Due to the growing influence of economics and economists in competition law and policy discourse and the internationalization of antitrust, the equity–efficiency trade-off debate has played a defining role in the transformation of the dominant paradigm governing competition law enforcement since at least the 1970s. The debate remains crucial today as issues of economic inequality and its interaction with efficiency become of central concern to policymakers and decision-makers in competition law, as well as in other spheres of public policy. Despite their central role in the grammar of competition law on the global plane, the intellectual underpinnings of the interactions between equity and efficiency in the context of competition enforcement have never been examined in-depth. This book aims precisely to fill this gap by discussing novel approaches in understanding the role of efficiency and equity concerns in competition law.

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GLOBAL COMPETITION LAW AND ECONOMICS POLICY

This series publishes monographs highlighting the interdisciplinary and multijurisdictional nature of competition law, economics, and policy. Global in coverage, the series should appeal to competition and antitrust specialists working as scholars, practitioners, and judges.

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Reconciling Efficiency and Equity

A GLOBAL CHALLENGE FOR COMPETITION POLICY

Edited by

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Preface

Competition Policy at the Intersection of Equity and Efficiency

A Tribute to Eleanor Fox

Ian S. Forrester

It is much more fun to get an advance copy of one’s obituary than to have to wait for the day when it is needed. This volume honours someone who stands in no need of an obituary, no need of respectful deference, and no need to cluck about the very remote good old days. Moreover, someone who thankfully shows no prospect of early retirement. Someone who is of today, now, actively engaged in the analysis and shaping of the law. Eleanor Fox.

I should put Eleanor Fox’s modernity in context. We have known each other over two centuries, at least. Our recollections jointly and severally are so antique that we cannot forget events which lie at the outer edge of antitrust recollection. It is perfectly natural for sweet young things to regard me, a veteran of the Magill case (T-69/89 and C-241 and 242/91), as if I were a survivor of the Battle of Trafalgar. We have both seen great battles, and Eleanor has documented them like a good war correspondent, clearly but not dispassionately.

The law has developed greatly since we were beginners: another way of saying that the law has changed in its theories, processes, prime targets and enforcers. Goals, penalties, civil damages, discounts, licensing, market integration, cartels, leniency and cooperation between agencies – all of these in Europe have seen immense evolution. US law has changed greatly, sometimes in parallel to European, sometimes not.

Eleanor Fox’s writings have dealt with antitrust law from many points of view. The aspect which I most appreciate is her coverage of the history. Clearly presenting the choices and recognising the alternative points of view make the history far more compelling than showing it as a triumph of right over wrong. Those who neglect the underlying factual controversy and start with the findings are missing half the fun and most of the understanding of what the case means.
Speaking as an advocate who was on the losing side of many cases, I feel sensitive and negative to case histories which present the losing side as obviously hopeless, doomed; and the winning side as evidently destined for success. Parties go to court because they believe they can win. There are always attractive arguments on both sides. Litigation is driven by antitrust lawyers’ market forces: logic, a modest literacy in economics, precedent, factual fairness and advocacy of simplicity with an edge of passion which together can convince courts. Seeing this in historical context is a great merit and Eleanor Fox’s writings help us understand that context.

Eleanor Fox’s contribution has been immense in another hugely important respect: in the development of competition cultures in Africa, Latin America and Asia. I have seen first-hand how competition disciplines, with a bit of creativity and lots of local knowledge, can transform a developing country and emerging economies.

The Gambia, Swaziland, Cambodia and Bhutan are just a few of the small countries touched by the liberating effect of novel competition law thinking. So far as I know, Eleanor Fox has not yet been canonised by a competition agency in one of these countries, but recognition cannot be far away. She has been for emerging nations, uniquely, a voice for the underdog.

Many competition lawyers say I would love to do pro bono work but opportunities don’t come up in my practice. I respectfully disagree. Practising lawyers are endowed with great privileges. Working for no fee is a practitioner’s duty, a moral tax upon success and eminence. It is one which Eleanor Fox undertakes routinely and cheerfully.

And then of course there is the teaching and the cluster of excellent pupils who have grown in insight and been launched on their careers through academic exposure to Eleanor Fox. I haven’t yet met one who had a bad thing to say about their great mentor.

The participation of so many admirers of Eleanor’s contribution to our legal discipline in this volume confirms her unique status.