



Stanford
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PANEL V

BUSINESS USERS RELATION AND INTER-PLATFORMS COMPETITION

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- The revival of fairness and the manifold meanings of fairness
 - The DMA and the interface between fairness and contestability
 - German Monopolkommission (2021): different goals, i.e. exclusion v. exploitation
 - Fairness ≠ contestability (Recital 33): «imbalance between the rights and obligations of business users»; gatekeepers' «gateway position and superior bargaining power»; «disproportionate advantage» that does not allow other market participants to capture fully the benefits of their own contributions
- [see also Monopolkommission (2021) and Data Act (Chapter V): fairness and economic dependence; Crawford et al (2023): fairness and surplus sharing]
- Fairness *and* contestability («intertwined»: Recital 34)

Results:

- an obligation may address both fairness and contestability
- the DMA does not clarify which obligation is aimed at safeguarding contestability and/or promoting fairness
- most of its provisions appear aimed at ensuring contestability (some of these do not directly involve business users relation)
- in the vast majority of its provisions, the goal of fairness appears confused/intertwined with contestability

Table 1. Contestability and/or fairness in the DMA

DMA provision	Protected interest	Direct beneficiaries
Art. 5(2): use of personal data	Contestability	End users
Art. 5(3): parity clause	Contestability and fairness	Business users
Art. 5(4): anti-steering	Contestability and fairness	Business users
Art. 5(5): access to third-party app	Contestability	End users
Art. 5(6): non-compliance	Contestability and fairness	Business and end users
Art. 5(7): use of ID functionalities	Contestability and fairness	Business and end users
Art. 5(8): access to core services conditional on each other	Contestability and fairness	Business and end users
Art. 5(9-10): transparency in advertising intermediation	Transparency	Business users
Art. 6(2): sherlocking	?	Business users
Art. 6(3): app un-installing	Contestability	End users
Art. 6(4): side-loading	Contestability	Business users
Art. 6(5): self-preferencing in ranking	Contestability	Business users
Art. 6(6): restriction to user switching	Contestability	End users
Art. 6(7): access to operating system and other features	Contestability	Business users
Art. 6(8): transparency in advertising intermediation	Transparency	Business users
Art. 6(9): data portability	Contestability	End users
Art. 6(10): access to data generated by users of business users	Contestability	Business users
Art. 6(11): access to search data	Contestability	Business users
Art. 6(12): FRAND access	Fairness	Business users
Art. 6(13): conditions of termination	Contestability and fairness	Business and end users
Art. 7: interoperability of number-independent interpersonal communications	Contestability	Business users

Source: Colangelo, 'In fairness we (should not) trust. The duplicity of the EU competition policy mantra in digital markets', (2023) Antitrust Bulletin

Some open questions

- ❑ The meaning(s) of fairness
- ❑ The relationship between fairness and consumer welfare
- ❑ Unfairness as abuse of economic dependence
- ❑ If unfair = abusive, fair = lawful? Or fair may also be abusive?
- ❑ Justifications for the differential treatment under the DMA and the competition law (e.g., MFN)?

Panelists



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