provided evidence suggesting that fairness motives affect the behavior of many people and can restrict the actions of profit-seeking firms, confirming at the same time, however, that notions of what is fair can vary among individuals.<sup>18</sup> As a result, the concept leaves it unclear as to which benchmark should be applied for measuring it, thus posing serious challenges to legal certainty, since it does not allow for predicting *ex ante* whether a practice will be sanctioned for having trespassed the unfairness threshold. Accordingly, policy makers have been invited to give no weight to fairness in choosing legal rules, but rather to assess policies entirely on the basis of their effects on individuals' well-being.<sup>19</sup>

As fairness has found its way through recent EU regulatory interventions, it is worth investigating whether a clear and enforceable definition has been provided (and, in this case, whether the content of fairness has been specified as a rule or as a standard) or whether vagueness and ambiguity associated with its meaning will be exploited to grant policy makers a convenient shortcut. Indeed, a goal that cannot be measured is irresistibly attractive to enforcers because it can mean anything they want it to.

This paper aims to demonstrate that the revival of fairness is merely functional, to provide policy makers with more room for intervention by relieving them of the burden of economic analysis, and to pursue the political goal of restoring what the US neo-Brandeis movement considers the original mission of antitrust law, namely to ensure the democratic distribution of power protecting “small dealers and worthy men.”<sup>20</sup> In such scenario, rather than to assess the anti-competitiveness of some practices, fairness is used to correct market outcomes.

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University of Pennsylvania, Institute for Law & Economics Research Paper No. 22-33, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4121866](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4121866).

<sup>16</sup> Nicolas Petit and David J. Teece, *Innovating Big Tech firms and competition policy: favoring dynamic over static competition*, 30 *Industrial and Corporate Change* 1168 (2021).

<sup>17</sup> See Bart J. Wilson, *Contra Private Fairness*, 71 *American Journal of Economics and Sociology* 407 (2012), arguing that the understanding and the use of the term fair in economics can best be described as muddled.

<sup>18</sup> Daniel Kahneman, Jack L. Knetsch, & Richard Thaler, *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 *The American Economic Review* 728 (1986). See also Ernst Fehr & Klaus M. Schmidt, *A Theory of Fairness, Competition, and Cooperation*, 114 *The Quarterly Journal of Economics* 817 (1999).

<sup>19</sup> Louis Kaplow & Steven Shavell, *Fairness versus Welfare*, Harvard University Press (2002).

<sup>20</sup> *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 323 (1897). See Bedoya, *supra* note 6, 2, arguing that “today, it is *axiomatic* that antitrust does *not* protect small business. And that the lodestar of antitrust is not fairness, but efficiency” (emphasis in original). See also Margrethe Vestager, *The road to a better digital future*, (2022), [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_22\\_5763](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_5763), welcoming the Digital Markets Act because it will provide the EU with more powers “to make sure large digital platforms do not squeeze out small businesses.”

Similar concerns have been, indeed, raised about the new policy statement recently released by the U.S. Federal Trade Commission (FTC) regarding the scope of the prohibition of unfair methods of competition under the Section 5 of the FTC Act.<sup>21</sup> The FTC points to the legislative record demonstrating that Section 5 has been enacted to protect “smaller, weaker business organizations from the oppressive and unfair competition of their more powerful rivals.”<sup>22</sup> Against the declared aim of “reactivating Section 5”<sup>23</sup>, Commissioner Wilson vigorously dissented complaining that, by preferring a “near-per se approach” that discounts or ignores both the business rationales underlying challenged conduct and the potential efficiencies that the conduct may generate, the policy statement reflects a “repudiation of the consumer welfare standard and the rule of reason” and resembles the work of an academic or a think tank fellow who “dreams of banning unpopular conduct and remaking the economy.”<sup>24</sup>

The paper is structured as follows. Section II describes how fairness represents the mantra of Commissioner Vestager’s political mandate. Section III examines how the notion of unfairness has been applied in EU antitrust caselaw. Section IV analyzes the use of fairness as a rationale for recent EU legislative initiatives in the digital economy. Section V illustrates that these initiatives do not provide a meaningful contribution to the application of fairness either as a standard or as a rule. Section VI concludes.

## II. The Vestager mandate: fairness as political signaling

As widely noted, in the EU fairness has emerged as a guiding principle of competition policy during Commissioner Vestager’s previous and current terms.<sup>25</sup> Making reference to fairness in numerous speeches, Vestager has characterized her political mandate by strongly advocating for fairness in the application of antitrust rules. However, rather than articulating it as a substantive standard for the antitrust enforcement, Vestager seems weaponized fairness as a mantra for mere political signaling.

Notably, discussing the role of competition in the digital age, Vestager held that “competition policy also reflects an idea of what society should be like”, that is “the idea

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<sup>21</sup> U.S. Federal Trade Commission, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, (2022), <https://www.ftc.gov/legal-library/browse/policy-statement-regarding-scope-unfair-methods-competition-under-section-5-federal-trade-commission>.

<sup>22</sup> *Ibid.*, footnotes 15, 18, and 21.

<sup>23</sup> Lina M. Khan, Rebecca Kelly Slaughter, Alvaro M. Bedoya, *On the Adoption of the Statement of Enforcement Policy Regarding Unfair Methods of Competition Under Section 5 of the FTC Act*, (2022) 1, <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-of-chair-khan-commissioners-slaughter-bedoya-on-policy-statement-regarding-section-5>.

<sup>24</sup> See Christine S. Wilson, *Dissenting Statement Regarding the Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act* (2022) 1, 2, and 3, <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-of-commissioner-wilson-on-policy-statement-regarding-section-5>, also arguing that “[t]he only crystal-clear aspect of the Policy Statement pertains to the process following invocation of an adjective: after labeling conduct “facially unfair,” the Commission plans to skip an in-depth examination of the conduct, its justifications, and its potential consequences.”

<sup>25</sup> See, e.g., Konstantinos Stylianou & Marios Iacovides, *The goals of EU competition law: a comprehensive empirical investigation*, 42 *Legal Studies* 620 (2022), reporting the different goals mentioned by EU Commissioners in their speeches during their terms; and Dunne, *supra* note 12, 238, noting that Vestager invoked fairness in 85 per cent of speeches in her first term in the office.

of a Europe that works fairly for everyone.”<sup>26</sup> Indeed, “when competition works, we end up with a market that treats people more fairly.”<sup>27</sup> Therefore, “fair markets are just what competition is about”<sup>28</sup> and “we all have a responsibility to help build a fairer society.”<sup>29</sup> According to her view, as the power of digital platforms has grown, “it’s become increasingly clear that we need something more, to keep that power in check, and to keep our digital world open and fair.”<sup>30</sup> The Europe envisaged by the founders of the Treaty of Rome is indeed “one that would bring prosperity and fairness, not just to a few, but to all Europeans.”<sup>31</sup> As a result, while in some speeches fairness appears mainly related to the need that competition give consumers the power to demand a “fair deal”<sup>32</sup> by ensuring that “their choices and preferences count”<sup>33</sup>, in others the responsibility to be fair also implies running business “in a way that is fair to your competitors, fair to your business partners.”<sup>34</sup>

However, the target of her message is apparently bigger and more political, and fairness seems invoked to moralize antitrust law.<sup>35</sup> By emphasizing the social side of competition law and its fundamental role in building a fair society, Vestager’s speeches are addressed to the whole “society” and to the “people”<sup>36</sup>: “People don’t just want to be told that open

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<sup>26</sup> Margrethe Vestager, *Fair markets in a digital world*, (2018) [https://wayback.archive-it.org/12090/20191129214609/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/fair-markets-digital-world\\_en](https://wayback.archive-it.org/12090/20191129214609/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/fair-markets-digital-world_en).

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> Margrethe Vestager, *Competition and fairness in a digital society*, (2018) <https://perma.cc/VF53-2ULV>.

<sup>30</sup> Margrethe Vestager, *Competition in a digital age*, (2021) [https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-digital-age\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-digital-age_en).

<sup>31</sup> Margrethe Vestager, *What is competition for?*, (2021) [https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-margrethe-vestager-danish-competition-and-consumer-authority-2021-competition-day-what\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-margrethe-vestager-danish-competition-and-consumer-authority-2021-competition-day-what_en).

<sup>32</sup> See, e.g., Margrethe Vestager, *Fairness and competition*, (2018) <https://perma.cc/XXC2-7P7J>; Margrethe Vestager, *Making the decisions that count for consumers*, (2018) <https://perma.cc/BU47-D95T>.

<sup>33</sup> Vestager, *supra* note 26.

<sup>34</sup> Margrethe Vestager, *A responsibility to be fair*, (2018) <https://perma.cc/AC36-B4KS>.

<sup>35</sup> Thibault Schrepel, *Antitrust Without Romance*, 13 New York University Journal of Law & Liberty 326 (2020). As noted by Dolmans and Lin, *supra* note 14, 38, fairness, “with its moral overtones, confers a rhetorical flourish and sense of intrinsic righteousness when used to describe an act or situation.” However, see Sandra Marco Colino, *The Antitrust F Word: Fairness Considerations in Competition Law*, 5 Journal of Business Law 329, 343 (2019), arguing that “[i]t makes little sense to defend a competition policy that develops with its back purposefully turned to the attainment of moral and social justice.” For a more balanced reading, see Johannes Laitenberger, *Fairness in EU competition law enforcement*, (2018) [https://ec.europa.eu/competition/speeches/text/sp2018\\_10\\_en.pdf](https://ec.europa.eu/competition/speeches/text/sp2018_10_en.pdf), arguing that “while ‘fairness’ is a guiding principle, it is not an instrument that competition enforcers can use off the shelf to go about their work in detail. In each and every case the Commission looks into, it must dig for evidence; conduct rigorous economic analysis; and check findings against the law and the guidance provided by the European Courts.”

<sup>36</sup> Margrethe Vestager, *Competition for a fairer society*, (2016) <https://eaccny.com/news/chapternews/eu-commissioner-margrethe-vestager-competition-for-a-fairer-society/>. See also Margrethe Vestager, *Antitrust for the digital age*, (2022) [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_22\\_5590](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_5590), arguing that the power large platforms wield “is not just an issue for fair competition; it is an issue for our very democracies” and that the most important goal of competition policy is making markets work for people; and Margrethe Vestager, *Keynote at the Making Markets Work for People conference*, (2022) [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_22\\_6445](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_6445), stating that “[t]he only policy goal for markets is to serve the people.” On the social rationale of competition law see also Damien Gerard,

markets make us better off. They want to know that they benefit everyone, not just the powerful few. And that is exactly what competition enforcement is about ... public authorities are here to defend the interests of individuals, not just to take care of big corporations. And that everyone, however rich or powerful, has to play by the rules.”<sup>37</sup>

### III. The EU antitrust enforcement: fairness as a standard

Despite its recent popularity and appeal in antitrust circles, fairness is not foreign to EU competition law. The Preamble to the Treaty on the Functioning of the European Union (TFEU) includes a reference to “fair competition”, and its antitrust provisions keep restrictive agreements or practices which, among other things, allow consumers a “fair share” of procompetitive benefits (Article 101) and prohibit any abuse of dominant position consisting in imposing “unfair purchase or selling prices” or other “unfair trading conditions” (Article 102), respectively. Moreover, according to Vestager, by preventing Member states from granting companies a selective advantage, state aid rules also reflect the notion of fairness within “the ordinary meaning of the word.”<sup>38</sup>

In general, these provisions endorse a standard-based approach to fairness specifying *ex post* the content of the law, rather than a rule-based approach introducing an *ex ante* more specific legal command.<sup>39</sup> Yet, since fairness is nowhere defined, the very meaning of the notion is disputed and the standard is hard to operationalize.

#### A. Unfair terms and excessive pricing

The notion of unfairness has traditionally been analyzed by the Court of Justice (CJEU) and the European Commission in only a few decisions. In some historic judgments and decisions, the injustice of the clauses under scrutiny was traced back to two facts: the circumstance that such clauses were not functional to the achievement of the purpose of the agreement and the fact that the clauses were unjustifiably restricting the freedom of

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*Fairness in EU Competition Policy: Significance and Implications*, 9 Journal of European Competition Law and Practice 211 (2018).

<sup>37</sup> See also Vestager, *supra* note 4, stating that “[w]e are on the side of the people, sometimes when no one else is.” In a similar vein, on the U.S. side, see Bedoya, *supra* note 6, 9, describing antitrust as a way to protect “people living paycheck to paycheck”: “For me, that’s what antitrust is about: your groceries, your prescriptions, your paycheck. I want to make sure the Commission is helping the people who need it the most.” See also Ariel Ezrachi & Maurice E. Stucke, *The Fight over Antitrust’s Soul*, 9 Journal of European Competition Law and Practice 1 (2018), arguing that “[u]ltimately the divide is over the soul of antitrust: Is antitrust solely about promoting some form of economic efficiency (or as cynics argue, the interests of the powerful who hide behind a narrow utilitarian approach) or the welfare of the powerless (the majority of citizens who feel increasingly disenfranchised by big government and big business)?” On a similar note, see Adi Ayal, *Fairness in Antitrust: Protecting the Strong from the Weak*, Hart (2016).

<sup>38</sup> Vestager, *supra* note 29. See Vestager’s reaction to the CJEU’s judgement annulling the Commission’s decision finding that Luxembourg granted selective tax advantages to Fiat (CJEU, 8 November 2022, Joined Cases C-885/19 P and C-898/19 P, *Fiat Chrysler Finance Europe v. Commission*, EU:C:2022:859), describing the final outcome as “a big loss for tax fairness” (<https://twitter.com/vestager/status/1589915517833412610?s=20&t=F8dryDXFFOqJloy8QsCMxA>).

<sup>39</sup> An extensive literature has been devoted to investigating the trade-offs between rules and standards: see, e.g., Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 Washington & Lee Law Review 49 (2007); Louis Kaplow, *Rules versus standards: An economic analysis*, 42 Duke Law Journal 557 (1992); Isaac Ehrlich & Richard A. Posner, *An economic analysis of legal rulemaking*, 3 The Journal of Legal Studies 257 (1974).

the parties.<sup>40</sup> The association between unfairness on the one hand and the absence of a functional relationship between the contractual clauses and the purpose of the contract on the other was also highlighted in *Tetra Pak II*<sup>41</sup> and in *Duales System Deutschland (DSD)*.<sup>42</sup> Moreover, it may be inferred from a reading of some of the Commission's other decisions that in some cases unfairness has been associated with opaque contractual conditions that have increased the weakness of the dominant firms' counterparties, who ended up being unable to understand the actual terms of the commercial offer in question.<sup>43</sup>

With regard to excessive pricing, in recent years, an increasing number of cases concerning the prices of medicines and the tariffs applied by collective management organisations have supported the view of a revival of the concept of "unfair prices."<sup>44</sup> Yet, instead of establishing the meaning of fairness, courts and competition authorities have leaned towards a rule-based approach developing alternative measures rooted in economic reasoning for identifying unfair prices.<sup>45</sup> Indeed, since *United Brands*, in order to evaluate the unfairness of a price the CJEU has focused on the reasonable relation to the economic value of the product.<sup>46</sup> Notably, a price may be unfair in itself (e.g., prices charged to customers which do not receive any product or service in return or prices set at a particularly high level because the dominant undertaking is not interested in selling the product or service in question but intends to pursue a different, anticompetitive, aim) or when compared to competing products. More recently, in *SABAM* the CJEU confirmed that the royalty rate requested by a collective society should be influenced by the

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<sup>40</sup> See, e.g., CJUE, 27 March 1974, Case C-127/73, *Belgische Radio en Televisie and Société belge des auteurs, compositeurs et éditeurs v. SV SABAM and NV Fonior*, EU:C:1974:25, para. 15, holding that an exploitative abuse may occur when "the fact that an undertaking entrusted with the exploitation of copyrights and occupying a dominant position ... imposes on its members obligations which are not absolutely necessary for the attainment of its object and which thus encroach unfairly upon a member's freedom to exercise his copyright."

<sup>41</sup> European Commission, 24 July 1991, Case IV/31.043, *Tetra Pak II*, paras. 105-108, (1992) OJ L 72/1.

<sup>42</sup> European Commission, 20 April 2001, Case COMP D3/34493, *DSD*, para. 112, (2001) OJ L 166/1; affirmed in GC, 24 May 2007, Case T-151/01, *DerGrünePunkt – Duales System Deutschland GmbH v. European Commission*, EU:T:2007:154 and CJEU, 16 July 2009, Case C-385/07 P, EU:C:2009:456.

<sup>43</sup> See European Commission, 20 June 2001, Case COMP/E-2/36.041/PO, *Michelin (Michelin II)*, paras. 220-221 and 223-224, (2002) OJ L143/1, arguing that a discount program was unfair because it "placed [Michelin's dealers] in a situation of uncertainty and insecurity," because "it is difficult to see how [Michelin's dealers] would of their own accord have opted to place themselves in such an unfavourable position in business terms," and because Michelin's retailers were not put in a position to carry out "a reliable evaluation of their cost prices and therefore [could not] freely determine their commercial strategy."

<sup>44</sup> Opinion of Advocate General Pitruzzella, 16 July 2020, Case C-372/19, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Weareone.World BVBA, Wecandance NV*, EU:C:2020:598, para. 21. See also Marco Botta, *Sanctioning unfair pricing under Art. 102(a) TFEU: yes, we can!*, 17 European Competition Journal 156 (2021). For an overview of the recent case law, see Giovanni Pitruzzella, *Recent CJEU case law on excessive pricing cases*, in *The Interaction of Competition Law and Sector Regulation: Emerging Trends at the National and EU Level* (Marco Botta, Giorgio Monti, and Pier Luigi Parcu, eds.), Elgar 2022, 169; and Margherita Colangelo, *Excessive pricing in pharmaceutical markets: Recent cases in Italy and in the EU*, *ibid.*, 210.

<sup>45</sup> Dolmans and Lin, *supra* note 14, 59-60. See also Botta, *supra* note 44, arguing that, since the imposition of excessive prices by a dominant firm directly harms the welfare of the consumers, an explanation of the resurgence of excessive pricing cases is linked to the role of consumer's welfare standard in EU competition policy.

<sup>46</sup> CJEU, 14 February 1978, Case C-27/76, *United Brands Company and United Brands Continental BV v. Commission of the European Communities*, EU:C:1978:22.



economic value of the copyright work.<sup>47</sup> Further, since *United Brands*, courts and antitrust authorities have struggled with applying the test set out by the CJEU to assess the unfairness of the price.<sup>48</sup> As acknowledged in *AKKA-LAA*, “there is no single adequate method” with which to evaluate unfair pricing cases.<sup>49</sup> Nonetheless, as argued by the Advocate General Wahl, it is only when no rational economic explanation (other than the mere capacity and willingness to use market power even when abusive) can be found for the high price applied by a dominant undertaking that that price may be qualified as abusive.<sup>50</sup>

## B. Margin squeeze

The fairness of pricing practice has also been investigated from the perspective of the margin squeeze strategy, which, under EU competition law, is a stand-alone abuse that undermines the condition of equality of opportunity between economic operators.<sup>51</sup> Notably, instead of refusing to supply, a vertical integrated dominant undertaking can charge a price for the product on the upstream market which, compared to the price it charges on the downstream market, does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis. Such a margin squeeze exists if the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services to end-users.<sup>52</sup> Accordingly, the unfair spread between the upstream price and the retail price can be evaluated as exclusionary when it squeezes rivals’ margins on the retail market undermining their ability to compete on equal terms. Therefore, the dominant player is required to leave its rivals a fair margin between wholesale and retail prices.<sup>53</sup>

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<sup>47</sup> CJEU, 25 November 2020, Case C-372/19, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Weareone.World BVBA, Wecandance NV*, EU:C:2020:959.

<sup>48</sup> *United Brands*, *supra* note 46, para. 252, holding that the questions to be determined are “whether the differences between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products.”

<sup>49</sup> CJEU, 14 September 2017, Case C-177/16, *Autortiesību un komunikēšanās konsultāciju aģentūra v. Latvijas Autoru apvienība v Konkurences padome*, EU:C:2017:689, para. 49.

<sup>50</sup> Opinion of Advocate General Wahl, 6 April 2017, Case C-177/16, EU:C:2017:286, para. 131.

<sup>51</sup> See European Commission, *Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, (2009) OJ C 45/7, para. 80; CJEU, 14 October 2010, Case C-280/08 P, *Deutsche Telekom AG v. European Commission*, EU:C:2010:603; CJEU, 17 February 2011, Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB*, EU:C:2011:83; CJEU, 10 July 2014, Case C-295/12 P, *Telefónica SA and Telefónica de España SAU v. European Commission*, EU:C:2014:2062; CJEU, 25 March 2021, Case C-165/19 P, *Slovak Telekom a.s. v. Commission*, EU:C:2021:239.

<sup>52</sup> However, in *Teliasonera* (*supra* note 51), the CJEU found that there can be an exclusionary abuse even where the margin level of input purchasers is positive (so called positive margin squeeze theory), being enough that rivals’ margins are insufficient, for instance because they must operate at artificially reduced levels of profitability.

<sup>53</sup> On the US side, rejecting margin squeeze as a stand-alone offense, the Supreme Court in *Pacific Bell Tel. Co. v. linkLine*, 555 U.S. 438 (2009) argued that it is nearly impossible for courts to determine the fairness of rivals’ margins and quoted *Town of Concord v. Boston Edison Co.*, 915 F. 2d 17, 25 (1<sup>st</sup> Cir. 1990) asking “how is a judge or jury to determine a ‘fair price?’ Is it the price charged by other suppliers of the primary product? None exist. Is it the price that competition ‘would have set’ were the primary level

### C. FRAND-encumbered SEPs

Another scenario in which the notion of fairness appears is represented by standard essential patents (SEPs) whose holders are subject to fair, reasonable, and non-discriminatory (FRAND) licensing obligations.<sup>54</sup>

Given the importance of standards for the modern global economy, the process of their development creates an opportunity for companies to engage in anticompetitive behavior, notably it gives rise to holdup problems involving the strategic use of patents. The claim is that SEPs confer market power because the standardization process leads to the exclusion of alternative technologies. As a consequence, SEP owners enjoy an *ex post* monopoly power that would enable them to charge excessively high royalty rates in their licensing agreements or constructively refuse to license their patents.

To address these concerns, standard-setting organizations (SSOs) typically require SEPs holders to submit FRAND commitments. The goal is to make SEPs available at a price equivalent to what patents would have been worth in the market prior to the time they were declared essential.

However, whether FRAND commitments can effectively prevent SEP owners from imposing excessive royalty obligations on licensees is a debated issue. This is due mainly to the unclear economic meaning of the FRAND acronym. In fact, there are no generally agreed-upon tests to determine whether a particular license does satisfy a FRAND commitment. Furthermore, there is also no consensus over its legal effects, notably as to whether FRAND commitments should imply a waiver of the general law of remedies (more precisely, injunctive relief and other extraordinary remedies). As a result, such broad uncertainty has caused an impressive wave of litigations worldwide over the last decades.

This has induced some SSOs and courts to adopt a rule-based approach providing a definition of fair/reasonable rate and developing methods for the valuation of FRAND royalties, while the CJEU in *Huawei*<sup>55</sup> endorsed a hybrid approach.<sup>56</sup> Indeed, instead of defining the meaning of FRAND (which remains left to a standard-based approach), it imposed a procedural framework for good faith SEP licensing negotiations identifying the steps that patent holders and implementers must follow in negotiating a FRAND royalty and using the threat of antitrust liability and patent enforcement as levers to steer parties towards a mutually agreeable royalty level. Nonetheless, none of these different approaches has proven to be effective in reducing uncertainty and litigations so far.

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not monopolized? How can the court determine this price without examining costs and demands, indeed without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years? Further, how is the court to decide the proper size of the price ‘gap?’ Must it be large enough for all independent competing firms to make a ‘living profit,’ no matter how inefficient they may be? . . . And how should the court respond when costs or demands change over time, as they inevitably will?”

<sup>54</sup> For an overview, see Oscar Borgogno & Giuseppe Colangelo, *Disentangling the FRAND Conundrum*, DEEP-IN Research Paper (2019), <https://ssrn.com/abstract=3498995>.

<sup>55</sup> CJEU, 16 July 2015, Case C-170/13, *Huawei Technologies Ltd. v. ZTE Corp.*, EU:C:2015:477.

<sup>56</sup> Nicolas Petit & Amandine Léonard, *FRAND Royalties: Relus v Standards?* (forthcoming) Chicago-Kent Journal of Intellectual Property.

## D. Abuse of economic dependence

A final attempt to investigate the fairness of terms and conditions may instead be made under the provisions of the abuse of economic dependence (also known as relative market power or superior bargaining power) that several EU Member States have adopted over the years to address the imbalance of bargaining power between business parties.<sup>57</sup> Notably, rules forbidding the abuse of economic dependence reflect the concerns about the asymmetry of economic power in business-to-business relationships, which is considered a potential source of unfair trading practices.

Although the abuse of economic dependence is not regulated at the European level, national legislations on this matter are authorized by Article 3(2) of the Regulation 1/2003 on the implementation of competition rules, which allows Member States to adopt and apply on their territory stricter national laws prohibiting or sanctioning unilateral conduct engaged in by undertakings.<sup>58</sup> Recital 8 of the Regulation refers specifically to national provisions which prohibit or impose sanctions on abusive behavior toward economically dependent undertakings.

However, also in the case of economic dependence, the unfairness of some practices is scrutinized only when certain economic requirements occur. Indeed, economic dependence is mainly the result of significant switching costs that may lock a party into a business relationship, not allowing it to find equivalent alternative solutions. Therefore, economic dependence is evaluated taking into account the amount of relationship-specific investment undertaken (*i.e.*, investments that a party may be required to undertake to support its trading relationship), which may expose weak parties to holdup, or the hypothesis in which the counterparty should be considered an unavoidable trading partner because of its exclusive control over an essential input.

For the sake of our analysis, it is worth noting that recent legislative initiatives signal a willingness to rely on the abuse of economic dependence to tackle digital platforms' conducts and their trading relationship with business users. In particular, in 2020 Belgium approved an amendment to its Code of Economic Law to insert a provision on the abuse of economic dependence<sup>59</sup>, justifying the novelty by making specific reference to the legislative gap concerning digital platforms. In 2021, alongside the new antitrust tool on undertakings of "paramount significance for competition across markets", the German legislator extended its economic dependence provision to firms acting as "intermediaries on multi-sided markets", insofar as companies are dependent on their intermediary services for accessing supply and sales markets in such a way that sufficient and reasonable alternatives do not exist.<sup>60</sup> Finally, in 2022 the Italian Annual Competition Law included a specific provision aimed at introducing a rebuttable presumption of economic dependence when an undertaking uses intermediation services provided by a

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<sup>57</sup> For an overview, see Giuseppe Colangelo, *The European Digital Markets Act and antitrust enforcement: a liaison dangereuse*, 47 *European Law Review* 597 (2022). See also Inge Graef, *Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence*, 38 *Yearbook of European Law* 448 (2019), suggesting giving a stronger role to economic dependence both within and outside EU competition law.

<sup>58</sup> Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L 1/1.

<sup>59</sup> Belgian Royal Decree of 31 July 2020 amending books I and IV of the Code of economic law as concerns the abuse of economic dependence, Article 4.

<sup>60</sup> GWB Digitalization Act, 18 January 2021, Section 20.

digital platform that plays a “key role” in reaching end users or suppliers, thanks also to network effects or availability of data.<sup>61</sup>

### E. Summary of the findings

Two main takeaways derive from this brief overview of the EU antitrust enforcement. First, despite some references in the TFEU, antitrust enforcers have traditionally been reluctant to engage with the unfairness of terms and conditions. The uncertainty around the notion and the boundaries of fairness makes it difficult to use it as an actionable standard for the evaluation of anticompetitive behavior. Second, if the recent case law is suggestive of a novel stance, such revival is pursued by anchoring the concept of fairness to specific economic values or to a detailed code of conduct (i.e., switching to a rule-based approach), rather than relying on a political or moral interpretation. Yet, traditional issues and concerns are still on the table. Disputes over the method of assessing excessive prices as well as the fair royalty in the SEPs scenario suggest that mere reference to “the ordinary meaning of the word” does not appear particularly useful.

Moreover, while fairness is explicitly mentioned in exploitative abuse cases, Article 102 TFEU includes no reference to fairness as a benchmark for exclusionary abuse cases. In this regard the CJEU in *Servizio Elettrico Nazionale* has confirmed the effects-based approach to the assessment of the abusive nature of practices arising from the recent European case law.<sup>62</sup> Notably, the CJEU definitively stated that competition law is not intended to protect the competitive structure of the market, but rather consumer welfare, which represents the ultimate goal of the antitrust intervention.<sup>63</sup> Accordingly, as previously argued in *Intel*, not every exclusionary effect is necessarily detrimental to competition<sup>64</sup>: competition on the merits may, by definition, lead to the departure from the market or the marginalization of competitors that are less efficient and so less attractive to consumers from the point of view of price, choice, quality or innovation.<sup>65</sup>

## IV. The EU competition policy in digital markets: fairness as a rule?

The overview of the EU antitrust enforcement shows that, despite the recent political appetite for fairness, authorities and courts struggle to operationalize it as a substantive standard. Nonetheless, Vestager’s political agenda permeates the legislative initiatives in the digital economy, which, for the European competition policy, mark a progressive shift

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<sup>61</sup> Italian Annual Competition Law, 5 August 2022, No. 118, Article 33.

<sup>62</sup> CJEU, 12 May 2022, Case C-377/20, *Servizio Elettrico Nazionale SpA v. Autorità Garante della Concorrenza e del Mercato*, EU:C:2022:379.

<sup>63</sup> *Ibid.*, para. 46.

<sup>64</sup> CJEU, 6 September 2017, Case C-413/14 P, *Intel v. Commission*, EU:C:2017:632, paras. 133-134. The same principle has been affirmed in discrimination (CJEU, 19 April 2018, C-525/16, *MEO v. Autoridade da Concorrência*, EU:C:2018:270) and margin squeeze cases (CJEU, 27 March 2012, Case C-209/10, *Post Danmark A/S v. Konkurrenserådet*, EU:C:2012:172).

<sup>65</sup> CJEU, *Intel*, *supra* note 64, para. 73. See Alfonso Lamadrid de Pablo, *Competition Law as Fairness*, 8 *Journal of European Competition Law & Practice* 147 (2017), arguing that the notion of merit-based competition implicitly carries in it a sense of fairness, understood as equality of opportunity. In a similar vein, Alberto Pera, *Fairness, competition on the merits and article 102*, 18 *European Competition Journal* 229 (2022).

from competition law towards regulation. Therefore, in terms of rulemaking approaches, specific rules, instead of a general standard, are chosen to enforce the legal command.

The common premise of these interventions revolves around the strategic role of some large online platforms which exercise an intermediation (or bottleneck) power vis-à-vis business users being unavoidable trading partners in a wide range of contexts. As a result, interventions are needed to ensure a level playing field and prevent unfair behavior to the detriment of business users.

### **A. Platform-to-business Regulation**

The first legislative initiative is represented by the Regulation on promoting fairness and transparency for business users of online intermediation services (P2B Regulation).<sup>66</sup> Its aim is to contribute to the proper functioning of the internal market by laying down rules to ensure that business users of online intermediation services and corporate website users in relation to online search engines are granted appropriate transparency, fairness, and effective redress possibilities.<sup>67</sup> Indeed, according to the P2B Regulation, online intermediation services can be “crucial” for the commercial success of undertakings who use such services to reach consumers, hence, given the increasing dependence of business users, they often have superior bargaining power, which enables them to behave unilaterally in a way that can be unfair and that can be harmful to the legitimate interests of their business users and also, indirectly, of consumers.<sup>68</sup>

However, even if the title of the P2B Regulation refers to fairness, its provisions are essentially designed for enhancing transparency, rather than forbidding or prescribing specific conducts. Nonetheless, it keeps open the possibility for further measures if its provisions prove to be insufficient to adequately address imbalances and unfair commercial practices persisting in the sector.<sup>69</sup>

A few months after the P2B Regulation, the Communication on ‘Shaping Europe’s digital future’ unveiled the scenario of a further legislative intervention.<sup>70</sup> Since certain online platforms, acting as “private gatekeepers to markets, customers and information”, may jeopardize the fairness and openness of markets because of their systemic role, and “competition policy alone cannot address all the systemic problems that may arise in the platform economy”, additional rules may be needed to ensure contestability, fairness, and innovation and the possibility of market entry.<sup>71</sup> Notably, the declared policy goal is to ensure “a level playing field for businesses”, which, in the digital age, “is more important than ever.”<sup>72</sup>

### **B. Digital Markets Act**

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<sup>66</sup> Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, [2019] OJ L 186/57.

<sup>67</sup> *Ibid.*, Article 1(1).

<sup>68</sup> *Ibid.*, Recital 2.

<sup>69</sup> *Ibid.*, Recital 49.

<sup>70</sup> European Commission, *Shaping Europe’s digital future*, COM(2020) 67 final.

<sup>71</sup> *Ibid.*, 8-9.

<sup>72</sup> *Ibid.*, 8.

Against this background, the European Commission advanced the proposal of the Digital Markets Act (DMA)<sup>73</sup>, the rules of which have the purpose of ensuring “contestability and fairness” for digital markets.<sup>74</sup>

In its view, the distinctive characteristics of digital services (*i.e.*, the presence of strong economies of scale, extreme indirect network effects, remarkable economies of scope due to the role of data as a critical input, and conglomerate effects, along with consumers’ behavioral biases and single-homing tendency) generate significant barriers to entry that confer on platforms a gatekeeping power.<sup>75</sup> This situation is considered likely to lead to “serious imbalances in bargaining power and, consequently, to unfair practices and conditions” for business users, as well as for end users of platform services provided by gatekeepers, to the detriment of prices, quality, “fair competition”, choice and innovation in the market.<sup>76</sup> Moreover, gatekeepers frequently play a dual role, being simultaneously operators for the marketplace and sellers of their own products and services in competition with rival sellers.<sup>77</sup> Therefore, rules are required to prevent gatekeepers from unfairly benefitting from such dual role, by imposing on them a special responsibility in ensuring a level playing field which *de facto* amounts to the introduction of a platform neutrality regime.<sup>78</sup>

It follows that, by and large, according to the DMA, market processes are often incapable of ensuring “fair economic outcomes” with regard to core platform services.<sup>79</sup> This apparently requires a rethinking of competition policy. Notably, competition law is deemed unfit to effectively address the challenges to the well-functioning of the market posed by the conduct of gatekeepers, which are not necessarily dominant in competition-law terms.<sup>80</sup> Indeed, the scope of antitrust rules is limited to certain instances of market power (*e.g.*, dominance on specific markets) and of anti-competitive behavior.<sup>81</sup> Further, its enforcement occurs *ex post* and requires an extensive investigation of often very complex facts on a case-by-case basis.<sup>82</sup>

It is, therefore, declared that the DMA aims at protecting a different legal interest from antitrust rules by pursuing an objective that is different from that of protecting undistorted competition on any given market, as defined in competition law terms, which is to ensure that markets where gatekeepers are present are and remain “contestable and fair”, independently from the actual, likely or presumed effects of the conduct of a given gatekeeper.<sup>83</sup> As a result, a regulatory intervention is introduced to complement traditional antitrust rules by imposing a set of *ex ante* obligations for online platforms designated as gatekeepers and relieving enforcers of responsibility for defining relevant markets, proving dominance, and measuring market effects.

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<sup>73</sup> Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), (2022) OJ L 265/1.

<sup>74</sup> *Ibid.*, Recital 7.

<sup>75</sup> *Ibid.*, Recital 2.

<sup>76</sup> *Ibid.*, Recitals 2 and 4.

<sup>77</sup> *Ibid.*, Recitals 46, 47, 51, 56, and 57.

<sup>78</sup> Colangelo, *supra* note 61. See also Oscar Borgogno & Giuseppe Colangelo, *Platform and Device Neutrality Regime: The New Competition Rulebook for App Stores?*, 67 *The Antitrust Bulletin* 451 (2022).

<sup>79</sup> DMA, *supra* note 73, Recital 5.

<sup>80</sup> *Ibid.*.

<sup>81</sup> *Ibid.*.

<sup>82</sup> *Ibid.*.

<sup>83</sup> *Ibid.*, Recital 11.

However, despite the proclaimed protection of a different legal interest from antitrust rules, there is no indication that the promotion of fairness and contestability differs from the substance and scope of competition law.<sup>84</sup> While the DMA proposal merely states that it aims at promoting fairness and contestability, providing neither a definition of them nor an indication as to how each obligation imposed on digital gatekeepers is intended to deliver against each objective, the final version fills a part of this gap, including a definition of these goals. Notably, with regard to contestability, DMA provisions are aimed at banning practices that are liable to increase barriers to entry or expansion in digital markets and at imposing obligations that tend to lower these barriers.<sup>85</sup> Therefore, contestability relates to the ability of undertakings to “effectively overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their products and services.”<sup>86</sup> With respect to fairness, the obligations imposed on gatekeepers aim at addressing the “imbalance between the rights and obligations of business users” that allows gatekeepers to obtain a “disproportionate advantage” by appropriating the benefits of market participants’ contributions.<sup>87</sup> Indeed, “[d]ue to their gateway position and superior bargaining power, it is possible that gatekeepers engage in behaviour that does not allow others to capture fully the benefits of their own contributions, and unilaterally set unbalanced conditions for the use of their core platform services or services provided together with, or in support of, their core platform services.”<sup>88</sup>

Nonetheless, the DMA also considers fairness “intertwined” with contestability<sup>89</sup>: “The lack of, or weak, contestability for a certain service can enable a gatekeeper to engage in unfair practices. Similarly, unfair practices by a gatekeeper can reduce the possibility for business users or others to contest the gatekeeper’s position.”<sup>90</sup> Therefore, an obligation

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<sup>84</sup> Pinar Akman, *Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act*, 47 *European Law Review* 85 (2022); Colangelo, *supra* note 61; Heike Schweitzer, *The art to make gatekeeper positions contestable and the challenge to know what is fair: A discussion of the Digital Markets Act Proposal*, 3 *ZEUP* 503 (2021).

<sup>85</sup> DMA, *supra* note 73, Recital 32. See also Article 12(5).

<sup>86</sup> *Ibid.*.

<sup>87</sup> *Ibid.*, Recital 33 and Article 12(5). See also Recital 62 providing some benchmarks that can serve as a yardstick to determine the fairness of general access conditions (*i.e.*, prices charged or conditions imposed for the same or similar services by other providers of software application stores; prices charged or conditions imposed by the provider of the software application store for different related or similar services or to different types of end users; prices charged or conditions imposed by the provider of the software application store for the same service in different geographic regions; prices charged or conditions imposed by the provider of the software application store for the same service the gatekeeper provides to itself).

<sup>88</sup> *Ibid.*. See also Monopolkommission, *Recommendations for an effective and efficient Digital Markets Act*, (2021) 15, <https://www.monopolkommission.de/en/reports/special-reports/special-reports-on-own-initiative/372-sr-82-dma.html>, recommending that the DMA objective of fairness should address the economic dependence of business users vis-à-vis a gatekeeper, and hence the asymmetric negotiating power favouring the gatekeeper. See also Gregory S. Crawford, Jacques Crémer, David Dinielli, Amelia Fletcher, Paul Heidhues, Monika Schnitzer, Fiona M. Scott Morton, & Katja Seim, *Fairness and Contestability in the Digital Markets Act*, Yale Digital Regulation Project, Policy Discussion Paper No. 3 (2021), 4-10, <https://tobin.yale.edu/sites/default/files/Digital%20Regulation%20Project%20Papers/Digital%20Regulation%20Project%20-%20Fairness%20and%20Contestability%20-%20Discussion%20Paper%20No%203.pdf>, supporting the interpretation of fairness with respect to surplus-sharing. According to the Authors, since the platform is a co-creation of the platform itself and its users, regulation should correct the distortion related to unfair outcomes when users are not rewarded for their contribution to the success of the platform.

<sup>89</sup> DMA, *supra* note 73, Recital 34.

<sup>90</sup> *Ibid.*. See also Recital 16 referring to “unfair practices weakening contestability.” See, instead, Monopolkommission, *supra* note 88, 16, suggesting to clearly distinguish the objectives pursued by the

may address both. However, unfortunately, the DMA does not list the obligations according to the specific goal they are supposed to pursue, hence it does not clarify which obligation is aimed at safeguarding contestability and/or promoting fairness. This happens despite the title of Chapter III, which refers to practices of gatekeepers that limit contestability “or” are unfair.<sup>91</sup>

The confusion between the two policy goals is confirmed in several passages of the text, which refer indiscriminately to contestability “and” fairness.<sup>92</sup>

In line with the definition of contestability and fairness provided in the DMA, the following table summarizes the obligations according to protected interests and principal beneficiaries.

**Table 1. Contestability and/or fairness in the DMA**

<b>DMA provision</b>	<b>Protected interest</b>	<b>Direct beneficiaries</b>
Art. 5(2): use of personal data	Contestability	End users
Art. 5(3): parity clause	Contestability and fairness	Business users
Art. 5(4): anti-steering	Contestability and fairness	Business users
Art. 5(5): access to third-party app	Contestability	End users
Art. 5(6): non-compliance	Contestability and fairness	Business and end users
Art. 5(7): use of ID functionalities	Contestability and fairness	Business and end users
Art. 5(8): access to core services conditional on each other	Contestability and fairness	Business and end users
Art. 5(9-10): transparency in advertising intermediation	Transparency	Business users
Art. 6(2): sherlocking	?	Business users
Art. 6(3): app un-installing	Contestability	End users
Art. 6(4): side-loading	Contestability	Business users
Art. 6(5): self-preferencing in ranking	Contestability	Business users
Art. 6(6): restriction to user switching	Contestability	End users
Art. 6(7): access to operating system and other features	Contestability	Business users
Art. 6(8): transparency in advertising intermediation	Transparency	Business users
Art. 6(9): data portability	Contestability	End users
Art. 6(10): access to data generated by users of business users	Contestability	Business users

DMA, which should be understood in such a way that only ecosystem-related questions of contestability are addressed by the DMA in the sense of problems of exclusion and fairness in the sense of exploitation problems with regard to business users.

<sup>91</sup> See also DMA, *supra* note 73, Articles 12(1, 3, 4, and 5), 19(1), 41(3 and 4), and Recitals 15, 69, 77, 79, 93.

<sup>92</sup> *Ibid.*, Articles 1(1 and 5), 18(2), 40(7), 53 (2 and 3), and Recitals 8, 11, 28, 31, 42, 45, 50, 58, 67, 73, 75, 97, 104, 106.



Art. 6(11): access to search data	Contestability	Business users
Art. 6(12): FRAND access	Fairness	Business users
Art. 6(13): conditions of termination	Contestability and fairness	Business and end users
Art. 7: interoperability of number-independent interpersonal communications	Contestability	Business users

The vast majority of the provisions aim at promoting contestability. Most of them are clearly described in this way, including explicit references to terms such as contestability, switching, multi-homing, and barriers to entry and expansion.<sup>93</sup> Two of the provisions instead introduce pure transparency obligations. Although they are described as functional to promote contestability and fairness<sup>94</sup>, they do not appear able to either affect the imbalance of bargaining power or lower barriers to entry and expansion.

An interesting case is provided by the ban on sherlocking (*i.e.*, the use of data of business users to compete against them), which apparently does not belong to any of the proclaimed goals. Indeed, even if the prohibition is justified to prevent gatekeepers from unfairly benefitting from their dual role<sup>95</sup>, the characterization of the conduct in question does not match the definition of fairness provided in Recital 33.

The goal of fairness appears almost always confused (*rectius*, “intertwined”) with contestability. Indeed, some provisions are justified, stating that, through the imposition of contractual terms and conditions, gatekeepers may limit inter-platform contestability.<sup>96</sup> Other provisions are deemed necessary to prevent reinforcing business users’ dependence on the core platform services of gatekeepers and to promote multi-homing.<sup>97</sup> Further, to ensure a “fair commercial environment” and protect the contestability of the digital sector, it is considered important to safeguard the right to raise concerns about unfair practices by gatekeepers.<sup>98</sup> Moreover, since certain services are “crucial” for business users, gatekeepers should not be allowed to leverage their position against their dependent business users, therefore “the freedom of the business user to choose alternative services” should be protected.<sup>99</sup> Finally, some practices should be prohibited because they give gatekeepers a means of capturing and locking-in new business users and end users, thus raising barriers to entry.<sup>100</sup>

As a result, the interface between contestability and fairness seems to affect the very notion of the latter. Further, while Recital 33 links the notion of fairness to the imbalance between rights and obligations of business users, some provisions also protect end users

<sup>93</sup> *Ibid.*, Recital 36 regarding Article 5(2), Recital 50 regarding Article 6(4), Recital 51 regarding Article 6(5), Recital 53 regarding Article 6(6), Recital 59 regarding Article 6(9), Recital 61 regarding Article 6(11), Recital 64 regarding Article 7.

<sup>94</sup> *Ibid.*, Recital 45 regarding Article 5(9-10) and Recital 58 regarding Article 6(8).

<sup>95</sup> *Ibid.*, Recital 46. See also European Commission, *Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices*, (2020) Press release, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_2077](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077).

<sup>96</sup> DMA, *supra* note 73, Recital 39 regarding Article 5(3).

<sup>97</sup> *Ibid.*, Recital 40 regarding Article 5(4).

<sup>98</sup> *Ibid.*, Recital 42 regarding Article 5(6).

<sup>99</sup> *Ibid.*, Recital 43 regarding Article 5(7).

<sup>100</sup> *Ibid.*, Recital 44 regarding Article 5(8).

against unfair practices.<sup>101</sup> Moreover, the concept seems interpreted in the DMA as embracing the fairness of both contractual terms and market outcomes. Indeed, in order to justify the need for an intervention that goes beyond traditional antitrust rules, it is stated that the market processes are often incapable of ensuring “fair economic outcomes” with regard to core platform services.<sup>102</sup> In other words, rather than being concerned by specific practices, the novel approach starts from an assessment that the outcome is unfair and regulates some practices to redress this.

Against this background, Article 6(12) represents the only provision clearly addressed at ensuring just fairness as defined in Recital 33. Indeed, describing the FRAND access obligation, Recital 62 includes the keywords of such definition stating that pricing or other general access conditions should be considered unfair if they lead to an “imbalance of rights and obligations” imposed on business users or confer a “disproportionate advantage” on the gatekeeper. However, in such circumstance fairness acts as a standard rather than as a rule and, to avoid the scenario already illustrated with regards to SEPs, Recital 62 provides with some benchmarks to determine the fairness of general access conditions.

A specific investigation is, instead, required by the provision under Article 5(3), which forbids parity clauses, also known as platform most-favored nation (MFN) agreements or across-platform parity agreements (APPAs). In particular, the provision bans both the wide and the narrow versions of such clauses, hence gatekeepers cannot restrict the ability of business users to offer products or services under more favorable conditions through other online intermediation services or through direct online sales channels. As maintained in the DMA, while the wide version of the parity clause may limit inter-platform contestability, its narrow dimension would unfairly restrain the freedom of business users to use direct online sales channels.<sup>103</sup>

However, if the common rationale is to protect weak business parties against the superior bargaining power exerted by digital intermediaries, the potential effects of wide and narrow MFNs differ significantly. Namely, while wide parity clauses are more likely to produce net anti-competitive effects, efficiency justifications related to the protection of platforms’ investments against the risk of free riding usually prevail in case of narrow parity clauses. Indeed, the DMA proposal only forbade wide MFNs as the European Commission has traditionally endorsed a case-by-case analysis of their effects under competition law.<sup>104</sup> The more lenient approach towards narrow MFNs has been confirmed by the new Guidelines on vertical restraints, where it is stated that narrow retail parity obligations are more likely to fulfil the conditions of Article 101(3) TFEU than across-platform retail parity obligations “primarily because their restrictive effects are generally less severe and therefore more likely to be outweighed by efficiencies” and “[m]oreover, the risk of free riding by sellers of goods or services via their direct sales

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<sup>101</sup> *Ibid.*, Articles 5(6), 5(8), and 6(13). See also Recital 2 referring to the impact on “the fairness of the commercial relationship between [gatekeepers] and their business users and end users.”

<sup>102</sup> *Ibid.*, Recital 5. See also Recital 42 referring to “fair commercial environment.”

<sup>103</sup> *Ibid.*, Recital 39.

<sup>104</sup> Commission Staff Working Document accompanying the *Report from the Commission to the Council and the European Parliament Final report on the E-commerce Sector Inquiry*, SWD(2017) 154 final. Conversely, in Germany the Federal Supreme Court (Bundesgerichtshof, 18 May 2021, Case KVR 54/20, *Booking.com*) has supported the Bundeskartellamt’s strict approach against narrow price parity clauses used.

channels may be higher, in particular because the seller incurs no platform commission costs on its direct sales.”<sup>105</sup>

Against this backdrop, by banning narrow MFNs, the final version of the DMA disregards these efficiency justifications. In terms of fairness, rather than just being concerned about gatekeepers’ disproportionate advantage, the focus should also be on the risk of free riding by business users which may lower the incentive to invest in the development of the platform.<sup>106</sup> Indeed, relying on the definition provided in Recital 33, this could be a situation where fairness may be even invoked by a gatekeeper against business users, because the former may be unable to fully capture the benefits of its own contribution.

### C. Data Act

The ambiguity about the notion of fairness also characterizes the proposal for a Data Act.<sup>107</sup>

On the one hand, the proposal pursues the goal of “fairness in the allocation of value from data” among actors in the data economy.<sup>108</sup> This concern stems from the observation that data value is concentrated in the hands of relatively few large companies, while the data produced by connected products or related services are an important input for aftermarket, ancillary and other services.<sup>109</sup> To this aim, the Data Act attempts to facilitate access to and the use of data by consumers and businesses, while preserving incentives to invest in ways of generating value through data. On the other hand, as increasing fairness of the data economy starts with ensuring fairness in the underpinning data processing services and infrastructures, the proposal aims for “fairer and more competitive markets” for data processing services, such as cloud computing services.<sup>110</sup>

Moreover, such objectives include operationalizing rules to ensure “fairness in data sharing contracts.”<sup>111</sup> Notably, to prevent the exploitation of contractual imbalances that hinder fair data access and use for micro, small or medium-sized enterprises (SMEs)<sup>112</sup>, Chapter IV of the Data Act addresses the unfairness of contractual terms in data sharing contracts between businesses in situations where a contractual term is unilaterally imposed by one party on a SME. This is justified by considering SMEs typically to be in a weaker bargaining position, without a meaningful ability to negotiate the conditions for access to data, thus often left with no other choice than to accept take-it-or-leave-it contractual terms.<sup>113</sup> Terms unilaterally imposed on SMEs are subject to an unfairness

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<sup>105</sup> European Commission, *Guidelines on vertical restraints*, [2022] OJ C 248/1, para. 374.

<sup>106</sup> *Ibid.*, para. 372.

<sup>107</sup> European Commission, *Proposal for a Regulation of the European Parliament and of the Council on harmonised rules on fair access and use of data (Data Act)*, COM(2022) 68 final. For a first comment, see Giuseppe Colangelo, *European Proposal for a Data Act – A First Assessment*, (2022) CERRE Assessment Paper, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4199565](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4199565).

<sup>108</sup> Data Act, *supra* note 107, Explanatory Memorandum, 2.

<sup>109</sup> *Ibid.*, Recital 6 and Explanatory Memorandum, 1.

<sup>110</sup> European Commission, *Inception Impact Assessment – Data Act*, Ares (2021) 3527151, 1, [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13045-Data-Act-amended-rules-on-the-legal-protection-of-databases\\_en,1-2](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13045-Data-Act-amended-rules-on-the-legal-protection-of-databases_en,1-2).

<sup>111</sup> Data Act, *supra* note 107, Explanatory Memorandum, 3.

<sup>112</sup> *Ibid.*, Recital 5.

<sup>113</sup> *Ibid.*, Recital 51 and Explanatory Memorandum, 13

test<sup>114</sup>, where a contractual term is considered unfair if it is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.<sup>115</sup> However, by revolving around vague and broad concepts such as gross deviation from good commercial practices or contrary to good faith and fair dealing, the unfairness test may generate uncertainty which could be heightened by potential different interpretations at a national level.

Therefore, rather than envisaging specific rules, the proposal of the Data Act opts for a standard-based approach and to provide a yardstick to interpret the unfairness test<sup>116</sup>, Article 13 includes a list of terms that are always considered unfair and a list of terms that are presumed to be unfair. If a contractual term is not included in these lists, the general unfairness provision applies. Moreover, model contractual terms recommended by the Commission may assist commercial parties in concluding contracts based on fair terms.

Some terms considered unfair by the Data Act are clearly inspired by the abuse of economic dependence.<sup>117</sup> However, given the suggested parallel between data dependence and economic dependence, the exclusion of SMEs from the scope of application of Article 13 is not justified.<sup>118</sup> Indeed, the abuse of economic dependence scrutinizes the unfairness of terms and conditions due to the imbalance of bargaining power between business parties, regardless of the size of the players involved. Moreover, in the case of data-sharing contracts, such imbalance would be generated by a data dependence, which may also emerge when SMEs exert control over certain data.

In summary, to achieve a greater balance in the distribution of the economic value from data among actors, the fairness of both contractual terms and market outcomes are addressed in the Data Act. The creation of a cross-sectoral governance framework for data access and use aims to ensure contractual fairness by rebalancing the bargaining power of SMEs vis-à-vis large players in data sharing contracts.<sup>119</sup> As a result, fairer and more competitive market outcomes shall be promoted in aftermarkets and in data processing services.<sup>120</sup>

#### **D. Summary of the findings**

The analysis of the recent EU legislative efforts inspired by the objective of promoting fairness in digital markets seems to confirm traditional doubts about the possibility of relying on it as a suitable tool for assessing the anti-competitiveness of conduct.

If fairness has proven to be unsuitable to serve as a substantive standard in the EU competition law enforcement, the shift towards a rule-based approach promoted by the competition policy in digital markets does not provide a significant improvement. Fairness still appears to represent an overarching and vague goal. Further, the envisaged

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<sup>114</sup> *Ibid.*, Recital 52

<sup>115</sup> *Ibid.*, Article 13(2).

<sup>116</sup> *Ibid.*, Recital 55.

<sup>117</sup> See, e.g., *ibid.*, Article 13(4)(e), according to which a contractual term is presumed unfair if its object or effect is to enable the party that unilaterally imposed the term to terminate the contract with unreasonably short notice, taking into consideration the reasonable possibilities of the other contracting party to switch to an alternative and comparable service and the financial detriment caused by such termination.

<sup>118</sup> Colangelo, *supra* note 107.

<sup>119</sup> European Commission, *supra* note 110, 2.

<sup>120</sup> *Ibid.*.

black and white rules do not plainly address fairness, which instead is still essentially tackled according to a standard-based approach. Moreover, the lack of clarity about its meaning and the boundaries of its scope remains a relevant and thorny issue.

Indeed, looking at the initiatives characterizing the EU competition policy in the digital economy, different concepts of fairness emerge. While in the P2B Regulation fairness has been *de facto* equated to transparency rules, in the DMA it has been defined as referring to the imbalance in bargaining power that prevents a fair share of value among all the players that contribute to the platform ecosystem. However, almost all the DMA obligations are addressed at promoting contestability. In some cases, fairness is at best intertwined with contestability. Further, the only provision clearly aimed at ensuring fairness as defined in the DMA relies on a standard-based approach. In a similar vein, sharing the argument of ensuring fairness in the allocation of value to achieve fair and more competitive markets, the proposal of the Data Act points to fairness as a standard introducing a contractual protection based merely on the size of the players (*i.e.*, SMEs) and providing with a yardstick to interpret the unfairness test.

## **V. Fairness as a blanket license for regulatory interventions: the risk of regulatory capture**

Alongside the apparent difficulties in operationalizing fairness as both a standard and a rule, the analysis has shown that an all-encompassing notion of fairness emerges, where the lines separating fairness in the process from the outcomes of competition are blurred.<sup>121</sup> After all, in her speeches Commissioner Vestager does not hide her dissatisfaction with current market outcomes, showing an inclination for evaluating the market structure as a proxy of fairness. Despite the efforts to describe efficiency and fairness as converging objectives for competition policy enforcers, she implicitly acknowledged the trade-off between these goals.<sup>122</sup> Notably, Vestager argued that “[i]t’s true that competition, by its very nature, involves winners and losers. But as long as the social market economy is working properly, the efficiency gains that accrue from this process can be fairly and justly shared across all stakeholders.” However, it is hard to deny the fundamental contradiction between defending efficient markets and promoting distributive justice, and reconcile her message with the CJEU’s well-established principle according to which an exclusionary effect does not necessarily undermine competition.<sup>123</sup> Indeed, rather than interpreting fairness as equality of initial opportunities that characterizes a process based on competition on the merits, Vestager explicitly referred to the fairness of market outcomes.

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<sup>121</sup> Dunne, *supra* note 12, 239. See Massimo Motta, *Competition Policy: Theory and Practice*, Cambridge University Press, 2004, 26, distinguishing between *ex ante* equity, which is consistent with competition policy implying equal initial opportunities of firms in the marketplace, and *ex post* equity representing equal outcomes of market competition.

<sup>122</sup> Vestager, *supra* note 4.

<sup>123</sup> CJEU, *supra* notes 62 and 64. See also the Opinion of Advocate General Rantos, 9 December 2021, Case C-377/20, *Servizio Elettrico Nazionale SpA v. Autorità Garante della Concorrenza e del Mercato*, EU:C:2021:998, para. 45, arguing that if any conduct having an exclusionary effect were automatically classed as anticompetitive, antitrust would become a means for protecting less capable, less efficient undertakings and would in no way protect the more meritorious undertakings, which can serve as a stimulus to a market’s competitiveness.

From this perspective, it would be more coherent to state that the reason why there is no clash between efficiency and fairness is because they perform different functions. While the former acts as a substantive standard for the antitrust enforcement, the latter is a mere aspiration and a useful mantra for political signaling.

It is not surprising that the revival of fairness in digital markets has been developed outside the competition law framework. Such policy choice implicitly acknowledges the impossibility of using fairness as an alternative standard to competition on the merits in antitrust law terms. As recently recalled by the CJEU, the ultimate goal of the antitrust intervention is represented by the protection of consumer welfare, rather than the competitive structure of the market, and the exclusion of as-efficient-competitors is key to triggering antitrust liability for competition foreclosure. Therefore, in order to pursue the political agenda of building a fairer society<sup>124</sup>, it is necessary to bypass competition law, arguing -as the DMA does- that the latter is unfit to address the new challenges posed by digital gatekeepers. Indeed, in the different setting of regulation, fairness could be invoked to justify more discretion, disregarding the economic analysis and the demonstration of the anticompetitive effects of conduct.

Against this background, the definition of fairness envisaged in the DMA (as protection against the asymmetric negotiating power of digital gatekeepers vis-à-vis business users to ensure an adequate sharing of the surplus) appears insufficient to provide the much-needed limits to its scope of application. Its particular flavor of distributive justice may, indeed, favor regulatory capture, justifying interventions which actually reflect rent-seeking strategies aimed at shielding some legacy players from the competition at the expense of consumers.

### **A. The case of press publishers**

This is apparently the case with some EU policy initiatives, such as the Directive on copyright in the Digital Single Market.<sup>125</sup> In line with the proclaimed purpose of achieving “a well-functioning and fair marketplace for copyright”<sup>126</sup>, the Directive grants to publishers a neighboring right for the reproduction and making available to the public of press publications in respect of online uses by information society service providers.<sup>127</sup> The new right aims to address the value gap dispute between digital platforms and news publishers, as the former are accused of capturing a huge share of the advertising revenue by free riding on the investments made in producing news content, hence taking advantage of the value created by the distribution of content that they do not produce and for which they do not bear the costs.<sup>128</sup> Notably, because of the reliance by publishers on some Big Techs for traffic (*i.e.*, Google and Facebook), the latter are deemed to exert substantial bargaining power which makes it difficult for press publishers to negotiate on an equal footing.<sup>129</sup> Accordingly, it has been considered necessary to provide a

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<sup>124</sup> Vestager, *supra* note 29.

<sup>125</sup> Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, [2019] OJ L 130/92.

<sup>126</sup> *Ibid.*, Recital 3.

<sup>127</sup> *Ibid.*, Article 15.

<sup>128</sup> See Giuseppe Colangelo, *Enforcing copyright through antitrust? The strange case of news publishers against digital platforms*, 10 *Journal of Antitrust Enforcement* 133 (2022).

<sup>129</sup> Directive 2019/790, *supra* note 125, Recitals 54 and 55. See also European Commission, *Impact assessment on the modernisation of EU copyright rules*, SWD(2016) 301 final, §5.3.1, arguing that the gap

harmonized legal protection to put publishers in a better negotiating position in their contractual relations with large online platforms.

However, the European reform has not been guided by an evidence-led approach. Indeed, there is no empirical evidence in support of the free riding narrative.<sup>130</sup> The European approach merely relies on evidence of the newspaper industry crisis, regardless of the lack of proof about the claim that digital infomediaries negatively impact on legacy publishers by displacing online traffic. Looking at the previous ancillary rights solutions at national level (*i.e.*, in Germany and Spain), empirical results show no evidence of a substitution effect, but rather demonstrate the existence of a market-expansion effect, therefore proving that online news aggregators complement newspaper websites and may benefit them in terms of increased traffic and more advertising revenue since they allow consumers to discover news outlets' content that they would not otherwise be aware of, and reduce search times, enabling readers to consume more news.<sup>131</sup>

## B. The case of network operators

In a similar vein, in the context of the digital transition and as part of the 2030 digital policy program<sup>132</sup>, European Institutions seem ready to deliver a further legislative initiative to make some large online platforms contribute to the cost of telecoms infrastructure.<sup>133</sup> Indeed, telecom operators claim that Internet traffic markets are unbalanced since, while a few large online companies generate a significant part of all telecom networks' traffic, they do not adequately contribute to the development of such networks<sup>134</sup>. As the argument goes, while network operators bear massive investments to

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in the current EU rules “further weakens the bargaining power of publishers in relation to large online service providers.”

<sup>130</sup> *Ibid.*. See also Lionel Bently, Martin Kretschmer, Tobias Dudenbostel, Maria Del Carmen Calatrava Moreno, & Alfred Radauer, *Strengthening the position of press publishers and authors and performers in the Copyright Directive*, (2017) Study commissioned by the European Parliament, [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL\\_STU\(2017\)596810\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU(2017)596810_EN.pdf).

<sup>131</sup> See, e.g., Susan Athey, Markus Mobius, & Jenő Pal, *The Impact of Aggregators on Internet News Consumption*, NBER Working Paper No. 28746 (2021), <http://www.nber.org/papers/w28746>; Joan Calzada & Ricard Gil, *What do News Aggregators Do?*, 39 *Marketing Science* 134 (2020); Joint Research Centre for the European Commission, *Online News Aggregation and Neighbouring Rights for News Publishers*, (2017) <https://www.asktheeu.org/en/request/4776/response/15356/attach/6/Doc1.pdf>.

<sup>132</sup> See European Parliament and Council of the European Union, Decision (EU) 2022/2481 establishing the Digital Decade Policy Programme 2030, [2022] OJ L 323/4; European Commission, *2030 Digital Compass: the European way for the Digital Decade*, COM/2021/118 final.

<sup>133</sup> See European Commission, *Exploratory Consultation - The future of the electronic communications sector and its infrastructure*, (2023) <https://digital-strategy.ec.europa.eu/en/consultations/future-electronic-communications-sector-and-its-infrastructure>. For a critical analysis, see Giuseppe Colangelo, *Fair share of network costs and regulatory myopia: learning from net neutrality mistakes*, (2023) ICLÉ working paper, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4452280](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4452280).

<sup>134</sup> Axon Partners Group Consulting, *Europe's internet ecosystem: socio-economic benefits of a fairer balance between tech giants and telecom operators*, (2022) Report prepared for the European Telecommunications Network Operators' Association (ETNO), <https://etno.eu/downloads/reports/europes%20internet%20ecosystem.%20socio-economic%20benefits%20of%20a%20fairer%20balance%20between%20tech%20giants%20and%20telecom%20operators%20by%20axon%20for%20etno.pdf>. See also Frontier Economics, *Estimating OTT traffic-related costs on European telecommunications networks*, (2022) A report for Deutsche Telekom, Orange, Telefonica, and Vodafone,

ensure connectivity, digital platforms free ride on the infrastructure that carries their services. Moreover, strong competition on the retail telecommunications markets and regulatory interventions on the wholesale level have contributed to a decline of profit margins for telcos' traditional retail revenue streams. Therefore, telecom operators argue that their costs of capital are higher than their returns of capital. Finally, network operators complain of not being in a position to negotiate fair terms with these platforms due to their strong market positions, asymmetric bargaining power, and the lack of a level regulatory playing field, hence a legislative intervention is requested to address such imbalance and ensure a fair share of network usage costs with large online content providers.<sup>135</sup>

Following this path, the EU Council has recently supported the view expressed in the European Declaration on Digital Rights and Principles for the Digital Decade that it is necessary to develop adequate frameworks so that “all market actors benefiting from the digital transformation assume their social responsibilities and make a fair and proportionate contribution to the costs of public goods, services and infrastructures, for the benefit of all Europeans.”<sup>136</sup>

However, the arguments advanced by telecom operators supporting the introduction of a network fee payment scheme that would amount to a sending-party-network-pays system are not new and they have been already rejected. As the Body of European Regulators for Electronic Communications (BEREC) noted ten years ago, such proposal overlooks the fact that it is the success of content providers that lies at the heart of increases in demand for broadband access.<sup>137</sup> Indeed, the request for the data flow stems not from content providers but from retail Internet access providers' own customers, from whom Internet service providers are already deriving revenues.<sup>138</sup> From this perspective, both sides of

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<https://www.telekom.com/resource/blob/1003588/384180d6e69de08dd368cb0a9feb646/dl-frontier-g4-ott-report-stc-data.pdf>.

<sup>135</sup> See also the appeal published by the CEOs of Telefónica, Deutsche Telekom, Vodafone and Orange, *United appeal of the four major European telecommunications companies*, (2022) <https://www.telekom.com/en/company/details/united-appeal-of-the-four-major-european-telecommunications-companies-646166>; and, more recently, the statement released by several CEOs, *CEO statement on the role of connectivity in addressing current EU challenges*, (2022) [https://etno.eu/downloads/news/ceo%20statement\\_sept.2022\\_26.9.pdf](https://etno.eu/downloads/news/ceo%20statement_sept.2022_26.9.pdf).

<sup>136</sup> European Commission, *European Declaration on Digital Rights and Principles for the Digital Decade*, COM(2022) 28 final, 3. See also European Council, *2030 policy programme 'Path to the Digital Decade': the Council adopts its position*, (2022) [https://www.consilium.europa.eu/en/press/press-releases/2022/05/11/programme-d-action-a-l-horizon-2030-la-voie-a-suivre-pour-la-decennie-numerique-le-conseil-adopte-sa-position/?utm\\_source=dsms-auto&utm\\_medium=email&utm\\_campaign=2030+policy+programme+%u2018Path+to+the+Digital+Decade%u2019%3a+the+Council+adopts+its+position](https://www.consilium.europa.eu/en/press/press-releases/2022/05/11/programme-d-action-a-l-horizon-2030-la-voie-a-suivre-pour-la-decennie-numerique-le-conseil-adopte-sa-position/?utm_source=dsms-auto&utm_medium=email&utm_campaign=2030+policy+programme+%u2018Path+to+the+Digital+Decade%u2019%3a+the+Council+adopts+its+position).

<sup>137</sup> Body of European Regulators for Electronic Communications, *BEREC's comments on the ETNO proposal for ITU/WCIT or similar initiatives along these lines*, BoR(12) 120 (2012), 3, <https://www.berec.europa.eu/en/document-categories/berec/others/berecs-comments-on-the-etno-proposal-for-ituwcit-or-similar-initiatives-along-these-lines>. See also Body of European Regulators for Electronic Communications, *Report on IP-Interconnection practices in the Context of Net Neutrality*, BoR (17) 184 (2017), <https://www.berec.europa.eu/en/document-categories/berec/reports/berec-report-on-ip-interconnection-practices-in-the-context-of-net-neutrality>, finding the Internet protocol interconnection market to be competitive.

<sup>138</sup> See also former Commissioner Neelie Kroes, *Adapt or die: What I would do if I ran a telecom company*, (2014) [https://ec.europa.eu/commission/presscorner/detail/de/SPEECH\\_14\\_647](https://ec.europa.eu/commission/presscorner/detail/de/SPEECH_14_647), arguing that the current situation of European telcos is not the fault of OTTs, given that the latter are the ones driving digital demand: “[EU homes] are demanding greater and greater bandwidth, faster and faster speeds, and are



the market (content providers and end users) already contribute to paying for Internet connectivity.<sup>139</sup> Further, “[t]his model has enabled a high level of innovation, growth in Internet connectivity, and the development of a vast array of content and applications, to the ultimate benefit of the end user.”<sup>140</sup>

Moreover, by charging Big Techs, the proposal may clash with the legal obligation of equal treatment that ensues from the Net Neutrality Regulation<sup>141</sup>, which has been justified under the opposite view that broadband providers are those who enjoy an endemic market power as terminating access monopolies, hence they should be precluded from discriminating against some traffic.<sup>142</sup> From this perspective it would be difficult to justify an intervention aimed at restoring fairness in the relationship between network operators and content providers on the premise that the former suffers from an asymmetry

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prepared to pay for it. But how many of them would do that, if there were no over the top services? If there were no Facebook, no YouTube, no Netflix, no Spotify?”

<sup>139</sup> Body of European Regulators for Electronic Communications, *supra* note 137, 4. Concerns about side effects on consumers of the possible introduction of a network infrastructure fee have been raised by the European consumer organisation BEUC, *Connectivity Infrastructure and the Open Internet*, (2022) [https://www.beuc.eu/sites/default/files/2022-09/BEUC-X-2022-096\\_Connectivity\\_Infrastructure-and-the\\_open\\_internet.pdf](https://www.beuc.eu/sites/default/files/2022-09/BEUC-X-2022-096_Connectivity_Infrastructure-and-the_open_internet.pdf). See also the open letter signed by 34 civil society organisations from 17 countries ([https://epicenter.works/sites/default/files/2022\\_06-nn-open\\_letter\\_cso\\_0.pdf](https://epicenter.works/sites/default/files/2022_06-nn-open_letter_cso_0.pdf)) arguing that nothing has changed that would merit a different response to the proposals that have been already discussed over the past ten years and that charging content and application providers for the use of internet infrastructure would undermine and conflict with core net neutrality protections. See also David Abecassis, Michael Kende, & Guniz Kama, *IP interconnection on the Internet: a European perspective for 2022*, (2022) <https://www.analysismason.com/consulting-redirect/reports/ip-interconnection-european-perspective-2022/>, finding no evidence for significant changes to the way interconnection works on the Internet and arguing that the approach advocated by proponents of network usage fees would involve complexity and regulatory costs, and risk being detrimental to consumers and businesses in Europe. Furthermore, see David Abecassis, Michael Kende, Shahan Osman, Ryan Spence, and Natalie Choi, *The Impact of Tech Companies’ Network Investment on the Economics of Broadband ISPs*, (2022) <https://www.analysismason.com/internet-content-application-providers-infrastructure-investment-2022/>, reporting significant investments undertaken by content and application providers in Internet infrastructure.

<sup>140</sup> Body of European Regulators for Electronic Communications, *supra* note 137, 4. In the next months, the BEREC is expected to assess again the impact of the potential sending party network pays principle on the Internet ecosystem: see Body of European Regulators for Electronic Communications, *Work Programme 2023*, BoR (22) 143 (2022), 26-27, <https://www.berec.europa.eu/en/document-categories/berec/berec-strategies-and-work-programmes/draft-berec-work-programme-2023>.

<sup>141</sup> Regulation (EU) 2015/2120 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 L 310/1.

<sup>142</sup> For a summary of the net neutrality debate, see Giuseppe Colangelo & Valerio Torti, *Offering zero-rated content in the shadow of net neutrality*, 5 Market and Competition Law Review 141 (2021). See also Tobias Kretschmer, *In Pursuit of Fairness? Infrastructure Investment in Digital Markets*, (2022) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4230863](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4230863), arguing that the policy solution at issue would fall short of the principles of efficient risk allocation, time consistency, and net neutrality, and might seem like arbitrarily targeting a group of (largely US-based) firms while letting (at least partly European) newcomers and/or smaller firms enjoy the same externalities at no cost. Indeed, the Author notes that a transfer from Big Techs to telecoms infrastructure providers would be equivalent to a tax on success since it would be based on *ex post* estimates of benefits from prior investments. Further, a direct and unrestricted transfer may not ensure sufficient infrastructure investment in the future as it is not conditional on future behavior, but rather it would serve as a windfall profit for past (imprudent) behavior that can finance any kind of activity by telecoms infrastructure providers. Finally, a fair distribution of investment financing would require all complementors to the basic service to pay a share of future investments proportional to the expected benefit from the investments to be undertaken.

of bargaining power without repealing the Net Neutrality Regulation whose rationale instead relies on the premise that content providers and consumers should be protected against the risk of unfair terms imposed by network operators.

The BEREC has recently confirmed its view releasing a preliminary assessment of such mechanism of direct compensation to telecom operators.<sup>143</sup> Changes in the traffic patterns do not modify the underlying assumptions regarding the sending party network pays charging regime, therefore “the 2012 conclusions are still valid”<sup>144</sup>: the sending party network pays model would provide ISPs “the ability to exploit the termination monopoly” and such a significant change could be of “significant harm to the internet ecosystem.”<sup>145</sup> Further, the BEREC questioned the assumption that an increase in traffic directly translates into higher costs, noting that the costs of Internet network upgrades necessary to handle an increased Internet traffic volume are very low compared to the total network costs and upgrades come with a significant increase of capacity.<sup>146</sup> Moreover, the BEREC found once again no evidence of free riding along the value chain<sup>147</sup>: the IP-interconnection ecosystem is still largely competitively driven and costs for Internet connectivity are typically covered and paid for by Internet service providers’ customers.

## VI. Concluding remarks

Like the Sirens’ music in the Odyssey, fairness exerts an irresistible allure. By evoking principles of equity and justice, fairness makes it hard for anyone to disagree with the pursuit of a goal that would make not just markets, but the whole society better off. However, as warned by Homer, the rhetoric may be deceptive and designed to distract from the proper path. We see such risk in the call for fairness as the guiding principle of the EU competition policy in digital markets.

The experience of EU competition law enforcement is illustrative of the difficulty in relying on fairness as an applicable standard and is explanatory of the traditional reluctance shown by enforcers. Indeed, the attempts made to evaluate the unfairness of prices have required courts and competition authorities to identify economic values and the struggle in finding an agreement on the economic definition of what is fair has generated a wave of litigations in the SEPs licensing scenario. Therefore, while seeking refuge in the ordinary meaning of the word is apparently useless, envisaging an economic proxy for fairness is particularly challenging.

Despite this background, the European Institutions have embarked on the mission of appointing fairness to be the driver of the policy in digital markets. A definition of fairness is only included in the DMA, nonetheless all the other initiatives (P2B Regulation, Data Act Proposal, Copyright Directive, and the ongoing discussion on the cost of telecoms infrastructure) are also moved to address the imbalance in bargaining power which does not guarantee an adequate sharing of the surplus among market participants. However, on closer inspection, the initiatives are not fully coherent with such definition. Fairness is often merged with contestability and it is invoked to protect a wide range of

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<sup>143</sup> Body of European Regulators for Electronic Communications, *BEREC preliminary assessment of the underlying assumptions of payments from large CAPs to ISPs*, BoR (22) 137 (2022).

<sup>144</sup> *Ibid.*, 4-5.

<sup>145</sup> *Ibid.*, 5.

<sup>146</sup> *Ibid.*, 7-8.

<sup>147</sup> *Ibid.*, 11-14.

stakeholders (business users, end users, rivals, or just small players), even when there is no evidence of any disproportionate advantage for large online companies. Moreover, rather than being translated in specific rules, fairness is still essentially promoted according to a standard-based approach.

The revival of fairness appears mainly motivated by the policy makers' goal of being free of any significant constraint. With a similar aim, the recent policy trend of US authorities also questions the role of efficiency in antitrust enforcement, calling for a "return to fairness."<sup>148</sup> In the name of fairness, practice, strategies, and contractual terms can be evaluated without incurring a burdensome economic analysis. And even the market structure can be questioned.

Fairness has the power to transform policy makers into judges, deciding what is right and who is worthy. A temptation that would require the sagacious foresight of Ulysses.

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<sup>148</sup> Bedoya, *supra* note 6, 8.