

Fairness in the Platform – End Users Relation

Prof. Marco Botta

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Fairness – a well-known principle in EU competition law

- **Fairness in the Treaty provisions:**
 - 1) Art. 101(3): consumers should receive a ‘fair’ share of the benefits deriving from the agreement.
 - 2) Art. 102(a): the dominant company shall NOT impose ‘unfair purchase or selling prices’ ➤ excessive pricing.
 - 3) Art. 102(a): the dominant company shall NOT impose ‘unfair trading conditions’ ➤ unfair contract terms.
 - 4) Art. 102(c): dominant firm shall NOT discriminate its customers, ‘placing them at a competitive disadvantage’.
- **Reference to ‘fair competition’ in CJEU case law on exclusionary abuses:**
 - 1) ‘...where the national court refers to ‘normal competition’, it is using terminology repeatedly used by the Court,... (such as) ‘**fair competition**’, ‘competition on the merits’ and ‘competition on the basis of quality’.’ (AG’s Opinion in *Servizio Elettrico Nazionale*, para. 53).
 - 2) ‘The objective of undistorted competition implies that competition takes place on a **fair basis** that is not adversely affected either by agreements between undertakings..., or by the unilateral conduct of dominant undertakings’ (*Google Shopping*, para. 433).
- **CJEU has never clarified the meaning of fairness ➤ consumers’ welfare v. fairness?**



Fairness – 1 concept v. 4 possible meanings

Equity:

proper allocation of gains/burdens
among market participants.
Art. 101(3); Excessive pricing.

Correctness:

abide recognized market
rules/behaviours.
Unfair trading conditions.

Equality:

non-discrimination.
Discriminatory pricing

Equal opportunities

among market participants.
Exclusionary abuses
(e.g., self-preferencing; preferential
access)

Antitrust decisions in digital markets based on fairness considerations

Case	Jurisdictions	Anti-competitive conduct	Beneficiary	Fairness meaning
<i>Apple store</i>	NL (2021) – <i>dating apps</i> EU (pending) – <i>music</i> UK (pending)	Unfair trading conditions on apps developers	Business users	CORRECTNESS EQUAL OPPORTUNITIES
<i>Google Ads Rules</i>	FR (2019)	Unfair trading conditions on advertisers	Business users	CORRECTNESS
<i>Google News</i>	FR (2022)	Unfair trading conditions on newspapers	Business users	CORRECTNESS
<i>Google Shopping</i>	EU (2017)	Self-preferencing	Business users	EQUAL OPPORTUNITIES
<i>Google Android</i>	EU (2018)	Prohibition apps removal	Business users End users	EQUAL OPPORTUNITIES CORRECTNESS
<i>German Facebook</i>	DE (2019)	Unfair processing of personal data	End users	CORRECTNESS

DMA objectives

- **Definitions – DMA Preamble:**

- 1) **Contestability:** ‘ability of undertakings to effectively overcome barriers to entry...and challenge the gatekeeper on the merits of their products and services’ (para. 32).
- 2) **Fairness:** ‘unfairness should relate to an imbalance between the rights and obligations of the **business users** where the gatekeeper obtains a **disproportionate advantage**’ (para. 33)
- 3) ‘Contestability and fairness are **intertwined**. The lack of contestability ... can enable a gatekeeper to engage in unfair practices.’ (para. 34).

Contestability:

- 1) Platform 2 business users
- 2) Platform 2 platform

Fairness:

- 1) Platform 2 business users
- 2) **Platform 2 end users** ????

Fairness in the DMA obligations - end users as indirect beneficiaries?

DMA provision	Obligation	Protected interest	Fairness meaning
Art. 5(2)	Prohibition combination personal data without the users' consent	Contestability/fairness	CORRECTNESS
Art. 5(5)	Access/subscribe to third-party apps	Contestability/fairness	CORRECTNESS
Art. 6(3)	Possibility to un-install gatekeeper's apps	Contestability / fairness	CORRECTNESS
Art. 6(6)	Switch/subscribe to different software applications	Contestability / fairness	CORRECTNESS
Art. 6(9)	Right to real-time data portability	Contestability / fairness	CORRECTNESS



Fairness in DMA – DG Comp

- What are the benefits of the Digital Markets Act?

'Consumers will have more and better services to choose from, more opportunities to switch their provider if they wish so, direct access to services, and **fairer prices**'.

Source: DG Comp web-page explaining the DMA benefits



Questions for the panelists

- 1) Fairness v. consumers' welfare in antitrust enforcement in digital markets ➤ friends v. foes?
- 2) Fairness as a 'political slogan' v. long-term game changer in EU competition law enforcement in digital markets?
- 3) What is the origin and meaning of 'fairness' under the DMA?
Same meaning under EU competition law?
- 4) Does the DMA effectively promote 'fairness' in the platform-end users relation?

Our panelists



A decorative graphic on the left side of the slide features a stylized map of Europe in white. The map is set against a blue background that is densely populated with various colored speech bubbles (yellow, red, pink, and light blue) and question marks. The speech bubbles and question marks are scattered across the entire left half of the slide, creating a vibrant and thematic border.

Poll question

Should 'fairness' considerations have any role in antitrust/DMA enforcement in digital markets?

- 1) YES.
- 2) NO.

Thank you for your attention!

marco.botta@eui.eu

