



Fairness and the Challenge of Making Markets Work Better

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This article explores the revival of fairness as the lodestar of EU competition enforcement. It considers the theory and evolving discourse of fairness, then identifies and evaluates examples of fairness-oriented enforcement activity. Concluding that fairness represents a distinct development from the ‘hipster antitrust’ movement, the article suggests reasons to explain the shift, including a need to rehabilitate the social market economy in an age of market-scepticism, and to facilitate the progressive expansion of competition law to address modern market failures.

INTRODUCTION

Well-functioning markets can be quite brutal. The dispassionate language of market-clearing often disguises more dramatic stories of disappointed rivals, fickle customer preferences, the exclusion of vulnerable consumers, and even gales of creative destruction which drive innovation by destroying what has come before. A question of increasing prominence, however, is whether the notion of a well-functioning market requires some degree of *fairness* in its operation or outcomes. An issue of broader relevance in an era when faith in market-based mechanisms is under increasing strain, this article focuses on the question as it arises in the competition law context – described as the ‘fight over antitrust’s soul’.¹ Not only is this a field where the clash between fairness and the quotidian brutality of the market mechanism is particularly acute; moreover ‘[c]ompetition rules have large footprints,² with knock-on effects across a spectrum of adjacent public policy areas. This article explores the purported revival of fairness as the lodestar of enforcement within the European Union (EU), alongside potential explanations for this shift in practice.

The issue has come to public attention through the ‘fairness mantra’³ associated with Margrete Vestager’s tenure at DG Competition. Recent enforcement

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1 A. Ezrachi and M.E. Stucke, ‘The Fight over Antitrust’s Soul’ (2018) 9 JECLAP 1.

2 C. Townley, *A Framework for European Competition Law* (Oxford: Hart, 2018) 43.

3 MLex, ‘Vestager’s ‘fairness’ mantra rattles through EU competition law’ 15 November 2016 at <https://mlexmarketinsight.com/insights-center/editors-picks/antitrust/europe/vestagers-fairness-mantra-rattles-through-eu-competition-law>.

activity reinforces the perception that, after several decades during which competition law pivoted towards a ‘more economic approach,’ this nominal consensus may be less than settled. The proposition that the competition process should deliver fairness raises challenging questions: from what *is* fairness, to fairness *for whom*? A critical account may view this development as sloganeering – a ‘weasel word’⁴ – or an attempt to politicise or corrupt the application of these ostensibly technical rules. This article explores such tensions, revisiting well-worn questions about the goals of competition law, yet endeavouring to place these within the distinctive circumstances of the contemporary internal market.

The following section sets the scene, describing the shift from fairness-based enforcement, to the more economic approach, and back again. The legal implications of these changes are unclear, however, for two reasons. First, although the concept appears throughout the EU competition framework, at no point is fairness defined. Indeed, fairness is amenable to multiple competing, even conflicting definitions, creating a lack of clarity about what a fairness standard requires. This is considered in the third section. Second, although the rhetoric of fairness is distinct from that of the more economic approach, the Commission insists that the former is not only compatible with, but is a manifestation of, the latter. Yet, as explained in the fourth section, not only are these concepts difficult to reconcile linguistically or theoretically but much of the tenor and focus of recent enforcement moves away from an economic approach as strictly understood. Accordingly, the rhetorical shift towards a fairness standard occurs alongside a shift in enforcement practice, which may or may not mirror these changes in discourse. The fifth section asks: why now? If we accept that the contemporary fairness mantra represents a substantive departure from previously declared policy, what explains this, particularly coming so soon after, and in apparent contradiction of, the initial corrective of the more economic approach?

SETTING THE SCENE: FAIRNESS TO EFFICIENCY AND BACK AGAIN?

EU law incorporates a wide spectrum of competition rules. Like most systems, it has rules regulating collusion,⁵ dominance,⁶ and mergers.⁷ It also includes provisions that are EU-specific, including rules against State aids⁸ and State measures that require antitrust violations.⁹ What unites these discrete provisions are the overarching policy objectives served. The thorny question of what motivates EU competition law is one which perpetually sparks debate, and to

4 J. Laitenberger, ‘EU competition law in innovation and digital markets: fairness and the consumer welfare perspective’ Speech, 10 October 2017 (JL Speech, 10 October 2017).

5 Art 101 TFEU.

6 Art 102 TFEU.

7 Regulation 139/2004 on the control of concentrations between undertakings (OJ L24/1, 29 January 2004).

8 Arts 107–109 TFEU.

9 Art 106(1) TFEU.

which arguably no definitive answer can be given.¹⁰ Our focus is the pursuit of fairness as an enforcement goal within the evolving EU system: a question of renewed importance in light of recent polarised debates about the necessity of significant changes in the antitrust area, in Europe and further afield.

The concept of fairness is not an unknown quantity in EU competition law. The language of fairness has been present within the textual framework since the Treaty of Rome, and it continues to have a prominent role within the Treaty on the Functioning of the European Union (TFEU). The Preamble to the TFEU includes an overarching reference to ‘fair competition,’ while Articles 101 and 102 refer to ‘a fair share’ for consumers and ‘unfair purchase or selling prices or other unfair trading conditions,’ respectively. It has furthermore been argued that the prohibition on selective advantages under the State aid rules ‘self-evidently’ reflects notions of fairness ‘within the ordinary meaning of the word’.¹¹ Accordingly, at least formally, fairness has always been a consideration within the competition framework.

Fairness has instinctive appeal as a policy objective. Fairness discourse extends beyond competition law to embrace a range of policy areas, including asylum,¹² labour law,¹³ insolvency,¹⁴ data privacy¹⁵ and private law theory.¹⁶ Proponents argue that the pursuit of fairness links directly to the ‘social rationale’ for competition law.¹⁷ The idea is put forcefully by Marco Colino: ‘It makes little sense to defend a competition policy that develops with its back purposefully turned to the attainment of moral and social justice.’¹⁸ Accordingly, fairness is posited as a central concern because, otherwise, there is little point to market intervention if not to generate fairer outcomes.

Much depends upon what is understood by fairness, a point considered in the next section. Yet even if what might be broadly construed as a fairness-based approach was evident during the early years of the EU system, it became more difficult to make the case for a central role later on. Instead, the last couple of decades have witnessed the explicit adoption of the so-called more economic approach by the European Commission.¹⁹ From this perspective, the pursuit of economic efficiency is the primary if not the sole objective of competition enforcement. The impetus for this shift was, at least partly, in response to considerable criticism of the existing jurisprudence: criticism summed up in the

10 M. Motta, *Competition Policy: Theory and Practice* (New York, NY: Cambridge University Press, 2004) 17–30; and A. Ezrachi, ‘Sponge’ (2017) 5 J Antitrust Enforcement 49.

11 M. Vestager, ‘Competition and fairness in a digital society’ Speech, 22 November 2018 (MV Speech, 22 November 2018)

12 E. Küçük, ‘The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?’ (2016) 23 ELJ 448.

13 A. Sanders, ‘Fairness in the Contract of Employment’ (2017) 46 *Industrial Law Journal* 506.

14 S. Paterson, ‘Debt Restructuring and Notions of Fairness’ (2017) 80 MLR 600.

15 D. Clifford and J. Ausloos ‘Data Protection and the Role of Fairness’ (2018) 37 YEL 130.

16 G.S. Alexander, *Property and Human Flourishing* (Oxford: OUP, 2018) and N.J. McBride, *The Humanity of Private Law* (Oxford: Hart, 2018).

17 D. Gerard, ‘Fairness in EU Competition Policy: Significance and Implications’ (2018) 9 JECLAP 211, 211.

18 S. Marco Colino, ‘The Antitrust F Word: Fairness Considerations in Competition Law’ 2018 CUHK Faculty of Law Research Paper No 2018-09, 18.

19 A useful study is A.C. Witt, *The More Economic Approach to EU Competition Law* (Oxford: Hart, 2016).

provocation, ‘we protect competition, you protect competitors’.²⁰ The upshot is that the ‘modernised’ competition framework gives short shrift to fairness as a standalone value. At first glance, therefore, the movement towards a more economic approach heralded an era of what might be termed ‘post-fairness’ antitrust within the EU.

Yet this too has been overtaken by developments which swing the pendulum back towards a fairness-imbued approach. As explained in the fifth section below, it is crucial to appreciate the broader context here. The fairness debate emerged at a tense and disruptive moment in economic and political terms globally: a time of increased public mistrust of market institutions,²¹ greater awareness of inequality,²² and a rise in political populism with its associated hostility towards established institutions.²³ The past decade was a time of crisis for Europe: the Eurozone, migration, rule-of-law, and Brexit crises.²⁴ As part of a multi-pronged response to the tide of Euroscepticism that this ‘polycrisis’²⁵ engendered,²⁶ searching questions are being asked about ‘the future of Europe,’²⁷ with acknowledgement of ‘doubts about the EU’s social market economy and its ability to deliver on its promise to leave no one behind’.²⁸ Finally, alongside the revival of fairness rhetoric in Europe, an equivalent debate occurred across the Atlantic, the ‘hipster antitrust’ movement.²⁹ Essentially a backlash against the minimalist vision of the Chicago School, its proponents call for a fundamental rethinking of how the US enforces antitrust law. In short, the argument is for more aggressive intervention, against a broader range of market failures, which casts off the shackles of the existing neutered framework. By challenging ostensibly settled assumptions so fundamentally, hipster antitrust throws down a gauntlet that need not be embraced but cannot be ignored.

It is thus unsurprising that, despite the nominal triumph of the more economic approach, competition policy discourse has become preoccupied with the so-called antitrust ‘F’ word.³⁰ The re-emergence of fairness is associated, most notably, with the tenure of Commissioner Vestager at DG Competition. The most obvious manifestation is rhetorical: Vestager placed the concept of fairness front and centre in the large majority of competition policy speeches delivered during her first term in office. This was followed by a subsequent

20 E. Fox, “‘We Protect Competition, You Protect Competitors’” (2003) 26 *World Competition* 149.

21 E. Luce, *The Retreat of Western Liberalism* (London: Little, Brown, 2017).

22 T. Piketty, *Capital in the Twenty-First Century* (Cambridge, MA: Harvard University Press, 2014).

23 M. Caiani and P. Graziano, ‘Understanding varieties of populism in times of crises’ (2019) 43 *West European Politics* 1141.

24 J. Zeitlin, F. Nicoli and B. Laffan, ‘Introduction: the European Union beyond the polycrisis?’ (2019) 26 *JEPP* 963.

25 ‘Speech by President Jean-Claude Juncker at the Annual General Meeting of the Hellenic Federation of Enterprises’ 21 June 2016.

26 S.B. Hobolt and C.E. de Vries, ‘Public Support for European Integration’ (2016) 19 *Annual Review of Political Science* 413; F. Nicoli, ‘Hard-line Euroscepticism and the Eurocrisis’ (2017) 55 *JCMS* 312; and L. Hooghe and G. Marks, ‘Cleavage Theory Meets Europe’s Crises’ (2018) 25 *JEPP* 109.

27 European Commission, *White Paper on the Future of Europe* COM(2017)2025.

28 *ibid.*, 9.

29 An overview of differing perspectives is found in *CPI Antitrust Chronicle* Spring 2018, vol 1 No 1, entitled ‘Hipster Antitrust’.

30 Marco Colino, n18 above.

(re)embracing of the language of fairness by Commission officials, academic commentators and the EU legislator. As explained in the fourth section, moreover, fairness-based reasoning is increasingly discernible within Commission enforcement activity. What is described as Vestager's 'fairness mantra'³¹ has, accordingly, put the concept, squarely and inescapably, back on the competition policy agenda.

FAIRNESS: THEORY AND RHETORIC

As noted, the concept of fairness is used throughout the Treaty framework to set the acceptable parameters of the free functioning of markets. Fairness is not defined in EU law, however, nor is it obvious that a single conception applies across the instances where it is invoked. Fairness is an inherently malleable concept, meaning different things to different people; while certain conceptions may fundamentally conflict: my fair shake comes precisely at your expense, at least in your eyes. In order to understand what fairness (may) mean as a legal term-of-art, this section explores ideas of fairness as it relates to economic organisation and activity: that is, 'fair competition'. We approach the question from two angles: theoretical perspectives, and the modern fairness mantra.

It is necessary to acknowledge, however, the limited ambit of competition law, the role of which is often described as 'making markets work better'.³² Competition law is premised upon the effective functioning of the market mechanism, free from abusive exercises of market power. It is, consequently, conducive to achieving policy goals that are contingent upon, or furthered by, open and undistorted competition. Competition law also utilises a tort/crime rather than a regulatory model: proscribing categories of behaviour, rather than dictating *ex ante* the activities of market actors.³³ Any conception of fairness advanced regarding competition law must acknowledge the mode and comparatively modest scope of operation of the rules themselves: limitations not always obvious within more politically-influenced discussions of antitrust-as-fairness.

Theories of fairness

We start with fairness in theory. At its most basic, fairness connotes rules of 'fair play'.³⁴ Fair competition is that conducted in accordance with the established rules of the market. As a 'joint enterprise,' those who opt to (potentially) benefit from participation in market activities must respect and follow the rules that bind other participants.³⁵

31 n 3 above.

32 European Commission, *The EU Explained: Competition. Making Markets Work Better* (2017).

33 D.A. Crane, 'Antitrust Antifederalism' (2008) 96 *Cal L Rev* 1, 14–15.

34 G. Klosko, 'The Principle of Fairness and Political Obligation' (1987) 98 *Ethics* 353, 353.

35 H.L.A. Hart, 'Are there any Natural Rights?' (1955) 64 *Philosophical Review* 175, 185.

Identifying precisely what market rules demarcate the boundaries of fair play is rather trickier. Rawls' celebrated original position, for instance, equates fairness with objectivity, alongside some degree of equity and solidarity.³⁶ By locating his protagonists behind a veil of ignorance, the aim is to derive principles that are inherently 'fair' rather than tailored to advantage the decisionmakers' individual interests: to 'leav[e] aside those aspects of the social world that seem arbitrary from a moral point-of-view.'³⁷ Yet the determination of arbitrariness itself involves value judgments. For Nozick, for example, the fairness of an individual distribution depended only on how it came about.³⁸ Whereas Rawls emphasised the inherent randomness (and thus amorality) of any original distribution, Nozick was concerned with how individuals subsequently chose 'to develop their own natural assets.'³⁹ Their disagreement effectively goes to the heart of fairness as it pertains to the market mechanism, where success may depend upon a difficult-to-disentangle combination of incumbency advantage, effort, underhand tactics, and sheer dumb luck.

In the context of market competition specifically, fairness is often contrasted with welfare economics. Kaplow and Shavell define the latter as decision-making that is geared towards enhancing individual well-being, encompassing material needs and wants and intangible benefits.⁴⁰ Fairness implies decision-making not based exclusively on how it affects well-being, but instead incorporating some essentially 'moral' principle such as corrective or retributive justice or promise-keeping.⁴¹ While welfare economics is concerned with maximising beneficial outcomes, and is thus indifferent to the relative treatment or moral culpability of actors, fairness is unconcerned with outcomes, provided that the applicable principle is employed correctly. Yet this non-consequentialist vision, central to economic analysis of law, finds limited support in behavioural economics. For Kahneman *et al*, who examined the perceived fairness of individual transactions through survey evidence,⁴² 'the phrase "it is fair" is simply an abbreviation for "a substantial majority of the population studied think it is fair".'⁴³ These majoritarian assessments are governed by a principle of 'dual entitlement': the notion that all sides should gain from a transaction.⁴⁴ Public opinion forms around a 'reference transaction,' being the perceived normal and thus appropriate division. Two important aspects follow. First, normalcy is not necessarily aligned with justice, so that a majority of the public may consider an outcome fair even if not morally correct. Second, since the reference transaction can change over time, fairness is a dynamic concept, as perceptions change with it.⁴⁵

36 J. Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1999).

37 *ibid.*, 14.

38 R. Nozick, 'Distributive Justice' (1973) 3 *Philosophy & Public Affairs* 45.

39 *ibid.*, 108.

40 L. Kaplow and S. Shavell, *Fairness versus Welfare* (Cambridge, MA: Harvard University Press, 2002) 18.

41 *ibid.*, 39.

42 D. Kahneman, J.L. Knetsch and R. Thaler, 'Fairness as a Constraint on Profit Seeking: Entitlements in the Market' (1986) 76 *AER* 728.

43 *ibid.*, 729.

44 *ibid.*

45 *ibid.*, 730.

Yet these higher-level assessments leave us little the wiser about the mechanics of fairness as a standard for intervention, for which we must turn to accounts developed for the antitrust context. There is often a reluctance to articulate precisely what fairness requires under competition law. Some work focuses on the descriptive questions of how and when issues of fairness arise, without seeking to provide an overarching solution to these overlapping demands.⁴⁶ Others view fairness in political terms, focused on the ‘moral intuition’⁴⁷ that market power concentrated in a small number of firms is morally repugnant, enabling dominant actors to gain unfair advantages at the expense of ‘the welfare of the powerless’.⁴⁸ From this perspective, and in a landscape where ‘markets, morality and society cannot realistically be separated’,⁴⁹ the control of market power should target inefficient behaviour *and* unfair practices, as the latter inevitably exacerbate societal unfairness more generally. Despite its circular logic, Gerbrandy’s definition of fairness as the pursuit of market outcomes ‘acceptable to society’⁵⁰ usefully emphasises the extent to which the goal of ‘a highly competitive social market economy’⁵¹ therefore precludes an exclusive focus on efficiency.

Yet purely descriptive or politically oriented accounts fail to provide an applicable legal standard for the task of enforcement. A prominent idea informing the latter is the ‘level playing field’: the notion that all firms should have the same initial opportunities in the marketplace.⁵² This equality of opportunity approach is associated with German Ordo-liberalism,⁵³ and reflected in the refrain that the competition system ‘aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such.’⁵⁴ From this perspective, fairness demands that would-be market participants have equivalent access to enter and compete, without prejudice to the success of that participation. Yet the simple notion of the level playing field can be hellishly complex, particularly where rival firms are differently resourced, operate under different business models, or offer differentiated products. Moreover, fairness from this perspective is pitched solely in terms of the supply side of the equation, while any resulting advantages for consumers or society more broadly are mere collateral benefits.

Construing fairness in terms of *ex post* equity – equality of *outcome* – is more difficult to square with the task of ‘making markets work better’. As Motta explains, ‘markets work so that firms which invest more, innovate more, or simply

46 E.J. Hughes, ‘The Left Side of Antitrust: What Fairness Means and Why it Matters’ (1994) 77 *Maquette L Rev* 265, and F. Ducci and M. Trebilcock, ‘The Revival of Fairness Discourse in Competition Policy’ (2019) 64 *Antitrust Bulletin* 79.

47 A. Ayal, *Fairness in Antitrust* (Oxford: Hart, 2016) 99.

48 Ezrachi and Stucke, n 1 above, 1.

49 A. Gerbrandy, ‘Conceptualizing Big Tech As ‘Modern Bigness’ and Its Implications for European Competition Law’ 2019, 3 at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3275235.

50 A. Gerbrandy, ‘Rethinking Competition Law within the European Economic Constitution’ (2019) 57 *JCMS* 127, 129.

51 Art 3(3) TEU.

52 Motta, n 10 above, 26.

53 D.J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford: OUP, 1998).

54 C-501/06P *GlaxoSmithKline* EU:C:2009:610 at [63].

are luckier than others will be more successful'.⁵⁵ Yet it is possible to envisage fairness standards even here. Alhborn and Padilla offer a tantalising vision of fairness as the hypothetical competitive outcome, thus construing the *exercise* of market power as unfair.⁵⁶ For Gerber, fairness is a buttressing goal: the presence of unfairness within a transaction acts as an indicator of potential illegal distortion.⁵⁷ A more radical vision derives from the mooted role of competition law in tackling inequality.⁵⁸ A market outcome would thus only be fair if it had positive or neutral effects on levels of equality, becoming a policy of *redistribution* through market transactions. Perhaps the widest reading of the modern fairness mantra is as a catch-all for socially desirable objectives that conceivably come within the regulatory ambit of the competition system:⁵⁹ whether as justifications for regulatory restraint, or, more contentiously, as drivers for ambitious intervention.

This study establishes several points. Bare calls to fairness are unilluminating: there are too many different understandings of what the concept might mean to direct the substantive task of enforcement. If fair competition is the goal, then elaboration about what this means—specifically, what it requires of firms – is necessary. Second, choosing between different conceptions necessarily involves political choices, as to which competing conception of the good is preferred. The above discussion, brief as it was, demonstrated the breadth of potential perspectives on fairness from an antitrust standpoint: reciprocity, consistency, procedural propriety, market opportunity, substantive equity, even redistribution. While this is not a disqualifying characteristic, the task cannot be waved away as a technocratic, value-neutral one. A third consideration, implicit in our discussion, is the difficulty of operationalising fairness as a clear, precise and certain legal standard upon which to hang the task of enforcement. This is developed in the fourth section of this article.

The contemporary rhetoric of fairness

This brings us to the expression of fairness within contemporary discourse. As noted, a key driver of the revived debate is Vestager's apparently deliberate

55 Motta, n 10 above, 26.

56 C. Ahlborn and A.J. Padilla, 'From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law' in C.-D. Ehlermann and M. Marquis (eds), *European Competition Law Annual 2007* (Oxford: Hart, 2008).

57 D.J. Gerber, 'The Future of Article 82: Dissecting the Conflict' in Ehlermann and Marquis (eds), *ibid.*

58 J.B. Baker and S.C. Salop, 'Antitrust, Competition Policy, and Inequality' (2015) 104 *Georgetown L J* 1; M. Gal, 'The Social Contract at the Basis of Competition Law' in D. Gerard and I. Lianos (eds), *Reconciling Efficiency and Equity: A Global Challenge for Competition Law?* (Cambridge: Cambridge University Press, 2019); and most radically, L. Khan and S. Vaheesan, 'Market Power and Inequality' (2017) 11 *Harvard Law & Policy Review* 235.

59 Consider H. First and S. Weber-Waller, 'Antitrust's Democracy Deficit' (2013) 81 *Fordham L Rev* 2543; M. Steinbaum, 'Antitrust, the Gig Economy, and Labor Market Power' (2019) 82 *Law & Contemporary Problems* 45; S. Holmes, 'Climate change, sustainability, and competition law' (2020) *J Antitrust Enforcement* (forthcoming); and D. Srinivasan, 'The Antitrust Case Against Facebook,' (2019) 16 *Berkeley Bus L J* 39.

choice to embrace fairness language as she developed an increasingly ambitious vision for competition enforcement.⁶⁰ What is under-explored is how this evolved to encompass broader themes of trust in the market and preserving democracy, also examined below. In our analysis, the Commissioner's policy language is augmented by that of her Director-Generals and contrasted with her predecessors'. We further consider spill-overs into the domain of legislative rhetoric with the ECN+ Directive, which unexpectedly embraces fairness as a central concept. The intention is not to offer a *quantitative* assessment,⁶¹ but rather, by analysing the *discourse* of fairness, to shine light on this opaque notion to understand the motivations behind and intentions of this evolution.

Fairness has been a lynchpin of the Commissioner's policy rhetoric: she invoked fairness as a guiding principle for the operation or outcome of market processes in 85 per cent of speeches in her first term in office.⁶² (Fairness here is distinguished from procedural fairness, another important contemporary theme, albeit beyond the focus of this article.⁶³) The first reference, which occurred in her second speech, was figurative: to explain why Member States should not favour national champions, Vestager referred to shifting goalposts to favour one team, which 'would not be fair, not much fun, and would be really, really bad for the sport.'⁶⁴ In subsequent speeches, the Commissioner articulated more directly a myriad of ways in which markets might reflect unfairness and thus merit intervention.

Some references are generic: 'fair competition culture',⁶⁵ 'fair conditions in the market',⁶⁶ 'a Europe that gives everyone a fair chance'.⁶⁷ Others are consistent with consumer welfare: the need to 'make sure businesses treat people fairly',⁶⁸ that 'consumers have the power to demand a fair deal',⁶⁹ receive 'fair access'⁷⁰ to innovation and see a 'fair share of the benefits of growth'.⁷¹ Yet, crucially, the Vestager conception of fairness transcends the more economic approach, with its focus on ends over means. Thus, fairness to market operators receives equal billing: from 'the shenanigans of unfair rivals'⁷² and the need 'to preserve fair opportunities in our markets',⁷³ to sweeping statements regarding the rights of 'all companies – large and small' to 'a fair, fighting chance to

60 Our focus is Commissioner Vestager's policy speeches, namely remarks in English for public delivery, not directed solely at specific enforcement cases or the Commission's legislative role. All speeches at <https://ec.europa.eu/competition/speeches/>.

61 Contrast T. Schrepel, 'Antitrust Without Romance' (2020) 13 *NYU Journal of Law & Liberty* 236.

62 111 of 130 policy speeches, or 85.4 per cent, delivered to 29 November 2019. A new Commission took office in December 2019, and Commissioner Vestager continued her role. This survey covers her first term.

63 Generally, D.D. Sokol and A.T. Guzman (eds), *Antitrust Procedural Fairness* (Oxford: OUP, 2019).

64 'Thoughts on merger reform and market definition' Speech, 12 March 2015.

65 'EU Competition Law in today's global economic relations' Speech, 7 November 2018 (MV Speech, 7 November 2018).

66 'Working together to support fair competition worldwide' Speech, 3 June 2016.

67 'Setting innovation free' Speech, 12 October 2017 (MV Speech, 12 October 2017).

68 'Why global markets need rules' Speech, 5 August 2017.

69 'The future of European values' Speech, 3 October 2018 (MV Speech, 3 October 2018).

70 'Intellectual property and competition' Speech, 11 September 2015.

71 'Competition for a Fairer Society' Speech, 20 September 2016.

72 'Enforcing competition rules in the global village' Speech, 20 April 2015.

73 'On fair markets and gender equality' Speech, 29 November 2018 (MV Speech, 29 November 2018).

succeed on their merits,⁷⁴ and ‘to compete in our economy’.⁷⁵ Moreover, the understanding of what makes a market ‘fair’ exceeds the conventional parameters of competition law. The Commissioner thus insists that companies must pay ‘their fair share of tax,’⁷⁶ so that ‘everyone makes a fair contribution to the services that make a decent society’.⁷⁷ Later speeches raise the issue of ‘fair pay’⁷⁸ and protection from ‘unfair working conditions’⁷⁹ for workers who make the goods that we consume. Finally, although the Commission long disclaimed a quasi-regulatory role in competition enforcement,⁸⁰ Vestager is receptive to the use of antitrust to secure ‘a fair price,’⁸¹ for final consumers *and* other economic operators.⁸²

What these examples of unfair – and potentially illegal – conduct lack is a unitary theme. The vision that emerges encompasses fairness in the *process* of competition and in its *outcomes*. The former, furthermore, evidently goes beyond the pursuit of equality of opportunity only for *efficient* competitors that, as we shall see, is the hallmark of the more economic approach.⁸³ Accordingly, fairness cannot be reduced to a ‘level playing field,’ as the Ordos suggested,⁸⁴ nor securing ‘bang for their buck’ for customers, as consumer welfare advocates argue,⁸⁵ nor the ‘capitalist conception of justice’ that follows from maximising total welfare, as the Chicago School contended.⁸⁶ Fairness, by implication, is more fundamental and all-encompassing. Yet this creates potential for overlaps and tensions: between fair prices for consumers and fair wages for workers, or fair opportunities for entrants and fair rewards for incumbents. Thus Director-General Laitenberger’s claim that fairness is ‘a call to rigour, coherence and consistency’⁸⁷ is unconvincing; although he clarified that fairness, in the antitrust sense, is distinguishable from inequitable behaviour under the unfair trading rules, insofar as it implies restrictions on competition as such.⁸⁸

74 ‘Perspectives on Europe’ Speech, 20 November 2015.

75 MV Speech, 3 October 2018, n 69 above.

76 ‘Independence is non-negotiable’ Speech, 18 June 2015; also ‘Helping people cope with technological change’ Speech, 21 November 2017; ‘Competition and a fair deal for consumers online’ Speech 26 April 2018; ‘Protecting consumers in a digital world’ Speech, 4 December 2018 (MV Speech, 4 December 2018); ‘An innovative digital future’ Speech, 8 February 2018; and ‘A digital future that works for Europeans’ Speech, 27 August 2019 (MV Speech, 27 August 2019).

77 MV Speech, 12 October 2017, n 67 above.

78 ‘Building a fairer and more sustainable economy’ Speech, 19 September 2018; also ‘Making fashion sustainable’ Speech, 15 May 2018.

79 ‘An innovative digital future’ Speech, 8 February 2019 (MV Speech, 8 February 2019); also ‘The champions Europe needs’ Speech, 9 January 2019 (MV Speech, 9 January 2019).

80 n 161 below.

81 ‘How competition supports innovation’ Speech, 24 May 2016.

82 ‘Protecting consumers from exploitation’ Speech, 21 November 2016 (MV Speech, 21 November 2016).

83 See C-280/08P *Deutsche Telekom* EU:C:2010:603, endorsing ‘as-efficient competitor’ test for margin squeeze; and C-413/14P *Intel* EU:C:2017:632 at [139], which linked the permissibility of exclusive dealing to whether such practices ‘exclude competitors that are at least as-efficient as the dominant undertaking’.

84 n 53 above.

85 H. Hovenkamp, ‘Is Antitrust’s Consumer Welfare Principle Imperilled?’ (2018) *Institute for Law & Economics Research Paper* No 18-15.

86 R.A. Posner, ‘Utilitarianism, Economics, and Legal Theory’ (1979) 8 *J Legal Studies* 103, 136.

87 JL Speech, 10 October 2017, n 4 above.

88 *ibid.*

Gradually, moreover, a more ambitious overarching message emerged: namely, market fairness as a gateway to societal fairness: '[I]f we value an open economy, and a liberal society, we have to show that those values benefit everyone ... if we want to show that our society treats everyone fairly, ... we need to prove it in the market.'⁸⁹

The not-unreasonable rationale is that 'people don't think about politics all the time. But they do deal with the market every single day.'⁹⁰ The crux of the concern is a matter of perception: that ordinary people *experience* the world as an unfair place. By implication, competition enforcement against large powerful companies helps to redress this *perceived* imbalance,⁹¹ even if the evidence that antitrust can address problems like inequality or the democratic deficit is limited.⁹² Laitenberger portrayed this as a *duty* of the Commission, linked to a general expectation that 'public institutions ... serve the broader purpose of a fairer and more inclusive society'.⁹³ Vestager herself spoke of the 'responsibility to the public' of enforcers,⁹⁴ eventually positioning fairness as one of the EU's 'basic values'.⁹⁵

Vestager was thus bullish about embracing fairness as the guiding principle for enforcement.⁹⁶ Yet in doing so, she sought to curtail the radicality of her message in two dimensions. First, referencing its Treaty bases, she argued that 'the concept of fairness ... is as old as the competition rules themselves.'⁹⁷ Even if *explicit* discussion of fairness had long been absent, the concept was dormant rather than non-existent. Laitenberger spoke of the 'revival' of fairness discourse, rather than its reinvention,⁹⁸ while his successor, Director-General Madero Villarejo, described the Commissioner's 'references to the *full implications* of competition policy.'⁹⁹ Second, embracing fairness as the lodestar of contemporary enforcement is not considered to necessitate replacing 'the whole system

89 'Competition and the Digital Single Market' Speech, 15 September 2016.

90 'Defending competition throughout the EU' Speech, 23 November 2016; also 'Meeting the challenges of globalisation together' Speech, 10 May 2017; 'Fighting for European values in a time of change' Speech, 14 June 2017; and 'Competition in changing times' Speech, 16 February 2018.

91 'Competition policy in context' Speech, 1 December 2016.

92 On inequality, D.A. Crane, 'Antitrust and Wealth Inequality' (2016) 101 *Cornell L Review* 1171; on democracy, N. Petersen, 'Antitrust Law and the Promotion of Democracy and Economic Growth' (2013) 9 *JCLE* 593; and T.C. Ma, 'Antitrust and Democracy: Perspectives from Efficiency and Equity' (2016) 12 *JCLE* 233. Vigorous targeted application of the existing framework may deliver collateral benefits: Baker and Salop, n 58 above; S. Ennis et al, *Inequality: A hidden cost of market power* OECD 2017 at <http://www.oecd.org/daf/competition/inequality-a-hidden-cost-of-market-power.htm>; and J. Kwoka, *Mergers, Merger Control and Remedies* (Cambridge, MA: MIT Press, 2015).

93 'Striking the right balance in the enforcement of competition rules' Speech, 20 September 2017.

94 MV Speech, 21 November 2016, n 82 above.

95 'Leadership in a changing world' Speech, 12 November 2019; similarly, 'Building a positive digital world' Speech, 29 October 2019.

96 '[C]ompetition ... does help to make our markets work more fairly ... we shouldn't be ashamed to say that.' 'Fair markets in a digital world' Speech, 9 March 2018 (MV Speech, 9 March 2018).

97 MV Speech, 22 November 2018, n 11 above; language echoed in JL Speech, 10 October 2017, n 4 above.

98 'Fairness in EU competition law enforcement' Speech, 20 June 2018.

99 'The legacy of Commissioner Vestager and a peek into the future' Speech, 12 November 2019 (emphasis added).

of rules that lawyers and economists have developed over two generations.¹⁰⁰ That is, crucially, fairness is not, from this viewpoint, incompatible with the otherwise ascendant more economic approach. Laitenberger, indeed, used the fairness debate to assert that the more economic approach does not, in the EU, translate into an exclusive focus on short-term price effects, but considers, *inter alia*, harm to structural competition and innovation.¹⁰¹ At most, then, the fairness revival represents an evolution, but not a revolution, in competition law. The soundness of this contention is considered in the fourth section.

This raises an important question, however, namely the extent to which the Commissioner's focus distinguishes her from predecessors in the role. The language of fairness was by no means absent from the policy pronouncements of Vestager's immediate predecessors in the 'modernised' era: Joaquin Almunia, Neelie Kroes and Mario Monti.¹⁰² There are marked differences, however, between Vestager's usage of fairness and that of earlier Commissioners.

First, fairness is a more consistent theme for Vestager: Almunia¹⁰³ and Kroes¹⁰⁴ made reference to market fairness in half of their policy speeches, and it arose in less than a third delivered by Monti.¹⁰⁵ Earlier allusions, secondly, tended to be brief, perfunctory and somewhat trite, with little effort to expound upon what fairness meant or why it mattered. Almunia frequently spoke of competition law's mission to 'keep markets open and fair'.¹⁰⁶ Kroes made recurrent references to 'free and fair' competition,¹⁰⁷ and maintaining 'a fair level playing field'¹⁰⁸. Monti rarely went far beyond basic mentions of 'fair competition'¹⁰⁹. Thus even if the language of fairness was present, it was neither prioritised nor given substantive content. Third, references in earlier discourse

100 MV Speech, 9 March 2018, n 96 above.

101 JL Speech, 10 October 2017, n 4 above.

102 Commissioner Almunia held office from 2009 to 2014; Commissioner Kroes held office from 2004 to 2009; and Commissioner Monti held office from 1999 to 2004.

103 71 of 130 speeches, or 54.61 per cent. Figures for earlier Commissioners include only speeches available in English, and exclude statements about specific cases or legislative developments, and speeches discussing procedural fairness or where the word 'fair' arises in phrases like 'it is fair to say'. All at <https://ec.europa.eu/competition/speeches/>.

104 75 of 142 speeches, or 52.82 per cent.

105 26 of 84 speeches, or 30.95 per cent.

106 'Competition policy as a pan-European effort' Speech, 2 October 2012; 'Competition, innovation and growth: an EU perspective on the challenges ahead' Speech, 21 November 2013; and 'Competition policy and the global economy' Speech, 7 March 2014.

107 'Reforming Europe's state aid regime: An action plan for change' Speech, 14 June 2005; 'One year in: Continuity, concentration and consolidation in European competition policy' Speech, 21 October 2005; 'Market developments and future perspectives in the automotive sector' Speech, 25 September 2006; 'Helping Europeans get the best deal: a sound competition policy for well-functioning markets' Speech, 15 November 2007;

108 'The competition principle as a guidelines for legislation and state action' Speech, 6 June 2005; 'Speech by Commissioner Kroes before the Korean Competition Forum' Speech, 26 June 2006; 'Competition policy in a Lisbon context – the State of Play' Speech, 6 July 2006; and 'Closing remarks at roundtable to discuss future of the Car Block exemption' Speech, 9 February 2009.

109 'Contribution of competition policy to competitiveness of European business' Speech, 26 May 2003; 'Intervening against government restraints on competition: reflections from the EU expertise' Speech, 27 October 2003; 'Recent developments in European air transport law and policy' Speech, 6 November 2003; 'New developments in state aid policy' Speech, 1 December 2003; and 'State aid enforcement in context: competitiveness, economic reforms and enlargement' Speech, 27 April 2004.

demonstrated a different sensibility. Almunia repeatedly emphasised the entitlement of patent-holders and suppliers to fair compensation,¹¹⁰ and the unfairness to other market participants that followed from state subsidies or public ownership.¹¹¹ Notably, the most in-depth discussion in the policy statements of Kroes involved the Commissioner *rejecting* the contention that fairness plays a role under Article 102, instead arguing that ‘competition policy evolves as our understanding of economics evolves.’¹¹² The thinness of fairness discourse within the rhetoric of Monti is consistent with his positioning as ‘the reformer,’¹¹³ during a period which considerations of substantive fairness took a backseat to procedural fairness and greater rigour in economic assessment. Accordingly, while looking backwards supports the contention that fairness is not a novel consideration,¹¹⁴ this fails to recognise the more expansive, pervasive nature of its contemporary iteration.

Critical attention focuses on Vestager’s overarching claims of fairness. Yet gradually the rhetoric of fairness embraced two further themes: trust and democracy. It is hardly coincidental that the first, public trust in market-based institutions, emerged in the first speech that Vestager gave after the Brexit vote in June 2016, where she argued:

[I]t’s not enough anymore for business and government to simply ask people to trust them ... We now need to show people that the system is fair. [C]ompetition enforcement can help to deal with the biggest concerns that Europeans face ... because it helps to make sure the system works fairly.¹¹⁵

From this perspective, competition law serves not only the individualist goal of correcting discrete market failures; it also addresses overarching concerns that the social market economy as such has failed. Laitenberger similarly made repeated reference to fears among ordinary citizens that ‘the game is somehow rigged’.¹¹⁶ Addressing this concern is of equal if not greater importance

110 ‘SGEI reform and the application of competition rules to the financial sector: themes for dialogue with the European Parliament’ Speech, 22 March 2011; ‘Looking back at five years of competition enforcement in the EU’ Speech, 10 September 2014; and ‘Some highlights from EU competition enforcement’ Speech, 19 September 2014.

111 ‘Staying ahead of the curve in EU competition policy’ Speech, 19 April 2011; ‘An integrated approach to State aid’ Speech, 26 May 2011; ‘International cooperation to fight protectionism’ Speech, 18 April 2013; ‘Europe’s banking sector after the crisis: Oversight, regulation and responsibility’ Speech, 10 May 2013; ‘Competition enforcement in the EU: Beyond the integration of Markets’ Speech, 18 October 2013; and ‘Banks in distress and Europe’s competition regime: On the road to the Banking Union’ Speech, 25 September 2014.

112 ‘Preliminary thoughts on policy review of Article 82’ Speech, 23 September 2005 (NK Speech, 23 September 2005).

113 ‘Competition enforcement reforms in the EU’ Speech, 4 April 2003.

114 n 97 above.

115 ‘EESC Plenary Thursday 14 July’ Speech, 14 July 2016.

116 ‘Restoring confidence in a world in flux: The contribution of competition policy and enforcement’ Speech, 26 February 2017 (JL Speech, 26 February 2017); also ‘Remarks delivered at a panel discussion organised by the EU Delegation to Canada on the occasion of the 60th anniversary of the Treaties of Rome’ Speech, 27 March 2017 (JL Speech, 27 March 2017); JL Speech, 10 October 2017, n 4 above; and ‘Enforcing EU competition law in a time of change’ Speech, 1 March 2018.

because, *per* Vestager, public trust is ‘the most important currency our societies have’.¹¹⁷

The concept of trust, in Vestager’s rendering, has two dimensions, both of which are augmented by competition enforcement. First, the public lack trust in society as a whole, in particular the state institutions that underpin the social market economy.¹¹⁸ Thus, ‘when people feel cheated by the market, they very easily lose trust in their whole society’.¹¹⁹ Second, the public lack trust in private actors,¹²⁰ like technology companies that access personal data,¹²¹ employ algorithmic decision-making,¹²² or avoid tax.¹²³ Laitenberger, additionally, was candid in identifying a third focus of public scepticism, ‘specialists’¹²⁴ and ‘experts,’¹²⁵ defined as ‘including the legal and economic professions’¹²⁶ that comprise the backbone of most competition agencies. (This concern was, infamously, also raised in Brexit debates.¹²⁷) This variety of mistrust is arguably of acute concern to competition authorities like the Commission, insofar as it questions their authority to engage in enforcement activities. Moreover, it provides a rationale for aggressive and very public enforcement to counter the narrative of a technocratic agency disconnected from public concerns – an issue revisited in the fifth section below.

A third theme is the role of competition law in promoting democracy, another ‘basic value’.¹²⁸ This concern links largely to the digital economy,¹²⁹ and the attendant influence of digital platforms ‘[o]ver our daily lives, and even over the way our democracy works.’¹³⁰ Like fairness, the emphasis is subjective, related to the ordinary citizen-consumer’s perceptions: ‘Democracy has always been about feelings, as well as reason.’¹³¹ At times, this debate has a paternalistic character: antitrust intervenes to ensure that otherwise-efficient transactions do

117 ‘How competition can build trust in our societies’ Speech, 21 September 2017 (MV Speech, 21 September 2017).

118 ‘To win people’s trust, we have to take action that makes a difference to their lives’: MV Speech, 20 September 2016, n 71 above; also ‘Making markets deliver essential medicines’ Speech, 20 August 2018; MV Speech, 9 January 2019, n 79 above.

119 ‘Fairness and Competition’ Speech, 25 January 2018.

120 MV Speech, 21 September 2017, n 117 above; ‘A responsibility to be fair’ Speech, 3 September 2018; ‘Building a fairer digital world’ Speech, 7 November 2018 (MV Speech, 7 November 2018); ‘Defending trust and openness in the digital age’ Speech, 12 November 2018; and MV Speech, 4 December 2018, n 76 above.

121 ‘Making data work for us’ Speech, 9 September 2016; and MV Speech, 12 October 2017, n 67 above.

122 ‘Clearing the path for innovation’ Speech, 7 November 2017.

123 ‘For a fair taxation system in Europe’ Speech, 28 November 2017, and ‘Working together for fair taxation’ Speech, 2 September 2016.

124 JL Speech, 27 March 2017, n 116 above.

125 JL Speech, 26 February 2017, n 116 above.

126 *ibid.*

127 ‘Britain has had enough of experts, says Gove’ *Financial Times* 3 June 2016.

128 n 95 above.

129 ‘When technology serves people’ Speech, 1 June 2018; MV Speech, 7 November 2018, n 120 above; MV Speech 4 December 2018, n 76 above; and ‘Dealing with power in a brave new world: economy, technology and human rights’ Speech, 19 March 2019 (MV Speech, 19 March 2019).

130 ‘Competition and the future of Europe’ Speech, 17 December 2017.

131 ‘Getting the best out of Europe’ Speech, 25 January 2019 (MV Speech, 25 January 2019).

not generate excessive non-economic societal costs.¹³² Competition policy is accordingly repurposed as a tool to enable market participation, which leads to greater feelings of empowerment among citizens and, eventually, builds society.¹³³ Issues raised include algorithmic decision-making,¹³⁴ data privacy,¹³⁵ and the shift from public to private economic control.¹³⁶ Laitenberger even drew links to fake news, hate speech and ‘echo chambers,’ although without expressly claiming that competition enforcement addresses such problems.¹³⁷

Thus far, our discussion has considered policy statements of representatives of DG Competition. Yet it is worth considering what looks like a drafting quirk of the ECN+ Directive to understand how the rhetoric of fairness finds concrete legislative expression.¹³⁸ When the Directive was proposed,¹³⁹ its draft recitals referenced ‘open competitive markets’ as the objective of competition enforcement. By its adoption, this language changed pointedly to ‘fairer and more open competitive markets’ in recital (1), and to ‘fairer competitive markets’ in recital (6). On one level, these revisions are inconsequential, as the Directive is unconcerned with the substance of antitrust. Yet this shift is more important than it appears. An easy objection to discussion of fairness as a rhetorical concept is that, whatever the frequency of such references, they are mere puff without legal significance. Conversely, the ECN+ Directive provides an unambiguous legal statement of the centrality of fairness to contemporary enforcement. Indeed, the Directive necessarily reflects wider EU-level acceptance of fairness as the changes were introduced during the legislative process. Even if the recitals lack substantive bite, they nonetheless add to the formal corpus of competition law which provides textual support for fairness as a motivating principle.

In sum, the fairness mantra as developed in recent discourse is wide-ranging and occasionally inconsistent. Rather than resolving the open questions and overlapping claims identified above, it embraces a multitude of perspectives and deserving recipients of ‘fair’ treatment. Notably, it positions competition law as a regulatory tool that goes beyond the technical task of remedying discrete market failures, instead laying claim to a range of targets that extend to the core of modern liberal democracy. While its most ambitious claims are rhetorical, the ECN+ Directive provides evidence that fairness is back on the formal competition policy agenda.

132 ‘Making the data revolution work for us’ Speech, 4 February 2019.

133 ‘Playing by the rules in a globalised world’ Speech, 20 July 2018 (MV Speech, 20 July 2018).

134 ‘Bundeskartellamt 18th Conference on Competition, Berlin’ Speech, 16 March 2017.

135 MV Speech, 20 July 2018, n 133 above.

136 MV Speech, 19 March 2019, n 129 above.

137 ‘Accuracy and administrability go hand in hand’ Speech, 12 December 2017.

138 Directive 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (OJ L11/3, 14 January 2019).

139 European Commission, *Proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market* COM(2017)142.

Rise and fall of the ‘more economic approach’

If fairness has the advantage and curse of being an expansive morally infused notion, economic efficiency may be its perfect foil. Efficiency, otherwise known as wealth maximisation, measures an industry’s performance of its economic task in society’s interest.¹⁴⁰ It is considered a particularly apt metric in the antitrust context insofar as well-functioning markets – nominally the objective of any competition system – deliver an efficient allocation of resources. While few competition scholars today advocate for an unadulterated efficiency-maximisation standard without consideration of distributional consequences, an approach to enforcement that deliberately neglects efficiency considerations is more difficult to defend.

It was this recognition, among other factors,¹⁴¹ that prompted the Commission to move towards the more economic approach from the early 2000s. Its general thrust was described by Commissioner Monti as a shift ‘from a legalistic-based approach to an interpretation of the rules based on sound economic principles.’¹⁴² Developed progressively in the areas of agreements, mergers and dominance, the more economic approach comprises several key themes. First, it sets an overarching objective of tackling ‘anticompetitive foreclosure,’ defined as exclusion of competitors that generates harmful effects for consumers.¹⁴³ Thus exclusion is no longer the focus, but only where this affects *efficient* sources of competition. Second, the Commission committed to rigorous, robust methodologies to determine anticompetitive harm.¹⁴⁴ Third, it signalled greater receptiveness towards countervailing efficiencies which arise concurrently with restrictive behaviour.¹⁴⁵ Thus the more economic approach aligns with the broadly (though not unconditionally) accepted understanding of competition law as a ‘consumer welfare prescription’.¹⁴⁶ The revised approach did not purport to override the plurality of objectives long-recognised in EU law, such as market integration.¹⁴⁷ But it did suggest that the primary focus of the rules and their enforcement, in future, was to ensure efficient operation of markets in the consumer interest.

The movement towards an effects-based, economics-imbued approach was not aimed in direct opposition to fairness-minded concerns. Indeed, the more economic approach is consistent with a fairness rationale insofar as a focus on

140 W.K. Viscusi et al, *Economics of Regulation and Antitrust* (Cambridge, MA: MIT Press, 2005) 79.

141 Witt, n 19 above, ch 1.

142 ‘EU competition policy after May 2004’ Speech, 24 October 2003.

143 European Commission, *Guidelines on the assessment of non-horizontal mergers* (OJ C265/6, 18 October 2008) (Non-Horizontal Merger Guidelines) para 18; *Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (OJ C45/7, 24 February 2009), (Enforcement Priorities) para 19; and *Guidelines on Vertical Restraints* (OJ C130/1, 19 May 2010) para 100.

144 Non-Horizontal Merger Guidelines, *ibid*, para 32, and Enforcement Priorities, *ibid*, paras 23–27.

145 European Commission, *Guidelines on the application of Article 81(3) of the Treaty* (OJ C101/97) (Art 81(3) Guidelines); *Guidelines on the assessment of horizontal mergers* (OJ C31/5, 5 February 2004) paras 76–88; and Enforcement Priorities, n 43 above, paras 28–31.

146 So described by the US Supreme Court in *Reiter v Sonotone Corp* 442 US 330 (1979), 343.

147 See for example C-56/64 *Consten and Grundig* EU:C:1966:41 (*Consten*); C-439/09 *Pierre Fabre* EU:C:2011:649; and AT.40134 – *AB Inbev* Decision of 13 May 2019.

efficiency can deliver, *inter alia*, basic necessities like food and medicine at lower prices, increasing their availability for the most vulnerable.¹⁴⁸ Yet the almost reactionary rejection of market power in certain iterations of fairness sets it on a collision course with the more economic approach, under which even significant market power is not necessarily objectionable if exercised in a manner that benefits consumers. Thus the concept of ‘fair competition’ as anything other than a proxy for ‘effective competition’ within ‘open and competitive’ markets was gradually expunged from the antitrust lexicon.¹⁴⁹

Yet efficiency is a somewhat underwhelming value, arguably, raising questions as to why the competition community turned its back on fairness so decisively. Despite its intuitive attractiveness, there are several reasons why a fairness standard is at odds with a ‘modernised’ competition framework.

The first has been noted, but bears reiterating: the absence of an established definition of fairness in EU law. The third section above illustrated the variety of approaches both within the literature and arising in current discourse. Without a clear baseline for intervention, fairness is criticised as an equivocal and unstable basis for antitrust enforcement.¹⁵⁰ While the absence of an authoritative definition within the Treaty is not unusual, what is more surprising is the failure of the Court of Justice to articulate a coherent vision, particularly in light of its tendency to favour teleological approaches to interpretation. Indeed, on those occasions in which the Court has considered the meaning of fairness in discrete instances, it generally favours a conservative understanding that aligns readily with the more economic approach.

The ‘fair share’ of benefits that must accrue to consumers for successful application of Article 101(3), for instance, is interpreted in terms of the allocation of efficiency gains.¹⁵¹ The exception rule associates fairness with the maximisation of overall consumer surplus,¹⁵² rather than any more profound interpretation. The reference to ‘unfair’ prices in Article 102 is similarly interpreted in essentially economic terms. Following the language of Article 102(a), the Court accepts that exploitatively high prices might be abusive, but attempts to set an objective, economics-oriented standard to measure excessiveness: namely, that price must bear ‘no reasonable relation to the economic value of the product’.¹⁵³ Unfairly low prices are typically assessed by reference to their exclusionary effect under Article 102(b). Here too, the Court adopts a demanding, economics-focused approach, mapping the acceptability of low prices onto the relationship between the defendant’s *own* costs and revenues.¹⁵⁴ While margin

148 See for example C.R. Leslie, ‘Antitrust as Public Interest Law’ (2012) 2 UC Irvine L Rev 884, and H.J. Hovenkamp, ‘Progressive Antitrust’ (2017) U Penn Institute for Law and Economics Research Paper No 17-25.

149 Art 81(3) Guidelines, n 145 above, para 47; and regarding Art 102, NK Speech, 23 September 2005, n 112 above.

150 A critical treatment is M. Dolmans and W. Lin, ‘Fairness and Competition Law: A Fairness Paradox’ *Concurrences* No 4-2017; a more ambivalent account emphasising the ambiguity of fairness is Ayal, n 47 above.

151 This is clear since *Consten* n 147 above, 348; also Art 81(3) Guidelines, n 145 above, paras 33 and 85.

152 C-238/05 *Asnef-Equifax* EU:C:2006:734 at [70].

153 C-27/76 *United Brands* EU:C:1978:22 at [250].

154 C-62/86 *AKZO* EU:C:1991:286; reaffirmed C-202/07P *France Télécom* EU:C:2009:214.

squeeze is framed in fairness-oriented terms, relating to the ‘unfairness of the spread’ between wholesale and retail prices, this is measured by reference to exclusionary effects on *efficient* competitors.¹⁵⁵ Although price discrimination appears inherently unfair,¹⁵⁶ moreover, the mere existence of price differentials is not abusive, but instead evidence of exclusion of efficient rivals¹⁵⁷ or specific competitive disadvantage¹⁵⁸ is required.

Accordingly, the conventional understanding of fairness as interpreted in the jurisprudence maps more or less onto the substantive content of the economically oriented competition rules, with little independent existence besides as a synonym for welfare-maximising behaviour. While this is not to suggest that the Court has never endorsed fairness-based reasoning, it is reluctant to do so in so many words. Accordingly, even if fairness is ‘as old as the competition rules themselves,’¹⁵⁹ the absence of a clear and functional definition limits its utility.

A second difficulty is that, even assuming that a single definition of fairness – as distinct from efficiency – could be agreed, it is difficult to conceive of one which would not require significant trade-offs. As our discussion above illustrated, fairness is not *necessarily* a zero-sum game: but in the context of market competition, it is rare that everybody considers themselves a winner. A high retail price may be viewed as unfair by individual consumers who must pay the elevated price or do without. But high prices are more reasonable – rather *fairer* – when considered from the perspective of suppliers seeking an adequate return on investment, or the supplier’s workforce pursuing fair wages, or would-be rivals hoping to enter the market with competitive offerings, or the exchequer where excess profits are taxed appropriately – or even the customer herself, where high prices are designed to discourage harmful consumption. More complex trade-offs arise in contemporary markets. Is it, for example, unfair for consumers to be required, perhaps unknowingly, to provide large quantities of personal data, in order knowingly to access a valuable free-to-use service like a social network or search engine? Or are the significant positions of economic strength held by the tech giants unfair in themselves, even if these reflect years of investment, innovation and competition on the merits? A ‘fairness paradox’ is accordingly identified, insofar as appeals to fairness can be made by many sides in a debate.¹⁶⁰

Translating these trade-offs into the context of a law enforcement exercise – as antitrust entails – reveals the complexity. To the extent that the preferences of one group are favoured, this unavoidably involves ‘picking winners,’ an essentially political role that most competition authorities actively disclaim.¹⁶¹ Indeed, even among those who argue for greater space for fairness in

155 *Deutsche Telekom* n 83 above at [167].

156 A contemporary discussion is C. Townley, E. Morrison and K. Yeung, ‘Big Data and Personalized Price Discrimination in EU Competition Law’ (2017) 36 YEL 683.

157 C-209/10 *Post Danmark* EU:C:2012:172.

158 C-295/17 *MEO* EU:C:2018:942 at [26]-[28].

159 n 97 above.

160 Dolmans and Lin, n 150 above, para 9.

161 ‘[T]he Commission is not and does not wish to act as a price regulator’: European Commission, *XXVIIIth Report on Competition Policy* (1997) 29; also Speech of Maureen Ohlhausen, Acting Chairman FTC, ‘Antitrust Enforcement in the Digital’ 12 September 2017.

contemporary antitrust, there is wariness about whether agencies are equipped to make such judgment calls.¹⁶² It may, moreover, be difficult to articulate a clear and coherent threshold for intervention *ex ante*, or develop robust consistent methodologies for assessing unfair behaviour *ex post*. Such imprecision raises issues of legal certainty for defendants – a problem that can itself be construed in ‘fairness’ terms – and of deterrence, insofar as the exhortation, ‘don’t be unfair,’ has limited instructive value.

A third concern relates to the nature of the competition process. Competitive markets are not necessarily ‘fair’ places, as the term is conventionally understood.¹⁶³ Exclusion of less effective competitors is hardwired into the market mechanism,¹⁶⁴ while the motto of *caveat emptor* – while constrained by contract and consumer protection laws, and sector regulation – hints at an innate opposition between consumer and producer interests. To put the point bluntly, if a fairer world overall is the ultimate goal, why is competition law the instrument of choice? (‘Because it’s there’ is, perhaps, the implicit response – a point considered below.) Otherwise, to set fairness as the standard for intervention either requires a narrow technical understanding of the concept, as has been the case to date, or risks taking the role of competition law from one of buttressing the market to supplanting it entirely.

Accordingly, fairness is arguably an inapt metric where the task is that of market regulation and the chosen instrument involves individual instances of enforcement against defaulting companies. The fundamental objection in the antitrust context is not that fairness is an inappropriate goal for courts, regulators or any system of law to pursue. Rather, the concern is the disjuncture between any meaningful conception of fairness and the narrower range of outcomes that application of the competition rules can hope to achieve, effectively and legitimately.¹⁶⁵ Societal fairness is a compelling and urgent goal in today’s unequal and polarised world, one which ‘confers a rhetorical flourish and intrinsic righteousness’.¹⁶⁶ Yet its content remains disputed and elusive, making it an inopportune basis from which to attack the fundamental freedom to conduct a business which prevails even in the vaunted social market economy.¹⁶⁷ As progressive critics emphasise, moreover, intervening to tame market power for its own sake can have the perverse outcome of harming the most vulnerable most immediately by raising prices.¹⁶⁸ From this perspective, fairness contrasts with efficiency. While the legitimacy of directing an entire field of law *solely* towards the pursuit of this technical concept has repeatedly and rightly been challenged,¹⁶⁹ efficiency has numerous advantages from a regulatory perspective.¹⁷⁰ It is definable, it is measurable, and enhancing efficiency generates an

162 F. Jenny, ‘Populism, fairness and competition’ (2019) 70 *Japanese Economic Review* 280.

163 T.J. Brennan, ‘Should Antitrust Go Beyond “Antitrust”?’ (2018) 63 *Antitrust Bulletin* 49, 55.

164 Recognised in *Post Danmark* n 157 above at [21], and *Intel* n 83 above at [133].

165 Offering an emphatic counterargument, I. Lianos, ‘The Poverty of Competition Law’ *CLES Research Paper Series* 2/2018.

166 Dolmans and Lin, n 150 above, para 15.

167 Protected by the Charter of Fundamental Rights, Art 16.

168 Hovenkamp, n 85 above, 37.

169 See Fox, n 20 above, and B.Y. Orbach, ‘The Antitrust Consumer Welfare Paradox’ (2011) 7 *JCLE* 133.

170 For this reason, endorsed by, for example, Motta, n 10 above.

unambiguous public benefit (it enhances the size of the pie available to all), even if subsequent questions of equity deserve equal attention, whether from antitrust enforcers or other policymakers.

And yet – the siren call of fairness in an era of market scepticism has not gone unheard. Despite its two-decades-old commitment to a more objective, rigorous approach, much of recent Commission enforcement activity reveals only the most limited influence of its ostensible guiding principles. Below we consider examples from current practice which diverge from the scientism of the more economic approach, and thus align with one or more visions of fair competition.¹⁷¹ Two caveats are necessary. First, the claim is not that fairness has or will displace all that has gone before in competition law. The argument is simply that, in shaping the evolution of the antitrust rules in areas of policy salience, the pursuit of fairness provides inspiration and impetus. Second, consistent with our observations about the absence of an authoritative definition of fairness and the multitude of perspectives in recent discourse, no single understanding is advocated. Instead, we consider examples which cover a range of fairness-based perspectives, from fairness of opportunity for individual operators, to fairness in terms of the equity of societal outcomes, to a technical conception of fairness as *anything other than* the prescriptions of the more economic approach.

A Very Public Attack on ‘Big Tech’

We start with the most prominent theme of enforcement during Vestager’s first term in office, namely an explicit and unequivocal focus on regulating ‘Big Tech’. It was noted above, in the third section, that contemporary fairness discourse discloses a particular concern with the digital economy, in terms of both market power and wider societal implications. This is matched by a focus on digital issues, in day-to-day enforcement and bigger-picture policy planning.

On the enforcement side, Commission activity in the digital economy encompasses Article 101, Article 102 and the State Aid rules. As we shall see, some of this practice is marked by a notable departure from the proposed methodology of the more economic approach, whether the impugned behaviour is novel or not so novel in nature. Taken together, the most obvious aspect is the very public demonstrative function that follows from using competition law to challenge the largely-unimpeded market freedom of ‘tech giants’. Arguably the clearest manifestation is the record-breaking fines imposed in the *Google* cases under Article 102,¹⁷² the largest of which, *Android*, conveniently rounded-up to USD\$5 billion when reported.¹⁷³ Similarly, it was reflected in the headline-grabbing figure of €13 billion which Apple was required to repay for

171 The reference period is Commissioner Vestager’s first term in office (November 2014–2019). We exclude cartel enforcement, which falls outside the scope of the more economic approach.

172 AT.39740 – *Google Search (Shopping)* Decision of 27 July 2017 (*Shopping*), saw a fine of €2.42 billion, double the largest under Art 102 previously. That was eclipsed by a penalty of €4.34 billion in AT.40099 – *Google Android* Decision of 18 July 2018 (*Android*). The fine of €1.49 billion for AT.40411 – *Google Search (AdSense)* Decision of 20 March 2019 (*AdSense*), was almost anticlimactic.

173 See for example ‘Why Did the European Commission Fine Google Five Billion Dollars?’ *The New Yorker* 20 July 2018.

uncollected taxes that allegedly violated the State Aid rules, a decision described by Apple's CEO as 'total political crap'.¹⁷⁴ It is further evident in the choice to pursue the *Google* cases as infringement rather than commitment decisions – the latter having been the preferred option prior to Vestager's arrival at DG Competition.¹⁷⁵ These widely-reported financial penalties and unambiguous findings of breach send a clear message: even if technology companies seem all-powerful, this can be tamed by the EU in the public interest.

This links evidently to several concerns explored earlier, in particular high levels of public mistrust in the technology companies that increasingly appear to control daily life, and a perceived need to promote democracy through enforcement. Of course, the actual subject-matter of these decisions is far removed from the most acute public concerns about the digital economy. But the cases demonstrate that the EU can and will confront, and may essentially regulate, unacceptable behaviour by otherwise-unassailable technology companies. The fairness mantra is accordingly reflected in the decision to prioritise and pursue in such a defiantly and purposefully high-profile manner these cases, which chimes with the bold claim that enforcement helps to make the modern world a better place.

This ethos is similarly evident in policy efforts to shape the evolution of competition law in light of challenges posed by the digital economy. Specifically, the Commission's expert report on *Competition Policy for the Digital Era* presents an ambitious, provocative vision for pro-active enforcement going forward.¹⁷⁶ Again, the focus on Big Tech is striking, not least because the 'new economy' is no longer so new.¹⁷⁷ As above, it chimes with public sentiment regarding the need for greater oversight of the increasingly-powerful digital economy. Yet many of the individual recommendations also reflect a notable step back from the rigour (or, perhaps, restrictiveness) of the more economic approach, in favour of a looser, more holistic assessment that coincides with the expansive fairness criterion within Vestager's policy rhetoric. These include deliberate departure from the consumer welfare standard in certain instances,¹⁷⁸ rejection of error-cost analysis by erring on the side of prohibiting potentially anticompetitive conduct in digital markets;¹⁷⁹ and reverse burdens of proof for dominant platforms that must demonstrate an *absence* of anticompetitive effects from their behaviour.¹⁸⁰ Although eschewing direct references to fairness, the approach is consistent with the flexible, multi-polar vision that the fairness standard suggests. The motivation for the report's innovations is similarly aligned: an

174 "'Total political crap": Tim Cook on the Apple tax verdict' *Financial Times* 1 September 2016.

175 In *Shopping* n 172 above, the Commission went through three rounds of (ultimately unsuccessful) market-testing before switching to the infringement procedure (at [76]). In *Android* n 172 above, although the defendant offered commitments, the Commission either considered these inadequate or the claimed infringement so serious as to rule out Art 9 (at [32]).

176 European Commission, *Competition Policy for the Digital Era. A report by Jacques Crémer, Yves-Alexandre de Montjoye & Heike Schweitzer* (Brussels: European Commission, 2019) (*Competition Policy for the Digital Era*).

177 Also querying the report's timing, 'Editorial Comments: Special Advice on Competition Policy for the Digital Era' (2020) 57 CMLRev 315, 315–316.

178 *Competition Policy for the Digital Era* n 176 above, 40–41.

179 *ibid*, 50–52.

180 *ibid*, 66–67.

awareness that ‘the influence of [tech firms] is not only economic but extends to social and political issues.’¹⁸¹

Yet the epithet of fair competition impacts not only the high-level message of enforcement, but also the day-to-day activity of applying the rules in practice. In one sense, the (re)embracing of fairness inevitably represents an implicit rejection of the more economic approach, despite somewhat feeble efforts to reconcile these currents of thought.¹⁸² In filling the analytical gaps that result, moreover, certain ideas familiar from contemporary fairness discourse are prominent, suggesting that fairness in substance requires more than simply moving beyond efficiency maximisation.

Article 102 and the ‘Fair Chance to Succeed’

It was argued above that a prominent symbol of the Commission’s renewed fairness-based crusade are the staggeringly high fines imposed for Article 102 violations by one of today’s largest digital companies, Google. These cases are noteworthy not only for the punishment imposed, however, but also for the underlying theories of harm. Our focus is *Shopping* and *Android*,¹⁸³ both of which are under appeal.¹⁸⁴

Shopping addressed what is known as self-preferencing, referring to situations whereby digital platforms give ‘preferential treatment to one’s own products or services when they are in competition with products and services provided by other entities using the platform.’¹⁸⁵ This is clearly a question of fairness from a market opportunity perspective: the contention that it is unfair – and thus abusive – for dominant platforms to favour their own activities in markets where they compete with independent businesses which rely upon the platform to access consumers. In effect, the dominant firm must secure equitable market access for competitors; a duty that, self-evidently, departs from its default ‘freedom to conduct a business’.

While dominant firms have a well-established ‘special responsibility’ to ensure that their conduct does not ‘impair genuine undistorted competition,’¹⁸⁶ what is notable about *Shopping* is the Commission’s refusal to delimit the parameters of the prohibition on self-preferencing by reference to the *Bronner* criteria on refusal to supply.¹⁸⁷ *Bronner* makes any duty to pro-actively assist rivals contingent upon demonstrating the objective necessity – ‘indispensability’ – of doing so,¹⁸⁸ the rationale being that a denial of access to indispensable inputs is likely to harm effective competition to the detriment of consumers.¹⁸⁹ Departure from the objective criterion of indispensability raises the prospect of assessing the duty to assist by reference to subjective metrics such as

181 *ibid.*, 13.

182 See notes 100–101 above.

183 The text of *AdSense* was unpublished at time of writing.

184 T-612/17 *Google and Alphabet* and T-604/18 *Google and Alphabet*, respectively.

185 *Competition Policy for the Digital Era* n 176 above, 7.

186 C-322/81 *Michelin* EU:C:1983:313 at [10].

187 *Shopping* n 172 above at [651].

188 C-7/97 *Oscar Bronner* EU:C:1998:569 (*Bronner*) at [41].

189 AT.39759 – *ARA* Decision of 20 September 2016 at [112]–[113].

convenience to, or fairness judged from the perspective of, would-be rivals, a possibility rejected in *Bronner*.¹⁹⁰ Although the Commission in *Shopping* was at pains to demonstrate distortive competitive effects,¹⁹¹ it thus failed to make a compelling case about consumer harm.

Accordingly, self-preferencing represents a substantive step away from the more economic approach towards a more holistic fairness-oriented assessment.¹⁹² Vestager recognised as much when she described self-preferencing as raising ‘a broader issue for our societies, of whether we think it’s right for companies like Google and others to have such control over the success or failure of other companies’.¹⁹³ The Commissioner concluded that, ultimately, ‘we may find that we need regulation’ to address such concerns.¹⁹⁴ Yet *Shopping* demonstrates that it is possible to cloak what is, inherently, a value judgment about the optimal organisation of society within the language and methodology of competition enforcement. Although there is not a single reference to ‘fairness’ or ‘unfair’ behaviour in the *Shopping* decision, this ethos is intrinsic to the theory of harm.

Another noteworthy aspect of self-preferencing is its novelty. In *Shopping*, the Commission insisted that leveraging ‘constitutes a well-established, independent, form of abuse falling outside the scope of competition on the merits’.¹⁹⁵ The precedents cited do not support the contention of such a free-standing theory of harm,¹⁹⁶ however, and the grounds by which the *Bronner* criteria were rejected are unconvincing.¹⁹⁷ The progressive development of competition law is not only permissible but arguably is to be applauded. Yet the Commission’s failure to embrace and explain the novelty of its progressive policymaking is regrettable, particularly in light of Vestager’s efforts to make the case for the such a role. (The Commissioner subsequently acknowledged that self-preferencing constitutes at least a ‘new example’ within the established case-law.¹⁹⁸) It is difficult to avoid the suspicion that such reluctance was motivated by the desire to

190 *Bronner* n 188 above at [44]–[45].

191 *Shopping* n 172 above at [589]–[643].

192 Arguably, *Bronner* encapsulates an alternative conception of fairness, balancing the right of dominant firms to run their businesses and the necessity for intervention in ‘exceptional circumstances’ to benefit rivals and consumers; see Opinion of AG Jacobs in C-7/97 *Oscar Bronner* EU:C:1998:264.

193 MV Speech, 27 August 2019, n 76 above.

194 See, in this regard, Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services (OJ L186/57, 1 July 2019), and proposals for a Digital Services Act (European Commission, ‘Commission launches consultation to seek views on Digital Services Act package’ 2 June 2020) and quasi-regulatory ‘new competition tool’ (European Commission, ‘Antitrust: Commission consults stakeholders on a possible new competition tool’ 2 June 2020).

195 *Shopping* n 172 above at [649].

196 *Shopping ibid* at [334]. The case-law cited is of questionable reliability (T-288/97 *Irish Sugar*), premised upon a distinct theory of harm like tying or predation (C-333/94 *Tetra Pak*), or was superseded by or explicitly applies *Bronner* (C-311/84 *Telemarketing* and T-201/04 *Microsoft*, respectively).

197 In *Shopping ibid* at [651], the Commission stated that *Bronner* pertains only to the required remedy, whereas the Court in *Bronner* n 188 above at [41], applied the criteria to determine ‘the existence of an abuse’.

198 ‘Competition and the digital economy’ Speech, 3 June 2019.

impose a then record-breaking, headline-catching fine, in line with the more demonstrative fairness function discussed above.¹⁹⁹

Hot on the heels of *Shopping* came *Android*, where the Commission found violations of Article 102 through tying, exclusive dealing and anti-fragmentation policies involving Google's mobile operating system, Android. Although as reticent as in *Shopping* to embrace the language of fairness, in substance its analysis represents a wholesale abandonment of the more economic approach – and thus must be seen, impliedly, as a victory for fairness, whatever the latter entails. While the cornerstone of the more economic approach is the concept of anti-competitive foreclosure, *Android* contains almost no mention, and certainly no analysis, of the latter: the 'anticompetitive' limb appears to have been jettisoned entirely.

The alleged tying practices, for instance, were assessed solely by reference to the 'competitive advantage' that they afforded to Google's own products.²⁰⁰ In assessing the anti-fragmentation practices, similarly, consumer harm or benefit was largely immaterial; the question was whether Google's behaviour was capable of hindering the development of competing products.²⁰¹ In relation to exclusive dealing, about which the Commission suffered its high-profile defeat in *Intel*, it nominally considered, as *Intel* decreed that it must,²⁰² the capability of the practices to harm competition.²⁰³ Yet far from constituting a full-blown rule of 'rule-of-reason',²⁰⁴ the Commission engaged in an abstract assessment of the potential impact of Google's behaviour on the incentives of market actors.²⁰⁵ Moreover, although it ostensibly conducted an 'as-efficient competitor' analysis, the starting point was the low market shares of Google's existing rivals, which suggests that 'efficient' competition is not the point.²⁰⁶ The Commission's main objection was a potential (entirely speculative) detriment to innovation.²⁰⁷ Crucially, however, the decision was premised on the assumption that foreclosure is inherently 'anticompetitive'; an assumption that holds true insofar as maintaining structurally-competitive markets is the policy goal,²⁰⁸ but which is harder to square with the consumer welfare-focused vision espoused by the Commission itself under the more economic approach.²⁰⁹

Android, like *Shopping* before it, hinges on the presumed entitlement of economic actors to fair market opportunities. Although impact on consumers is not irrelevant, it is essentially peripheral. The upshot of *Android* was that, prohibited from monetising its investment through preinstallation, Google resorted to

199 Where the Commission finds a novel violation of competition law, standard practice is either to refrain from fining or to discount for novelty.

200 For each tying claim, the Commission dedicated a single paragraph (of 1,481 in total) to assert that the conduct was 'capable of harming, directly or indirectly, consumers' by diminishing choice (*Android* n 172 above at [863] and [971]).

201 *Android* *ibid* at [1076]–[1113].

202 *Intel* n 83 above at [138]–[139].

203 *Android* n 172 above at [1188]–[1191].

204 cf N. Petit, 'The Judgment of the EU Court of Justice in *Intel* and the Rule of Reason in Abuse of Dominance Cases' (2018) 43 *ELRev* 728.

205 *Android* n 172 above at [1208]–[1281].

206 *ibid* at [1225]–[1126].

207 *ibid* at [1313]–[1322].

208 n 54 above.

209 In particular, *Enforcement Priorities* n 143 above.

charging manufacturers a licensing fee to incorporate its previously-free proprietary apps:²¹⁰ an additional cost which it is difficult to imagine not being passed on to final consumers. *Android* nonetheless suggests that higher prices are considered a fair price to pay to secure ‘a fair, fighting chance to succeed’²¹¹ for smaller businesses within the digital economy.

Corporate Taxation, State Aid and the Need to ‘Do Something’

Another area where fairness plays a role is in defence of the Commission’s most contentious recent State aid decisions, namely its pursuit of national tax rulings granting favourable treatment to certain undertakings.²¹² ‘Fairness’ in corporate taxation is a key theme in EU law,²¹³ albeit efforts at harmonisation have stalled.²¹⁴ Of interest for our purposes is how this idea spills over into competition enforcement, in particular through an expansive reading of the ‘selectivity’ and ‘advantage’ requirements which enables the Commission to condemn the individualised tax treatment of large firms.²¹⁵

It is widely recognised that the pursuit of corporate tax policies through State aid enforcement is a ‘second best’ solution, necessitated by the impossibility of persuading Member States to accept harmonisation.²¹⁶ Nonetheless, what is most remarkable about the deployment of a fairness-based justification here is that this is directed, primarily, at the consequences that follow *from a societal perspective* where companies avoid tax: namely, that ‘governments have to cut vital services, or put even more of the costs onto those who are least able to pay,’²¹⁷ versus a world where ‘governments can afford the safety nets that keep people feeling secure.’²¹⁸ (An irony of such ‘unfairness’ is that it is precisely certain national governments that facilitate these practices through domestic tax policies.) Such concerns are compelling from a public policy perspective, and in a 2018 interview, Vestager explained that the Commission prioritised these cases because of EU-wide public anger about tax avoidance, and a perceived need to ‘do something’ within its limited powers in this sphere.²¹⁹

What this explanation lacks is an obvious link to the applicable legal standard under the State aid rules.²²⁰ It thus remains to be seen whether this evolution can withstand judicial scrutiny. The response to date has been mixed, suggesting that the legality of ‘unfair’ tax arrangements turns less on inherent unconscionability,

210 ‘Google to start charging a licensing fee after EU Android ruling’ *Politico* 16 October 2018.

211 n 74 above.

212 See http://ec.europa.eu/competition/state_aid/tax_rulings/index_en.html.

213 n 267 below.

214 Traversa, ‘Editorial’ (2019) 47 *Intertax* 244.

215 A. Giraud and S. Petit, ‘Tax Rulings and State Aid Qualification: Should Reality Matter?’ (2017) 16 *European State Aid Law Quarterly* 233, and L. Panci, ‘Latest Developments on the Interpretation of the Concept of Selectivity in the Field of Corporate Taxation’ (2018) 17 *European State Aid Law Quarterly* 353.

216 Panci, *ibid.*, 363.

217 MV Speech, 8 February 2019, n 79 above.

218 MV Speech, 25 January 2019, n 131 above.

219 ‘Interview with Margrethe Vestager: “We are doing this because people are angry”’ *The Observer* 17 September 2018.

220 Art 107(1).

and more on technical questions regarding the parameters of the national rules.²²¹ This proved to be the fate of the *Apple* case before the General Court, which dismissed higher-level claims regarding the Commission's competence to pursue domestic tax policies under competition law, but nonetheless struck down the incompatibility decision on the basis that the Commission failed to establish that the relevant rulings constituted an 'advantage' on their facts.²²² Thus *Apple* is reconcilable with the existing case-law without necessarily embracing – or rejecting – the fairness mantra. Given the case's potent mixture of tax justice and digital economy concerns, however, the Commission's defeat may present more of a public relations dilemma than a jurisprudential one.²²³

Article 101 and 'Business as Usual' Against Vertical Restraints

Both the *Google* and the taxation cases, it is argued, represent the expansive application of the competition rules in a novel fashion that reflects fairness-based considerations. In parallel, the Commission has pursued enforcement against vertical restraints in the e-commerce sphere, where the reverse occurred: namely, it adopted a 'business as usual' approach by applying earlier jurisprudence, but which is entirely at odds with the case-by-case analysis advocated under the more economic approach.

That vertical restraints potentially constitute 'by object' restrictions has long been recognised.²²⁴ These cases moreover concern resale price maintenance (RPM) policies and restrictions on cross-border resales, both of which have firmly been placed within the 'object box'.²²⁵ Yet the intervening decades have seen a sharp rejection of the '*per se*' scepticism that underlies the existing precedents,²²⁶ alongside strong re-statements from the Court of Justice of the need to assess restrictions within their legal and economic context.²²⁷ Thus the sort of literalism in *Binon* – where the Court read the reference in Article 101(1)(a) to practices that 'directly or indirectly fix purchase or selling prices' as an *automatic* prohibition on RPM²²⁸ – is incompatible both with the direction of the more economic approach, and, arguably, the Court's recent pronouncements.²²⁹

Yet in a series of infringement decisions, the Commission has opted precisely to follow its older 'by object' treatment, without acknowledging the criticisms of this approach or any potential incompatibility with its more economic prescriptions.²³⁰ Construing these cases in substantive fairness terms is perhaps a

221 Contrast the Commission's diverging fate in T-755/15 *Luxembourg v Commission* and T-759/15 *Fiat Chrysler* EU:T:2019:670, and in T-760/15 *Netherlands v Commission* and T-636/16 *Starbucks* EU:T:2019:669; see also A. Lamadrid, 'The *Fiat* and *Starbucks* Judgments' *Chillin' Competition Blog* 25 September 2019.

222 T-778/16 *Apple v Commission* EU:T:2020:338.

223 A. Lamadrid, 'The *Apple* Judgment in Context' *Chillin' Competition Blog* 15 July 2020.

224 *Consten* n 147 above.

225 *ibid*, and C-243/83 *Binon* EU:C:1985:284.

226 Notably, US Supreme Court decision in *Leegin v PSKS*, 551 US 877 (2007).

227 Including C-67/13P *CB* EU:C:2014:2204 and C-307/18 *Generics (UK)* EU:C:2020:52.

228 *Binon* n 225 above at [44].

229 Particularly, C-345/14 *Maxima* EU:C:2015:784.

230 AT.40465 – *Asus*, AT.40469 – *Denon & Marantz*, AT.40181 – *Philips*, AT.40182 – *Pioneer*, Decisions of 24 July 2018; AT.40428 – *Guess* Decision of 17 December 2018; 40436 – *Nike* Decision

stretch: while we are dealing with the digital economy, the presumed villainy of our defendants is less readily apparent. E-commerce is nonetheless a topic to which the Commission has directed considerable recent attention, being relevant to its roles both of protecting consumers and furthering integration (the ‘digital single market’).²³¹ As with the *Google* cases, the Commission chose to pursue these as infringement decisions and to impose fines, in notable contrast to, for instance, the equivalent stream of enforcement that followed the *Energy Sector Inquiry* a decade previously.²³² Moreover, while these cases align with a claimed tendency to prefer the ‘by object’ category in Article 101 enforcement generally,²³³ the Commission’s approach was remarkable, both for its unthinking adherence to a legalistic, defiantly non-effects-based approach, and for the use of informal settlement procedures which ensure that none the decisions were challenged before the Court.²³⁴ This strand of case-law thus aligns with the view of fairness as *other than* the more economic approach, even if, again, it leaves open the question of what, precisely, replaces it.

Fairness Beyond Big Tech? Enforcing a ‘Responsibility to the Public’

Finally, fairness considerations reach beyond the digital economy. Arguably reflective of a more acute awareness of its ‘responsibility to the public’²³⁵ alongside the recognition that the fairness mantra gives to ‘fair prices,’²³⁶ the Commission has pursued several recent cases with a distinct public interest quasi-regulatory dimension.

In *Gazprom*, the Commission condemned an alleged ‘unfair pricing policy’ premised upon market segmentation, which enabled the dominant energy firm to extract excessively-high wholesale prices for natural gas.²³⁷ The claimed unfairness pertained both to energy businesses, which were prevented from ‘shopping around’ for better deals, and final consumers, who ultimately bore the higher prices.²³⁸ Similarly, the ongoing *Aspen Pharma* investigation is probing alleged price-gouging for cancer medication,²³⁹ a factual background that unites a perfect storm of urgent public health concerns and over-stretched

of 25 March 2019; 40432 – *Sanrio* Decision of 9 July 2019; and 40433 – *NBCUniversal* Decision of 30 January 2020.

231 European Commission, *Final report on the E-commerce Sector Inquiry* COM(2017)229.

232 European Commission, *Report on energy sector inquiry* SEC(2006)1724.

233 A. Witt, ‘The Enforcement of Article 101 TFEU – What Has Happened to the Effects Analysis?’ (2018) 55 CMLRev 417.

234 European Commission, *Factsheet: Cooperation—FAQ* 17 December 2018 at https://ec.europa.eu/competition/publications/data/factsheet_guess.pdf.

235 n 94 above.

236 n 81 above.

237 AT.39816 – *Gazprom* Decision of 24 May 2018.

238 European Commission, ‘Antitrust: Commission imposes binding obligations on Gazprom to enable free flow of gas at competitive prices in Central and Eastern European gas markets’ 24 May 2018.

239 European Commission, ‘Antitrust: Commission opens formal investigation into Aspen Pharma’s pricing practices for cancer medicines’ 15 May 2017.

public purses.²⁴⁰ Both energy and pharmaceuticals are ‘old economy’ markets, but their strategic importance is reflected in an established pattern of Commission-level scrutiny.²⁴¹ Excessive pricing, as noted, has always been prohibited under Article 102(a).²⁴² What makes these recent decisions remarkable is the willingness of the Commission to *apply* this prohibition, although such cases fall outside its ‘enforcement priorities’ articulated a decade ago.²⁴³

The policy decision to embrace innovation as a central concern within the Commission’s merger control practice is also framed in fairness terms.²⁴⁴ In some ways, this claim to fairness is uncontentious, focused on ensuring better products for future consumers. In the leading decision – *Dow/Dupont*, concerning the seeds and agrochemicals sectors²⁴⁵ – the Commissioner expressed herself in the most tangible of terms: ‘This is literally a question about our daily bread’.²⁴⁶ Yet the simplicity of the message belies the analytical complexity, and attendant uncertainty, of this shift in practice. Here again, the language of fairness functions as a proxy for expansion of the competition rules in a manner that is not necessarily problematic in substance, but which represents more of a departure from the orthodoxy of the ‘consumer welfare prescription’ than the Commission is prepared to admit.²⁴⁷

This discussion sought to demonstrate two points. First, despite assertions to the contrary, fairness as a standard for intervention does not align with the more economic approach, even if the latter can be construed loosely in fairness terms. Second, recent enforcement does not demonstrate faithful adherence to the precepts of the more economic approach, adopted by the Commission with much fanfare in the recent past. Fairness remains a subsidiary influence: evolution not revolution, as its proponents insist. Yet these examples show that fairness considerations can and do motivate the innovative interpretation, and proactive application, of competition law today. No single definition of what constitutes ‘fairness’ can be distilled; instead, what unites this activity is an assumption that the underlying problems represent a compelling public concern and merit an urgent solution. In this sense, these cases reflect a well-established tradition of ‘antitrust imperialism’,²⁴⁸ whereby enforcers have long laid claim to expansive ever-evolving powers which extend the ambit of competition law over the ostensible jurisdiction of national regulators. Yet what distinguishes the fairness

240 Considered in European Commission, *Competition Enforcement in the Pharmaceutical Sector (2009-2017)*. *European competition authorities working together for affordable and innovative medicines* COM(2019)17.

241 See *Energy Sector Inquiry Report* n 232 above, and European Commission, *Pharmaceutical Sector Inquiry Final Report* 8 July 2009.

242 n 153 above.

243 Enforcement Priorities, n 143 above, para 7, recognise but fail to consider exploitative abuses.

244 MV Speech, 29 November 2018, n 73 above; also JL Speech, 10 October 2017, n 4 above.

245 M.7932 – *Dow/Dupont* Decision of 27 March 2017.

246 ‘EU greenlights Dow-DuPont mega-merger raising food security fears’ *The Guardian* 27 March 2017.

247 For example N. Jung and E. Sinclair, ‘Innovation Theories of Harm in Merger control’ (2019) 40 ECLR 266; and N. Petit, ‘Innovation Competition, Unilateral Effects and Merger Policy’ (2019) 82 Antitrust L J 873.

248 D. Bailey, ‘The new frontiers of Article 102 TFEU: antitrust imperialism or judicious intervention?’ (2018) 6 J Antitrust Enforcement 25.

mantra from other gap-filling or ‘regulator’s regulator’²⁴⁹ cases is the manner in which such innovation is defended: not by reference to the need to harmonise, strengthen or prioritise enforcement of the hierarchically-superior EU rules,²⁵⁰ but rather linked to the legitimacy of the broader project of integration. It is this aspect to which we now turn.

Understanding fairness in contemporary EU competition law

What is happening here? While it is easy to find defenders of fairness, commentators are more coy about reconciling the day-to-day business of enforcement with the higher-level values at stake. Moving beyond an account rooted in the inherent appeal of fairness, we offer a tentative explanation which situates it within wider contemporary concerns about the continued existence of the social market economy ideal.

First, however, it is necessary to rebut claims that the shift may be a development internal to the discipline of competition law. The second section above noted the looming presence of hipster antitrust, and it can reasonably be asked whether the fairness mantra is a European variant. Certainly, parallels are drawn in the literature,²⁵¹ and there are parallels in substance. Both are born of the same historical moment, a time of market scepticism; both advance a broader vision of what antitrust should achieve, beyond securing low prices; and both have an ideological dimension, characterised as the ‘New Brandeis School’²⁵² and ‘Vestager School’²⁵³ respectively.

Yet, ultimately, their motivations and implications are sufficiently distinct to require individual assessment. Hipster antitrust is an ‘outsider’ exercise, originating outside the mainstream of antitrust scholarship and enforcement, and launching an attack on both. While its successes should not be underestimated,²⁵⁴ there is limited institutional enthusiasm for its key prescription, namely abandoning the consumer welfare standard.²⁵⁵ The shift to fairness, by contrast, originates at the heart of the EU’s multi-layered enforcement framework, and is an exercise in technocracy. There is also hipster antitrust’s uncomfortable insistence on an originalist perspective, atypical in calls for progressive intervention.²⁵⁶ Without overstating the infallibility of modern

249 G. Monti, *EC Competition Law* (Cambridge: Cambridge University Press, 2007) 495.

250 Opinion of AG Mazak in 280/08P *Deutsche Telekom* EU:C:2010:603 especially at [21].

251 L. Khan, ‘The New Brandeis Movement: America’s Antimonopoly Debate’ (2018) 9 *JECLAP* 131.

252 *ibid.*

253 M.N. Volmar and K.O. Helmach, ‘Protecting consumers and their data through competition law?’ (2018) 14 *ECJ* 195.

254 See for example FTC, ‘FTC’s Bureau of Competition Launches Task Force to Monitor Technology Markets’ 26 February 2019; and DOJ, ‘Justice Department Reviewing the Practices of Market-Leading Online Platforms’ 23 July 2019.

255 Speech of AAG Delrahim, ‘Stand By Me: The Consumer Welfare Standard and the First Amendment’ 12 June 2018, and Speech of FTC Commissioner Wilson, ‘Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get’ 15 February 2019.

256 D.A. Strauss, ‘Originalism and Precedent: Why Conservatives Shouldn’t be Originalists’ (2008) 31 *Harvard J L & Pub Pol’y* 969.

economics, there is something disturbing about a standpoint that blindly rejects a century of intellectual progress based on the inconvenience of the answers that it provides.²⁵⁷ Conversely, in the EU, efforts have been made to reconcile the revival of fairness not only with its Treaty bases, but also recent policy developments.²⁵⁸ Though arguably unconvincing, this suggests a further basis for distinction, namely that hipster antitrust is an iconoclastic enterprise, intended to prompt the ripping-up of the established antitrust rulebook. After decades of Chicago School-influenced erosion, it is uncontested that the substantive scope of US antitrust today is inadequate. But hipster antitrust is not a constructive movement, to the extent that this necessitates a detailed blueprint for reform. Such an iconoclastic vision is explicitly disclaimed by fairness proponents, so that instead the shift to fairness links to the progressive development of the *existing* framework. The fairness mantra is thus an empowering and amplifying concept, driving and justifying intervention.

Instead of representing hipster antitrust à l'*Européen*, therefore, the deliberate adoption of fairness as the cornerstone of enforcement links to wider efforts aimed at 'upgrading [the EU's] unique social market economy to fit today's new ambitions,²⁵⁹ so that 'the fight for fairness never stops.'²⁶⁰ This has two dimensions: a retrospective element, looking backward to defend the market regulation exercise; and a prospective element, guiding its future development.

The second section explained how the adequacy of the bargain struck within existing understandings of the social market economy concept has been reconsidered as the polycrisis underlined existing disparities between its social and economic components. This concept has traditionally functioned as a compromise between the competing claims of socialism and liberalism,²⁶¹ yet integration is thinner in the social sphere.²⁶² Moreover, precisely when many Europeans became more vulnerable due to the effects of (EU-mandated) austerity, efforts to pursue a European social policy had stalled.²⁶³ In considering options for 'the future of Europe,'²⁶⁴ an unduly *laissez-faire* approach to social protection therefore risks imperilling the liberal *economic* model that underpins integration efforts. To that end, the European Pillar of Social Rights was proclaimed in 2017, premised on the notion that 'economic and social progress are intertwined'.²⁶⁵ Of particular relevance is that the Pillar adopts a fairness

257 Arguing for maintaining an economic framework even within reinvigorated enforcement, see J.B. Baker, J. Sallet and F. Scott-Morton, 'Unlocking Antitrust Enforcement' (2018) 127 Yale L J 1916, 1917.

258 See notes 100–101 above.

259 European Commission, 'The von der Leyen Commission: for a Union that strives for more' 10 September 2019.

260 Speech of von der Leyen, 'Opening Statement in the European Parliament Plenary Session' 16 July 2019.

261 D. Hildebrand, 'The Equality and Social Fairness Objectives in EU Competition Law' *Concurrentes* No 1-2017.

262 See for example C. Joerges, V. Bogoeski and L. Nüse, 'Economic Constitutionalism and the "European Social Model"' in H.C.H. Hofmann et al (eds), *The Metamorphosis of the European Economic Constitution* (Cheltenham: Edward Elgar, 2019).

263 P. Graziano and M. Hartlapp, 'The end of social Europe? Understanding EU social policy change' (2019) 26 JEPP 1484.

264 n 27 above.

265 European Pillar of Social Rights, Recital 11.

standard for the latter.²⁶⁶ Fairness has also been adopted as the metric by which to implement other elements of the broader regulatory framework to tame more malign aspects of modern capitalism,²⁶⁷ while such themes were replicated in the rhetoric of the incoming von der Leyen Commission.²⁶⁸ The upshot is a renewed interest, and perceived urgency, in making the case for the social market economy as a compelling – but also *indissociable* – policy goal, with ‘fairness’ at its core.

Current discussions of fairness in the competition context are, therefore, partly motivated by the economic disruption of the past decade and the concomitant need to rehabilitate the social market economy concept. This links to competition’s law longstanding role in reinforcing the internal market, and the Commission’s multi-faceted responsibilities in the project of integration. Yet the challenges of Europe today are more specific and acute. We live in an age of market scepticism (questioning the desirability of ‘making markets work better’), and of Euroscepticism (questioning the desirability of doing so specifically at the European level). By using competition law to demonstrate that markets can be fair as well as merely efficient, this shift in rhetoric provides a more tangible, comprehensible, *defensible* rationale for the pursuit of market-focused integration even in a time of market scepticism.

The aim is partly political: countering public mistrust and alienation and the attendant swing towards (typically Euro-sceptic²⁶⁹) populist forces. Though Vestager acknowledged the limits of antitrust – ‘[n]ot every case of unfairness is a matter for competition law’²⁷⁰ – the claims made transcend the purely technical. EU competition law is not simply a matter of *individualised* enforcement against transgressor undertakings; it also plays a *collective* role in (re)building the social market economy, by taming excessive or exploitative market forces that threaten its already delicate balance. Drawing on the Ordoliberal roots of EU competition policy, Vestager endorsed its conceptualisation as ‘the basic law of the social market economy’.²⁷¹ To the extent that there is an accepted need to reprioritise the social aspect of Europe, reorienting competition law towards a fairness-based rationale fits with the emerging narrative that the economic and the social are intertwined and mutually reinforcing.

Of particular significance is the rise of populism and the role that competition law might play in stemming the tide of anti-market illiberal forces. The Commissioner’s approach is nuanced, acknowledging that ‘when people have the sense that markets aren’t listening to their needs, we shouldn’t be surprised if they start to look for radical alternatives.’²⁷² Without legitimating the claims

266 *ibid*, Recital 14: ‘The European Pillar of Social Rights expresses principles and rights essential for *fair* and well-functioning labour markets and welfare systems’ (emphasis added).

267 Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (OJ C119/1, 4 May 2016) Art 5(1)(a); and European Commission, *A Fair and Efficient Corporate Tax System in the European Union* COM(2015)302.

268 See notes 259–260 above.

269 M. Kneuer, ‘The tandem of populism and Euroscepticism: a comparative perspective in the light of the European crises’ (2019) 14 *Contemporary Social Science* 26.

270 ‘Setting priorities in antitrust’ Speech, 1 February 2016.

271 ‘Competition and Europe’s Digital Future’ Speech, 14 March 2019.

272 ‘Restoring trust in our economy’ Speech, 27 January 2017.

of populism,²⁷³ she recognised that these should be considered and addressed in competition policy.²⁷⁴ Provocatively for an antitrust enforcer, she rejected steadfast deference to the market where the outcome is that ‘people simply have to suffer’ from its efficient operation.²⁷⁵ Thus the fairness mantra might be construed, not only as a shot at redemption for the social market economy, but also a warning shot hinting at the potentially disastrous consequences of ignoring fairness considerations within the integration project.²⁷⁶

Yet there is arguably a more self-interested, borderline existential aspect to this exercise for DG Competition. If the competition rules are about ‘making markets work better,’ then, necessarily, their social value is contingent upon the value to society of well-functioning markets. Accordingly, the shift towards fairness might be seen as a self-justificatory exercise. By appealing to a concept that is more readily recognisable and acceptable to a jaded European public, the fairness mantra makes a compelling case for the continued significance of competition enforcement. The logic is simple: applying competition law leads to fairer markets, leading to a fairer society, in contradistinction to the turmoil and injustice of the recent past. Despite lingering public scepticism of the added value provided by ‘experts from organisations with acronyms,’²⁷⁷ what might be perceived as the populist (or certainly popular) cause of recalibrating European society towards a more equal and accountable model is furthered by greater levels of ostensibly technocratic ‘elite’ enforcement.

Of course, one may legitimately doubt the extent to which ordinary Europeans take heed of policy pronouncements of the Competition Commissioner,²⁷⁸ even if trust-busting is back on the public’s radar. What such language achieves, however, is to pave the way for the essentially performative – as opposed to strictly legal – function of aggressive and high-profile enforcement on a fairness basis, which, as discussed above, *does* garner public attention.

Additionally, the fairness mantra has a prospective element. Fairness, as noted, is an instinctively appealing but substantively elusive concept. It is thus well-suited as an enforcement standard where the competition rules are applied proactively to address unusual forms of bad business behaviour in innovative or emerging markets. Contrary to concerns outlined above about the slipperiness of fairness as a standard for intervention, it is *precisely* its imprecision which liberates rather than constrains – and thus explains its appeal.

There are two factors at play, both of which emerged in our consideration of recent enforcement. First, there is the rise of the digital economy, and with it, new markets, business models and ways of potentially harming competition (and society beyond). Second, linked to the accepted need to rebalance the social market economy, there is increased recognition of the ‘responsibility to the public’ of enforcers,²⁷⁹ namely an obligation to give priority to market problems of wider social concern. As Vestager put it, ‘as the world changes, and new types

273 ‘Fighting fear with factfulness – and engagement’ Speech, 3 September 2018.

274 MV Speech, 3 October 2018, n 69 above; and MV Speech, 25 January 2019, n 131 above.

275 ‘Renewing trust in politics’ Speech, 1 June 2017.

276 MV Speech, 22 November 2018, n 11 above.

277 n 127 above.

278 A. Lamadrid, ‘Competition Law as Fairness’ (2017) 8 JECLAP 147, 147.

279 MV Speech, 21 November 2016, n 82 above.

of power and influence grow, the rules we have need to keep up'.²⁸⁰ In both instances, well-established theories of harm and analytical frameworks find their limits. The enforcement activity discussed above suggests that, in all areas, the comparatively recent Commission guidance setting the direction of the more economic approach is already outdated: self-preferencing finds no reference in the Article 102 guidelines, for instance; the growth of e-commerce gives rise to restraints beyond the contemplation of the vertical guidelines; and the merger regime is subject to calls for expansion of its jurisdiction and the cognisable theories of harm. It accordingly becomes necessary to construct revised theories of liability, preferably composed in a manner consistent with the existing rules and underpinning principles, yet which can be applied and adapted as necessary within new market or social circumstances.²⁸¹ Unlike the claims of originalism propagated by hipster antitrust, however, the EU response looks outwards and forwards. This unquestionably makes sense in a context where progressive development is hardwired into the structure of the EU project, exemplified by the (increasingly strained) notion of 'ever closer union'.²⁸² Given the breadth and depth of integration in the intervening decades, moreover, regressing to a mid-twentieth century vision of the role and reach of EU competition law would be absurd.

Fairness nonetheless provides an obligingly generous and receptive baseline for assessment in novel cases. On the one hand, the very elusiveness of its content facilitates an expansive approach which focuses on injury rather than precedent – in notable contrast to the 'straightjacket' of the more economic approach. On the other, reasoning by reference to fairness provides legitimation for the implicit judicial (or agency) activism that ambitious theories of harm tend to suggest. Of course, neither advantage suffices to counter the serious concerns about coherence, consistency and certainty associated with fairness, outlined in the fourth section above. Yet to the extent that this is a period when EU law must address complex challenges, both economic and social, fairness at least provides a gateway to the progressive development of the competition rules. It may also open avenues, and provide impetus, to more concrete legislative changes to achieve broadly the same ends.²⁸³

It becomes vitally important in such circumstances, however, to ensure adequate *ex post* scrutiny of Commission decision-making by the Court of Justice. High-profile disputes like those involving Google and Apple at least have the benefit of ensuring the development of robust precedent, clarifying how and to what extent fairness considerations fit into contemporary competition analysis.²⁸⁴ Enforcement approaches that essentially shield the Commission from judicial supervision are more troubling.²⁸⁵ Notably, much of the Court's recent jurisprudence reflects the caution and concerns of the more economic

280 'Security and trust in a digital world' Speech, 13 September 2019.

281 MV Speech, 7 November 2018, n 65 above.

282 Art 1(2) TEU.

283 n 194 above.

284 See notes 184 and 222 above.

285 n 234 above and accompanying text.

approach,²⁸⁶ even if the Court does not consider itself bound by Commission guidance.²⁸⁷ An open question is whether, as fairness-imbued enforcement activity makes its way through the appeals processes, the Court might be similarly persuaded to depart from its new course, or at least to broaden the category of cognisable ‘effects’ for these purposes.

Finally, given the reach of EU law, one might ask why we see this shift in the competition field specifically. As noted, reprioritisation of the social side of the social market economy is an overarching concern within the contemporary EU. Yet competition law provides an effective plane within which to take such a stand, precisely because it is an elite technocratic field squarely within the Commission’s jurisdiction. It is easier to be radical when such change can be implemented without the need to reach agreement amongst several dozen national governments, which may face domestic pressure to resist expansion of the *acquis*.²⁸⁸ Most pragmatically, therefore, we suggest that Vestager embraced the language and ethos of fairness precisely because she had the *ability* to do so more straightforwardly than many of her colleagues. Moreover, while accounts premised on Vestager’s charismatic authority or political ambitions fail to give adequate weight to the wider context in which she exercised her role, she was reappointed as Competition Commissioner in 2019 with an amplified portfolio: an outcome that is surely a ‘fair’ reward for a successful term in office.

CONCLUSIONS

This article explored the revival of fairness as a guiding principle for competition law. The choice of the term ‘revival’ is apt, as many of the themes debated – market opportunity, consumer exploitation, an understanding of antitrust harm that transcends efficiency calculations, etc – would be readily cognisable to earlier generations of antitrust scholars. The question of what fairness entails was left unanswered, though multiple parallel narratives were identified. Indeed, the sheer breadth of the distinct manifestations of fairness that are recognised is its most volatile attribute, insofar as there is real potential for conflict and incoherence amongst the competing interests at play. Yet, the fairness mantra is more than simply a retreat to past arguments for hyper-aggressive intervention, and its more nuanced nature distinguishes it, conspicuously, from hipster antitrust.

What is going on is largely political: chiming with the long-accepted reality of competition law as a political enterprise, despite its veneer of economics-mandated impartiality. As a matter of principle, the fairness mantra suggests that the social side of the social market economy equation should receive adequate attention in applying the rules that regulate the market side of the bargain. More cynically, the shift in rhetoric may seek to make the case for the social market economy as a complementary and indissociable whole – and not two concepts

286 Including *CB* n 227 above, *Generics (UK)* n 227 above, C-230/16 *Coty* EU:C:2017:941, *Intel* n 83 above, *MEO* n 158 above, and on merger control, T-399/16 *CK Telecoms* EU:T:2020:217.

287 T-286/09 *Intel* EU:T:2014:547.

288 cf Zeitlin et al, n 24 above, 972.

inherently at loggerheads, as the last chaotic decade in Europe arguably suggests. The fairness mantra thus represents an attempt by the discipline of competition law 'to reconcile it with society'.²⁸⁹ Against this perspective, the most potent concern is that by redirecting competition law to place greater focus on populist fears, the system may expose itself to counterproductive outcomes, overt politicisation, or even corruption.²⁹⁰ Yet this does not mean that the search for fairness should be dismissed, even if it introduces known risks.

The fairness mantra, at its core, provides a rationale for the progressive development of competition law, and some (albeit loose) indication of the optimal direction of travel. What will be vitally important in coming years is how the Commission approaches the task of advancement and reform: not merely in terms of the types of cases that are pursued, but how such cases are analysed and explained by reference to both the existing jurisprudence and any radical departures, alongside adequate *ex post* scrutiny by Union Courts. Fairness may be an elusive, even rhetorical concept; but competition law and its enforcement are necessarily real-world endeavours. To the extent that the competition-as-fairness mantra may become the primary driver of EU competition law, it would benefit from a concomitant dose of frankness, to ensure fair outcomes in all senses.

289 Lamadrid, n 278 above, 148.

290 *ibid*, 147.