

Fairness and Ambiguity in EU Competition Policy

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Abstract

The concept of fairness is not foreign to competition law, nor are considerations of fairness new to it. Persistent uncertainty regarding what constitutes fairness has, however, traditionally counseled against its application as a standalone legal standard. Indeed, antitrust enforcers often have been reluctant to define even what constitutes unfair terms and conditions. Nonetheless, amid a swell of accusations of undue corporate power and market concentration in the digital economy, debates about fairness have recently taken center stage in the policy debate—particularly in Europe, where several recent regulatory interventions have been touted as promoting fairness in digital markets. This paper argues that policymakers are attracted to “fairness” remedies precisely because the term’s meaning is so ambiguous, thus granting them more discretion and room for intervention.

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Introduction

In public debates over the emerging ubiquity of digital markets and platform-business models, the concept of “fairness” has been elevated into a guiding principle of competition-law enforcement. Dissatisfied with the ways that profits are allocated in digital-services markets and decrying what they see as undue corporate power and market concentration, interlocutors in such debates have invoked fairness as the cure for bigness.

This is particularly apparent in the European Union (EU), where several recent legislative initiatives have been adopted with the stated goal of promoting fairness in the digital economy. A central focus of such initiatives is the “gatekeeping” position enjoyed by a few large online platforms, which purportedly allows them to exert intermediation power over whether and under what terms the platform’s business users can reach their end users. As such, critics of so-called “Big Tech” assert, these platforms represent unavoidable trading partners who can exploit their superior bargaining power by imposing unfair contract terms and conditions. Moreover, since they often occupy a dual role—acting simultaneously as intermediaries and as competitors on their own platforms—they may have incentive to discriminate in favor of their own services or subsidiaries (so-called self-preferencing).¹

In response to the perceived risks generated by these conflicts of interest and imbalances of bargaining power, policymakers in various jurisdictions around the world have proposed or enacted provisions intended to ensure a level playing field and to neutralize the competitive advantages of large intermediary platforms. According to this line of reasoning, Big Tech firms must be compelled to treat both their rivals and their guests on the platform fairly.

Fairness has therefore become part of the larger debate on the role of competition law in the digital economy, with some militating for more aggressive intervention to ensure fairness and questioning whether the consumer welfare standard should remain the lodestar of antitrust law. Because it eschews many other potential goals of competition law, the argument goes, the consumer welfare standard systematically biases antitrust toward underenforcement,² with some even labeling it a “distraction” or a “catch phrase.”³ Rather than the efficiency-oriented approach favored by the Chicago School, the ostensibly holistic approach that has earned support among progressives would combine competition law with other fields of law in order to take into account such broad social interests and ethical goals as labor protection, wealth inequality, and environmental sustainability.⁴

¹ Giuseppe Colangelo, *Antitrust Unchained: The EU’s Case Against Self-Preferencing*, INTERNATIONAL CENTER FOR LAW & ECONOMICS (Oct. 7, 2022) ICLE White Paper, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4227839.

² Jonathan Kanter, *Remarks at New York City Bar Association’s Milton Handler Lecture*, U.S. JUSTICE DEPARTMENT (May 18, 2022) <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association>.

³ *Ibid.*

⁴ See, e.g., Amelia Miazad, *Prosocial Antitrust*, 73 HASTINGS LAW J. 1637 (2022); Dina I. Waked, *Antitrust as Public Interest Law: Redistribution, Equity and Social Justice*, 65 ANTITRUST BULL. 87 (Feb. 28, 2020); Ioannis Lianos, *Polycentric Competition Law*, 71

Considerations of fairness are not, however, new to competition law.⁵ The history of antitrust law in the United States, for example, demonstrates that U.S. lawmakers and jurists have long had a profound concern for economic liberty as a notion embedded in the nation's conception of freedom.⁶ After all, “[i]f efficiency is so important in antitrust, then why doesn't that word, ‘efficiency,’ appear anywhere in the antitrust statutes?”⁷ Indeed, antitrust has been described as a body of law designed to promote economic justice, fairness, and opportunity.⁸ Therefore, the purpose of antitrust law is to protect the competitive process in service of both prosperity and freedom. Rather than a myopic focus on promoting efficiency, antitrust economics should be concerned with ensuring that competition may flourish among a significant number of rivals in free and open markets.⁹ And at the heart of the competitive process is the guarantee that “everyone participating in the open market—consumers, farmers, workers, or anyone else” has the opportunity to choose freely among alternative offers.¹⁰

This is also evident in the EU, where competition law has always reflected various social, political, and ethical objectives, even as the so-called “more economic approach” was adopted in the late

CURR LEG PROBL 161 (Dec. 1, 2018); Lina M. Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and its Discontents*, 11 HARV. L. & POL'Y REV. 235 (2017). See also Margrethe Vestager, *Fairness and Competition Policy*, EUROPEAN COMMISSION (Oct. 10, 2022), https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_6067, arguing that properly functioning markets become an instrument of social change and progress as, e.g., “keeping markets open to smaller players and new entrants benefits female entrepreneurs and entrepreneurs with a migrant background.”

⁵ Eleanor M. Fox, *The Battle for the Soul of Antitrust*, 75 CAL. L. REV. 917 (May 1987).

⁶ Kanter, *supra* note 2; See also Alvaro M. Bedoya, *Returning to Fairness*, FEDERAL TRADE COMMISSION, 2 (Sep. 22, 2022), available at https://www.ftc.gov/system/files/ftc_gov/pdf/returning_to_fairness_prepared_remarks_commissioner_alvaro_bedoya.pdf, noting that “when Congress convened in 1890 to debate the Sherman Act, they did not talk about efficiency.”; See also Waked, *supra* note 4, framing antitrust as public-interest law and arguing that a sole focus on efficiency goals is inconsistent with the history of antitrust; For analysis of the conceptual links among competition, competition law, and democracy in the EU and the United States, see Elias Deutscher, *The Competition-Democracy Nexus Unpacked—Competition Law, Republican Liberty, and Democracy*, YEARBOOK OF EUROPEAN LAW (forthcoming), arguing that the idea of a competition-democracy nexus can only be explained through the republican conception of liberty as nondomination; In a similar vein, see Oisín Suttle, *The Puzzle of Competitive Fairness*, 21 PPE 190 (Mar. 7, 2022), distinguishing competitive fairness from equality of opportunity, sporting fairness (e.g., a level playing field), and economic efficiency, and arguing that competitive fairness is justified under the republican ideal of nondomination, namely the status of being a free agent protected from subjection to arbitrary interference.

⁷ Bedoya, *supra* note 6, 8.

⁸ See, e.g., Louis B. Schwartz, “Justice” and Other Non-Economic Goals of Antitrust, 127 UNIV PA LAW REV 1076 (1979); John J. Flynn, *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy*, 125 UNIV PA LAW REV 1182 (1977).

⁹ Eleanor M. Fox, *Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (August 1981).

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

1990s.¹¹ Moreover, the goal of ensuring equal opportunity in the marketplace by guaranteeing a level playing field among firms has been incorporated in EU antitrust law, reflecting the influence of the philosophy of Ordoliberalism and the Freiburg School of economic thought.¹² From this perspective, fairness would include the protection of economic freedom, rivalry, the competitive process, and small- and medium-size firms.¹³

Nonetheless, it should not be overlooked that the rise of the Chicago School approach, which affirms the need to anchor antitrust enforcement in objective criteria, was itself a response to the limitations and drawbacks of prioritizing various noneconomic goals in competition law. Precisely because “fairness” is so difficult to both define and delineate, it has traditionally proven unsuitable as a standalone legal standard.¹⁴ The same doubts are raised today by some U.S. scholars regarding the possibility of replacing the consumer welfare standard with what has been called the “competitive process test.”¹⁵

Like considerations of distribution or justice, debates about fairness are inevitably bedeviled by the existence of many differing and sometimes contradictory definitions, rendering the term’s content undefined and incomplete.¹⁶ Despite its many appealing features in the abstract, fairness is a subjective and vague moral concept and, hence, essentially useless as a decision-making tool. Behavioral economics has provided evidence that fairness motives do affect many people’s behavior and can restrict the actions of profit-seeking firms, while simultaneously confirming that notions of fairness

¹¹ See Anu Bradford, Adam S. Chilton, & Filippo Maria Lancieri, *The Chicago School’s Limited Influence on International Antitrust*, 87 U CHI L REV 297 (2020), arguing that the influence of the Chicago School has been more limited outside the United States.

¹² Niamh Dunne, *Fairness and the Challenge of Making Markets Work Better*, 84 MOD LAW REV 230, 236 (March 2021).

¹³ Christian Ahlborn & Jorge Padilla, *From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct Under EC Competition Law*, in CLAUS-DIETER EHLERMANN & MEL MARQUIS (eds.), EUROPEAN COMPETITION LAW ANNUAL 2007: A REFORMED APPROACH TO ARTICLE 82 EC (Hart Publishing, 2008), 55, 61-62; See also Vestager, *supra* note 4, stating that “[f]airness is what motivated us to take a look at the working conditions of the solo self-employed. ... And fairness is what we considered first in our design of the Temporary Crisis Framework - avoiding subsidy races while ensuring those most affected by the crisis can receive the support they need.”

¹⁴ See, e.g., Dunne, *supra* note 12, 237; Maurits Dolmans & Wanjie Lin, *How to Avoid a Fairness Paradox in EU Competition Law*, in DAMIEN GERARD, ASSIMAKIS KOMNINOS, & DENIS WAELBROECK (eds.), FAIRNESS IN EU COMPETITION POLICY: SIGNIFICANCE AND IMPLICATIONS, GCLC Annual Conference Series, Bruylant (2020), 27-76; Francesco Ducci & Michael Trebilcock, *The Revival of Fairness Discourse in Competition Policy*, 64 ANTITRUST BULL. 79 (Feb. 12, 2019); Harri Kalimo & Klaudia Majcher, *The Concept of Fairness: Linking EU Competition and Data Protection Law in the Digital Marketplace*, 42 EUR. LAW REV. 210 (2017).

¹⁵ See Einer Elhauge, *Should The Competitive Process Test Replace The Consumer Welfare Standard?*, PROMARKET (May 24, 2022), <https://www.promarket.org/2022/05/24/should-the-competitive-process-test-replace-the-consumer-welfare-standard>; Herbert Hovenkamp, *The Slogans and Goals of Antitrust Law*, FACULTY SCHOLARSHIP AT PENN CAREY LAW. 2853, (Jun. 2, 2022) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4121866.

¹⁶ See Bart J. Wilson, *Contra Private Fairness*, 71 AM J ECON SOCIOL 407 (April 2012), arguing that the understanding and use of the term “fair” in economics can be described as muddled, at best.

can vary widely among individuals.¹⁷ As a result, it is inherently unclear what benchmark should be applied to measure fairness. This poses a serious challenge for legal certainty, as actors cannot predict *ex ante* whether a practice will be sanctioned for having trespassed the unfairness threshold. Accordingly, policymakers have been invited to give no weight to fairness in choosing legal rules, but rather to assess policies entirely on the basis of their effects on individuals' well-being.¹⁸

As notions of fairness have taken a central place in recent EU regulatory interventions, it is worth investigating whether a clear and enforceable definition has been provided (and, in this case, whether the content of fairness has been specified as a rule or as a standard) or whether the vagueness and ambiguity associated with the term's meaning can be exploited to grant policymakers convenient procedural shortcuts. Indeed, an unmeasurable goal will tend to be irresistibly attractive to enforcement agencies, as it can mean anything they want it to. This paper aims to demonstrate that the revival of fairness considerations in competition law functions primarily to offer policymakers greater latitude to intervene, relieving them of the burden of economic analysis and allowing them to pursue political ends. Chief among the latter is restoring what the U.S. neo-Brandeisian movement considers the original mission of antitrust law: namely, to ensure a more democratic distribution of power and to protect "small dealers and worthy men."¹⁹ Rather than being used to assess whether practices are anti-competitive, fairness is used to correct market outcomes.

Similar concerns have been raised about a new policy statement issued recently by the U.S. Federal Trade Commission (FTC) regarding the scope of the agency's authority to prohibit unfair methods of competition (UMC) under the Section 5 of the FTC Act.²⁰ The FTC points to the legislative record to argue that Section 5 was enacted to protect "smaller, weaker business organizations from the oppressive and unfair competition of their more powerful rivals."²¹ Against the declared aim of "reactivating Section 5,"²² Commissioner Christine S. Wilson noted in her dissent that, by

¹⁷ Daniel Kahneman, Jack L. Knetsch, & Richard Thaler, *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM ECON REV 728 (September 1986); See also Ernst Fehr & Klaus M. Schmidt, *A Theory of Fairness, Competition, and Cooperation*, 114 QJ ECON 817 (August 1999).

¹⁸ LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE*, Harvard University Press (2002).

¹⁹ *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 323 (1897); See Bedoya, *supra* note 6, 2, arguing that "today, it is axiomatic that antitrust does not protect small business. And that the lodestar of antitrust is not fairness, but efficiency" (emphasis in original); See also Margrethe Vestager, *The Road to a Better Digital Future*, EUROPEAN COMMISSION (Sep. 22, 2022), https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_5763, welcoming the Digital Markets Act because it will empower the EU "to make sure large digital platforms do not squeeze out small businesses."

²⁰ *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, U.S. FEDERAL TRADE COMMISSION (Nov. 10, 2022), <https://www.ftc.gov/legal-library/browse/policy-statement-regarding-scope-unfair-methods-competition-under-section-5-federal-trade-commission>.

²¹ *Ibid.*, footnotes 15, 18, and 21.

²² Lina M. Khan, Rebecca Kelly Slaughter, Alvaro M. Bedoya, *On the Adoption of the Statement of Enforcement Policy Regarding Unfair Methods of Competition Under Section 5 of the FTC Act*, U.S. FEDERAL TRADE COMMISSION (Nov. 10, 2022), 1, <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-of-chair-khan-commissioners-slaughter-bedoya-on-policy-statement-regarding-section-5>.

preferring a “near-*per se* approach” that discounts or ignores both the business rationales that may underly challenged conduct and the potential efficiencies that such conduct may generate, the policy statement reflects a “repudiation of the consumer welfare standard and the rule of reason” and resembles the work of an academic or a think tank fellow who “dreams of banning unpopular conduct and remaking the economy.”²³

This paper is structured as follows. Section I describes how fairness considerations lie at the core of European Commissioner for Competition Margrethe Vestager’s political mandate. Section II examines how the notion of unfairness has been applied in EU antitrust case law. Section III analyzes the use of fairness as a rationale for recent EU legislative initiatives in the digital economy. Section IV illustrates that these initiatives do not provide a meaningful contribution to the application of fairness, either as a standard or as a rule. Section V concludes.

I. The Vestager Mandate: Fairness as Political Signaling

As has been widely noted, fairness has emerged as a guiding principle of EU competition policy during Commissioner Vestager’s previous and current terms.²⁴ She has referred to fairness in numerous speeches, characterizing her political mandate as one of advocating vigorously for antitrust rules to uphold notions of fairness. But rather than articulate a substantive standard of fairness that could be applied consistently in antitrust enforcement, Vestager has weaponized the notion of fairness as political signaling.

Among Vestager’s pronouncements on the subject are that “competition policy also reflects an idea of what society should be like” and that this is “the idea of a Europe that works fairly for everyone.”²⁵ She has contended that “when competition works, we end up with a market that treats people more fairly.”²⁶ Moreover, Vestager concludes that “fair markets are just what competition is about”²⁷ and “we all have a responsibility to help build a fairer society.”²⁸ As the power of digital platforms has

²³ Christine S. Wilson, *Dissenting Statement Regarding the Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, U.S. FEDERAL TRADE COMMISSION (Nov. 10, 2022), 1-3, <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-of-commissioner-wilson-on-policy-statement-regarding-section-5>, also arguing that “[t]he only crystal-clear aspect of the Policy Statement pertains to the process following invocation of an adjective: after labeling conduct ‘facially unfair,’ the Commission plans to skip an in-depth examination of the conduct, its justifications, and its potential consequences.”

²⁴ See, e.g., Konstantinos Stylianou & Marios Iacovides, *The Goals of EU Competition Law: A Comprehensive Empirical Investigation*, LEG STUD (forthcoming), reporting the various goals mentioned in speeches by EU commissioners during their terms in office; Dunne, *supra* note 12, 238, noting that Vestager invoked fairness in 85% of speeches in her first term in office.

²⁵ Margrethe Vestager, *Fair Markets in a Digital World*, EUROPEAN COMMISSION (Mar. 9, 2018), https://wayback.archive-it.org/12090/20191129214609/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/fair-markets-digital-world_en.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Margrethe Vestager, *Competition and Fairness in a Digital Society*, EUROPEAN COMMISSION (Nov. 22, 2018) <https://perma.cc/VF53-2ULV>.

grown, Vestager says, “it’s become increasingly clear that we need something more, to keep that power in check, and to keep our digital world open and fair.”²⁹

The Europe envisaged by the founders of the Treaty of Rome is, she argues, “one that would bring prosperity and fairness, not just to a few, but to all Europeans.”³⁰ While some of the commissioner’s speeches invoke fairness primarily in the context of competition giving consumers the power to demand a “fair deal”³¹ by ensuring that “their choices and preferences count,”³² others imply that firms have a responsibility to run their businesses “in a way that is fair to your competitors, fair to your business partners.”³³

Taken as a whole, her various invocations of fairness frame antitrust law not as economic policy, but as a kind of morality play.³⁴ Addressing her speeches to the “people,” Vestager emphasizes competition law’s fundamental role in building a fair society.³⁵

People don’t just want to be told that open markets make us better off. They want to know that they benefit everyone, not just the powerful few. And that is exactly what

²⁹ Margrethe Vestager, *Competition in a Digital Age*, EUROPEAN COMMISSION (Mar. 17, 2021), https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-digital-age_en.

³⁰ Margrethe Vestager, *What Is Competition For?*, EUROPEAN COMMISSION (Nov. 4, 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.

³¹ See, e.g., Margrethe Vestager, *Fairness and Competition*, EUROPEAN COMMISSION (Jan. 25, 2018), <https://perma.cc/XXC2-7P7J>; Margrethe Vestager, *Making the Decisions that Count for Consumers*, EUROPEAN COMMISSION (May 31, 2018) <https://perma.cc/BU47-D95T>.

³² Vestager, *supra* note 25.

³³ Margrethe Vestager, *A Responsibility to Be Fair*, EUROPEAN COMMISSION (Sep. 3, 2018), <https://perma.cc/AC36-B4KS>.

³⁴ Thibault Schrepel, *Antitrust Without Romance*, 13 N. Y. UNIV. J. LAW LIB. 326 (May 4, 2020); As noted by Dolmans & Lin, *supra* note 14, 38, fairness, “with its moral overtones, confers a rhetorical flourish and sense of intrinsic righteousness when used to describe an act or situation.”; However, see Sandra Marco Colino, *The Antitrust F Word: Fairness Considerations in Competition Law*, 5 J. BUS. LAW 329, 343 (2019), arguing that “[i]t makes little sense to defend a competition policy that develops with its back purposefully turned to the attainment of moral and social justice.”; For a more balanced reading, see Johannes Laitenberger, *Fairness in EU Competition Law Enforcement*, EUROPEAN COMMISSION (Jun. 20, 2018) https://ec.europa.eu/competition/speeches/text/sp2018_10_en.pdf, arguing that “while ‘fairness’ is a guiding principle, it is not an instrument that competition enforcers can use off the shelf to go about their work in detail. In each and every case the Commission looks into, it must dig for evidence; conduct rigorous economic analysis; and check findings against the law and the guidance provided by the European Courts.”

³⁵ Margrethe Vestager, *Competition for a Fairer Society*, EUROPEAN AMERICAN CHAMBER OF COMMERCE (Sep. 29, 2016) <https://eaccny.com/news/chapternews/eu-commissioner-margrethe-vestager-competition-for-a-fairer-society>; see also Margrethe Vestager, *Antitrust for the Digital Age*, EUROPEAN COMMISSION (Sep. 16, 2022) https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_5590, arguing that the power that large platforms wield “is not just an issue for fair competition; it is an issue for our very democracies” and that the most important goal of competition policy is to make markets work for people; Margrethe Vestager, *Keynote at the Making Markets Work for People Conference*, EUROPEAN COMMISSION (Oct. 27, 2022) https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_6445, stating that “[t]he only policy goal for markets is to serve the people.”; on the social rationale of competition law, see Damien Gerard, *Fairness in EU Competition Policy: Significance and Implications*, 9 J. EUR. COMPET 211 (2018).

competition enforcement is about ... public authorities are here to defend the interests of individuals, not just to take care of big corporations. And that everyone, however rich or powerful, has to play by the rules.³⁶

II. EU Antitrust Enforcement: Fairness as a Standard

The notion of fairness is not foreign to EU competition law. The Preamble to the Treaty on the Functioning of the European Union (TFEU) includes a reference to “fair competition.” Its antitrust provisions, while prohibiting restrictive agreements and practices, creates an exception for those that grant consumers a “fair share” of procompetitive benefits (Article 101). The provisions also prohibit abuses of dominant position that impose “unfair purchase or selling prices” or other “unfair trading conditions” (Article 102). Moreover, Vestager has argued that state-aid rules, which prevent member states from granting companies a selective advantage, likewise reflect the notion of fairness within “the ordinary meaning of the word.”³⁷

In general, these provisions endorse a standard-based approach to fairness that specifies the content of the law *ex post*, rather than a rule-based approach that introduces more specific legal commands *ex ante*.³⁸ Because fairness remains undefined and its meaning is disputed, the standard is hard to operationalize.

A. Unfair Terms and Excessive Pricing

While only a handful of judgments and decisions by the European Court of Justice (CJEU) and the European Commission analyze the notion of unfairness, what these typically share is a focus on clauses that either were not functional to achieve the purpose of the agreement or that unjustifiably

³⁶ Vestager, *supra* note 4, stating that “[w]e are on the side of the people, sometimes when no one else is.”; in a similar vein, on the U.S. side, see Bedoya, *supra* note 6, 9, describing antitrust as a way to protect “people living paycheck to paycheck” (“For me, that’s what antitrust is about: your groceries, your prescriptions, your paycheck. I want to make sure the Commission is helping the people who need it the most.”); see also Ariel Ezrachi & Maurice E. Stucke, *The Fight over Antitrust’s Soul*, 9 J. EUR. COMPET 1 (2018), arguing that “[u]ltimately the divide is over the soul of antitrust: Is antitrust solely about promoting some form of economic efficiency (or as cynics argue, the interests of the powerful who hide behind a narrow utilitarian approach) or the welfare of the powerless (the majority of citizens who feel increasingly disenfranchised by big government and big business)?”; see also ADI AYAL, FAIRNESS IN ANTITRUST: PROTECTING THE STRONG FROM THE WEAK, Hart (2016).

³⁷ Vestager, *supra* note 28; see also @vestager, TWITTER (Nov 8, 2022, 4:39 AM) <https://twitter.com/vestager/status/1589915517833412610>, featuring Vestager’s reaction to the European Court of Justice’s (CJEU) judgment annulling the Commission’s decision that found Luxembourg had granted selective tax advantages to Fiat in *Fiat Chrysler Finance Europe v. Commission*.

³⁸ There is an extensive literature devoted to investigating the tradeoffs between rules and standards: see, e.g., Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. LEE LAW REV. 49 (2007); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis Of Legal Rulemaking*, 3 J. LEG. STUD. 257 (January 1974).

restricted the freedom of the parties.³⁹ The relationship between unfairness and the absence of a functional relationship between the contract's purpose and challenged contractual clauses was highlighted in *Tetra Pak II*⁴⁰ and *Duales System Deutschland (DSD)*.⁴¹ It can be inferred from some of the Commission's other decisions that unfairness may be associated with opaque contractual conditions that render a dominant firm's counterparties weaker, particularly when those counterparties are unable to understand the terms of the commercial offer in question.⁴²

Recent years have seen a revival of cases concerning "unfair prices," particularly in cases concerned with drug pricing or the collection of royalties.⁴³ But rather than establish the meaning of fairness, courts and competition authorities have tended toward a rule-based approach to identify unfair prices, developing alternative measures rooted in economic reasoning.⁴⁴ Indeed, since *United Brands*, the CJEU has evaluated whether a price is unfair by determining whether it has a reasonable relation to the economic value of the product.⁴⁵ For example, in *SABAM*, the CJEU confirmed that the royalty rate requested by a collective society should bear relation to the economic value of the copyright work.⁴⁶ But courts and antitrust authorities have also struggled to apply the test set out by the

³⁹ See, e.g., CJEU, Case C-127/73, *Belgische Radio en Televisie and Société Belge des Auteurs, Compositeurs et Editeurs v. SV SABAM and NV Fonior* (Mar. 27, 1974), EU:C:1974:25, para. 15, holding that an exploitative abuse may occur when "the fact that an undertaking entrusted with the exploitation of copyrights and occupying a dominant position ... imposes on its members obligations which are not absolutely necessary for the attainment of its object and which thus encroach unfairly upon a member's freedom to exercise his copyright."

⁴⁰ European Commission, Case IV/31.043, *Tetra Pak II* (Jul. 24, 1991), paras. 105-108, (1992) OJ L 72/1.

⁴¹ European Commission, Case COMP D3/34493, *DSD* (Apr. 20, 2001), para. 112, (2001) OJ L 166/1; affirmed in GC, Case T-151/01, *DerGrünePunkt – Duales System Deutschland GmbH v. European Commission* (May 24, 2007), EU:T:2007:154 and CJEU, Case C-385/07 P (Jul. 16, 2009), EU:C:2009:456.

⁴² See European Commission, Case COMP/E-2/36.041/PO, *Michelin (Michelin II)* (Jun. 20, 2001), paras. 220-221 and 223-224, (2002) OJ L143/1, arguing that a discount program was unfair because it "placed [Michelin's dealers] in a situation of uncertainty and insecurity," because "it is difficult to see how [Michelin's dealers] would of their own accord have opted to place themselves in such an unfavourable position in business terms," and because Michelin's retailers were not in a position to carry out "a reliable evaluation of their cost prices and therefore [could not] freely determine their commercial strategy."

⁴³ Opinion of Advocate General Pitruzzella, Case C-372/19, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Weareone.World BVBA, Wecandance NV* (Jul. 16, 2020), EU:C:2020:598, para. 21; see also Marco Botta, *Sanctioning Unfair Pricing Under Art. 102(a) TFEU: Yes, We Can!*, 17 EUR. COMPET. J. 156 (2021); for an overview of recent case law, see Giovanni Pitruzzella, *Recent CJEU Case Law on Excessive Pricing Cases*, in *THE INTERACTION OF COMPETITION LAW AND SECTOR REGULATION: EMERGING TRENDS AT THE NATIONAL AND EU LEVEL* (MARCO BOTTA, GIORGIO MONTI, AND PIER LUIGI PARCU, eds.), Elgar 2022, 169; Margherita Colangelo, *Excessive Pricing In Pharmaceutical Markets: Recent Cases in Italy and in the EU*, *ibid.*, 210.

⁴⁴ Dolmans & Lin, *supra* note 14, 59-60; see also Botta, *supra* note 43, arguing that, since the imposition of excessive prices by a dominant firm directly harms consumer welfare, the resurgence of excessive-pricing cases is linked to the role of consumer's welfare standard in EU competition policy.

⁴⁵ CJEU, Case C-27/76, *United Brands Company and United Brands Continental BV v. Commission of the European Communities* (Feb. 14, 1978) EU:C:1978:22.

⁴⁶ CJEU, Case C-372/19, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Weareone.World BVBA, Wecandance NV* (Nov. 25, 2020), EU:C:2020:959.

CJEU in *United Brands* to assess whether prices are unfair.⁴⁷ As acknowledged in *AKKA-LAA*, “there is no single adequate method” to evaluate unfair-pricing cases.⁴⁸ Given this, Advocate General Nils Wahl has argued that a price charged by a dominant undertaking should be deemed abusive only when no rational economic explanation (other than a firm possessing the capacity and willingness to use its market power) can be found for why it is so high.⁴⁹

B. Margin Squeeze

Unfair-pricing practices have also been investigated in the context of the margin-squeeze strategy, which is a standalone abuse under EU competition law on grounds that it undermines equality of opportunity between economic operators.⁵⁰ Rather than refusing to supply, a vertically integrated dominant firm may instead charge a price for a product on the upstream market that would not allow an equally efficient competitor to compete profitably on a lasting basis with the price the dominant firm charges on the downstream market. A margin squeeze exists if the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services to end-users.⁵¹ Accordingly, the unfair spread between the upstream price and the retail price is deemed exclusionary when it squeezes rivals’ margins on the retail market, thereby undermining their ability to compete on equal terms. The dominant player is therefore required to leave its rivals a fair margin between the wholesale and retail prices.⁵²

⁴⁷ *United Brands*, *supra* note 45, para. 252, holding that the questions to be determined are “whether the differences between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products.”

⁴⁸ CJEU, Case C-177/16, *Autortiesību un Komunicēšanās Konsultāciju Agentūra v. Latvijas Autoru Apvienība v Konkurences Padome* (Sep. 14, 2017), EU:C:2017:689, para. 49.

⁴⁹ Opinion of Advocate General Wahl, Case C-177/16 (Apr. 6, 2017), EU:C:2017:286, para. 131.

⁵⁰ See European Commission, *Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, (2009) OJ C 45/7, para. 80; CJEU, 14 October 2010, Case C-280/08 P, *Deutsche Telekom AG v. European Commission*, EU:C:2010:603; CJEU, 17 February 2011, Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB*, EU:C:2011:83; CJEU, 10 July 2014, Case C-295/12 P, *Telefónica SA and Telefónica de España SAU v. European Commission*, EU:C:2014:2062; CJEU, 25 March 2021, Case C-165/19 P, *Slovak Telekom a.s. v. Commission*, EU:C:2021:239.

⁵¹ However, in *Teliasonera* (*supra* note 50), 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.

⁵² On the US side, rejecting margin squeeze as a stand-alone offense, the Supreme Court in *Pacific Bell Tel. Co. v. linkLine*, 555 U.S. 438 (2009) argued that it is nearly impossible for courts to determine the fairness of rivals’ margins and quoted *Town of Concord v. Boston Edison Co.*, 915 F. 2d 17, 25 (1st Cir. 1990) asking “how is a judge or jury to determine a ‘fair price?’ Is it the price charged by other suppliers of the primary product? None exist. Is it the price that competition ‘would have set’ were the primary level not monopolized? How can the court determine this price without examining costs and demands, indeed without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years? Further, how is the court to decide the proper size of the price ‘gap?’ Must it be large enough for all independent competing firms to make a ‘living profit,’ no matter how inefficient they may be? . . . And how should the court respond when costs or demands change over time, as they inevitably will?”

C. FRAND-Encumbered SEPs

The notion of fairness has also been raised in the context of standard-essential patents (SEPs), whose holders are subject to fair, reasonable, and non-discriminatory (FRAND) licensing obligations.⁵³ The process of developing standards can create opportunities for companies to engage in anticompetitive behavior where such standards give 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 *ex post* monopoly power that could enable them to charge excessively high royalty rates in their licensing agreements or to constructively refuse to license their patents.

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

It is a matter of debate, however, whether FRAND commitments can effectively prevent SEP owners from imposing excessive royalty obligations on licensees. In fact, there are no generally agreed-upon tests to determine whether a particular license does or does not satisfy a FRAND commitment. There is also little consensus regarding the legal effects of FRAND commitments, such as whether they imply a waiver of the general law of remedies (more precisely, injunctive relief and other extraordinary remedies). Such broad uncertainty has prompted a wave of litigation around the globe in recent decades.

While some SSOs and courts have moved toward a rule-based approach to define fair/reasonable rates and to develop methods for the valuation of FRAND royalties, the CJEU in *Huawei*⁵⁴ endorsed a hybrid approach.⁵⁵ Indeed, rather than define the meaning of FRAND (which remains left to a standard-based approach), the CJEU imposed a procedural framework for good-faith SEP-licensing negotiations. The framework identifies the steps that patent holders and implementers must follow in negotiating FRAND royalties, with the threats of antitrust liability and patent enforcement as levers to steer the parties toward a mutually agreeable level. Nonetheless, none of these approaches has thus far proven effective in reducing either uncertainty or litigation.

D. Abuse of Economic Dependence

Over the years, several EU member states have adopted provisions related to the abuse of economic dependence (also known as relative market power or superior bargaining power), creating yet another

⁵³ For an overview, see Oscar Borgogno & Giuseppe Colangelo, *Disentangling the FRAND Conundrum*, DEEP-IN Research Paper (2019), <https://ssrn.com/abstract=3498995>.

⁵⁴ CJEU, Case C-170/13, *Huawei Technologies Ltd. v. ZTE Corp.* (Jul. 16, 2015), EU:C:2015:477.

⁵⁵ Nicolas Petit & Amandine Léonard, *FRAND Royalties: Relus v Standards?* CHI-KENT J. INTELL. PROP. (forthcoming).

context in which the unfairness of terms and conditions may be implicated.⁵⁶ Rules forbidding the abuse of economic dependence reflect concerns about the asymmetry of economic power in business-to-business relationships, which is considered a potential source of unfair-trading practices.

Although abuse of economic dependence is not regulated at the EU level, national-level legislation is authorized by Article 3(2) of the Regulation 1/2003 on the implementation of competition rules, which allows member states to adopt and apply stricter laws prohibiting or sanctioning unilateral conduct.⁵⁷ Recital 8 of the regulation refers specifically to national provisions that prohibit or impose sanctions on abusive behavior toward economically dependent undertakings.

Economic dependence is typically the result of significant switching costs that may lock a party into a business relationship and prevent it from finding equivalent alternative solutions. Therefore, evaluations of economic dependence include examining the amount of relationship-specific investment the dependent firm has undertaken (*i.e.*, investments required to support its trading relationship), which may expose weak parties to holdup, as well as whether the counterparty should be considered an unavoidable trading partner because of its exclusive control over an essential input.

It is worth noting that recent legislative initiatives signal a willingness by EU member states to rely on abuse-of-economic-dependence claims to tackle digital platforms' purportedly unfair conduct and trading relationship with business users. In 2020, Belgium approved an amendment to its Code of Economic Law to insert a provision on abuse of economic dependence,⁵⁸ with lawmakers making specific reference to the perceived legislative gap concerning digital platforms. In 2021, alongside its new antitrust tool focused on firms of "paramount significance for competition across markets," the German Bundestag extended its economic-dependence provision to target firms acting as "intermediaries on multi-sided markets," insofar as business users are significantly dependent on their intermediary services to access supply and sales markets such that sufficient and reasonable alternatives do not exist.⁵⁹ Finally, in 2022, the Italian Annual Competition Law included a specific provision introducing a rebuttable presumption of economic dependence when a firm uses intermediation services provided by a digital platform that play a "key role" in reaching end users or suppliers due to network effects or the availability of data.⁶⁰

⁵⁶ For an overview, see Giuseppe Colangelo, *The European Digital Markets Act and Antitrust Enforcement: A Liaison Dangereuse*, 47 EUR. LAW REV. 597 (July 2022); see also Inge Graef, *Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence*, 38 YEARBOOK OF EUROPEAN LAW 448 (2019), suggesting giving a stronger role to economic dependence both within and outside EU competition law.

⁵⁷ 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.

⁵⁸ 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.

⁵⁹ GWB Digitalization Act, 18 January 2021, Section 20.

⁶⁰ Italian Annual Competition Law, 5 August 2022, No. 118, Article 33.

E. Summary of Findings

There are two primary takeaways from this brief overview of fairness in EU antitrust law. First, despite some references in the TFEU, antitrust enforcers have traditionally been reluctant to engage with the unfairness of terms and conditions. Uncertainty regarding the definition and legal boundaries of fairness make it challenging to use as an actionable standard for the evaluation of anticompetitive behavior. Second, if recent case law is suggestive of how attitudes about the use of fairness in antitrust are evolving, courts and competition authorities likely will continue to prefer that fairness be anchored in specific economic values or a detailed code of conduct (*i.e.*, switching to a rule-based approach), rather than relying on political or moral considerations. The ongoing disputes over how to assess whether prices are excessive, as well as determining “fair” royalties for SEPs, suggest that questions about the scope and nature of unfair conduct cannot be usefully resolved by references to “the ordinary meaning of the word.”

Moreover, while fairness is explicitly mentioned in exploitative-abuse cases, Article 102 TFEU makes no reference to fairness as a benchmark for such cases. In this regard, the CJEU’s *Servizio Elettrico Nazionale* ruling affirmed the effects-based approach the court would take to assessing the abusive nature of unfair practices.⁶¹ Notably, the CJEU definitively stated that competition law is not intended to protect the existing structure of the market, but rather that the ultimate goal of antitrust intervention is the protection of consumer welfare.⁶² Accordingly, as the court previously found in *Intel*, not every exclusionary effect is necessarily detrimental to competition.⁶³ Competition on the merits may, by definition, mean that less-efficient competitors who are less attractive to consumers in terms of price, choice, quality, or innovation may be marginalized or forced to exit the market.⁶⁴

III. EU Competition Policy in Digital Markets: Fairness as a Rule?

The preceding overview of EU antitrust enforcement demonstrates that, despite recent political interest in the subject of fairness, authorities and courts continue to struggle to apply it as a substantive standard. Commissioner Vestager’s fairness agenda nonetheless permeates several recent legislative initiatives to regulate the digital economy through specific rules, rather than a general standard.

⁶¹ CJEU, Case C-377/20, *Servizio Elettrico Nazionale SpA v. Autorità Garante della Concorrenza e del Mercato* (May 12, 2022), EU:C:2022:379.

⁶² *Ibid.*, para. 46.

⁶³ CJEU, Case C-413/14 P, *Intel v. Commission* (Sep. 6, 2017), EU:C:2017:632, paras. 133-134. The same principle has been affirmed in discrimination and margin-squeeze cases, such as CJEU, C-525/16, *MEO v. Autoridade da Concorrência* (Apr. 19, 2018), EU:C:2018:270 and CJEU, Case C-209/10, *Post Danmark A/S v. Konkurrencerådet* (Mar. 27, 2012), EU:C:2012:172, respectively.

⁶⁴ CJEU, *Intel*, *supra* note 63, para. 73; see Alfonso Lamadrid de Pablo, *Competition Law as Fairness*, 8 J. EUR. COMPET 147 (Feb. 15, 2017), arguing that the notion of merit-based competition implicitly carries in it a sense of fairness, understood as equality of opportunity; see also Alberto Pera, *Fairness, Competition on the Merits and Article 102*, 18 EUR. COMPET. J. 229 (April 2022).

A common feature of these interventions is their preoccupation with the intermediation (or bottleneck) power that some large online platforms may wield vis-à-vis business users, to the extent that they may be unavoidable trading partners in a wide range of contexts. As a result, proponents argue, the interventions are needed to ensure a level playing field and to prevent unfair behavior to the detriment of business users.

A. Platform-to-Business Regulation

In 2019, the EU adopted the regulation on promoting fairness and transparency for business users of online intermediation services (P2B Regulation).⁶⁵ Its aim was to lay down rules to ensure that digital intermediation platforms and search engines grant appropriate transparency, fairness, and effective redress to business users and corporate websites, respectively.⁶⁶ According to the P2B Regulation, online intermediation services can be “crucial” for the commercial success of firms who use such services to reach consumers. Given that dependence, such platforms often have superior bargaining power that enables them to behave unilaterally in ways that can be unfair, harmful to the legitimate interests of their business users, and also, indirectly, to consumers.⁶⁷

While fairness is referenced in the P2B Regulation’s formal title, its provisions are more concerned with enhanced transparency, rather than forbidding or prescribing specific conduct. Nonetheless, the regulation left open the potential for further measures if its provisions proved insufficient to adequately address imbalances and unfair commercial practices in the sector.⁶⁸ A few months after the P2B Regulation was promulgated, the European Commission unveiled in a communication to the European Parliament its view for the circumstances under which further legislative intervention would be needed.⁶⁹ Since platforms that act as “private gatekeepers to markets, customers and information” may jeopardize the fairness and openness of markets, and “competition policy alone cannot address all the systemic problems that may arise in the platform economy,” the Commission noted that additional rules may still be needed to ensure contestability, fairness, and innovation in digital markets, as well as the possibility of market entry.⁷⁰ Notably, the Commission’s declared policy goal was to ensure “a level playing field for businesses,” which it argued “is more important than ever” in the digital era.⁷¹

⁶⁵ 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.

⁶⁶ *Ibid.*, Article 1(1).

⁶⁷ *Ibid.*, Recital 2.

⁶⁸ *Ibid.*, Recital 49.

⁶⁹ European Commission, *Shaping Europe’s Digital Future*, COM(2020) 67 final.

⁷⁰ *Ibid.*, 8-9.

⁷¹ *Ibid.*, 8.

B. Digital Markets Act

It was against this backdrop that the European Commission proposed the Digital Markets Act (DMA),⁷² with the goal of ensuring “contestability and fairness” for digital markets.⁷³ In the Commission’s view, the distinctive characteristics of digital services (*i.e.*, the presence of strong economies of scale, indirect network effects, economies of scope due to the role of data as a critical input, and conglomerate effects, along with consumers’ behavioral biases and single-homing tendency) generate significant barriers to entry that confer gatekeeping power on certain large platforms.⁷⁴

The Commission warned that this situation would lead to “serious imbalances in bargaining power and, consequently, to unfair practices and conditions” both for business users and for platforms’ end users, to the detriment of prices, quality, “fair competition,” choice, and innovation in the market.⁷⁵ Moreover, gatekeepers frequently play a dual role, being simultaneously operators of a marketplace and sellers of their own products and services in competition with rival sellers.⁷⁶ Therefore, the Commission contended, rules are needed to prevent gatekeepers from unfairly benefitting and to impose on them a special responsibility to ensure a level playing field, which *de facto* amounts to the introduction of a platform-neutrality regime.⁷⁷

Implicit in the DMA is the presumption that market processes are often incapable of ensuring “fair economic outcomes” with regard to core platform services,⁷⁸ apparently requiring a rethinking of competition policy. Under this view, competition law is deemed unfit to effectively address challenges posed by gatekeepers that are not necessarily dominant in competition-law terms.⁷⁹ Indeed, antitrust is limited to certain examples of market power (*e.g.*, dominance on specific markets) and of anti-competitive behavior.⁸⁰ Further, its enforcement occurs *ex post* and requires an extensive investigation on a case-by-case basis of what are often very complex facts.⁸¹

The DMA therefore aims to protect a different legal interest from antitrust rules. Rather than protect undistorted competition on any given market, as defined in competition law terms, the DMA seeks to ensure that markets where gatekeepers are present are and remain “contestable and fair,”

⁷² 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.

⁷³ *Ibid.*, Recital 7.

⁷⁴ *Ibid.*, Recital 2.

⁷⁵ *Ibid.*, Recitals 2 and 4.

⁷⁶ *Ibid.*, Recitals 46, 47, 51, 56, and 57.

⁷⁷ Colangelo, *supra* note 60; see also Oscar Borgogno & Giuseppe Colangelo, *Platform and Device Neutrality Regime: The New Competition Rulebook for App Stores?*, 67 ANTITRUST BULL. 451 (2022).

⁷⁸ DMA, *supra* note 72, Recital 5.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

independent of the actual, likely, or presumed effects of gatekeeper conduct.⁸² As a result, it introduces a set of *ex ante* obligations for online platforms designated as gatekeepers, thereby effectively relieving enforcers of the responsibility to define relevant markets, prove dominance, and measure market effects.

Despite that proclaimed protection of a different legal interest, however, there is no indication that the DMA's promotion of fairness and contestability differs from the substance and scope of competition law.⁸³ The draft DMA didn't define either fairness or contestability, nor did it indicate how the obligations it would impose on digital gatekeepers was intended to deliver each objective. The final version fills part of this gap, including a definition of these goals. With regard to contestability, the DMA targets practices that increase barriers to entry or expansion in digital markets and imposes obligations that tend to lower these barriers.⁸⁴ Therefore, contestability relates to firms' ability to "effectively overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their products and services."⁸⁵ With respect to fairness, the obligations seek to address 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.⁸⁶ Indeed, "[d]ue to their gateway position and superior bargaining power, it is possible that gatekeepers engage in behaviour that does not allow others to capture fully the benefits of their own contributions, and unilaterally set unbalanced conditions for the use of their core platform services or services provided together with, or in support of, their core platform services."⁸⁷

⁸² *Ibid.*, Recital 11.

⁸³ Pinar Akman, *Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act*, 47 EUR. LAW REV. 85 (Mar. 30, 2022); Colangelo, *supra* note 60; Heike Schweitzer, *The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What Is Fair: A Discussion of the Digital Markets Act Proposal*, 3 ZEUP 503 (May 7, 2021).

⁸⁴ DMA, *supra* note 72, Recital 32. See also Article 12(5).

⁸⁵ *Ibid.*.

⁸⁶ *Ibid.*, Recital 33 and Article 12(5); see also Recital 62 providing some benchmarks that can serve as a yardstick to determine the fairness of general access conditions (i.e., prices charged or conditions imposed for the same or similar services by other providers of software application stores; prices charged or conditions imposed by the provider of the software application store for different related or similar services or to different types of end users; prices charged or conditions imposed by the provider of the software application store for the same service in different geographic regions; prices charged or conditions imposed by the provider of the software application store for the same service the gatekeeper provides to itself).

⁸⁷ *Ibid.*; see also Monopolkommission, *Recommendations for an Effective and Efficient Digital Markets Act*, (2021) 15, <https://www.monopolkommission.de/en/reports/special-reports/special-reports-on-own-initiative/372-sr-82-dma.html>, recommending that the DMA objective of fairness should address the economic dependence of business users vis-à-vis a gatekeeper, and hence the asymmetric negotiating power favoring the gatekeeper; see also Gregory S. Crawford, Jacques Crémer, David Dinielli, Amelia Fletcher, Paul Heidhues, Monika Schnitzer, Fiona M. Scott Morton, & Katja Seim, *Fairness and Contestability in the Digital Markets Act*, YALE DIGITAL REGULATION PROJECT, Policy Discussion Paper No. 3 (2021), 4-10, <https://tobin.yale.edu/sites/default/files/Digital%20Regulation%20Project%20Papers/Digital%20Regulation%20Project%20-%20Fairness%20and%20Contestability%20-%20Discussion%20Paper%20No%203.pdf>, supporting the interpretation of fairness with respect to surplus sharing. According to the authors, "since a platform ecosystem is a co-creation of the

Nonetheless, the DMA also considers fairness to be “intertwined” with contestability.⁸⁸ “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.”⁸⁹ Therefore, an obligation may address both. Unfortunately, because the DMA does not index the obligations based on the specific goal they purportedly advance, it also does not clarify which obligations are intended to safeguard contestability and/or promote fairness. This is despite the fact that the title of the DMA’s Chapter III refers to practices of gatekeepers that limit contestability “or” are unfair.⁹⁰

The confusion between the two policy goals is confirmed in several passages of the text, which refer indiscriminately to contestability “and” fairness.⁹¹ In line with the definition of contestability and fairness provided in the DMA, the table below summarizes the obligations according to protected interests and principal beneficiaries.

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

platform itself and its users, regulation should correct the distortion related to unfair outcomes when users are not rewarded for their contribution to the success of the platform.

⁸⁸ DMA, *supra* note 72, Recital 34.

⁸⁹ *Ibid.*; see also Recital 16 referring to “unfair practices weakening contestability.”; see, instead, Monopolkommission, *supra* note 87, 16, suggesting to clearly distinguish the objectives pursued by the DMA, which should be understood such that only ecosystem-related questions of contestability are addressed by the DMA when it comes to the intersection of exclusion and fairness with exploitation of business users.

⁹⁰ See also DMA, *supra* note 72, Articles 12(1, 3, 4, and 5), 19(1), 41(3 and 4), and Recitals 15, 69, 77, 79, 93.

⁹¹ *Ibid.*, Articles 1(1 and 5), 18(2), 40(7), 53 (2 and 3), and Recitals 8, 11, 28, 31, 42, 45, 50, 58, 67, 73, 75, 97, 104, 106.

Art. 6(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

The vast majority of the DMA's provisions seek to promote contestability. Most are clearly described in this way, including explicit references to terms such as contestability, switching, multi-homing, and barriers to entry and expansion.⁹² Two of the provisions instead introduce pure transparency obligations. Although they are described as functional to promote contestability and fairness,⁹³ they do not appear to either affect the imbalance of bargaining power or lower barriers to entry and expansion.

An interesting case is provided by the ban on “sherlocking” (i.e., the use of business users' data to compete against them), which apparently does not belong to any of the proclaimed goals. Indeed, even if the prohibition is justified to prevent gatekeepers from unfairly benefitting from their dual role,⁹⁴ the characterization of the conduct in question does not match the definition of fairness provided in Recital 33.

The goal of fairness is almost always confused (*rectius*, “intertwined”) with contestability. Indeed, some provisions are justified on grounds that the imposition of contractual terms and conditions by gatekeepers may limit inter-platform contestability.⁹⁵ Other provisions are deemed necessary to promote multi-homing and to prevent reinforcing business users' dependence on gatekeepers' core platform services.⁹⁶ Further, to ensure a “fair commercial environment” and to protect the contestability of the digital sector, the DMA considers it important to safeguard the right to raise concerns about unfair practices by gatekeepers.⁹⁷ Moreover, the DMA contends that, since certain services are

⁹² *Ibid.*, Recital 36 regarding Article 5(2), Recital 50 regarding Article 6(4), Recital 51 regarding Article 6(5), Recital 53 regarding Article 6(6), Recital 59 regarding Article 6(9), Recital 61 regarding Article 6(11), Recital 64 regarding Article 7.

⁹³ *Ibid.*, Recital 45 regarding Article 5(9-10) and Recital 58 regarding Article 6(8).

⁹⁴ *Ibid.*, Recital 46; see also European Commission, *Commission Sends Statement of Objections to Amazon for the Use of Non-Public Independent Seller Data and Opens Second Investigation into Its E-Commerce Business Practices* (Nov. 10, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077.

⁹⁵ DMA, *supra* note 72, Recital 39 regarding Article 5(3).

⁹⁶ *Ibid.*, Recital 40 regarding Article 5(4).

⁹⁷ *Ibid.*, Recital 42 regarding Article 5(6).

“crucial” for business users, gatekeepers should not be allowed to leverage their position against their dependent business users and therefore “the freedom of the business user to choose alternative services” should be protected.⁹⁸ Finally, the law suggests that some practices should be prohibited because they give gatekeepers a means to capture and lock in new business users and end users, thus raising barriers to entry.⁹⁹

Thus, there is significant definitional overlap between contestability and fairness under the DMA. Further, while Recital 33 links the notion of fairness to the imbalance between business users’ rights and obligations, some provisions also protect end users against unfair practices.¹⁰⁰ The law also embraces fairness as a notion applicable to both contractual terms and market outcomes. Indeed, in order to justify intervention that exceeds traditional antitrust rules, the DMA states that market processes are often incapable of ensuring “fair economic outcomes” with regard to core platform services.¹⁰¹ In other words, rather than concern itself with specific practices, the DMA’s approach to fairness starts with a presumption that the outcome is unfair and regulates some practices to redress this.

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

Article 5(3) forbids parity clauses, also known as most-favored nation (MFN) agreements or across-platform parity agreements (APPAs). The provision bans both the broad and narrow versions of such clauses, thereby prohibiting gatekeepers from restricting business users’ ability to offer products or services under more favorable conditions through other online intermediation services or through direct online sales channels. The DMA maintains that, while the broad version of the parity clause may limit inter-platform contestability, its narrow version would unfairly restrain business users’ freedom to use direct online sales channels.¹⁰²

To the extent that the rationale for the ban is to protect weak business parties against the superior bargaining power exerted by digital intermediaries, the potential effects of broad and narrow MFNs differ significantly. While broad parity clauses are more likely to produce net anti-competitive effects,

⁹⁸ *Ibid.*, Recital 43 regarding Article 5(7).

⁹⁹ *Ibid.*, Recital 44 regarding Article 5(8).

¹⁰⁰ *Ibid.*, Articles 5(6), 5(8), and 6(13); *see also* Recital 2 referring to the impact on “the fairness of the commercial relationship between [gatekeepers] and their business users and end users.”

¹⁰¹ *Ibid.*, Recital 5; *see also* Recital 42 referring to “fair commercial environment.”

¹⁰² *Ibid.*, Recital 39.

efficiency justifications related to the protection of platforms' investments against the risk of free riding usually prevail in case of narrow parity clauses. Indeed, the original DMA proposal only forbade broad MFNs, as the European Commission has traditionally endorsed a case-by-case analysis of their effects under competition law.¹⁰³ The more lenient approach toward narrow MFNs is seen in the new guidelines on vertical restraints, where it is stated that narrow retail-parity obligations are more likely to fulfil the conditions of Article 101(3) TFEU than across-platform retail parity obligations "primarily because their restrictive effects are generally less severe and therefore more likely to be outweighed by efficiencies" and "[m]oreover, the risk of free riding by sellers of goods or services via their direct sales channels may be higher, in particular because the seller incurs no platform commission costs on its direct sales."¹⁰⁴

By banning narrow MFNs, the final version of the DMA disregards these efficiency justifications. A more fulsome notion of fairness would be concerned not only with gatekeepers' disproportionate advantage, but also with the risk of free riding by business users, which may reduce the incentive to invest in platform development.¹⁰⁵ Indeed, relying on the definition provided in Recital 33, this could be a case where fairness may even be invoked by a gatekeeper against business users, because the former may be unable to fully capture the benefits of its own investment.

C. Data Act

Ambiguity about the notion of fairness also characterizes the proposed Data Act.¹⁰⁶ On the one hand, the proposal pursues the goal of "fairness in the allocation of value from data" among actors in the data economy.¹⁰⁷ This concern stems from the observation that the value of data is concentrated in the hands of relatively few large companies, while the data produced by connected products or related services are an important input for aftermarket, ancillary, and other services.¹⁰⁸ Given this, the Data Act attempts to facilitate access to and use of data by consumers and businesses, while preserving incentives to invest in ways of generating value from data. On the other hand, to ensure

¹⁰³ Commission Staff Working Document accompanying the *Report from the Commission to the Council and the European Parliament Final Report on the E-commerce Sector Inquiry*, SWD(2017) 154 final. Conversely, in Germany, the Federal Supreme Court has supported the Bundeskartellamt's strict approach against narrow price parity clauses used. See Bundesgerichtshof, Case KVR 54/20, *Booking.com* (May 18, 2021).

¹⁰⁴ European Commission, *Guidelines on Vertical Restraints* (2022) OJ C 248/1, para. 374.

¹⁰⁵ *Ibid.*, para. 372.

¹⁰⁶ 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; see also Giuseppe Colangelo, *European Proposal for a Data Act – A First Assessment*, CERRE Assessment Paper (Aug. 30, 2022) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4199565.

¹⁰⁷ Data Act, *supra* note 106, Explanatory Memorandum, 2.

¹⁰⁸ *Ibid.*, Recital 6 and Explanatory Memorandum, 1.

fairness in the underpinning data-processing services and infrastructure, the proposal seeks “fairer and more competitive markets” for data-processing services, such as cloud-computing services.¹⁰⁹

Moreover, such objectives include operationalizing rules to ensure “fairness in data sharing contracts.”¹¹⁰ Notably, to prevent the exploitation of contractual imbalances that hinder fair data-access and use for small or medium-sized enterprises (SMEs),¹¹¹ Chapter IV of the Data Act addresses unfair contractual terms in data-sharing contracts in situations where a contractual term is imposed unilaterally by one party on a SME. The proposal justifies this requirement by assuming that SMEs will typically be in a weaker bargaining position, without meaningful ability to negotiate the conditions for access to data. They are thus often left with no other choice but to accept take-it-or-leave-it contractual terms.¹¹²

Terms imposed unilaterally on SMEs are subject to an unfairness test,¹¹³ where a contractual term is considered unfair if it is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.¹¹⁴ But given how vague and broad concepts such as “gross deviation from good commercial practices” or “contrary to good faith and fair dealing” are, the unfairness test may simply serve to generate further uncertainty, which could be heightened by potential differing interpretations at the national level.

Therefore, rather than outline specific rules, the proposed Data Act opts for a standard-based approach and provides a yardstick to interpret the unfairness test.¹¹⁵ Article 13 includes a list of terms that are always considered unfair and another list of terms that are presumed to be unfair. If a contractual term is not included in these lists, the general unfairness provision applies. Moreover, model contractual terms recommended by the Commission may assist commercial parties in concluding contracts based on fair terms.

Some terms considered unfair by the Data Act are clearly inspired by the abuse-of-economic-dependence standard.¹¹⁶ Given the implicit parallel between data dependence and economic dependence,

¹⁰⁹ European Commission, *Inception Impact Assessment – Data Act*, Ares (2021) 3527151, 1, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13045-Data-Act-amended-rules-on-the-legal-protection-of-databases_en,1-2.

¹¹⁰ Data Act, *supra* note 106, Explanatory Memorandum, 3.

¹¹¹ *Ibid.*, Recital 5.

¹¹² *Ibid.*, Recital 51 and Explanatory Memorandum, 13

¹¹³ *Ibid.*, Recital 52

¹¹⁴ *Ibid.*, Article 13(2).

¹¹⁵ *Ibid.*, Recital 55.

¹¹⁶ See, e.g., *ibid.*, Article 13(4)(e), according to which a contractual term is presumed unfair if its object or effect is to enable the party that unilaterally imposed the term to terminate the contract with unreasonably short notice, taking into consideration the reasonable possibilities of the other contracting party to switch to an alternative and comparable service and the financial detriment caused by such termination.

the exclusion of SMEs from the scope of application of Article 13 is not justified.¹¹⁷ Indeed, abuse-of-economic-dependence cases involve scrutinizing the unfairness of terms and conditions due to the imbalance of bargaining power between business parties, regardless of the size of the players involved. Moreover, in the case of data-sharing contracts, such imbalance would be generated by data dependence, which may also emerge when SMEs exert control over certain data.

In summary, to achieve a greater balance in the distribution of the economic value from data among actors, the fairness of both contractual terms and market outcomes are addressed in the Data Act. The creation of a cross-sectoral governance framework for data access and use aims to ensure contractual fairness by rebalancing the bargaining power of SMEs vis-à-vis large players in data sharing contracts.¹¹⁸ As a result, fairer and more competitive market outcomes shall be promoted in aftermarkets and in data processing services.¹¹⁹

D. Summary of Findings

Recent EU legislative efforts motivated by the objective of promoting fairness in digital markets have thus far appeared to confirm traditional doubts about the possibility of relying on it as a suitable tool to assess anti-competitiveness.

If fairness has proven to be unsuitable to serve as a substantive standard in EU competition-law enforcement, the shift towards a rule-based approach does not seem to provide a significant improvement. Fairness represents a vague overarching goal. The envisaged black and white rules do not plainly address fairness, which instead is still essentially treated according to a standard-based approach. Moreover, the lack of clarity about the meaning of the term and the boundaries of its scope remains a relevant and thorny issue.

Indeed, the recent initiatives apply fundamentally different concepts of fairness. While the P2B Regulation treats fairness as *de facto* equivalent to transparency rules, the DMA defines it as referring to an imbalance in bargaining power that prevents a fair share of value among all players that contribute to a platform ecosystem. That definition notwithstanding, almost all of the DMA's obligations putatively intended to promote fairness are, in effect, addressed at promoting contestability. Furthermore, the only provision clearly aimed at ensuring fairness as defined in the DMA relies on a standard-based approach. In a similar vein, the proposed Data Act treats fairness as a standard, introducing contractual protections based solely on the size of the players (*i.e.*, SMEs) and providing a yardstick to apply the unfairness test.

¹¹⁷ Colangelo, *supra* note 106.

¹¹⁸ European Commission, *supra* note 109, 2.

¹¹⁹ *Ibid.*.

IV. Fairness as a Blanket License for Regulatory Intervention

Alongside the apparent difficulties in operationalizing fairness as either a standard or a rule, in practice, the lines separating fairness in the process from the outcomes of competition are inevitably blurred.¹²⁰ After all, Commissioner Vestager has not hidden her dissatisfaction with current market outcomes, showing an inclination to evaluate market structure as a proxy for fairness. Despite the efforts to describe efficiency and fairness as converging objectives for competition-policy enforcers, she implicitly acknowledged the trade-off between these goals.¹²¹ Notably, Vestager argued that “[i]t’s true that competition, by its very nature, involves winners and losers. But as long as the social market economy is working properly, the efficiency gains that accrue from this process can be fairly and justly shared across all stakeholders.”

It is hard to deny the fundamental contradiction between defending efficient markets and promoting distributive justice. It is also difficult to reconcile Vestager’s message with the CJEU’s well-established principle that exclusionary effects do not necessarily undermine competition.¹²² Indeed, rather than interpret fairness as equality of initial opportunities, Vestager explicitly refers to the fairness of market outcomes.

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

It is not surprising that the recent push to revive fairness considerations in digital markets has originated outside the competition-law framework. Such policy choices implicitly acknowledge the impossibility of using fairness as an alternative standard to competition on the merits in antitrust law. As recently recalled by the CJEU, the ultimate goal of antitrust intervention is the protection of consumer welfare, rather than any particular market structure. The exclusion of as-efficient competitors is key to triggering antitrust liability for competition foreclosure. Therefore, for those who pursue the political agenda of building a fairer society,¹²³ it is necessary to bypass competition law, arguing—as the DMA does—that it is unfit to address the new challenges posed by digital gatekeepers.

¹²⁰ Dunne, *supra* note 12, 239; see also MASSIMO MOTTA, *COMPETITION POLICY: THEORY AND PRACTICE*, Cambridge University Press, 2004, 26, distinguishing between *ex ante* equity, which is consistent with competition policy and implies equal initial opportunities of firms in the marketplace, and *ex post* equity representing equal outcomes of market competition.

¹²¹ Vestager, *supra* note 4.

¹²² CJEU, *supra* notes 61 and 63; see also Opinion of Advocate General Rantos, Case C-377/20, *Servizio Elettrico Nazionale SpA v. Autorità Garante della Concorrenza e del Mercato* (Dec. 9, 2021), EU:C:2021:998, para. 45, arguing that if any conduct having an exclusionary effect were automatically classed as anticompetitive, antitrust would become a means for protecting less-capable, less-efficient undertakings and would in no way protect more meritorious undertakings that can serve as a stimulus to a market’s competitiveness.

¹²³ Vestager, *supra* note 28.

Indeed, in the setting of *per se* regulation, fairness can be invoked to justify more discretion, disregarding economic analysis and demonstration of the anticompetitive effects of conduct.

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

This is apparently the case with some EU policy initiatives such as the directive on copyright in the Digital Single Market.¹²⁴ In line with the proclaimed purpose of achieving “a well-functioning and fair marketplace for copyright,”¹²⁵ the directive grants to publishers a right to control the reproduction of digital summaries of press publications, which currently are often offered by information-service providers.¹²⁶ The new right aims to address the value gap dispute between digital platforms and news publishers, as the former are accused of capturing a huge share of the advertising revenue that might otherwise go to the latter by free riding on the investments made in producing news content. The argument is that these platforms take advantage of the value created by publishers when they distribute content that they do not produce and for which they do not bear the costs.¹²⁷

Notably, because of publishers’ reliance on some Big Tech platforms for traffic (*i.e.*, Google and Facebook), the latter are deemed to exert substantial bargaining power, which makes it difficult for publishers to negotiate on an equal footing.¹²⁸ Accordingly, it has been argued that a harmonized legal protection is needed to put publishers in better negotiating position in their contractual relations with large online platforms.

The European reform has not, however, been guided by an evidence-led approach. Indeed, there is no empirical evidence to support the free-riding narrative.¹²⁹ It relies merely on evidence of the crisis in the newspaper industry, without proof of the claim that digital infomediaries negatively impact

¹²⁴ Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, [2019] OJ L 130/92.

¹²⁵ *Ibid.*, Recital 3.

¹²⁶ *Ibid.*, Article 15.

¹²⁷ See Giuseppe Colangelo, *Enforcing Copyright Through Antitrust? The Strange Case of News Publishers Against Digital Platforms*, 10 J. ANTITRUST ENFORC 133 (Jun. 22, 2022).

¹²⁸ Directive 2019/790, *supra* note 124, Recitals 54 and 55; see also European Commission, *Impact Assessment on the Modernisation of EU Copyright Rules*, SWD(2016) 301 final, §5.3.1, arguing that the gap in the current EU rules “further weakens the bargaining power of publishers in relation to large online service providers.”

¹²⁹ *Ibid.*; see also Lionel Bently, Martin Kretschmer, Tobias Dudenbostel, Maria Del Carmen Calatrava Moreno, & Alfred Radauer, *Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive*, EUROPEAN PARLIAMENT (September 2017) [http://www.europarl.europa.eu/Reg-DATA/etudes/STUD/2017/596810/IPOL_STU\(2017\)596810_EN.pdf](http://www.europarl.europa.eu/Reg-DATA/etudes/STUD/2017/596810/IPOL_STU(2017)596810_EN.pdf).

legacy publishers by displacing online traffic. Looking at the previous ancillary-rights solutions at the national level (*i.e.*, in Germany and Spain), empirical results show no evidence of a substitution effect, but rather demonstrate the existence of a market-expansion effect. This therefore proves that online news aggregators complement newspaper websites and may benefit them in terms of increased traffic and more advertising revenue. Such aggregators allow consumers to discover news outlets' content that they would not otherwise be aware of, while reducing search times and enabling readers to consume more news.¹³⁰

In a similar vein, as part of the 2030 digital-policy program,¹³¹ the Commission and other European institutions appear set to deliver another legislative initiative that would force some large online platforms to contribute to the cost of telecommunications infrastructure.¹³² Indeed, telecom operators claim that internet-traffic markets are unbalanced, arguing that just a few large online companies generate a significant portion of all network traffic, but they do not adequately contribute to the development of such networks¹³³. As the argument goes, while network operators bear massive investments to ensure connectivity, digital platforms free ride on the infrastructure that carries their services.

Moreover, strong competition in the retail telecommunications market and regulatory interventions on the wholesale level have contributed to declining profit margins for telecom firms' traditional retail revenue streams. Therefore, telecom operators argue that their costs of capital are higher than their returns on capital. Finally, network operators complain that they are not in a position to negotiate fair terms with these platforms due to their strong market positions, asymmetric bargaining power, and the lack of a level regulatory playing field. Hence, they argue, a legislative intervention is

¹³⁰ See, *e.g.*, Susan Athey, Markus Mobius, & Jenő Pal, *The Impact of Aggregators on Internet News Consumption*, NBER Working Paper No. 28746 (2021), <http://www.nber.org/papers/w28746>; Joan Calzada & Ricard Gil, *What Do News Aggregators Do?*, 39 MARK. SCI. 134 (2020); Joint Research Centre for the European Commission, *Online News Aggregation and Neighbouring Rights for News Publishers*, (2017) <https://www.asktheeu.org/en/request/4776/response/15356/attach/6/Doc1.pdf>.

¹³¹ See European Commission, *2030 Digital Compass: the European Way for the Digital Decade*, COM/2021/118 final; and European Commission, *Proposal for a Decision of the European Parliament and of the Council Establishing the 2030 Policy Programme "Path to the Digital Decade"*, (2021) <https://data.consilium.europa.eu/doc/document/ST-11900-2021-INIT/en/pdf>.

¹³² See the public statements released in May 2022 by Commissioners Margrethe Vestager (<https://www.reuters.com/business/media-telecom/eus-vestager-assessing-if-tech-giants-should-share-telecoms-network-costs-2022-05-02>) and Thierry Breton (<https://www.euractiv.com/section/digital/news/commission-to-make-online-platforms-contribute-to-digital-infrastructure>).

¹³³ Axon Partners Group Consulting, *Europe's Internet Ecosystem: Socio-Economic Benefits of a Fairer Balance Between Tech Giants and Telecom Operators*, (2022) Report prepared for the European Telecommunications Network Operators' Association (ETNO), <https://etno.eu/downloads/reports/europes%20internet%20ecosystem.%20socio-economic%20benefits%20of%20a%20fairer%20balance%20between%20tech%20giants%20and%20telecom%20operators%20by%20axon%20for%20etno.pdf>; see also Frontier Economics, *Estimating OTT Traffic-Related Costs on European Telecommunications Networks*, (2022) A report for Deutsche Telekom, Orange, Telefonica, & Vodafone, <https://www.telekom.com/resource/blob/1003588/384180d6e69de08dd368cb0a9febf646/dl-frontier-g4-ott-report-stc-data.pdf>.

needed to address such imbalances and ensure a fair share of network usage costs are financed by large online content providers.¹³⁴

Following this path, the EU Council has recently supported the view expressed in the European Declaration on Digital Rights and Principles for the Digital Decade that it is necessary to develop adequate frameworks so that “all market actors benefiting from the digital transformation assume their social responsibilities and make a fair and proportionate contribution to the costs of public goods, services and infrastructures, for the benefit of all Europeans.”¹³⁵

The arguments advanced by telecom operators to support introducing a network-fee payment scheme would amount to a sending-party-network-pays system. Such proposals are not new, and they have already been rejected. As the Body of European Regulators for Electronic Communications (BEREC) noted 10 years ago, such proposals overlook that it is the success of content providers that lies at the heart of increases in demand for broadband access.¹³⁶ Indeed, requests for data flows stem not from content providers, but from internet consumers, from whom internet service providers already derive revenues.¹³⁷ From this perspective, both sides of the market (content providers and end users) already contribute to paying for Internet connectivity.¹³⁸ Further, “[t]his model has

¹³⁴ See also the appeal published by the CEOs of Telefónica, Deutsche Telekom, Vodafone and Orange, *United Appeal of the Four Major European Telecommunications Companies* (2022), <https://www.telekom.com/en/company/details/united-appeal-of-the-four-major-european-telecommunications-companies-646166>; and, more recently, the statement released by several CEOs, *CEO Statement on the Role of Connectivity in Addressing Current EU Challenges* (2022), https://etno.eu//downloads/news/ceo%20statement_sept.2022_26.9.pdf.

¹³⁵ European Commission, *European Declaration on Digital Rights and Principles for the Digital Decade*, COM(2022) 28 final, 3; see also European Council, *2030 Policy Programme ‘Path to the Digital Decade’: The Council Adopts Its Position* (2022), <https://www.consilium.europa.eu/en/press/press-releases/2022/05/11/programme-d-action-a-l-horizon-2030-la-voie-a-suivre-pour-la-decennie-numerique-le-conseil-adopte-sa-position>.

¹³⁶ Body of European Regulators for Electronic Communications, *BEREC’s Comments on the ETNO Proposal for ITU/WCIT or Similar Initiatives Along These Lines*, BoR(12) 120 (2012), 3, <https://www.berec.europa.eu/en/document-categories/berec/others/berecs-comments-on-the-etno-proposal-for-ituwcit-or-similar-initiatives-along-these-lines>; see also Body of European Regulators for Electronic Communications, *Report on IP-Interconnection practices in the Context of Net Neutrality*, BoR (17) 184 (2017), <https://www.berec.europa.eu/en/document-categories/berec/reports/berec-report-on-ip-interconnection-practices-in-the-context-of-net-neutrality>, finding the internet-protocol-interconnection market to be competitive.

¹³⁷ See former Commissioner Neelie Kroes, *Adapt or Die: What I Would Do if I Ran a Telecom Company* (2014), https://ec.europa.eu/commission/presscorner/detail/de/SPEECH_14_647, arguing that the current situation of European telcos is not the fault of OTTs, given that the latter are the ones driving digital demand: “[EU homes] are demanding greater and greater bandwidth, faster and faster speeds, and are prepared to pay for it. But how many of them would do that, if there were no over the top services? If there were no Facebook, no YouTube, no Netflix, no Spotify?”

¹³⁸ Body of European Regulators for Electronic Communications, *supra* note 136, 4. Concerns about side effects on consumers of the possible introduction of a network infrastructure fee have been raised by the European consumer organisation BEUC, *Connectivity Infrastructure and the Open Internet*, (2022) https://www.beuc.eu/sites/default/files/2022-09/BEUC-X-2022-096_Connectivity_Infrastructure-and-the_open_internet.pdf; see also the open letter signed by 34 civil-society organisations from 17 countries (https://epicenter.works/sites/default/files/2022_06-nn-open_letter_cso_0.pdf) arguing that nothing has changed that would merit a different response to the proposals that have been already discussed over the past 10

enabled a high level of innovation, growth in Internet connectivity, and the development of a vast array of content and applications, to the ultimate benefit of the end user.”¹³⁹

Moreover, by charging Big Tech firms, the proposal may clash with the legal obligation of equal treatment that ensues from the Net Neutrality Regulation,¹⁴⁰ which has been justified under the opposite view that it is broadband providers who enjoy endemic market power as terminating-access monopolies, and hence should be precluded from discriminating against some traffic.¹⁴¹ From this perspective, it would be difficult to justify an intervention intended to restore fairness in the relationship between network operators and content providers on the premise that the former suffers from an asymmetry of bargaining power without repealing the Net Neutrality Regulation.

BEREC recently affirmed its view in a preliminary assessment of the mechanism of direct compensation to telecom operators.¹⁴² Changes in the traffic patterns do not modify the underlying assumptions regarding the sending-party-network-pays charging regime, therefore “the 2012 conclusions are

years and that charging content and application providers for the use of internet infrastructure would undermine and conflict with core net-neutrality protections; see also David Abecassis, Michael Kende, & Guniz Kama, *IP Interconnection on the Internet: A European Perspective for 2022*, (2022) <https://www.analysismason.com/consulting-redirect/reports/ip-interconnection-european-perspective-2022>, finding no evidence for significant changes to the way interconnection works on the internet and arguing that the approach advocated by proponents of network-usage fees would involve complexity and regulatory costs, and risks being detrimental to consumers and businesses in Europe; furthermore, see David Abecassis, Michael Kende, Shahan Osman, Ryan Spence, & Natalie Choi, *The Impact of Tech Companies' Network Investment on the Economics of Broadband ISPs* (2022), <https://www.analysismason.com/internet-content-application-providers-infrastructure-investment-2022>, reporting significant investments undertaken by content and application providers in Internet infrastructure.

¹³⁹ Body of European Regulators for Electronic Communications, *supra* note 136, 4. In the next months, the BEREC is expected to assess again the impact of the potential sending party network pays principle on the Internet ecosystem: see Body of European Regulators for Electronic Communications, *Work Programme 2023*, BoR (22) 143 (2022), 26-27, <https://www.berec.europa.eu/en/document-categories/berec/berec-strategies-and-work-programmes/draft-berec-work-programme-2023>.

¹⁴⁰ Regulation (EU) 2015/2120 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union, (2015) OJ L 310/1.

¹⁴¹ For a summary of the net-neutrality debate, see Giuseppe Colangelo & Valerio Torti, *Offering Zero-Rated Content in the Shadow of Net Neutrality*, 5 M&CLR 41 (2021); see also Tobias Kretschmer, *In Pursuit of Fairness? Infrastructure Investment in Digital Markets*, (2022) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4230863, arguing that the policy solution at issue would fall short of the principles of efficient risk allocation, time consistency, and net neutrality, and might seem like arbitrarily targeting a group of (largely U.S.-based) firms while letting (at least partly European) newcomers and/or smaller firms enjoy the same externalities at no cost. Indeed, the author notes that a transfer from Big Tech to telecom-infrastructure providers would be equivalent to a tax on success, since it would be based on *ex post* estimates of benefits from prior investments. Further, a direct and unrestricted transfer may not ensure sufficient infrastructure investment in the future, as it is not conditional on future behavior, but rather it would serve as a windfall profit for past (imprudent) behavior that can finance any kind of activity by telecom-infrastructure providers. Finally, a fair distribution of investment financing would require all complementors to the basic service to pay a share of future investments proportional to the expected benefit from the investments to be undertaken.

¹⁴² Body of European Regulators for Electronic Communications, *BEREC preliminary assessment of the underlying assumptions of payments from large CAPs to ISPs*, BoR (22) 137 (2022).

still valid.”¹⁴³ The sending-party-network-pays model, BEREC argues, would provide ISPs “the ability to exploit the termination monopoly” and such a significant change could be of “significant harm to the internet ecosystem.”¹⁴⁴ Further, BEREC questioned the assumption that an increase in traffic directly translates into higher costs, noting that the costs of internet-network upgrades necessary to handle an increased traffic volume are very low relative to total network costs, while upgrades come with a significant increase in capacity.¹⁴⁵ Moreover, BEREC once again found no evidence of free riding along the value chain¹⁴⁶: the IP-interconnection ecosystem is still largely competitive and the costs of internet connectivity are typically covered and paid for by ISP customers.

V. Conclusion

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

The experience of EU competition-law enforcement is illustrative of the difficulties inherent in relying on fairness as an applicable standard. It also underscores why enforcers have traditionally been reluctant to do so. Indeed, attempts to evaluate the unfairness of prices have required courts and competition authorities to identify economic values, while the struggle in finding agreement on the economic definition of what is fair has generated a wave of litigation in the SEP-licensing scenario. Therefore, while seeking refuge in the “ordinary meaning of the word” is apparently useless, envisaging an economic proxy for fairness is particularly challenging.

Despite this background, the EU institutions have embarked on a mission to appoint fairness as the lodestar of policy in digital markets. The DMA offers one definition of fairness, while all the other initiatives (P2B Regulation, the proposed Data Act, the Copyright Directive, and the ongoing discussion on the cost of telecom infrastructure) are likewise moved to address imbalances in bargaining power that do not guarantee that surplus will be adequately shared among market participants. On closer inspection, however, the initiatives are not fully consistent with any particular definition. The notion of fairness is often merged with contestability and is invoked to protect a wide range of stakeholders (business users, end users, rivals, or just small players), even when there is no evidence of disproportionate advantage for large online companies. Moreover, rather than being translated into specific rules, fairness is still primarily promoted according to a standard-based approach.

¹⁴³ *Ibid.*, 4-5.

¹⁴⁴ *Ibid.*, 5.

¹⁴⁵ *Ibid.*, 7-8.

¹⁴⁶ *Ibid.*, 11-14.

The revival of fairness considerations appears motivated primarily by policymakers' desire to be free of any significant procedural constraints. An analogous policy trend can be seen among U.S. authorities, who likewise question the role of efficiency in antitrust enforcement and call for a "return to fairness."¹⁴⁷ In the name of fairness, various business practice, strategies, and contractual terms can be evaluated without incurring the burden of economic analysis. And even the market structure can be questioned.

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

¹⁴⁷ Bedoya, *supra* note 6, 8.