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Markets, Competition, and Fairness in the EU

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Abstract

Fairness considerations are increasingly evoked in economic policy and have become part of the current conversation on the objectives of competition policy. While fairness is undoubtedly an acceptable objective by itself and has its place in the history of economic regulation, its treatment in competition policy has been carefully conceptualized over the years with disciplined attempts to characterize the processes that are conducive to fair or unfair outcomes.
As fairness has found its way through recent EU regulatory interventions, the paper aims at analyzing the evolution of the concept of fairness in the EU competition policy.

Keywords: Competition policy; Digital platforms; Fairness; Efficiency

JEL codes: K20, K21, L40, L50

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1. Competition, market power, and fairness: an uneasy connection

Fairness considerations are increasingly evoked in economic policy and have become part of the current conversation on the objectives of competition policy. The renewed policy relevance can be traced back to 2016 when a policy brief published by the White House Council of Economic Advisors in the United States raised the alarm about a decrease in the level of dynamism in the US economy. This decline was linked to high levels of concentration in the economy, high margins for the largest firms and lower entrepreneurial activity.[1] The brief advocated for instilling more competition in markets in order to redress the economic harm inflicted on small businesses and consumers from the lack of opportunities and excessive concentration of rents.

A vocal intellectual movement pushing for stricter competition policy enforcement as a means to increase economic fairness, both in terms of opportunities and revenues, developed in the United States in subsequent years.[2] In Europe, over the same period, the disruptive effect of very large and mostly non-European digital platforms on traditional businesses similarly generated discontent against the seemingly unfettered economic power of very large digital players. The adoption of the Treaty on the Functioning of the European Union (TFEU) in 2007 had already explicitly stated a social dimension in its objective to create a highly competitive 'social market economy'. The emergence of the Environmental, Social, and Corporate Governance (ESG) movement that grew in importance in subsequent years contributed to the sentiment that market intervention had to be

[1] Council of Economic Advisors, *Benefits of Competition and Indicators of Market Power*, (2016) https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf.

[2] See the work of the Stigler Center for the Study of the Economy and the State at Chicago Booth School of Business. Proponents of this approach include Columbia Law School Professor Tim Wu and Lina Khan who gained prominent positions in the Biden administration.

put at the service of a wide range of societal goals.[3] This set the stage for an inclusion of fairness as a vague but actionable policy objective for market regulation and competition policy.

While fairness is undoubtedly an acceptable objective by itself and has its place in the history of economic regulation, its treatment in competition policy has been carefully conceptualized over the years with disciplined attempts to characterize the processes that are conducive to fair or unfair outcomes. Since its onset, the stated objective of competition policy has been fair competitive markets as a remedy to the unfairness of monopoly privilege. In recent decades though, competitive markets have been mostly praised for their efficiency and their ability to deliver the most efficient production processes as well as the best products for the lowest cost. Vibrant competition also ensures that any benefits of superior efficiency are passed on to consumers in the form of lower prices and higher quality. In this way, not only is productive efficiency achieved but consumer welfare is maximized in competitive markets. In addition, contestability in competitive markets guarantees an equal opportunity for businesses. The stylized world of perfect competition produces fairness for both citizens and businesses as well as prosperity in the form of efficiency. Things get more complicated with the emergence of market power. When a company acquires the ability to operate independently in a market, this conceptual equivalence between competition, efficiency, and fairness is broken – and it is broken in ways that are not easy to characterize. A company with market power may be more or less efficient than its peers depending on the source of its market power. In all cases, a company with market power is able to retain more of the value

[3] Article 3(3) TFEU sets out a target of "a highly competitive social market economy aiming at full employment and social progress." Regarding ESG considerations in competition policy, see e.g. OECD, *Sustainability and Competition*, (2020) http://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf; and European Commission, *Young experts' views on the greening of competition policy*, Competition policy brief (2021) https://data.europa.eu/doi/10.2763/958478.

it produces via higher prices. What this means for fairness is not clear when the company has achieved superior status by merit alone.

Proponents of including fairness as a guiding policy principle have sparked a vibrant debate on the original intention of antitrust legislation in the U.S. further sustained by the fact that there are enough judicial and congressional records to defend a variety of opinions about the nature of those original goals.[4] Since the 1980's the predominant approach has been to be wary of competition policy decisions impairing efficient production. Intervention has clamped down on conduct that appears to deviate from competition on the merits with a tolerance for value enhancing conduct that might hurt competitors.[5] This approach was successfully promoted by the free-market oriented Chicago School of economics during the 70s and the 80s that firmly established in the U.S. an unambiguous policy of non-intervention in the face of efficiency gains that improve value for consumers.[6] The policy came to be known as the implementation of a consumer welfare standard. While in the EU Article 102 TFEU mentions the imposition of 'unfair trading conditions' as an abuse, the elimination of less efficient competitors even in the face of market power has also not been considered unfair in recent decades but rather part of the legitimate competitive process.[7] The embrace of the consumer welfare standard was slower in Europe due to the subsistence of an

[4] For a discussion of the various different goals of US antitrust policy, see 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). Goals referring to fairness, equity, or justice are more commonly mentioned before the 1980s.

[5] In the U.S., Section 2 of the Sherman Act prohibiting monopolization was interpreted by the Supreme Court in *Trinko*, 540 U.S. 398, 407 (2014) such that "the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct."

[6] Robert Bork famously applied the Chicago School ideas to competition policy in *The Antitrust Paradox: A Policy at War with Itself*, New York:Basic Books (1978).

[7] 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*,* paras. 1 and 23: "it is not in itself illegal for an undertaking to be in a dominant position and such a dominant undertaking is entitled to compete on the merits; … intervention will target only pricing conduct capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking."

ordoliberal tradition of protecting the structure of the competitive market.[8] But after a series of Court defeats in the early 2000's European competition law adopted the more 'economic approach' prevalent in the U.S., albeit more prudently.[9]

For the last couple of decades, enforcement against 'unfair methods' of competition has been guided by well-established economic theories of harm that identify the conditions that generate market power and enable abusive conduct as well as the mechanisms by which these conducts produce anticompetitive outcomes harmful to consumers. Although European competition primary law does not foresee an objective justification defense for unilateral conduct, it is possible for an investigated company to allege as a defense that the conduct under scrutiny is efficient and creates superior value to consumers despite negative impact on competitors.[10] The prevailing approach so far in both the U.S. and EU has remained to abide by the consumer welfare standard whereby the conduct is permissible if it creates value that provides net positive effect for consumers, irrespective of its effect on less efficient competitors or on the redistribution across businesses or between businesses and consumers.[11]

Recently, the prevalence of the consumer welfare standard as the guiding principle for competition policy has been called into question, notably in the United States where some scholars and regulators as influential as the Assistant Attorney General Jonathan Kantor or the Chairman of the

[8] David Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus,* Oxford: Oxford University Press (1998).

[9] EU competition authorities showed a higher propensity to enforce competition policy compared to their US counterparts. Notable examples are the *GE/Honeywell* merger prohibited by the European Commission (3 July 2001, Case M.2220) or, more recently, the *Google Shopping* decision (European Commission, 27 June 2017, Case AT.39740*,* affirmed in General Court, 10 November 2021, Case T-612/17), which was the response to complaints regarding Google Search around 2010 that did not generate enforcement in the US.

[10] European Commission, *supra* note 7, para. 28

[11] Although paragraph 1 of the European Commission's Guidance mentions a special responsibility by the dominant company "not to allow its conduct to impair genuine undistorted competition", paragraph 19 restricts the scope of intervention to those instances where the conduct reduces consumer welfare.

Federal Trade Commission (FTC) Lina Khan have explicitly called for its demise.[12] The argument of this 'Neo Brandeisian' movement is that the application of this standard, together with the elaborate quantification exercises it demands, has led to underenforcement and the emergence of companies that are excessively large and powerful.[13] The root of the discussion is not technical but social and political with proponents calling for an adherence to what they believe is the original intent of antitrust law: the promotion of free competition and of the competition process as an expression of economic liberty. The 1945 Supreme Court *Alcoa* decision is commonly cited in reference to what they claim is the original goal of the Sherman Act:

> "Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other."[14]

The 'protection of competition' standard is currently being proposed in policy circles as a replacement of the consumer welfare standard. It focuses less on the value impact of a particular conduct and pays more attention to its impact on the nature of competition and on the opportunities available to competitors, which implicitly become the standard of fairness.[15]

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[12] 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; Lina M. Khan, *Remarks at Fordham Annual Conference on International Antitrust Law & Policy*, (2022) https://www.ftc.gov/system/files/ftc_gov/pdf/KhanRemarksFordhamAntitrust20220916.pdf. An excellent description of this discussion can be found in Tim Wu, *After Consumer Welfare, Now What? The 'Protection of Competition' Standard in Practice*, Competition Policy International (2018) https://ssrn.com/abstract=3249173.

[13] The name refers to Louis Brandeis, an early 20th century US Supreme Court Justice who believed monopolies were inherently harmful to the welfare of workers and business innovation. Some scholars have denounced the excessive degree of technicism of the more economic approach as generating a 'democratic deficit' in the implementation of the policy: See Harry First and Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 Fordham Law Review 2543 (2013).

[14] *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 429 (2nd Cir. 1945)

[15] Marshall Steinbaum and Maurice E. Stucke, *The Effective Competition Standard—A New Standard for Antitrust*, 86 University of Chicago Law Review 595 (2020).

In the EU, regulators seem more inclined to preserve the consumer welfare standard with competition policy decisions so far avoiding explicit deviations from this tradition despite an increase rhetoric around fairness and economic opportunities at political level.[16] The various recent political speeches that advocate for a renewed focus on fairness ultimately find this goal compatible with competition and the objective of efficiency.[17] New objectives of social equity and fairness seem so far to have little practical implications for competition policy as a whole. The exception can be found in digital markets where concerns about powerful digital platforms have led to a policy shift and a new goal to redress the unfairness and suppression of competition that are presumed to exist in markets dominated by large online platforms. The introduction of ex ante regulation in the digital sector in the form of the Digital Market Act (DMA) marks the first explicit deviation from the consumer welfare standard with the per se promotion of measures aiming to increase fairness and contestability and the elimination of the possibility of objective justification.[18]

Competition policy enforcement in the EU may further evolve in the digital space towards enforcement of fair value redistribution.[19] In addition, it may still adopt a more structural approach

[16] References to fairness in competition policy are more common in EU Commissioners' speeches than in actual Court decisions. See Konstantinos Stylianou and Marios Iacovides, *The goals of EU competition law: a comprehensive empirical investigation*, Legal Studies (forthcoming). Similarly, the approach taken by the UK Government, *New pro-competition regime for digital markets*, (2022) https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets/outcome/a-new-pro-competition-regime-for-digital-markets-government-response-to-consultation?msclkid=f5404be7cf8611ec833b8efe265aa90f#executive-summary, preserves the consumer welfare standard and the efficiency defense.

[17] Political speeches tend to present all socially desirable goals as achievable with the proper enforcement of competition policy. See 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: "Competition makes markets fairer, giving consumers lower prices, better products, more innovation. It makes sure that suppliers or customers aren't dependent on too few companies for the products or services – or the markets – that they need. It makes our economy more efficient, and our industry more competitive in Europe, and beyond."

[18] 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.

[19] Margrethe Vestager, *Fairness and Competition Policy*, (2022) https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_6067: "Protecting competition is about

while reconciling the protection of competitors with the consumer welfare standard using dynamic efficiency considerations - the argument that any loss of efficiency today will be more than compensated by consumer benefits in a fairer and more competitive future. Such considerations are already included in UK merger enforcement. [20]

Ultimately, whether changes occur in competition policy with a new objective of fairness will depend on the definition of what is fair and on the accepted mechanisms to produce such fairness. For the moment, there are no settled standards for either. In the following section we analyze the evolution of the concept of fairness in the EU competition policy. The EU presents an interesting case as it has had to reconcile competition law enforcement with its original mandate to ban unfair practices and has done this throughout its evolution towards a more economic approach. In Section 3, we discuss the revival of fairness as a goal in the digital space where it being pursued, together with contestability, as a complementary goal to competition policy. We will argue that the way fairness is being advocated still lacks concreteness and actionability and presents risks for policy makers and businesses unless it is made more precise. Section 4 discusses different approaches to the achievement of fairness and the concluding section discusses the implications of the current adoption of fairness goals for competition policy and its impact on the economy.

efficiency but not only … efficiency gains must be shared fairly and justly across stakeholders" "When efficiency and fairness are not aligned, there is a need for intervention."

[20] The loss of dynamic competition, i.e. the impairment of a potential future competitor, was one of the theories of harm in the UK Competition and Markets Authority (CMA) prohibition of Meta's acquisition of Giphy: see UK Competition and Markets Authority, *Facebook, Inc (now Meta Platforms, Inc) / Giphy, Inc merger inquiry,* (2022) https://www.gov.uk/cma-cases/facebook-inc-giphy-inc-merger-inquiry#final-report.

2. Fairness in EU antitrust law

Fairness is not foreign to EU competition law. The Preamble to the 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. Yet, since fairness is nowhere defined, the very meaning of the notion is disputed and the standard has been hard to operationalize.

The notion of unfairness has been analyzed by the Court of Justice (CJEU) and the European Commission in only a few decisions. In some historic judgments, the injustice of the clauses analyzed was traced back to two facts: the circumstance that such clauses were not material to the achievement of the purpose of the agreement and the fact that the clauses were unjustifiably restricting the freedom of the parties.[21] 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 further highlighted in *Tetra Pak II*[22] and in *Duales System Deutschland (DSD)*.[23] 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

[21] 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*, para. 15.
[22] European Commission, 24 July 1991, Case IV/31.043, *Tetra Pak II*, paras. 105-108.
[23] European Commission, 20 April 2001, Case COMP D3/34493, *DSD*, para. 112; affirmed in General Court, 24 May 2007, Case T-151/01, *DerGrünePunkt – Duales System DeutschlandGmbH v. European Commission*, and CJEU, 16 July 2009, Case C-385/07 P.

increased the weakness of the dominant firms' counterparties, who ended up being unable to understand the actual terms of the commercial offer in question.[24]

More recently, pricing strategies have also been deemed unfair. For example, under EU competition law, margin squeeze strategies, constitute a stand-alone abuse that undermine the condition of equality of opportunity between economic operators.[25] Notably, instead of refusing to supply, a vertical integrated dominant undertaking can charge a wholesale price for the upstream product which, compared to the retail price it charges downstream, does not allow even an equally efficient retail competitor to trade profitably on a lasting basis.[26] Accordingly, the unfair spread between the upstream price and the retail price can be evaluated for its exclusionary impact when it squeezes rivals' margins on the retail market undermining their ability to compete on equal terms.

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 revival of the concept of "unfair prices."[27] Yet, instead of establishing the meaning of fairness, courts and competition authorities have developed different methods rooted in economic reasoning for identifying unfair prices. *United Brands* established that an assessment of pricing fairness

[24] See European Commission, 20 June 2001, Case COMP/E-2/36.041/PO*, Michelin (Michelin II)*, paras. 220-221 and 223-224.
[25] See European Commission, *supra* note 7, para. 80; CJEU, 14 October 2010, Case C-280/08 P, *Deutsche Telekom AG v. European Commission*; CJEU, 17 February 2011, Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB*; CJEU, 10 July 2014, Case C-295/12 P, *Telefónica SA and Telefónica de España SAU v. European Commission*; CJEU, 25 March 2021, Case C-165/19 P, *Slovak Telekom a.s. v. Commission*. 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.
[26] However, in *Teliasonera, supra* note 25, 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.
[27] 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,* para. 21.

needed to relate the price of a product to its cost, signalling the profit margin as a relevant measure but leaving many unanswered questions about its assessment. [28] More recently, in *SABAM* the CJEU confirmed that the royalty rate requested by a collective society should be influenced by the economic value of the copyright work although in this case the economic value was linked to the value generated by the use of the copyrighted work [29] Further, since *United Brands*, courts and antitrust authorities have struggled with applying the criteria set out by the CJEU to assess the unfairness of the price. As acknowledged in *AKKA-LAA*, "there is no single adequate method" with which to evaluate unfair pricing cases.[30] The CJEU suggested methods involving the selection of a benchmark price found for similar markets or companies. 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.[31]

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

[28] CJEU, 14 February 1978, Case C-27/76, *United Brands Company and United Brands Continental BV v. Commission of the European Communities*.
[29] CJEU, 25 November 2020, Case C-372/19, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Weareone.World BVBA, Wecandance NV*.
[30] CJEU, 14 September 2017, Case C-177/16, *Autortiesību un komunicēšanās konsultāciju aģentūra v. Latvijas Autoru apvienība v Konkurences padome*, para. 49.
[31] Opinion of Advocate General Wahl, 6 April 2017, Case C-177/16, para. 131.

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 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. But what exactly that value should be is a subject of contention and 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 its Communication setting out the EU approach to standard essential patents, the European Commission did little more than reaffirm a desirable link between FRAND licensing terms and the discounted economic value of the patented technology.[32] 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 for patent violation and other extraordinary remedies), although the European Court of Justice did establish behavioral conditions whereby an entity can be declared to be an unwilling licensee and lose any protection from injunctions[33] Attempts to resolve FRAND disputes have oscillated between establishing valuation criteria and guaranteeing (or recreating) a fair negotiation process preventing both hold-ups and hold-outs. The difference is not trivial as the result of a hypothetical negotiation may be tolerant of asymmetries in information or bargaining power among parties while a valuation approach is meant to be uniquely based on the objective value of

[32] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee Setting out the EU approach to Standard Essential Patents COM(2017) 712 final 29.11.2017
[33] Case C-170/13 Huawei Technologies, EU:C:2015:477.

the technology. The broad uncertainty around the meaning of FRAND commitments has caused an impressive wave of litigations worldwide over the last decade.

A final attempt to investigate the fairness of terms and conditions may 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.[34]

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.[35] Recital 8 of the Regulation refers specifically to national provisions which prohibit or impose sanctions on abusive behavior toward economically dependent undertakings. Many of the legislations adopted under this provision have been motivated by the desire to address the power asymmetry between parties in the retail and food sectors where small producers often face draconian contract terms set by large consolidated distributors and where the lack of formal market dominance complicate the use of competition policy..[36] Solutions have ranged from sectoral

[34] For an overview, see Giuseppe Colangelo, *The European Digital Markets Act and antitrust enforcement: a liaison dangereuse,* 47 European Law Review *597* (2022).
[35] 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.
[36] The European Commission did explore the feasibility of establishing business to business unfair contract terms legislation as an alternative but in the end the issue was left for national legislation European Commission, *Study on the legal framework covering business-to-business unfair trading practices in the retail supply chain*, (2014) https://op.europa.eu/it/publication-detail/-/publication/c82dc8c6-ec15-11e5-8a81-01aa75ed71a1/language-en.

initiatives, mostly in the food distribution sector, to inclusion of general terms regarding economic dependence or asymmetric bargaining power in contract law or competition policy legislation. [37]

Sector specific legislation or code of conducts addressing fairness in contractual relations generally presumes the unfairness of the relationship between large consolidated trading partners and smaller counterparts and tends to include a black list of contract terms that are considered to impose excessive risk, uncertainty, and costs on smaller counterparties. One can recognize in such initiatives a precedent for what is currently emerging in the digital sector in the EU.

In competition law, on the other hand, the unfairness of some practices is scrutinized only when certain economic requirements occur. Indeed, the finding of 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) and of switching costs which, by not allowing weak parties to find equivalent alternative solution, may lock them in a business relationship and expose them 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. In this regard, pursuant to the interpretation provided in *Bronner*, the access to an input is not considered essential (namely, indispensable) if there are no technical, legal or even economic obstacles capable of making it impossible, or even unreasonably difficult, to duplicate it.[38] Furthermore, to demonstrate the lack of a realistic potential alternative, it would be necessary to

[37] See for example French Code of Commerce, art. L441-7; Italian law decree n. 1/2012, art. 62, as enacted by law no. 27/2012); UK Groceries Code Adjudicator Bill 2013.

[38] CJEU, 26 November 1998, Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*.

establish that it is not economically viable to create the resource on a scale comparable to that of the firm controlling the existing product or service.

In the next section, we illustrate how the revival of the fairness objective in EU digital policy, and notably in the Digital Market Act, borrows from some of the clean-cut normative solutions of contract law interventions but maintains the rationale of competition law, de facto possibly impacting the objective and direction of competition policy as a whole.

3. The renewed goal of fairness in digital markets

The disruption caused by the entry and expansion of large digital platforms in a variety of markets has greatly contributed to the revival of the discussion of fairness in competition policy. Complaints of unfairness and abuse by new digital businesses first happened in the area of digital media and e-commerce and took the form of legal action against counterfeit and copyright violations.[39] Restrictive clauses in commercial agreements between brand manufacturers and online retailers also sought to contain the unfettered expansion of online distribution.[40] Over time, many economic actors integrated the large platforms' digital ecosystems and claimed to be unfairly treated leading to a series of antitrust complaints as well as a number of sector inquiries.[41]

[39] Starting in 1999 with lawsuits against Napster (*A&M Records et al. v. Napster*, 239 F.3d 1004 (9th Cir. 2001) and against Grokster (*Metro-Goldwyn-Mayer Studios et al. v. Grokster*, 545 U.S. 913 (2005), the music industry sued extensively in the U.S. and lobbied in Europe for the remedial actions to copyright violations by online music files sharing services. Similarly, brand manufacturers sought to restrict online distribution of their products.

[40] See, e.g., *Guess* (17 December 2018, Case AT.40428), *Pioneer* (24 July 2018, Case AT.40182), *Asus* (24 July 2018, Case AT.40465).

[41] A non-exhaustive list includes: *Google Shopping* (*supra* note 9); *Google Android* (General Court, 14 September 2022, Case T-604/18); the case opened by the German competition authorities against Booking.com after a complaint by the national hotel association (Bundeskartellamt, 22 December 2015, Case B9-121/13, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-121-13.pdf?__blob=publicationFile&v=2); the investigation opened by the European Commission on Apple's App Store rules after a complaint by Spotify (European Commission, *Commission opens investigations into Apple's App Store rules*, (2020) Press release IP/20/1073, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073).

Regulators initiated investigations and studies to characterize the novel technologies, services, and business models.[42]

The complexity of the markets at stake stretched the limits of a conceptual framework that was not suited for markets and firms that operated in multi-sided exchanges, exhibited significant scale and scope synergies, and had the potential to scale fast. Regulators and experts introduced new concepts such as 'market tipping', 'self-preferencing', or data leveraging. The purpose was to identify market failures or at least market characteristics that constituted grounds for policy intervention as well as to characterize problematic behavior susceptible of being anti-competitive or unfair.

The limits of traditional competition enforcement were soon highlighted in a series of expert reports on digital markets commissioned by regulators.[43] Ongoing investigations struggled to define markets and demonstrate foreclosure or consumer harm in traditional ways. Decisions relied on debatable market definitions to establish dominance and inter-platform competition was generally ignored in the assessment of competitive dynamics.[44] The strict requirements of

[42] See, e.g., UK Competition and Markets Authority, *Online Platforms and Digital Advertising*, (2020) Market Study Report https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study; The Netherlands Authority for Consumers & Markets, *Market study into mobile app stores*, (2019) https://www.acm.nl/sites/default/files/documents/market-study-into-mobile-app-stores.pdf; Autorité de la concurrence, *Sector-specific investigation into online advertising* (2018) https://www.autoritedelaconcurrence.fr/en/press-release/6-march-2018-sector-specific-investigation-online-advertising; Bundeskartellamt, *Bundeskartellamt launches sector inquiry into market conditions in online advertising sector*, (2018) https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/01_02_2018_SU_Online_Werbung.html.

[43] See, e.g., Jacques Crémer, Yves-Alexandre de Montjoye, and Heike Schweitzer, *Competition policy for the digital era*, (2019) Report for the European Commission, https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf; Stigler Committee for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee (2019) https://research.chicagobooth.edu/stigler/events/single-events/antitrust-competition-conference/digital-platforms-committee; UK Digital Competition Expert Panel, *Unlocking digital competition*, (2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

[44] See *Google Android*, *supra* note 38; *Google Shopping, supra* note 9; Bundeskartellamt, 6 February 2019, Case B6-22/16, *Facebook.*

essentiality to justify remedial action were considered unnecessary for what constitutes effective access remedies.[45] In the presence of zero prices of services, assumptions about harm on quality and innovation became necessary.[46]

In sum, it is fair to say that competition authorities have encountered some difficulty to address allegations of exploitation and abuse with traditional competition policy tools. Yet, the increased size and clout of a relatively small number of large digital platforms has been real and the sense that their power over their users needs to be contained has political consensus. The catch-all principle of fairness has been increasingly used to address the set of grievances of platform business users that are difficult to run as traditional competition foreclosure cases.

Fairness considerations have gradually taken center stage in the implementation of competition policy in the digital space. They have also supported requests for broader intervention. Claims of unfairness underpin the forceful policy drive in recent years to redesign the relationship between publishers and online advertisement platforms such as Facebook (now Meta Platforms) and Google. Even more recently, the appeal to fairness underpins the request by telecommunications incumbents in the EU to be compensated by large online platforms for the usage of their communications network.[47] Despite these important conversations around fair value allocation,

[45] *Google Shopping, supra* note 9, para. 236: "[I]t cannot be inferred from paragraphs 48 and 49 of the judgment of 26 November 1998, Bronner, that the conditions to be met in order to establish that a refusal to supply is abusive must necessarily also apply when assessing the abusive nature of conduct which consists in supplying services or selling goods on conditions which are disadvantageous or on which there might be no purchaser. Such conduct may, in itself, constitute an independent form of abuse distinct from that of refusal to supply."

[46] *Google Android, supra* note 38, para. 115: "That is particularly so in the case of markets which, as in the present case, fall within the digital economy, where traditional parameters such as the price of products or services or the market share of the undertaking concerned may be less important than in traditional markets, compared to other variables such as innovation, access to data, multi-sidedness, user behaviour or network effects." The European Commission in the Android argued a decrease in quality and innovation as sources of consumer harm.

[47] See 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 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.

the impact of digital platforms on markets cannot be reduced to an issue of fairness as a mere redistribution issue. The preservation of entry and growth opportunities in the markets for digital services remains a priority concern for competition authorities and policy makers. For this reason, the European Commission always pursues the double objectives of fair competition and 'fair share' with its antitrust investigations. Yet, in digital markets, the Commission has shown a willingness to set up instruments to address business to business fairness issues upfront. These are the platform-to-business (P2B) dedicated legislative initiative in 2019, the current proposal for the Data Act, and the most recent Digital Market Act of 2022.

The first legislative initiative was the Regulation on promoting fairness and transparency for business users of online intermediation services (P2B Regulation).[48] 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.[49] 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, indirectly, also of consumers.[50]

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. The

[48] 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.
[49] Ibid., Article 1(1).
[50] Ibid., Recital 2.

P2B Regulation does not impose restrictions on contract terms. Nonetheless, the Regulation was widely perceived to be a first stage and 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.[51]

Indeed, a few months later, the Communication on 'Shaping Europe's digital future' unveiled the scenario of a further legislative intervention.[52] The approach was to ensure open markets and fair competition, but fairness was also stated as a goal in itself. 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.[53] Notably, the declared policy goal is to ensure "a level playing field for businesses", which in the digital age "is more important than ever."[54]

Against this background, the European Commission adopted the Digital Market Act [55], whose rules have the purpose to ensure "contestability and fairness" for digital markets.[56]

By 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 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 to platforms providing them a

[51] Ibid., Recital 49.
[52] European Commission, *Shaping Europe's digital future*, COM(2020) 67 final.
[53] Ibid., 8-9.
[54] Ibid., 8.
[55] DMA, *supra* note 18.
[56] Ibid., Recital 7.

gatekeeping power.[57] 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 core platform services provided by gatekeepers, to the detriment of prices, quality, "fair competition", choice and innovation in the digital sector".[58] 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.[59] Therefore, rules are required to prevent gatekeepers from unfairly benefitting from such dual role, by imposing over them a special responsibility in ensuring a level playing field which *de facto* amounts to the introduction of a platform neutrality regime.[60]

The DMA defines unfairness for the purpose of the regulation as an imbalance in the rights and obligations between business users and gatekeepers that provides a disproportionate advantage to the latter and does not allow other businesses to capture the full benefits of their contributions.[61] As regards to price and access conditions, the DMA considers unfair any condition that leads to a disadvantage for business users providing a similar service to the gatekeeper.[62] This definition of fairness is very expansive compared to how economic dependence has been treated in competition policy so far. First, it provides an interpretation of fairness that includes pure distributional issues and hence opens the door for remedies that reallocate rights and obligations and indirectly redistribute rents. Second, it equates fairness to a lack of 'disproportionate advantages' for the gatekeeper's services from contractual terms and, in what concerns pricing and access conditions,

[57] Ibid., Recital 2.
[58] Ibid., Recitals 2 and 4.
[59] Ibid., Recitals 46, 47, 51, 56, and 57.
[60] Colangelo, *supra* note 32. See also Oscar Borgogno and Giuseppe Colangelo, *Platform and Device Neutrality Regime: The New Competition Rulebook for App Stores?*, 67 The Antitrust Bulletin 451 (2022).
[61] DMA, *supra* note 18, Recital 33.
[62] Ibid., Recital 62.

the lack of any advantage at all. This definition of fairness seems closer to the notion of 'fair competition' but differs from the traditional competition policy interpretation in that it does not aim to protect against market power abuse alone but rather to actively promote equal competitive conditions.

The DMA presents the fairness objective as 'intertwined' with the contestability objective stating that fairness in the rights and obligations of gatekeepers and business users will protect contestability and contestability will prevent abusive terms. In doing this, the DMA maintains the traditional competition policy equivalence between competition and fair outcomes. But its intervention remit is very much enlarged by the expansive definition of fairness and the stated aim to resolve general contestability issues and not only those emanating from abusive conduct.[63] This wider policy remit can be considered a departure from an efficiency focused policy and a departure from the consumer welfare standard – at least in their commonly used static representation.

The enlarged remit of intervention does not come with a fully formed analytical toolkit for implementation. The regulation does not specify how to assess a 'disproportionate advantage' or how to calculate the 'full benefits' of a business contribution to the platform ecosystem. The remedial provisions of the DMA are applicable per se, deviating also here from current standards of competition policy. Once a platform has been designated as a gatekeeper, a designation that does not require the demonstration of dominance, the European Commission does not need to demonstrate the existence of an economic imbalance with business users or the presence of an asymmetric bargaining power for any of the provisions of the regulation to apply. In fact, the regulator does not need to determine whether it is solving for a contestability issue or a fairness

[63] See Recital 32 where contestability is defined as "the ability of undertakings to effectively overcome barriers to entry and expansion and challenge the gatekeeper on the merit", which includes structural barriers.

one. The different provisions do not map to any one specific objective so they can be thought of as fulfilling either one or both. For the most part, the DMA provisions grant competing business users access to platform resources used by the gatekeeper's own services, grant business users rights to the data they generate, and eliminate leveraging advantages of the gatekeeper platforms, for example by preventing data combination and restricting tying or self-preferencing practices.[64] These provisions are indeed consistent with the approach of eliminating advantages of the designated platforms vis a vis their business users and effectively redistribute access rights to the benefit of the latter. More so, one could argue that the totality of the provisions implicitly promotes the elimination of rights and advantages as well as platform neutrality as a means to achieve both fairness and contestability.

By comingling the goals of contestability and fairness but at the same time making these two objectives distinct, the Commission grants itself enormous discretion for the justification, specification, and implementation of the different DMA provisions in a clear departure of current competition policy standards where the harm is normally well identified, typically factually substantiated, and the objective of the remedial action clearly defined. This lack of precision as to the concrete objective of the provisions is sustainable due to the 'per se' nature of the mandated provisions of the DMA, which also bypasses the problem of the lack of an analytical framework to assess fairness violations and subsequent remedies.

The very same issue also emerges with regards to the recent proposal for a Data Act, which represents the latest effort of European policy makers to ensure the free flow of data and aims at fostering data sharing by unlocking machine-generated data and overcoming vendor lock-in.[65]

[64] DMA, *supra* note 18, Articles 5 and 6.
[65] 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.

Notably, the ambiguity about the notion of fairness also characterizes such proposal. Indeed, on the one hand, it pursues the goal of "fairness in the allocation of value from data" among actors in the data economy.[66] 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.[67]

Moreover, such objectives include operationalizing rules to ensure "fairness in data sharing contracts."[68] In particular, to prevent the exploitation of contractual imbalances that hinder fair data access and use for micro, small or medium-sized enterprises (SMEs), 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.[69] Some terms considered unfair by the Data Act are clearly inspired by the abuse of economic dependence. However, given the suggested parallel between data dependence and economic dependence, the exclusion of SMEs from the scope of application is not justified. 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.

[66] Ibid., Explanatory Memorandum, 2.
[67] European Commission, *Inception Impact Assessment – Data Act*, Ares (2021) 3527151, 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.
[68] Data Act, *supra* note 63, Explanatory Memorandum, 3.
[69] Ibid., Recital 51 and Explanatory Memorandum, 13.

The shortcuts adopted by the DMA or the Data Act are not intellectually satisfactory and the need for a better framework will continue to be felt, including by advocates of the fairness objective in competition policy and market regulation. Against this background, there is a vibrant conversation on the proper way to characterize and implement fairness solutions. The next sections summarized the different approaches considered and currently being implemented.

4. Remediation of unfairness: has it started and what does it look like?

There are two straightforward ways to approach fairness. One is to look for fairness in the process of allocation of rights and privileges and another is to focus on the fairness of the outcome.

John Rawls, the 20th century American political philosopher, could be said to be a defender of the latter.[70] His concept of "Justice as Fairness" relied on two principles: a liberty principle guaranteeing of set of equal basic liberties for everyone and the so called 'difference principle' that requires equal opportunities in competition for positions and privileges together with an admissibility of inequalities as long as they benefit the weakest members of society.[71] The difference principle hence does not promote full equity but inequality is only accepted to the extent that it provides benefits to those individuals with the least privileges. In addition, Rawls proclaimed the need to guarantee a 'fair value' of the political liberties meaning that these liberties must be meaningful and susceptible to be exercised. The 'fair value' consideration puts limits to the political freedom by setting for example a limit to the freedom to own the means of production.

[70] A discussion of different concepts of fairness in the competition policy context can be found in Niamh Dunne, *Fairness and the Challenge of Making Markets Work Better*, 84 Modern Law Review 230 (2021).
[71] David A. Reidy, *Rawls, John,* (2011) https://ssrn.com/abstract=1924902.

[72] Rawls' concept of fairness is anchored in the exercise of liberties and equal opportunities but contains the rationale for limits to economic rights and possible measures to guarantee an outcome where the liberties can be meaningfully exercised by all.

In contrast, another contemporaneous political philosopher, the libertarian Robert Nozick, defended a concept of liberty anchored in property rights and the right to act and dispose of one's possession as seen fit.[73] The principle is that an entitlement will be just if it arises from a just act. A society only needs to determine what are the just means for acquisition, transfer, or rectification to counteract the unjust taking of a just holding. A situation emanating from those accepted acquisition, transfer, or rectification acts is to be considered just and in no need of rectification or redistribution.

In Europe, German ordo-liberalism promoted the principle of individual freedom and the fight against illegitimate concentration of economic power and resulted in an interpretation of competition policy as the protection of the competitive process and the right to economic activity.[74] In fact, the adoption of the welfare standard and the more economic approach in the 2000s generated a discussion about whether this represented a deviation from the protection of the 'freedom to compete' and from the concern about accumulation of economic power.[75] The current discussions around fairness bring precisely those concerns back into the limelight.

The DMA and the political statements of recent years are evidence that a political decision has been taken in the EU that competition policy needs to tackle the issue of fairness, at least in the

[72] William A. Edmundson, *What Is the Argument for the Fair Value of Political Liberty?* 46 Social Theory and Practice 497 (2020).
[73] Robert Nozick, *Anarchy, State, and Utopia*, New York: Basic Books (1974).
[74] Wernard Möschel, *Competition Policy from an Ordo Point of View*, in A. Peacock and H. Willgerodt (eds.), *German Neo-Liberals and the Social Market Economy*, London: Palgrave Macmillan (1989), 142-159.
[75] Frank P. Maier-Rigaud, *On the Normative Foundations of Competition Law: Efficiency, Political Freedom and the Freedom to Compete*, in D. Zimmer (ed.), *The Goals of Competition Law*, Edward Elgar (2012), 132-168.

digital space. What seems to be emerging is a consensus that actively promoting contestability and the competitive process is an effective way to achieve a fair result.[76] Promoting contestability and the competitive process not only appeals to the ordoliberal tradition but combines the principle of equal opportunities and objectivity for businesses that is also dear to American liberal philosophers. Further, it rings true to classical economists that have long associated competition and fair outcomes for consumers. It largely avoids the controversy of explicit redistribution activities.

But what is a fair contestable market and how is it promoted? There is a difference between fighting abusive behavior to preserve market contestability, which is what competition policy does, and promoting contestability above and beyond what is delivered by the market with corrective interventions. Essential facility doctrines and utilities regulation are example of the latter with intervention consisting of mandated access to a facility, typically a monopolized facility, at a regulated price. Traditionally, such interventions have had the purpose to increase the market efficiency and lower market prices by instilling competition or have aimed at enabling new markets. Equity considerations were not at play. The question arises whether the active promotion of contestability for the purpose of achieving fairness, understood as the freedom to compete, leads to a lower threshold for intervention pursuing a structural rather than an efficiency objective.

A even wider discretion for regulatory intervention becomes a possibility if fairness is also understood as business users getting not only the opportunity to compete but also a "just reward for their contribution" as some scholars propose. The temptation is then to act beyond what is required for enabling entry and success but also to reallocate rights and opportunities to the benefit

[76] See, e.g., Jacques Crémer, Gregory S. Crawford, David Dinielli, Amelia Fletcher, Paul Heidhues, Monika Schnitzer, Fiona Scott Morton, and Katja Seim, *Fairness and Contestability in the Digital Markets Act,* (2021) https://ssrn.com/abstract=3923599.

of ecosystem participants. This concept of 'just rewards' goes beyond previous contract law interventions against unfairness that clamp down on clauses that are opaque, unjustifiable because disconnected from the economic activity, or heavily skewed against the interest of the weakest party. The approach is to consider that some of the profit obtained by large players is illegitimate.

Some scholars have proposed that profits emanating from 'moats', understood as barriers to entry or efficiencies from scale economies or integration, are not legitimate since not linked to the business' investment or innovation. Such moats and related profits may emanate from the economic characteristics inherent to the digital technologies and result from everyone's participation in the ecosystem. Rents may also result from unfair and abusive conduct enabled by the moats.[77] Therefore, these extraordinary rents should not be appropriated by the platform owner and the regulator is entitled to intervene to eliminate the advantage or ensure every participant of the ecosystem reaps their "fair share." The assumptions is that it should be easy to distinguish a share of profit that results from innovation efforts from those that are generated by 'moats' that may develop along the way. But the lack of a concrete analytical framework and the corresponding limiting principles open the way for a policy without clear boundaries leading at its extreme to a de facto platform neutrality and access regime.

The latest General Court's antitrust judgements in the digital space seem to indicate an openness to forceful intervention in that direction. In its *Google Shopping* judgement, the General Court established that, even though it did not rely on this fact to affirm the infringement decision, the precedent of a legal obligation of non-discrimination imposed on internet access providers was likely to imply similar non-discriminatory access obligations on Google in relation to its search

[77] Ibid.

service given its strong dominant position. The reason being that "a system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators."[78] The Court therefore implied that digital platforms could be subject to non-discriminatory access obligations for the sake of protecting equal opportunities and competition based on a finding of dominance alone and without any requirement for essentiality. This is in fact what the DMA, subsequently adopted, sets out to do. It is notable though, that the Court did affirm the European Commission finding that lack of equal treatment of third parties by Google on its search page represented a competition law violation under Art. 102 TFEU with no need to demonstrate the essentiality of the service at stake.

The judgement in *Google Android* is also notable for its emphasis of the problem created by the 'advantage' that Google derived from the scrutinized practices, in particular the pre-installation of its apps on Android phones.[79] The Commission maintained that the pre-installation Google's proprietary apps provided Google with an advantage "that had significant effects on competition by reducing, in particular, the choices available to consumers."[80] It asserted that the pre-installation practice raised barriers to entry, made it harder to compete requiring resources to overcome the advantage granted by the conduct, and reduced the incentive to compete and innovate.[81] The tying angle of the case was similarly constructed on the basis that the advantage generated by the practice resulted in a restriction of competition. Interestingly, the General Court considered that the question of whether competitors could theoretically overcome the advantage largely moot and

[78] *Google Shopping, supra* note 9, para. 180.
[79] *Google Android, supra* note 38.
[80] Ibid., para. 68.
[81] Ibid., para. 306.

relied on the market outcome and the fact that competitors had not managed to do so in practice to find that competition had been restricted.

The following paragraph of the *Google Android* Court Judgement affirming the European Commission decision is particularly notable:

> "In addition, contrary to Google's contention, it is not appropriate to find that the contested decision is not consistent with the case-law and with previous practice in taking decisions. It is not disputed in the contested decision that downloading can in principle offset the advantage that would be conferred by pre-installation... In the present case, however, for the reasons set out in the contested decision and examined above, it is apparent that even though general search or browser apps can readily be downloaded free of charge, they are not downloaded in practice, or in any event are downloaded for an insufficient proportion of the devices concerned."[82]

The judgement goes on to specify that the Commission infringement decision does not attempt to establish anticompetitive foreclosure but to establish "first, the existence of an advantage linked to the MADA pre-installation conditions that cannot be offset by competitors, and, second, the anticompetitive effects of that advantage."[83] This can hardly be interpreted as anything other than an explicit endorsement of objective to protect competition over any consideration of efficiency arguments or consumer welfare. One could also be forgiven the interpret this as the pursuit of a structural objective of supporting a multiplicity of players in the market.

The current consensus to intervene by redesigning the competition space is being supplemented by requests for purely redistributive fairness with a more direct reallocation of rents among the

[82] Ibid., para. 557.
[83] Ibid., para. 564.

trading parties. The most notorious one relates to the dispute between publishers and advertisement supported platforms such as Google and Meta. Publishers and media outlets have complained that they are being unfairly compensated for the usage and redistribution of their media content on platforms such as Google or Meta. The argument is that these large platforms use news publishers' content on their own surface to generate traffic for which they obtain user data and advertising revenues. Publishers are deprived from traffic going to their sites which lowers their revenues and prevents them from developing an efficient online advertisement business.[84] The political impact of those media related disputes has led to a series of initiatives around the globe setting mechanisms for a mandated negotiation for compensation by large online platforms (notably Google and Meta) to news publishers.[85]

In the EU, an ancillary copyright was even created for the posting of news online leading to rights for compensation upon licensing of those rights.[86] Notably, in line with the proclaimed purpose of achieving "a well-functioning and fair marketplace for copyright"[87], the Directive grants to publishers a neighbouring right for the reproduction and making available to the public of press publications in respect of online uses by information society service providers.

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[84] Australian Competition and Consumer Commission, *Lack of competition in ad tech affecting publishers, advertisers and consumers*, (2021) https://www.accc.gov.au/media-release/lack-of-competition-in-ad-tech-affecting-publishers-advertisers-and-consumers. See also The Cairncross Review, *A sustainable future for journalism*, (2019) https://www.gov.uk/government/publications/the-cairncross-review-a-sustainable-future-for-journalism.

[85] See Parliament of Australia, *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill*, (2021) https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6652; UK Competition and Market Authority, *CMA publishes code of conduct advice for platforms and publishers*, (2022) https://www.gov.uk/government/news/cma-publishes-code-of-conduct-advice-for-platforms-and-publishers; and the recent US Congress proposal for the *Journalism Competition and Preservation Act*, (2022) https://www.klobuchar.senate.gov/public/_cache/files/0/2/02edbc26-debb-41b4-8c19-da7090159e30/60AA7BF7A217968D95D8CE417B93C06C.sil22a02.pdf.

[86] Directive 2019/790 of the European Parliament and the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, Article 15.

[87] Ibid., Recital 3.

Digital platforms contest the economic reasoning underpinning these initiatives arguing that the posting and resharing of media content augments the audience size and drives rather than detracts traffic to publishers' sites.[88] This debate likely anticipates discussions around value flows within platform ecosystems that have so far been avoided but seem important for a proper case specific discussion on fairness and the fair allocation of value. Recently the telecommunications incumbents in the EU similarly presented a report claiming they are subject to unfair conditions due to an imbalance of power and should in fact be remunerated by very large platforms using their networks.[89] In both cases, the requested or actual intervention consists of mandating a negotiation while establishing the presumption that such compensation must happen. There is no guidance given or requested as to the economic principles leading to the determination of the compensation amount nor is there a full fledged analysis of the value contributions and value flows within the ecosystems at stake. [90]

The DMA in principle provides intellectual grounds for such a redistributive approach given its definition of fairness, which includes the right to obtain the 'full benefits' of one's contribution, but its current provisions provide access rights rather than compensation rights to business users. Intervention to redistribute value on the ground of fairness runs into the problem of a lack of concrete definitions and benchmark for "fair value" or "fair share." So far, the approach to fair prices and compensation in EU competition policy cases, which are supposed to link fair prices to

[88] Reuters, *Facebook owner Meta may remove news from platform if U.S. Congress passes media bill*, (6 December 2022) https://www.reuters.com/technology/facebook-owner-meta-remove-news-its-platform-if-congress-passes-media-bill-2022-12-05/.

[89] 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.

[90] Tobias Kretschmer, *In Pursuit of Fairness? Infrastructure Investment in Digital Markets,* (2022) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4230863

economic value, have relied on market based benchmarks and objective economic justifications.[91] It is therefore unclear to extent to which a pursuit of fairness by competition policy will lead to the type of rent redistribution some stakeholders are advocating for and, if so, whether decisions in that direction will be based on the implementation of economic criteria and in respect of the consumer welfare standard and the economic approach.

It is likely that national regulators will provide more clarity regarding the issue of fairness in the digital space. Past and current reform proposals are looking to address upfront the effect of the imbalance of power between large digital platforms and their business counterparties. Many of these reforms are taking place within competition policy law and it is expected that the standards of rigor and evidentiary requirement typical of that space will lead to some analytical progress on those issues. In particular, in 2020 Belgium approved an amendment to its Code of Economic Law to insert a provision on the abuse of economic dependence[92], 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.[93] 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

[91] *United Brands*, supra note 28; *AKKA-LAA, supra* note 30.
[92] 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.
[93] GWB Digitalization Act, 18 January 2021, Section 20.

intermediation services provided by a digital platform that plays a "key role" in reaching end users or suppliers, thanks also to network effects or availability of data.[94]

5. Concluding remarks. Regulating business models in the name of fairness?

Concerns about fairness are experiencing a revival in competition policy and market regulation. In the United States, it is embedded in a broader debate about the state of the economy and the possible risks of excessive economic concentration and uneven distribution of economic opportunities. In Europe, the appeal to more fairness has focused on the economic power of large digital platforms over their business users. In both places, the pursuit of fairness has been tied to a conversation about market contestability and economic opportunities of rival businesses.

In competition policy and digital market regulation space, the objective of fairness is comingled with that of promoting contestability (i.e., a traditional objective of competition policy) and has been in fact absorbed by it creating a new interpretation of competition policy rather than an explicit expansion of the policy's objectives. In fact, some scholars see the DMA as an instrument to support the traditional objective of maintaining healthy competitive process by updating tools and with no obvious intent of redistribution.[95] But others have alerted to the fact that it constitutes an active redesign of markets and business models that amounts to an effective redistribution of rents and appears to pursue concrete structural objectives beyond the natural remit of competition policy.[96] Recent antitrust investigations and the extent of the foreseen interventions in the DMA

[94] Italian Annual Competition Law, 5 August 2022, No. 118, Article 33.
[95] Heike Schweitzer, Heike, *The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair: A Discussion of the Digital Markets Act Proposal* (April 30, 2021). Forthcoming, 3 ZEuP 503 (2021).
[96] Pablo Ibáñez Colomo, *The Draft Digital Markets Act: A Legal and Institutional Analysis*, 12 Journal of European Competition Law & Practice 561 (2021).

indeed raise the question of whether the objective in the digital arena is to clamp down on abuse, more widely correct the competitive process, or achieve a particular structural outcome. The DMA for example aims to infuse competition in various layers of a platform ecosystem where it may not organically emerge, even at the possible expense of a gatekeeper platform's ability to differentiate and compete as an ecosystem. The ultimate objective appears to be a digital space comprising more players competing at more granular level on the platform (and with the platform) as opposed to a digital space characterized by inter-platform competition of integrated solutions. The direction of the Court in recent competition policy investigations and the provisions of the DMA also point to a possible *de facto* imposition of something akin to a platform neutrality policy.

This departure from traditional competition policy principles is emerging in the digital space without any equally articulated alternative concepts being proposed. The implementation process of the DMA is likely to contribute to the emergence of an analytical framework and will shed more light on the real intent of the legislation. Platforms will have to propose an implementation plan and stakeholders will be consulted on these plans. It is expected that third parties, and notably platform business users, will put their own version of implementation on the table, thereby providing their own vision of fairness and contestability. The extent to which their demands will have to be anchored in established concepts, or build on any analytical framework at all, as well as the inclination by the European Commission to accept these demands will provide further clarity about both the interpretation of fairness and contestability and the purpose of the legislation.

It also remains to be seen whether the departures from traditional competition policy standards in the digital agenda will impact competition policy more generally. Will there be a further spread of the various elements found in the DMA and in particular the lower threshold for intervention bypassing formal dominance requirements, the appeal to presumptions of harm, the comingling of

objectives, or the demise of the consumer welfare standard and related prominence of efficiency considerations? More importantly, will regulators be tempted to further regulate markets in the name of fairness, redesigning business models and markets? If that is indeed the case, are we likely to see such interventions in other markets or to pursue new objectives? How far are we willing to go to replace the market as the proper mechanisms to allocate rents, even jointly created rent?

The coming years will tell whether we are witnessing the beginning of a metamorphosis of competition policy and market regulation to account for social and equity issues or whether changes will be limited to the digital arena and possibly or even be just a temporary reaction to a technology and market disruption no one was prepared for.