

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

**HOW CAN COMPETITION CONTRIBUTE TO FAIRER SOCIETES?
Contribution from Greece**

- Session I -

29 November 2018

This contribution is submitted by Greece under Session I of the Global Forum on Competition to be held on 29-30 November 2018.

More documentation related to this discussion can be found at: oe.cd/cfs.

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JT03439678

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Summary

Fair competition means equitable competition among competitors. For economists, the base of fair competition is the proper function of competitive markets. The scope of TFEU is to remove any obstacles that hamper fair competition, such as unfair prices, unfair trading conditions and discrimination between businesses. Besides, in periods of economic and financial crisis the term fairness seems to be always in the agenda of competition policy. It may be used as a valuable link between competition and the society. However, fairness is a guiding principle for competition researchers and therefore it does not appear as a direct relevant policy consideration. Economic theory continues to rely on the self-interest hypothesis.

1. Introduction

1. Fairness has always been a value underpinning European Union (EU) competition law and its enforcement. It is one of the foundations of the EU and part of the rationale for the implementation of EU competition law. The elimination of anticompetitive practices within the Single Market ultimately benefits consumers and businesses. Indeed, anticompetitive practices are regarded by consumers not only as harmful but also as unfair.

2. The term fairness is a flexible concept. In terms of competition jargon synonyms of “*unfair trading laws*” are the terms “*unfair methods of competition*”, “*unfair prices*” and “*unfair share*”.¹ However, fairness is a guiding principle for competition researchers. This means that the term itself cannot be used by competition experts as an instrument in their work and therefore fairness does not appear as a directly relevant policy consideration.

3. This contribution attempts to shed light on how competitive markets are the fundamental prerequisite for fairer societies. For this purpose it is organized in the following way: in Section 2 we present the historical path of the term fairness and in Section 3 we analyze its guiding characteristics within competition procedures. In section 4 we analyse the relationship between fairness and economics and in Section 5 we highlight the basic merits related to fairness of recent decisions of Hellenic Competition Commission (HCC). Lastly, in Section 6 we conclude.

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¹ Gal, S., M. (2018) ‘Fairness as a Foundational Concern in Competition Law and Policy’, 13th Annual GCLC Conference on “Fairness in Competition Policy and Law”, Brussels.

2. Fairness from a historical point of view

4. In legal terms, fair competition means equitable competition among competitors. From an economic point of view, the base of fair competition is the proper function of competitive markets, within which the benefits are equally shared among its members (consumers and firms).

5. Historically, “[t]he EU’s rules on competition are designed to ensure fair and equal conditions for businesses, while leaving space for innovation, unified standards, and the development of small businesses”.² In the US, fair competition is an act “ (a) to promote and maintain and encourage competition; (b) to prohibit the prevention, restriction or distortion of competition and the abuse of dominant positions in trade in Barbados and within the Caricom Single Market and Economy; (c) to ensure that all enterprises, irrespective of size, have the opportunity to participate equitably in the market place; and (d) for connected matters”.³

6. According to Boehm, Eucken and Grossmann-Doerth (The Ordo Manifesto of 1936)⁴ “[f]ree competition must not be stopped on the erroneous grounds of alleged unfair practice. On the other hand, it must not be allowed to degenerate into truly unfair competition either...”.

7. The goal of the common market from its early outset was to provide productive efficiency, that is “...to achieve the optimal growth of production facilities through the use of the most advanced methods...”.⁵ The *Spaak Report*⁶ refers to fair competition as one of the practical measures necessary for the establishment and operation of the Common Market (Spaak report, 17). Particularly, the report’s reference to fair competition was more supply side rather than demand side oriented. Fair competition was necessary for the provision of required security to the producers, but not to the consumers. Besides, fair competition referred to business and not competitors since the main concern of the report was state aid which could hamper competition.

8. Nowadays, fair competition is an underlying element of competition policy within the EU. Indeed, the Treaty on the Functioning of the European Union (TFEU) aims to remove any obstacles that hamper competition, such as unfair prices, unfair trading conditions and discrimination between businesses. However, the TFEU does not provide a definition of fair competition and as a result fairness is perceived as a guiding principle and not as an instrument for competition enforcers.

² See https://europa.eu/european-union/topics/competition_en.

³ See Fair Competition Act, Ch. 326C (<https://www.ftc.gov.bb/library/CAP326C.pdf>).

⁴ Böhm F., Eucken W., Grossmann-Doerth H. (1989) The Ordo Manifesto of 1936. In: Peacock A., Willgerodt H. (eds) Germany’s Social Market Economy: Origins and Evolution. Trade Policy Research Centre. Palgrave Macmillan, London.

⁵ See Akman P. (2009), ‘Searching for the Long-Lost Soul of Article 82EC’, *Oxford Journal of Legal Studies*, 29(2).

⁶ Intergovernmental Committee of the Messina Conference, Report by the Heads of Delegations to the Foreign Ministers (‘Spaak Report’) 21 April 1956 (Provisional English Text) 6.

3. Fairness as a guiding principle and not as an instrument for competition experts

9. In most cases the decisions adopted by the EU Commission and National Competition Authorities are the result of an in depth assessment from all the engaged bodies. Competition experts, especially economists, look into the evidence of each individual case file and conduct their analysis in the light of the relevant legal provisions and case law. In this procedure, the term fairness emerges more as a guiding principle rather than as an instrument for competition analysis.⁷

3.1. Merger Control

10. Procedural fairness plays a critical role in competition analysis of mergers, abuse of dominant positions and cartel cases. In EU merger control, procedural fairness means that the firms participating in the transaction and third parties have the right to be heard by the Commission both prior and after its final decision. This right gives them the opportunity to actively participate in the merger control procedure and ensures that all stakeholders are fully informed about the special characteristics of the notified transaction.

11. The parties to the notified transaction have many opportunities to exercise their right. In the procedural framework of EU merger control they may intervene in different ways, such as a state-of-play meeting, in which they are informed about the state of the Commission's concerns and have the opportunity to express their views. Also, after the Commission's final decision the parties have access to the case file (only the non – confidential files) and have the opportunity to express their views during the oral hearing.⁸

12. Third parties have also the right to express their arguments as soon as the Commission has published its Notice in the Official Journal. If the third parties have a legitimate interest for the individual case they may request a non – confidential copy of the Commission's Statement of Objections and attend the oral hearings of the case.

3.2. Abuse of Dominant Position

13. Article 102(a) TFEU and 2 of Greek Competition Law prohibits a dominant firm from “*directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions*”. A market player follows unfair pricing strategy either by imposing unfairly high prices or by keeping prices artificially low in order to thwart competitors' ability to compete in the market.

⁷ See Anderson, D., and Cuff, R. (2011), ‘Cartels in the European Union: Procedural Fairness for Defendants and Claimants’. Fordham International Law Journal, 34(3) and OECD (2012) ‘Procedural Fairness and Transparency’, Competition Committee, available at <http://www.oecd.org/daf/competition/mergers/50235955.pdf>.

⁸ Similar rights provided in the procedural framework of Greek Competition Law N. 3959/2011 (“*Greek Competition Law*”).

3.2.1. Excessive Pricing

14. A price is unfair and excessive “.....because it has no reasonable relation to the economic value of the product supplied....”⁹ The determination of excessive pricing as unfair and anti-competitive practice constitutes a two – step test (“*The United Brands test*”): firstly, we determine if the difference between the cost actually incurred and the price actually charged is indeed excessive and secondly, we analyze if the imposed price is unfair in itself or compared to competing products.¹⁰

15. Firms price above marginal or variable cost since profits are the driving force of economic activity. Their limitation would dampen the incentive for firms to invest.¹¹ Besides, in competitive markets with no barriers to entry, excessive prices should normally attract new entrants and the market would converge to an “*economic*” level of profits. However, when excessive pricing becomes unfair, naturally when it is imposed by a dominant firm in the market, then entry may not ensure the convergence of the market forces to a natural level.

16. The imposition of excessive prices by dominant firms is the first and the foremost practice consumers find particularly unfair. In many cases involving article 102 TFEU, the EU Commission has imposed commitments, which oblige dominant firms to reduce prices to the competitive or fair level. Thus, the objective of fairness is to reach an outcome that ensures consumer welfare.

3.2.2. Exclusionary practices

17. In exclusionary practices, such as predation or margin squeeze, dominant firms take advantage of their power and their financial means to force competitors out of the market. For their purpose, they charge prices that do not allow competitors to recover their costs for sustained periods of time. Therefore, exclusionary practices are dynamic unfair policies of the market (dominant) players in order to eliminate the degree of free competition in it.

18. Prices set below average variable costs can be assumed to be predatory, because their intention is to eliminate the number of competitors in the market. Competitors would find more rational not to produce and sell a product that cannot be priced above average variable cost than producing it and generate loss from their investment.

19. Dominant firms, active in upstream and downstream markets, can squeeze margins of their downstream competitors by setting a relatively high or unfair price upstream¹² and a relatively low price downstream. Recently, scholars have argued that margin squeeze practices should be evaluated under adjusted predatory pricing standards. The said

⁹ See Judgment of the Court of 14 February 1978, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities, Chiquita Bananas*, Case 27/76.

¹⁰ See, *inter alia*, Akman, P., and Garrod, L. (2011). ‘When are Excessive Prices Unfair?’. *Journal of Competition Law & Economics*, 7(2), 403–426.

1.1.1. ¹¹ *EU Competition Commissioner Vestager has recently underlined the need for caution: “.....when we do take action against excessive prices, we need to make sure we're not taking away the rewards that encourage businesses to innovate. Because we need the innovation”. See “Protecting consumers from exploitation”, Speech, Chillin’ Competition Conference, Brussels, 21 November 2016*

¹² That is, the input costs of their downstream competitors.

adjustment refers to an increase in the cost benchmark used in the predatory pricing evaluation by including opportunity costs due to missed upstream sales.¹³

20. Firms may also use practices other than pricing strategy to harm competition. One example is the use of licensing of standard essential patents (SEPs) among manufacturers.¹⁴

3.2.3. Cartels

21. Antitrust policy globally aims at fostering competition in the interest of society as whole. Effective antitrust laws imposed by the EU Commission and national competition authorities are fundamental in creating fair societies as they prevent firms from distorting effective competition.¹⁵

22. Article 101 TFEU and 1 of Greek Competition Law prohibits “*all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market*”, except from these agreements which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. Competition authorities, as in the abuse of dominant position cases, cannot and does not rely on the term of fairness as an instrument available for competition analysis. It emerges as a guiding principle through the process of analysis in cartel cases.

23. Cartels, especially tacitly collusive agreements, possibly the anticompetitive practices people mostly perceive as unfair, are treated by competition law as hardcore restrictions.¹⁶ In cartel cases, the anticompetitive behavior between firms usually relies on: a) the coordination of their prices and the division of the customers among them, b) the absence of competition between cartel members in order to preserve their market shares and c) the coordination of their non-price strategic variables (advertising, e.t.c.). All these anti-competitive practices aim to increase the common profits of the cartel members and to force their competitors out of business.

24. Particularly in periods of economic downturn “*undertakings must use only means that are consistent with the competition rules. Price fixing and market sharing are certainly not legitimate means of combating difficult market conditions. Nor are undertakings*

¹³ See Gaudin, G., and Mantzari, D. (2016). ‘Margin Squeeze: An Above-Cost Predatory Pricing Approach’. *Journal of Competition Law & Economics*, 12(1), 151–179.

¹⁴ See, *inter alia*, CASE AT.39985 - MOTOROLA - ENFORCEMENT OF GPRS STANDARD ESSENTIAL PATENTS (http://ec.europa.eu/competition/antitrust/cases/dec_docs/39985/39985_928_16.pdf), CASE AT.39939 - SAMSUNG - ENFORCEMENT OF UMTS STANDARD ESSENTIAL PATENTS (http://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1501_5.pdf).

¹⁵ See Fotis, P. (2012), ‘Competition Policy and Firms’ Damages’. In J. E. Harrington Jr and Y. Katsoulacos eds ‘*Recent advances in the Analysis of Competition Policy and Regulation*’. E. Elgar Publications.

¹⁶ See also Speech by Joaquín Almunia ‘Fighting against cartels: A priority for the present and for the future’, Brussels, 3 April 2014, available at http://europa.eu/rapid/press-release_SPEECH-14-281_en.htm.

entitled to flout Community competition rules because of alleged overcapacity” (Official Journal C 153/32 04/07/09, 2009)¹⁷.

4. The relationship between fairness and economics

25. A cornerstone of economic science is that rational economic agents seek to maximize their own benefits (*self-interest hypothesis*). However, consumers do not always seek outcomes that maximize their financial benefits but also their behavior appears to be motivated by concerns about fairness. Even if wealth maximization is an instrument on the path to achieving society’s benefits, fair processes of distribution of benefits among different members of the society may be a critical step toward maximizing its wealth. As Fennell and McAdams state ‘.....[f]airness perceptions and the consequences of perceived unfairness can profoundly influence all of the activities and choices that would otherwise make the pie grow, from cooperating, to bargaining, to settling disputes, to complying with the law’.¹⁸

26. Experimental economists systematically refute that the self-interest hypothesis is the only hypothesis people seek in order to maximize their surplus and suggest that many of them are motivated by concerns for fairness and reciprocity.¹⁹ Reciprocity means if people are kind to each other, they have a greater tendency to respond more altruistically than self-interest hypothesis suggests.²⁰

27. In periods of economic and financial crisis the term fairness appears in most agencies’ competition policy agenda. Competition experts and regulators follow a more fair application of competition rules, while courts seem to realize more clearly the impact of anti-competitive behavior on the society as a whole.

28. However, classic empirical economists continue to estimate key demand and supply parameters, such as costs and demand elasticities, on the basis of observable data and under the assumption of full rationality of all consumers. If economists want to accurately predict the impact of mergers and abuse of dominant positions or to interpret anti-competitive market conducts, they must take into account fairness concerns in their analysis.

¹⁷ See, also, Fotis P. (2012). ‘Competition policy in periods of economic downturn’. *International Journal of Economics and Business Research*, 4(5), 560-76 and OECD Global Forum of Competition of 18 February 2011.

¹⁸ See L. A. Fennell., and R. H. McAdams. (2014), ‘Fairness in Law and Economics: Introduction’. *Coase-Sandor Working Paper Series in Law and Economics*, Working Paper No. 704, University of Chicago Law School.

¹⁹ See Fehr, E., and Schmidt, K. M. (2003). ‘Theories of Fairness and Reciprocity - Evidence and Economic Applications’. In Dewatripont, M., Hansen, L., P., and Turnovsky, S., J. eds ‘Advances in Economics and Econometrics’, *Econometric Society Monographs*, Eighth World Congress, Vol. 1, 208 – 257.

²⁰ For the incorporation of fairness in game theory see, among others, Rabin, M., (1993). ‘Incorporating Fairness into Game Theory and Economics’. *The American Economic Review*, 83(5), 1281-1302. See also Fehr, E., and Gächter, S. (2000). ‘Fairness and Retaliation: The Economics of Reciprocity’. *Journal of Economic Perspectives*, 14(3), 159-181 and Levin, J. (2006). ‘Fairness and Reciprocity’, available at <https://web.stanford.edu/~jdlevin/Econ%20286/Fairness.pdf>.

5. Case Law

29. Recent decisions issued by the HCC and national courts indicate that Greek competition law is becoming more familiar with the notion of fairness. By its Decision 563/VII/2013 the HCC applied its Notice for the calculation of fines²¹ and imposed a final amount of fine equal to 10% of the total turnover in the preceding business year of engaged firms in the infringement (“*The Poultry Case*”). On appeal by three of the implicated firms, by its decisions 1207/2016, 1208/2016 and 1324/2016 the Administrative Court of Appeal reduced the imposed fines to 1% of the appellants’ total turnover in the preceding business year. One of the critical arguments of the Administrative Court of Appeal was the significant role of the applicants in the local economy²², especially the fact that the applicants employed a great number of employees who dwell in the local markets. It is noteworthy to mention that the Counsel of State by its decisions 1107/2018, 1108/2018 and 1109/2018 upheld the decisions of the Administrative Court of Appeal.

30. In a recent settlement case (Decision 636/2017), the HCC unanimously decided to further reduce the imposed fine of the infringed firms, taking into account, *inter alia*, the significant impact of the infringing firms on the level of employment in the relevant market of high quality cosmetics in Greece. More specifically, the Decision indicated that the infringing firms employed a total staff of 3.000 employees, a number which is greater than the average rate of employment in the above market.

31. The above mentioned decisions indicate that both the HCC and national courts have realized the important link between competition law and the macroeconomic environment in which firms operate. Even though the said decisions apply the self-interest hypothesis, they recognize that fair distribution of benefits among different members of a society, namely on one hand the consumers/victims from the infringement and on the other hand the employees of the infringing firms, constitutes a critical tool towards an actual maximization of wealth.

6. Conclusion

32. Fairness should be perceived as an instrument and not only as a guiding principle for competition enforcers. Indeed, the terms of fairness and efficient competition are interrelated since the latter may achieve the fair distribution of benefits between the various links of the economic chain which are affected by anticompetitive practices. In periods of economic and financial crisis fairness may be used as a valuable link between competition policy and society.

²¹ See also Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003.

²² See also decision 663/2017, para 258, of Hellenic Competition Commission.