Is it the Advent of Fairness?*

Marc Ivaldi and Connie Lee
Toulouse School of Economics, NERA

I. Fairness is everywhere in the DMA

1815. Fairness has emerged as a central theme in the European Commission's Digital Markets Act (DMA) and is increasingly visible in policy discussions regarding digital markets.

1816. The DMA claims that "*market processes are often incapable of ensuring fair economic outcomes with regard to core platform services*," (recital 5) and sets forward a definition for gatekeepers in the digital markets. The Commission describes its concerns this way: "[gatekeeper features are] *likely to lead, in many cases, to serious imbalances in bargaining power and, consequently, to unfair practices and conditions for business users, as well as for end users of core platform services provided by gatekeepers, to the detriment of prices, quality, fair competition, choice and innovation in the digital sector*." (recital 4)

1817. Notably, the closest the DMA comes to describing what is fair is in stating, "*unfairness should relate to an imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage*." (recital 33) Interestingly, end users (i.e., consumers) are not part of this definition. While the DMA describes how end users fit into the digital markets setting, they are nowhere to be seen where it sets forward a theory of harm and a framework for intervention. Instead, the principles of contestability and fairness take center stage.

---

* This article has been previously published in Concurrences, and it might have been edited for clarity and cohesion. Marc Ivaldi, Connie Lee, Is it the advent of fairness?, September 2023, Concurrences N° 3-2023, Art. N° 113069, Concurrences+.

1818. Given Margrethe Vestager's focus on fairness since her term in office began, this is not surprising. Many have noticed a clear increase in the use of the words "fair" and "unfair" in Vestager's speeches, and some have voiced concerns about getting lost in the moral or "romantic" ideas of fairness. As we discuss below, fairness is a principle that can be defined in many ways on economic grounds, and when it comes time to implement rules, we have to be careful not to apply contradicting definitions of fairness.

II. Fairness has always been present in competition law and policy

1819. While some say the resurgence of fairness is a step away from the economic approach to competition enforcement, this is not the full picture.

1820. The concept of fairness is deeply ingrained in the history of antitrust. Since the beginning of the 20th century – when Standard Oil was accused of abusing its market dominance with unfair business practices – experts have evoked notions of fairness. A debate among legal professionals and economists on the goals of antitrust policy resulted in a convergence on the consumer welfare standard and Chicago School principles of economic efficiency. Crucially, this is a manifestation of fair principles, not an independent concept of fairness. The consumer welfare standard puts the consumer at the heart of the definition of fairness and, essentially, represents a consensus on the basis for applying fairness.

1821. In the EU, fair principles have been present in the Treaty on the functioning of the European Union (TFEU) since its inception. Article 102 prohibits "unfair trading conditions" and "unfair prices," and Article 101(1) refers to assessing whether consumers receive "a fair share." Furthermore, non-discrimination is a central theme in EU law. Again, the consumer welfare standard has been the standard used to guide these fair principles.

III. Why is fairness so present in digital markets?

1822. Today, the broader theme of fairness is returning once more, pushing the limits of the consumer welfare standard. This is particularly evident in digital markets as digital platforms have emerged with new market characteristics that do not fit into the existing framework. Digital platforms are often characterized by significant size asymmetries, zero-price services, network effects, weak IP protection, and more.

1823. The internet has been credited with enhancing access to information and lowering barriers to entry for small businesses. This means businesses on the web can reach more consumers, but they are also in competition with more

businesses. As the online web is so widely cast, the removal of one business from a platform means there are multiple other options to take its place. This has caused discontent among parties such as marketplace sellers and news publishers as they feel their asymmetric bargaining positions leave them subject to "unfair" terms or cause them to lose out on a "fair share" of the return.

1824. In addition, a fundamental principle of the open web is that it is "open." Consumers can access it freely and at zero price. Some may say the price consumers pay is the data they provide, but a precise methodology to measure this has not yet been established. This turns the consumer welfare principle on its head as the consumer surplus, in its traditional sense, is already maximized.

1825. The effects of any purported harmful practices will not be captured in a pass-through to prices. Therefore, the traditional methods of evaluation are ineffective.

1826. Instead, consumers may be affected by non-price factors such as quality or product variety or, alternatively, more social factors such as privacy and information access for democratic reasons. Further, nobody denies that digital platforms are innovative and have generated huge gains for society; however, the effect on innovation in adjacent areas may not be fully internalized.

1827. These effects on consumers are fundamentally more difficult to quantify and, therefore, potential harms are more difficult to measure. Since antitrust enforcers are concerned about type II errors, the difficulty in measuring effects on consumers has led to more theories of harm that stop short at the first step, with businesses. Even though businesses were already included in antitrust policy, the previous guiding principle was how that would then affect consumers. Now that the effect on consumers is more ambiguous, various parties are turning to fairness arguments for themselves and losing sight of consumers.

IV. The difficulties of defining fairness

1828. While the concept of fairness has a positive connotation among the broader population, when it comes to setting rules based on fairness, many issues emerge. What is "fair" can vary in the eye of the beholder. As George Stigler pointedly put it, justice is "*a suitcase full of bottled ethics from which one freely chooses to blend his own type of justice*."[1]

1829. The well-known cake-cutting exercise is an analogy that illustrates this challenge. What is the fairest way to cut a cake? One could cut the cake into equal slices, but how should one determine the people to share the cake between? Another distribution could be based on the value people have for cake, such that people who like cake get a larger slice than people who

1 J. Stigler, The Law and Economics of Public Policy: A Plea to the Scholars; (1972).

don't like cake as much. The cake could also be distributed based on subgroups. For instance, a fair distribution could split equal parts of the cake between men and women. Another distribution strategy could be based on equality of opportunity. This could be implemented by giving everyone a fork and letting them dig in at the same time. It could also be implemented as a raffle where everyone has an equal probability of winning, but the cake would only go to one person.

1830. As this analogy makes clear, different outcomes can be considered fair depending on the basis used. Operationalizing the concept will require answering questions such as "Fairness for who? And on what basis?" Equality, equity, equal opportunity, efficiency, etc., imply different outcomes, and using the term "fair" without a common definition will create the risk of conflicting effects.

V. How should fairness be implemented in practice?

1831. The typical question of how to fairly allocate the gains created by the actions of all, or a set of, players is the central question of cooperative game theory. Assuming all players explicitly or implicitly agree to cooperate, the object of cooperative game theory is to provide solution concepts that define and determine the allocation each player receives. These solutions are not self-enforcing. They must be enforced by external forces or contracts.

1832. The DMA, as well as many experts, considers that the outcomes – in terms of industrial organization – generated by the characteristics of the digital sector as summarized above (e.g., for core platform services) create situations of strong imbalances in bargaining power. Therefore, they require enforcement of fair allocations. This is why the concept and tools of cooperative game theory are called in.

1833. In this context, a fair allocation is one that allows a player to get a revenue at least as high as its contribution to the overall wealth generated by the actions of all players. Although it is an intuitive way to define fairness, implementing and enforcing this fair allocation is not an easy task for the regulator, the agency, or the intermediary since it requires the observation of information such as the costs and revenues of each player.

1834. One solution is to let the players enter a Nash bargaining agreement in which they must decide how to share the payoffs of the game. In a world of asymmetric information, it is not clear that this will end in a legally stable situation. Moreover, nothing guarantees that the outcome of such an agreement corresponds to the highest social welfare one could expect from the working of all individuals and firms in the economy.

1835. Clearly, the fairness objective strongly put forward in the DMA has opened Pandora's box.