Competition and fair play

The UK must not lose sight of the moral imperative in decision making

by ***Suzanne Rab****

"Fairness" as a driver of competition policy is receiving renewed attention, most notably in recent statements by the EU competition commissioner Margrethe Vestager and the (now former) US acting assistant attorney general Renata Hesse. Others maintain that infiltration of such a subjective concept into our modern competition law will pollute the purity of the more economics approach founded on dispassionate technical rigour. Rather than being a heresy, or a retrograde step, "fairness" can provide a useful lens through which to articulate what are often unexpressed beliefs and drivers of state-sponsored competition law. And now when the UK is on the threshold of leaving the European Union, with the prospect of greater autonomy in the development of its own competition policy, appeal to fair play might provide an illuminating and peculiarly English frame of reference within which to view the real-politic of competition law enforcement.

The notion of "fairness" in competition law

Fairness may seem far removed from the objectivity and discipline that is traditionally associated with modern competition laws founded on efficient resource allocation, incentives for innovation, value for money and choice for consumers.

The mantra that competition law is not about protecting competitors but is based on the premise of safeguarding the competitive process takes on an almost Darwinian construct in terms of survival of the fittest. It is inevitable that in this process some competitors will fall by the wayside and it is not the law's business to come to the aid of inefficient companies.

Some commercial practices attract greater legal scrutiny than others. Competition authorities will tend to prioritise their enforcement activities by balancing a number of factors, including the likely harm to consumers, the costs and the benefits of intervention and the risks of unintended consequences where intervention may itself produce harmful effects. The goal of enhancing consumer welfare underpins most modern competition laws and this tends to be an important driver of policy.

Against this background, it is important to clarify what is meant by "fairness" in a competition policy context. At least two basic themes recur and they each concern the use of power. In neo-classical economics terms, this can be defined as "market power" or even "monopoly power", or, in simpler parlance, the capacity of a firm to raise prices above competitive levels. This description may not fully capture the nuances of market power but it suffices for present purposes.

Raising prices

Two notions of fairness are linked to market power. The first refers to the relationship between buyers and sellers where firms use their market power to raise prices above competitive levels and this is characterised as unfair to consumers. Historically, agreements between competitors that fix prices, share markets and allocate customers have been the top enforcement priority. Vestager has said that "what is at stake is as old as Adam and Eve" and that "[for] all the economic theories and the business models, it all comes down to greed." The suspicion among competition authorities towards situations that bring competitors together is not new. In 1776, in his book *An Inquiry into the Nature and Causes of the Wealth of Nations*, Adam Smith the father of modern economics, famously wrote: "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or some contrivance to raise prices".

While the language has now changed – Adam Smith's conspiracies between people of the same trade are today's cartels – some of the key themes remain the same. Dealings between competitors (that is to say, horizontal agreements) are a key focus of competition law enforcement because they present the greatest risk of anticompetitive activity, often leading to increased or unfair prices.

Abusing power

The second dimension relates to the abuse of market power and relationships between a firm and its rivals. Competition law enforcement in unilateral conduct cases tends to feature less prominently and presents greater risks of "getting it wrong". There can be uncertainty as to what is the relevant market which frames the threshold assessment of a firm's position within that market and which triggers the application of the prohibition on abuse of market power. The question of what amounts to an abusive practice is open-ended and can be subject to significant legal, economic and policy debate.

The level of controversy surrounding competition law interventions tends to escalate from cartels (the least controversial and where the harm may be "obvious") to unilateral conduct (the most controversial and where there is scope for significant debate). In both these cases, the economic power of the market actors is used to disadvantage other actors in circumstances in which *the very same power* prevents those that are harmed from being able to respond effectively to the action. Consumers cannot reasonably be expected to move to alternative suppliers for a better deal where the market is cartelised. Similarly, where a firm with market power abuses it to foreclose competitors from access to the market or reduce their ability to compete on the merits, this practice offends ordinary notions of fairness.

Anchor point for understanding

The above analysis provides an anchor point for understanding the two basic prohibitions of competition law, namely the prohibition of restrictive agreements and abuse of a dominant position. Here the notion of fairness is used to integrate two

* *Suzanne Rab is a barrister specialising in EU and competition law at Serle Court Chambers (London)*

very different areas of law. Of course, the way in which these prohibitions are applied and enforced differs, as well as the legal tools for enforcing them.

The concepts of fairness outlined above concern the substantive application of competition law rather than procedure, where procedural fairness is a rich area of debate beyond the scope of this article. Nor is fairness a concept monopolised by behavioural competition law. The European Commission president Jean-Claude Juncker has said that the Commission's state aid case against Apple in Ireland demanding recovery of EUR14.5bn in taxes reflects the "social side of competition law".

Fairness and competition policy development in the European Union

Fairness is part of EU competition law's legislative architecture. Even where an agreement or practice restricts competition within article 101(1) TFEU, it will be saved from illegality where it satisfies the four cumulative exemption conditions of article 101(3). The second condition is that consumers must receive a "fair share" of the resulting benefits. The General Court has noted the importance of the "welfare of the final consumer of the product" (Case T-186/01, *GlaxoSmithKline* [2006] 5 ECR 11-2969 at para 118).

In general, cost efficiencies may lead to increased output and lower prices for consumers. If due to cost efficiencies, the undertakings in question can increase profits by expanding output, consumer pass-on may occur. Consumer pass-on can also take the form of new and improved products, creating value for consumers to compensate for the restrictive effects of the agreement, including a price increase. Any such balancing necessarily involves a value judgment where other values come into play beyond economic efficiency. For example, fewer choices might produce equally or more efficient outcomes but still be relevant to pass-on.

Fairness also finds expression in the legal text of article 102 TFEU which lists as its first specific example of such abuse "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions". The experience of the expanding concept of article 102 may be instructive in illustrating the malleability of the concept of abuse and also as a reminder of the risks of an open-ended concept of abuse and its implications for fairness. The European Commission sought to set out its approach and policy prioritisation of enforcement in relation to exclusionary abuses in its article 102 guidance. Yet the concept of abuse is a flexible one and continues to evolve. Article 102 has been applied to a wide category of abuses of which the following are selected (and non-exhaustive) examples: in exceptional circumstances, the enforcement of intellectual property rights; abuse of a trademark; abuse of the patent and regulatory system; acquisition of exclusive licences and rights; delisting suppliers who buy from competitors; refusal to negotiate promptly and in good faith; refusal to observe warranties; abusive litigation; and the seeking of injunctive relief by a dominant owner of a standard essential patent. The efficiency concept is not the only policy being pursued in these cases. Experience shows that other societal values are and have been important in creating an ideal economic equilibrium that is shaped by shifting economic and political perspectives.

Conclusions and thoughts for the future

Fairness can be applied both to monopolists and their victims. It can explain why cartels are considered the most pernicious of anticompetitive practices but also why enforcers may be more wary to intervene in unilateral conduct cases where there is a risk that a firm might be penalised for superior performance.

Viewed in this light, does fairness have a wider role to play in understanding the dynamics of competition law policies and enforcement? I would not argue that our competition law toolkit is unfit for purpose in the sense that fairness should create new causes of action where none previously existed. Rather, an understanding of fairness as a policy value can help reconcile what is happening in practice with a notion that may be more accessible by the ultimate beneficiaries of competition law enforcement – consumers. The rhetoric is certainly more appealing than other labels such as the "SSNIP test" or "cellophane fallacy" and it exposes the myth that interventions can be explained away on efficiency grounds alone.

There is another agent that is more powerful than any private monopolist. Through its ability to investigate and punish those firms that are found to be infringing competition law, the state wields great power. As Vestager has commented, "we have the power to do a lot of good". But to borrow a leitmotif from another context, "with great power comes great responsibility" and the risk of getting it wrong if fairness is retrofitted to justify enforcement outcomes rather than a starting point or sensitivity check. Competition law is sometimes referred to as "economic law" but it is law nonetheless and, in shedding light on its roots in fairness, one must not be lulled into a false sense of thinking that fairness should make up for a faulty legal analysis and scant evidence.

The goal of protecting those agents who cannot protect themselves either because they lack the organisation, voice or resources may seem a laudable aim and partly explains the important role that complainants play in the public enforcement system. The fact that those agents who are harmed by anticompetitive practices can and do bring their concerns to a competition authority firmly puts the responsibility on the enforcers to investigate those claims, vexatious ones aside. However, let us not overlook that complainants can themselves enjoy huge power in the enforcement process and just like the monopolist should not hold the market or the regulator to ransom. Fairness thus requires that a complainant's claims are properly and independently investigated. But regulators also need to recognise that a fairness narrative should not be allowed to stymie legitimate business practices regardless of the intellectual merits of the case.

The UK may create its own unique brand of competition law in the coming years. It should strive to maintain analytical clarity and not shirk from technical rigour. But it must not lose sight of the moral imperative at work in real-world decision-making. There is no dichotomy between economics and fairness in competition law enforcement when viewed in this light. A more interesting question is not whether competition law should pursue fairness but whether it does in fact do so. Accepting that it does provides a way to reconcile a discipline which can be impenetrable to those not schooled in antitrust economics with popular support. It may help to bring coherence to an area of law that is the life blood of a vibrant economy and an arguably fairer society if applied appropriately.