FOREWORD

DAMIEN GERARD*

“Fair competition” is referred to in the preamble of the Treaty on the Functioning of the European Union (“TFEU”) as a corollary to the elimination of barriers to trade between Member States justifying action at EU level in promotion of economic and social progress. But what does “fair” really mean when associated with “competition”, as it is in statutes enacted by various jurisdictions across the world? The question might sound utterly academic at first if it wasn’t for the pervasive references to fairness in today’s policy discourses underpinning competition law enforcement, in the EU but also beyond, and for the perception that a stream of cases recently brought or decided at EU and national level are guided by somewhat elusive fairness considerations, including non-discrimination, neutrality, equality of opportunities, natural justice or the avoidance of abuses of law. Hence, in pursuance of its mission to pool expertise and experience to shed light upon profound evolutions in EU competition policy, the Global Competition Law Center (GCLC) of the College of Europe invited practitioners and academics, enforcers and business advisers, lawyers and economists to reflect on the significance of fairness in explaining recent enforcement trends and actual outcomes, and on the implications of relying on fairness standards in applying substantive competition principles. That exercise took place on 25-26 January 2018 in Brussels on the occasion of the 13th GCLC Annual Conference.

Commissioner Vestager can be largely credited for spurring this renewed interest for a notion of fairness long overshadowed by a more technocratic vocabulary revolving around concepts of welfare, harm to competition and efficiencies. Fairness is indeed mentioned in one way or another in more than half of the Commissioner’s public remarks since 2014, and in numbers

* Director, Global Competition Law Center (GCLC); Visiting Professor, College of Europe and University of Louvain. All views are personal. Reactions and inquiries welcome at damien.gerard@uclouvain.be.
that will most probably top her three predecessors combined before the end of her mandate. Yet equally remarkable was the way former US Assistant Attorney General for Antitrust, Renata Hesse, hailed “economic fairness” as the “ultimate goal of antitrust” at a time where the Obama administration started questioning the existence of a possible causal relationship between declining competition, market entry and labour market mobility, on the one hand, and increased industry concentration and corporate profits, on the other hand. In her Georgetown speech of September 2016, Ms Hesse openly equated fairness with properly functioning competitive markets and postulated that fairness was inherent in protecting competition, thereby attempting to reconcile the popular and technocratic understandings of antitrust principles’ overarching goals. Needless to say that the resurgence of fairness in the US context elicited mixed reactions; likewise in Europe, competition professionals have displayed some discomfort at the inherently multifaceted nature and seemingly limitless reach of fairness as an enforcement principle.

In her opening address to the 13th GCLC Annual Conference, reproduced with permission in this volume, Commissioner Vestager clarified that fairness was about the social rationale of competition principles and not their application in individual cases: “[f]airness is about one of the most fundamental questions in our work – what, exactly, is competition policy for?” At a high level, competition enforcement involves complex balancing exercises between preserving businesses’ incentives to succeed and ensuring that consumers retain the possibility to arbitrate between competing options. These exercises are governed by established rules and standards, and require an in-depth assessment of legal and economic arguments. Fairness is about the outcome of these exercises: anticompetitive effects are unfair because they ultimately deprive consumers of the power to arbitrate the market place. This is fundamental, in Commissioner Vestager’s view, because the ubiquity of markets means that losing such power may significantly contribute to a general loss of trust in society and the institution tying it together, with unpredictable consequences. Markets are so much embedded in the social fabric that they have been the subject of various forms of regulations since time immemorial, and competition law can be viewed as one such form. Importantly, though, competition law is no silver bullet for solving all unfairness in society: “it doesn’t mean that just because something is unfair, it’s automatically also against the competition rules”. Yet, competition rules do contribute to ensuring faith in the allocative functions of free markets, as they lie at the core of the institutional arrangements governing our liberal society. Hence, competition principles “do [their] bit to make Europe a fairer place to live”.

10

BRUYLANT
DG COMP Director General Laitenberger also emphasized during the conference that references to fairness in policy discourses are not meant to replace rigorous, evidence-based analysis of individual cases, and that fairness is not an operational concept: it needs to be translated into more specific rules, standards and tests underpinned by the law, the jurisprudence, economic analysis and the painstaking establishment of the facts of each case.

Indeed, fairness as a concept can be viewed as inherently relative and open-ended, in tension with the legal certainty required for the proper functioning of markets. Likewise, there is across Europe a wide body of unfair trading practices law concerned with the protection of end-consumers and individual market participants, which belong to a different realm than competition law. Conversely, fairness as a social rationale for competition policy is sustainable as long as there is clarity about how the legal principles articulating that rationale are to be implemented in specific circumstances, e.g., by means of effects-based assessments of harm to competition. In turn, research into the legislative history of the EU rules of competition as included in the Treaties of Rome seems to confirm that fairness was not conceived at the time as an operational principle. The reference to unfair prices or trading conditions in Article 102(a) TFEU can even be attributed to an inaccurate translation of the German “unangemessen”, which literally means “inappropriate” and does not encapsulate specific fairness considerations, as explained by Thomas Lübbig. Moreover, as the conference also revealed, fairness is no operational principle under French or German competition law either, with some possible and interesting exceptions for network industries and utilities as they originated in or are still endowed with regulatory monopolies.

In the US as well, the FTC has publicly stated that the standalone enforcement of the notion of “unfair methods of competition” under Section 5 of the FTC Act would be guided by “the public policy underlying the antitrust laws, namely, the promotion of consumer welfare” and would require evidence of “harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications”. Thus “unfair” at an operational level amounts to “anticompétitive” under the Sherman Act, as interpreted by the US Supreme Court in cases like Brooke Group or Trinko. That does not prevent Congress to keep referring to “fair competition” in communicating to the general public about the social value of antitrust principles, including the fact that they do not entail protecting firms from competition itself. In other words, fairness can be used in different contexts as a convenient unifying concept to capture
and convey the overarching objective of competition policy, thereby also accommodating different conceptions of the defining principles of justice governing social institutions, including the role and scope of government intervention.

Against this background, it would be pointless to try summarizing each of the rich and stimulating presentations to the 13th GCLC Annual Conference and of the written contributions reproduced in this volume. The remainder of this foreword therefore focuses on three recurring themes that can assist in conceptualising the significance and implications of fairness for competition policy and, by way of consequence, the social rationale ascribed to antitrust principles in today’s EU context.

Firstly, very much like the EU itself, competition enforcement originated as a technocratic enterprise with a view to serving a higher purpose but still contained in its aims and reach. Its direction was shaped by interrelated institutional, procedural and substantive dimensions, which have evolved over time. With the EU turning into an autonomous albeit contested polity, and while it only recently emerged from a profound crisis that has shaken faith in markets and continues to have severe social repercussions, relying on fairness to locate competition policy as part as the EU’s core social arrangements surfaces as both a useful and clever endeavour. At the highest level, competition policy may indeed be theorised as an institution aimed at reconciling individual and collective rationality, i.e., each entrepreneur’s efforts to maximize profits, on the one hand, and the welfare of society at large, on the other hand. To that extent, fair competition may entail that there are boundaries to profit maximisation strategies beyond which these are considered socially unacceptable by reference to certain standards of justice as articulated in antitrust principles and applied by means of an array of legal tests and enforcement rules.

From there, while naturally concerned with overall welfare effects and the recognition of businesses’ contribution thereto, this basic fairness rationale emerges as an interesting epistemological tool to recognise the particular sensitivity of cases involving the ownership and use of specific rights and resources granted by society, including the actions of (former) de jure monopolies, the monetisation of IP rights or the operation of regulatory processes, including the reliance on possible loopholes therein, but also public compensations. That particular sensitivity rooted in the balancing of public and private interests may then translate into a possible gradation in the level of harm to competition justifying findings of infringement. Conversely, fairness suggests that the special responsibility ascribed to dominant firms in Europe may be construed as a relative concept whereby
those who contribute most to society may claim a larger share of the wealth pie, including of the value along the value chain. In turn, it may also support heightened scrutiny of the dealings of those market players who have achieved levels of prominence making them socially unassailable.

At the end, references to fairness in recent competition policy discourses appear to have been widely perceived as an invitation to take a step back from discussions of the subtle nuances of individual legal tests or the respective merits of economic models to reflect on the wider context and relevance of competition policy, in recognition of the fact that justice principles conveyed by the notion of fairness (or otherwise) may serve to adjust individual outcomes within the boundaries of the law. Hence, while Commissioner Vestager underlined the role that fairness may play in determining enforcement priorities, the acknowledgment that fairness does not mandate particular legal standards but pertains to the social rationale of competition policy also informs the exercise of the discretion permissible under established legal standards. Thus, instead of weakening legal certainty, the candid exposure of the fairness rationale underlying competition principles, as sketched out hereinabove, is due to increase the predictability of individual assessment.

In closing, it is quite remarkable that while discussing fairness over two consecutive days the GCLC conference did not specifically echo discussions ongoing in the US over the direction of antitrust enforcement and the alleged failure of the consumer welfare standard, as claimed by the tenants of the “New Brandeis School”. There seems indeed to be a tendency to approximate the EU fairness conversation with renewed attention in the US for issues of economic concentration and the proposition that they originate (at least in part) in lenient antitrust enforcement rooted in unduly conservative legal standards. One may only speculate about the possible difference in perception on both sides of the Atlantic as to the connection between fairness and the alleged limitations of the consumer welfare standard, aside from any hypothetical consensus between Commissioner Vestager and Justice Brandeis over the centrality of markets as the primary institutions where individuals experience freedom (or lack thereof) in their daily lives.

For example, the EU fairness conversation does not seem to advocate a departure from an effects/outcomes-based approach to determinations of harm to competition. Fairness rather emerges as an alternative way to capture enforcement outcomes, and one that is not anathema to efficiency considerations. Possibly, the different perception also arises from different starting points in the respective discussions; while the EU settled in
for a broad understanding of the notion of consumer welfare concerned with all plausible static and dynamic effects, the US is often presented as having adhered over the years to a narrower understanding of that standard, partly informed by normative assumptions about the robustness of markets and the virtues of monopoly rents. From a EU point of view, it is tempting to see in the claims formulated by the New Brandeis School a subtle plea for convergence with the kind of holistic approach developed in Europe and the prevailing trust in competition over monopolies in delivering optimal outcomes, even though that approach is fundamentally independent of fairness considerations. Finally, one cannot fully dismiss a certain discomfort in Europe with certain US-centred doctrinal debates that come across as partly detached from enforcement realities and the complex trade-offs involved in establishing harm to competition. At the end, independently of labels and removed from policy discourses, the crux of the antitrust discipline lies indeed in dialectic and iterative exchanges over the substance of cases with a view to assessing the (likely) welfare effects of business practices restricting competition, according to justifiable process rules and within the boundaries set by enabling statutory provisions.

* By subjecting fairness to the scrutiny of the antitrust community at large, the organisers of the 13th GCLC Annual Conference at least hope to have contributed to fostering a better understanding of some of the variables capable of affecting enforcement trends and individual outcomes, as well as their significance and implications. This edited volume containing written accounts of various contributions to the conference is designed to enable readers to delve deeper into this wide-ranging topic. Utmost gratitude goes to their authors for their commitment to this project, and their patience. This volume would have never seen the light without the invaluable support of Joanna Hornik and Lina Restivo who took charge of the practical – and flawless – organisation of the 13th GCLC Annual Conference.