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IN FAIRNESS WE (*SHOULD NOT*) TRUST.

THE DUPLICITY OF THE EU COMPETITION POLICY MANTRA IN DIGITAL MARKETS.

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Summary

- ❖ The revival of fairness
- ❖ The manifold meanings of fairness
- ❖ Research question and main claim
- ❖ The EU antitrust enforcement: fairness as a standard?
- ❖ The EU competition policy in digital markets: fairness as a rule?
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The revival of fairness

- ❑ Fairness as guiding principle of competition policy for digital economy: the cure for bigness
 - Gatekeepers, market concentration, imbalance of bargaining power, dual role (conflict of interests), profit allocation: platform fairness and neutrality

- ❑ Pure efficiency-oriented approach v. holistic approach: the antitrust underenforcement argument and the never-ending debate over the soul of antitrust
 - Kanter: 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 the country.
 - Bedoya: if efficiency is so important in antitrust, then why doesn't that word appear anywhere in the antitrust statutes?
 - Vestager: competition policy also reflects an idea of what society should be like, that is the idea of a Europe that works fairly for everyone.
 - EU Commission (2023): the enforcement of competition rules can contribute to achieving objectives that go beyond consumer welfare, such as plurality in a democratic society

The manifold meanings of fairness

- The protection of: equality of opportunities, level playing field, economic justice, economic freedom, rivalry, competitive process, small firms.
- Irresistible allure v. endemic uncertainty: a subjective and vague moral concept or a useful tool in decision-making?
- How to measure fairness?
- Fairness as political signaling: the Vestager mandate

Research question and main claim

- Research question: as fairness has found its way through recent EU regulatory interventions, the paper investigates 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.
- Claim: the revival of fairness is functional to provide policy makers with more room for intervention by relieving them of the burden of economic analysis; fairness as a convenient shortcut to pursue the political goal of correcting market outcomes, rather than to assess the anti-competitiveness of some practices (see, e.g., DMA, Recital 5: market processes are often incapable of ensuring “fair economic outcomes”).

The EU antitrust enforcement: fairness as a standard?

- TFEU Preamble (“fair competition”), Article 101 (“fair share” of procompetitive benefits), Article 102 (“unfair purchase or selling prices” or other “unfair trading conditions”): no definition and a challenging stand-alone legal standard to operationalize

a. Unfair terms

Few and historic decisions: clauses not functional to the achievement of the purpose of the agreement and unjustifiably restrictive of parties’ freedom (e.g., *Belgische Radio en Televisie*, *Tetra Pak II*, *Duales System Deutschland*); opaque contractual conditions able to increase the weakness of the dominant firms’ counterparties (*Michelin II*).

b. Excessive pricing

Traditional *United Brands* + recent increasing number of cases concerning the prices of pharmaceuticals and the tariffs applied by collective management organisations (e.g., *SABAM*, *AKKA-LAA*, and domestic decisions on drugs prices): rule-based approach and alternative measures rooted in economic reasoning for identifying unfair prices.

c. Margin squeeze

The dominant vertical integrated player is required to leave its rivals a fair margin between wholesale and retail prices: the unfair spread between the upstream price and the retail price is exclusionary when it squeezes rivals' margins on the retail market undermining their ability to compete on equal terms (*Deutsche Telekom, Teliasonera, Telefónica, Slovak Telekom*).

d. FRAND-encumbered SEPs

Fair, reasonable, and non-discriminatory (FRAND) licensing commitments to prevent SEP owners from imposing excessive royalty obligations: an impressive wave of litigations because of the unclear economic and legal meaning of the FRAND acronym.

The *Huawei* hybrid approach: no definition of FRAND (which remains left to a standard-based approach), but a procedural framework for good faith SEP licensing negotiations identifying the steps that patent holders and implementers must follow in negotiating a FRAND royalty.

e. Abuse of economic dependence

National provisions on relative market power or superior bargaining power adopted to address the imbalance/asymmetry of bargaining power in B2B relationships.

The unfairness of some practices is scrutinized only when certain economic requirements occur: amount of relationship-specific investments, switching costs, lack of equivalent alternative solutions, lock-in.

- Summary of the findings
 - ❑ Despite some references in the TFEU, antitrust enforcers have traditionally been reluctant to engage with the unfairness of terms and conditions as 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.
 - ❑ 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 (a rule-based approach). 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.
 - ❑ Article 102 TFEU includes no reference to fairness as a benchmark for exclusionary abuse cases + CJEU case law: effects-based approach and not every exclusionary effect is necessarily detrimental to competition (see, e.g., *Intel* and *SEN*).

EU competition policy in digital markets: fairness as a rule?

Premises: some online platforms, acting as gatekeepers, may jeopardize the fairness and openness of markets because of their systemic role + competition law alone cannot address all the systemic problems that may arise in the platform economy = additional rules are needed to ensure contestability, fairness, and innovation and the possibility of market entry

a. Platform-to-business Regulation (Regulation on promoting *fairness* and transparency for business users of online intermediation services)

Provisions essentially designed for enhancing transparency, rather than forbidding or prescribing specific conducts.

b. DMA (Regulation on contestable and *fair* markets in the digital sector)

Definition of 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; “Due 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.”

Fairness is “intertwined” with contestability: “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.” Therefore, an obligation may address both.

Unfortunately, the DMA does not clarify which obligation is aimed at safeguarding contestability and/or promoting fairness. The confusion between the two policy goals is confirmed in several passages of the text, which refer indiscriminately to contestability “and” fairness.

The vast majority of the provisions aim at promoting contestability. The goal of fairness appears almost always confused (*rectius*, “intertwined”) with contestability. As a result, the interface between contestability and fairness seems to affect the very notion of the latter.

The only provision clearly aimed at ensuring fairness as defined in the DMA relies on a standard-based approach.

Table 1. Contestability and/or fairness in the DMA

| DMA provision | Protected interest | Direct beneficiaries |
|---|-----------------------------|-----------------------------|
| 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 |
| 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 |

c. **Data Act** (Regulation on harmonised rules on *fair* access and use of data)

Goals of “fairness in the allocation of value from data” among actors in the data economy and “fairer and more competitive markets” for data processing services + rules to ensure “fairness in data sharing contracts.”

Chapter IV: 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.

Unfairness test (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) + a list of terms that are always considered unfair and a list of terms that are presumed to be unfair.

- Summary of findings
 - ❑ 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.
 - ❑ Envisaged black and white rules do not plainly address fairness, which instead is still essentially tackled according to a standard-based approach.

Fairness as a blanket license for regulatory interventions: the risk of regulatory capture

The flavor of distributive justice to justify interventions actually reflecting rent-seeking strategies aimed at shielding some legacy players from the competition at the expense of consumers.

a. The case of press publishers

The Directive on copyright in the Digital Single Market aims at ensuring “a well-functioning and *fair* marketplace for copyright.” Article 15: a new neighboring right to address a presumed *value gap* between digital platforms and news publishers. However, no empirical evidence in support of the free riding narrative: no evidence of a substitution effect, but rather the existence of a market-expansion effect.

b. The case of network operators

The *fair share* debate: 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. A new alleged free riding: while network operators bear massive investments to ensure connectivity, digital platforms free ride on the infrastructure that carries their services. However, once again no evidence of free riding along the value chain as 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 (BEREC).

Concluding remarks

- All-encompassing notion of fairness: from fairness as equality of initial opportunities (fairness in the process based on competition on the merits) to the fairness of market outcomes (market structure as a proxy of fairness).
- Efficiency v. fairness: different functions as, 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.
- The revival of fairness appears mainly motivated by the policy makers' goal of being free of any significant constraint.