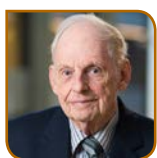


# THE MULTIFACETED NATURE OF FAIRNESS IN COMPETITION POLICY



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## I. THE MULTIFACETED NATURE OF FAIRNESS IN COMPETITION POLICY

A resurgence of arguments for incorporating fairness considerations within domestic competition policies parallels the re-emergence of free trade versus fair trade debates at the international level. Where the latter debate can be seen as the result of increasing discontent with globalization reflected in the rise of economic nationalism,<sup>2</sup> the former is a response to a widespread decrease in the levels of competition in various industries, in the United States in particular.<sup>3</sup> The question of what role fairness considerations should play in domestic competition policy, however, still remains largely unexplored and unclear. In this article, we disentangle the scope of fairness in competition policy by disaggregating and evaluating distinct notions of fairness that are pertinent to domestic markets, noting that both critics and supporters of fairness have generally failed to clarify the type of fairness concerns that should be pertinent to the competition policy domain.<sup>4</sup> As a result, arguments in favor of more equity-oriented competition laws risk being based on extremely vague notions of fairness, and arguments dismissing any scope for fairness risk neglecting legitimate notions that we believe are in fact pertinent to this area of law.

In contrast to wholesale and unclearly defined notions of fairness that usually animate the debate, we identify the following specific notions of fairness that are pertinent to domestic markets: vertical fairness (between producers and consumers); horizontal fairness on the demand side (between consumers); horizontal fairness on the supply side (between producers); procedural fairness (due process and private enforcement). Not only can the different dimensions of fairness be distinguished using the categories of supply and demand (fairness between and within supply and demand), but they also relate to different notions of justice: redistributive (for example, choosing a welfare standard); procedural justice (due process and institutional design); and corrective justice (private rights of access to enforcement procedures for injured parties); and different notions of equity concerned with outcome (for instance, between consumers and producers), opportunity (between producers) and procedures (due process and private enforcement).

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<sup>2</sup> Trebilcock, "The Fracturing of the Post-War Free Trade Consensus: The Challenges of Reconstructing a New Consensus" (2017) University of Toronto Faculty of Law.

<sup>3</sup> See for instance: Council of Economic Advisers Issue Brief, "Benefits of Competition and Indicators of Market Power" (April 2016). Available at: [https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414\\_cea\\_competition\\_issue\\_brief.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf); The Economist, Too Much of a Good Thing, March 26, 2016.

<sup>4</sup> This article is based on a larger working paper: Ducci & Trebilcock, "The Revival of Fairness Discourse in Competition Policy" (2017).

Our view is one of general skepticism about notions of fairness in domestic competition policy. We do not see the choice of welfare standard in favor of consumer welfare as reflecting normatively defensible notions of fairness based on distributive goals, and favor total welfare as the normatively preferable objective of competition laws. Similarly, we do not see room for horizontal fairness among consumers, noting that such dimension is already ignored even under the consumer welfare standard, and consider possible issues among consumers more pertinent to consumer protection and other regulatory instruments. On the supply side, we dismiss broad notions of horizontal fairness based on the protection of competitors, while we recognize a narrower version of horizontal fairness on the supply side as implicit in the assumptions behind ensuring access to markets, reducing barriers to entry and penalizing exclusionary conduct. In this regard, observable trends of decreasing competition raise concerns but require targeted policy responses, none of which in our view justifies the introduction of broader horizontal fairness considerations between producers. We finally identify a procedural dimension of fairness both in terms of basic norms of due process and of an expansive role of private enforcement based on a corrective justice rationale, and defend this notion of fairness as central to the enforcement of competition laws. We then conclude our review of fairness considerations in the domestic context by pointing to the parallelism between fairness debates in domestic competition policy and the free versus fair trade debate in the international context.

## II. DIMENSIONS OF FAIRNESS IN DOMESTIC COMPETITION POLICIES

Historically, fairness concerns have animated the development of competition law since its inception. The economic and social dislocations occurring in the nineteenth century, as a result of improved transportation and communication technologies that led to large-scale production and a substantial increase in the efficient scale of manufacturing enterprises, provoked concerns among small producers, farmers and consumers who perceived themselves as disrupted or negatively affected by the forces of such economic transformations.<sup>5</sup> These concerns have usually blended together issues of wealth inequality, high prices for consumers, protection of smaller businesses and corruption of the political process by concentrations of economic power, and are expressed often explicitly or implicitly in the legislative texts and jurisprudence of many competition law regimes.

As antitrust policy developed through time, attacks against notions of fairness as pertinent to competition policy have been launched on both philosophical and economic theory fronts. From a philosophical perspective, some have argued that welfare economics should dominate policy-making generally and no independent weight should be accorded to conceptions of fairness.<sup>6</sup> Commentators have also criticized the subjective nature of fairness, describing notions of fairness as “a suitcase full of bottled ethics from which one freely chooses to blend his own type of justice.”<sup>7</sup> From the perspective of economic theory, the ascendance of the Chicago school of antitrust led to an emphasis on economic efficiency as the single goal of antitrust law, and the elimination from its realm of any other political, social and ethical goals, including fairness considerations. The influence of Chicago antitrust economics has been significant both from a normative perspective in favoring economic welfare, and from a positive perspective in highlighting the efficiency virtues of various forms of conduct, in particular in the area of dominance and vertical restraints. Although fairness considerations have not completely disappeared from competition policy (as the debate in favor of consumer welfare over total welfare based on distributive concerns in favor of consumers exemplifies), the general consensus in most mature competition policy regimes is that the overriding goal should be the maximization of some notion of economic welfare, and fairness considerations should be at best peripheral to competition policy.

However, today fairness is regaining prominence in competition policy discourse. This is in part the result of a broader discontent with globalization and related challenges to the free trade consensus, at least partially in response to the market disruptions caused by international trade, technology and other factors.<sup>8</sup> Within domestic markets, the return of fairness concerns is closely linked to the perceived decrease in the levels of market competition, a general trend observable in particular

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5 See Chandler, *The Visible Hand: The Managerial Revolution in American Business* (Cambridge: Mass: Harvard University Press, 1977); Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Act* (University of Chicago Press, 1981).

6 Kaplov & Shavell, “Fairness versus Welfare” 114 Harv. L. Rev. 961, 966 (2001).

7 Stigler, “The Law and Economics of Public Policy: A Plea to the Scholars” (1972) 1 J. Legal Stud. 4.

8 Trebilcock, *supra*, note 2.

in the U.S., which manifests itself in three specific forms: (1) evidence of increasing levels of market concentration; (2) decreasing levels of new business entry; and (3) increasing importance of winner-take-all markets as a result of technological change. As a result of these trends, a surge of fairness claims permeate contemporary competition policy debates where an increasing number of scholars and commentators have advocated stronger incorporation of equity considerations in order to address distributive concerns.<sup>9</sup> Among others, Anthony Atkinson in his book on inequality has argued that competition policy should embody explicit distributional concerns;<sup>10</sup> similarly, Joseph Stiglitz has called for stronger and more effectively enforced competition laws to help address inequalities created by market power,<sup>11</sup> and Paul Krugman has blamed the collapse of antitrust enforcement as a potentially important factor in the stagnating demand for labor, and increasing inequality more generally.<sup>12</sup> Implicit in the debate between critics and proponents of fairness, is however an overly broad, undefined notion of fairness, which in our view fails to advance the debate. In contrast, we highlight the need to assess specific dimensions of fairness that are pertinent to the domestic competition policy domain, which we evaluate in turn.

## A. Vertical Fairness

With regard to vertical fairness, competition policy scholarship and jurisprudence have devoted particular attention to the vertical dimension of fairness between consumers and producers, reflected in the well-known debate over the choice of welfare standard between consumer welfare and total welfare.<sup>13</sup> In our view, although many countries have through time converged toward consumer welfare as the predominant objective of their competition laws – an ascendance that reflects some notions of distributive justice and fairness toward consumers<sup>14</sup> – the normative force of the consumer welfare standard remains fragile. Under a distributive justice perspective, the relationship between market power and distributional fairness between consumers and producers is complex, and highly contingent on the facts and circumstances of each individual case. For instance, both consumers and producers are heterogeneous in their preferences and wealth, and it is often complex to calculate the incidence of price increases. Moreover, in many litigated cases consumers are in fact intermediate purchasers, thereby not doing justice to final consumers (at least directly). Despite being usually justified by a distributive justice rationale, we believe that the consumer welfare standard does not vindicate distributional equity concerns for consumers *vis-à-vis* producers, and we believe that such choice of welfare standard does not represent an optimal tool for redistributive goals.

On the contrary, we view the consumer welfare standard as resulting from a mix of poorly defined distributive concerns and more political economy-oriented explanations. Under the latter perspective, the ascendance of the consumer welfare standard may be interpreted as a political bargain between self-interested groups of producers (primarily large firms defending the efficiency benefits of economies of scale) and consumers (including final consumers, small buyers, farmers), where the concept of “consumer welfare” can be seen as a more acceptable form of welfare standard for non-specialist audiences, which would politically allow the advancement of economic goals in the competition policy domain. Bork’s famous defense of total welfare can be read under this light, when he stated that:

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9 See Baker & Salop, “Antitrust, Competition Policy, and Inequality” (2015) 104 Geo. L.J. 1. For a different view, see Crane, “Wealth Inequality” (2016) 10(5) Cornell Law Review 1171.

10 Atkinson, *Inequality: What Can Be Done?* (Harvard University Press, 2015)

11 Stiglitz, *The Price Of Inequality: How Today's Divided Society Endangers Our Future* (W.W. Northon & Company, 2012).

12 <http://www.nytimes.com/2012/12/10/opinion/krugman-robots-and-robber-barons.html?mcubz=1>; <https://www.nytimes.com/2016/04/18/opinion/robber-baron-recessions.html?mcubz=1>.

13 See Trebilcock, et al., *The Law And Economics Of Canadian Competition Policy* (Toronto: University of Toronto Press, 2002); Posner, *Antitrust Law*, 2nd ed (Chicago: University of Chicago Press, 2001); Kaplov, “On the Choice of Welfare Standards in Competition Law” (2011) Discussion Paper No. 693 05/2011, at 6; Hovenkamp, “Implementing Antitrust’s Welfare Goals” (2013) 81 Fordham L. Rev. 2471; Ginsburg “Judge Bork, Consumer Welfare and Antitrust Law” (2008) 31 Harvard Law Journal and Public Policy 449.

14 For instance, Article 101(3) of the Treaty on the Functioning of the European Union allows for efficiencies to justify an otherwise restrictive agreement, but it requires that a “fair” share of these efficiencies must be passed onto consumers in order to justify an otherwise anticompetitive agreement, reflecting a clear fairness concern for consumers.

*Consumer welfare* is greatest when society's economic resources are allocated so that consumers are able to satisfy their wants as fully as technological constraints permit. Consumer welfare, in this sense, is merely another term for the wealth of nations. Antitrust has a built-in preference for material prosperity, but it has *nothing to say about the ways prosperity is distributed or used*.

Since we do not see normatively compelling reasons for adopting the consumer welfare standard from a distributive justice perspective, and we perceive its ascendance as related to this more political economy-oriented rationale of fairness toward consumers, we would dismiss the vertical dimension of fairness as strictly pertinent to competition laws and we would favor instead a total welfare standard.

## **B. Horizontal Fairness**

### 1. The Demand Side

Another dimension of fairness in competition policy is horizontal rather than vertical, both within the demand and within the supply side. On the demand side, consumers are generally heterogeneous in their preferences and demand conditions for similar goods and services, and possible fairness and distributional issues can emerge in various contexts when different consumers can be affected in different ways by a given conduct. Some consumers may win, and others lose. Examples of this can be found in cases of price discrimination, platform markets, and more recently, the emergence of forms of behavioral discrimination in online markets.<sup>15</sup> Even with perfect price discrimination, while all consumer surplus of those who are already in the market is lost to producer surplus, some additional consumer surplus is gained by allowing some consumers to be served who would not otherwise be in the market. These forms of different treatment between consumers are generally based on differences in demand elasticity and demand conditions, and not related to distributive concerns. To the extent that the source of differential treatment among consumers is their demand conditions, when conduct enhances total surplus without creating exclusionary effects, we find no compelling reason for antitrust scrutiny of such conduct. The effects on the welfare of different consumers is also already ignored even under a consumer welfare standard, an additional reason why we do not see any compelling justification for accounting for the horizontal dimension of fairness on the demand side.

### 2. The Supply Side

On the supply side, fairness considerations that have animated the origin of many competition law regimes, in particular with regard to small producers, are re-emerging as a result of decreasing levels of competition in many sectors of the economy, manifested by the increasing levels of market concentration (also exemplified by the emerging problem of horizontal shareholding);<sup>16</sup> decreasing rates of new business entry; and the emergence of winner-take-all markets as a result of technological change (as in the case of platform markets and the sharing economy phenomenon). As noted by the *Economist*, "one sign that monopolies are a problem in America is that the University of Chicago has just held a summit on the threat that they may pose to the world's biggest economy."<sup>17</sup>

While the apparent decline of competitive levels in many sectors of the economy is a troubling trend that requires appropriate policy responses, each manifestation needs to be addressed by tailored policy solutions that do not include expansive horizontal fairness considerations for competitors. We are generally skeptical about fairness considerations favoring less efficient or smaller competitors. At the same time, we recognize a narrow dimension of horizontal fairness at play on the supply side, as implicit in ensuring equal competitive conditions over access to markets and in targeting exclusionary forms of conduct and barriers to entry that deter entry of equally or more efficient competitors. We see this narrower form of horizontal fairness on the supply side as the normative basis of competition policy enforcement (a form of equality of opportunity consistent with efficiency goals), which should guide possible responses to decreasing levels of market competition. We also

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<sup>15</sup> Ezrachi & Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (Harvard University Press, 2016).

<sup>16</sup> Elhauge, "The Growing Problem of Horizontal Shareholding" *Competition Policy Chronicle* (2017).

<sup>17</sup> <https://www.economist.com/news/business/21720657-its-economists-used-champion-big-firms-mood-has-shifted-university-chicago>.



note that notions of horizontal fairness on the supply side are independent of the choice of welfare standards. In fact, concerns over decreasing levels of competition have materialized with particular emphasis in jurisdictions, like the U.S., that have already adopted a consumer welfare standard. We therefore do not see these phenomena as suggesting the need for either a renewed emphasis on vertical fairness concerns or broad horizontal fairness considerations on the supply side.

### ***C. Procedural Fairness***

The last dimension of fairness considerations that we identify as applicable to the domestic context is what we describe as procedural fairness, in terms of fair procedures (due process guarantees, legal and economic expertise, transparent, predictable, efficient proceedings) and rights of access to competition law procedures through private enforcement. With regard to due process and the attempt to strike a balance between competing normative values implicit in the design of competition law institutions,<sup>18</sup> we believe that ensuring basic notions of fair proceedings is central to competition law enforcement, and the effective achievement of due process guarantees must be evaluated pragmatically beyond the formal choice of an institutional model adopted in a given jurisdiction. With regard to the role of private enforcement, we believe corrective justice justifies an expansive role of private enforcement as complementary to public enforcement of competition laws to redress the harm that private parties may have suffered from anticompetitive conduct.<sup>19</sup> In our view, both the preservation of basic notions of due process advanced under various institutional models and private right of access under a corrective justice perspective are legitimate facets of fairness concerns for domestic competition policies.

### ***D. The Free Trade vs. Fair Trade Debate***

International trade is a critically important source of competition in most developed economies. The challenges to free trade and globalization that have escalated in recent years, mirroring the return of the fairness discourse in the domestic competition policy context, have provided renewed prominence to the long-standing debates about free trade versus fair trade. Complaints of unfair trade have traditionally taken a variety of forms (concerns over trade deficits; foreign subsidization of exports; currency manipulation; complaints about dumping; misappropriation of intellectual property in foreign countries; lax labor and environmental standards in foreign countries), some with merit, others lacking a defensible normative rationale.<sup>20</sup> More recently, the opposition to free trade has focused on job losses and unemployment, wage stagnation and rising levels of inequality in many developed and some developing countries, factors that have fueled the rise of protectionist tendencies to protect existing job markets. However, these effects are for the most part attributable to technology rather than trade,<sup>21</sup> and issues of job displacements related to international trade, technology or other factors including domestic competition, should be addressed by stronger active domestic labor market adjustment policies rather than by raising drawbridges to trade.<sup>22</sup> The re-emergence of these controversial issues, nonetheless, reveals the complementarity between the free trade versus fair trade debate at the international level and the return of fairness considerations in domestic competition policy.

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18 Trebilcock & Iacobucci, "Designing Competition Law Institutions: Values, Structure and Mandate" (2010) 41 *Loyola University Chicago Law Review* 455; Trebilcock & Iacobucci, "Canada: The Competition Law System and the Country's Norms" in Fox & Trebilcock, eds., *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford University Press, 2013).

19 See also Roach & Trebilcock, "Private Enforcement of Competition Laws" (1996) 4:3 *Osgoode Hall Law Journal* 461, at 470.

20 See Trebilcock & Wong, "Trade, Technology and Transitions: Trampolines or Safety Nets for Displaced Workers?" (2017) University of Toronto Faculty of Law.

21 Trebilcock, *supra*, note 2.

22 Trebilcock & Wong, *supra*, note 20.

### III. CONCLUSION

Despite the revival of fairness in competition policy, fairness considerations between and within the supply and the demand sides of domestic markets are generally misplaced within the competition policy domain, but not necessarily groundless in all forms. Vertical fairness does not vindicate defensible distributive justice goals, and we see total welfare as a better welfare standard guiding competition law enforcement. Similarly, we find no normative reasons for considering notions of horizontal fairness on the demand side. On the supply side, while we reject protectionist interventions in favor of less efficient producers, we find a narrow version of horizontal fairness defensible and implicit in the notion of equal access to markets (equality of opportunity consistent with efficiency goals). Finally, we have identified a procedural notion of fairness, in terms of due process and private enforcement based on a corrective justice rationale, which we view as central to the credible enforcement of competition laws.

The resurgence of fairness concerns discussed in the paper pertains to the domestic competition policy context, but it also has parallels internationally in the free trade versus fair trade debate animated by increasing challenges to free trade and globalization more generally. Complaints of unfair trade or unfair competition have usually taken various forms, but the debate has often failed to distinguish between meritorious claims and those lacking a defensible normative rationale.<sup>23</sup> Similar to these debates over international dimensions of fairness, proponents of broad notions of fairness in a domestic competition policy context have failed to make a normatively coherent and comprehensive case in their favor, while critics have perhaps too readily dismissed all possible dimensions of fairness in competition policy such as those we have identified in our review.

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<sup>23</sup> See *id.*

