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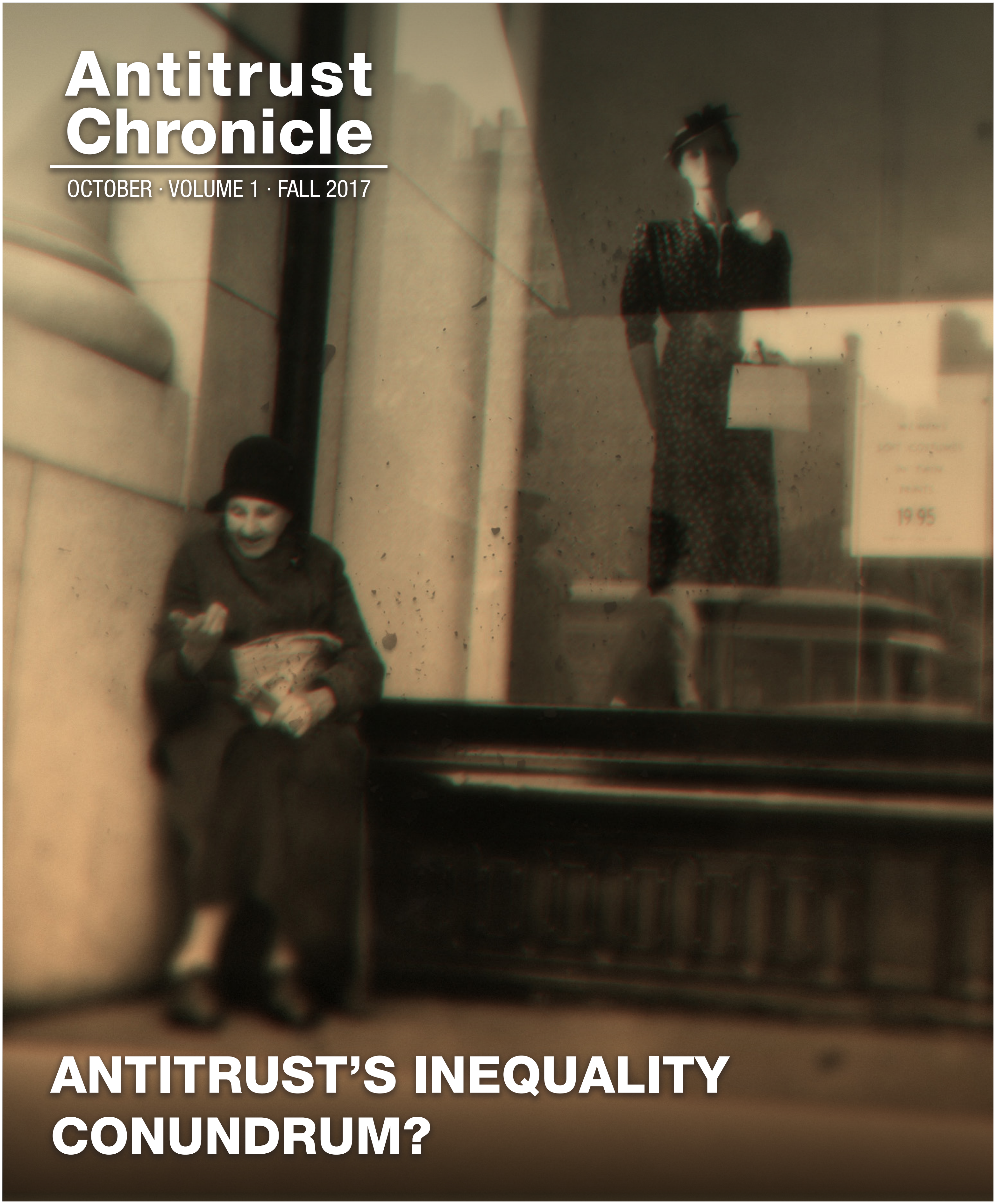

ANTITRUST'S INEQUALITY CONUNDRUM?

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

We are pleased to bring you the October 2017 Antirust Chronicle which addresses issues related to **Inequality and Antitrust**. How might concerns about mounting wealth inequality affect antitrust and competition policy? Does market power contribute to inequality? And what are some possible antitrust policy modifications that should be considered in response to inequality? Is antitrust law a viable wealth distribution device?

There is a general perception in some parts of the debate that for the last thirty years, lax enforcement of U.S. antitrust laws has tilted the scales towards more consolidation and "efficient" strategic conduct. During the same time, wealth and income inequality has grown significantly in the U.S. and internationally.

Some authors think that antitrust law should remain focused on doing what it does well, i.e. focusing on economic efficiency and consumer welfare. Others, argue that the time is right for a paradigm change.

The October Antitrust Chronicle features leading voices in the debate and we are proud to help foster a lively discussion of this interesting antitrust issue.

As always, thank you to our great panel of authors this month.

Sincerely,

CPI Team

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Antitrust Policy And Inequality Of Wealth

By Herbert Hovenkamp

Why should we use antitrust law as a wealth distribution device when far more explicit statutory tools are available for that purpose? One feature of antitrust is its open-textured, nonspecific statutes, so using antitrust to redistribute wealth may be a way of invoking the judicial process without having to go to Congress or a state legislature. The most defensible goal for the antitrust laws is prohibition of practices that serve to reduce output anticompetitively, which is simply a statement of the consumer welfare principle. Accepting that competitive markets are conducive to greater wealth equality, hasn't antitrust already done all it can do?

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By Daniel A. Crane

Drawing on earlier work, Crane debunks that claims that lax antitrust enforcement exacerbates wealth inequality. The assumption that antitrust violations generally involve wealth transfers from comparatively poorer consumers to comparatively wealthier shareholders fails to capture many of the countervailing effects of market power exercises and antitrust enforcement. Although some antitrust violations are regressive, others are progressive, and the general effect is too complex to ascertain with certainty.

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The Multifaceted Nature Of Fairness In Competition Policy

By Michael Trebilcock & Francesco Ducci

In this article, we explore the multifaceted dimensions of fairness in competition policy. Parallel to the revival of free trade versus fair trade debates at the international level, fairness considerations are making their way back into the competition policy domain as a result of a widespread decrease in the levels of competition in various industries. The debate over fairness, however, is usually based on vague and unclear notions of fairness, which in the article we attempt to clarify by evaluating the various dimensions that may be pertinent to domestic markets: vertical fairness, horizontal fairness on the demand side, horizontal fairness on the supply side, and procedural fairness. We conclude by pointing to the parallelism between fairness debates in domestic competition policy and the free trade versus fair trade debate at the international level.

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The Effects Of Market Power On Inequality

By Sean F. Ennis, Pedro Gonzaga & Chris Pike

Market power has generally not received much recognition as a potential source of inequality. This paper describes a mechanism by which income inequality can be exacerbated by market power, and provides a characterization of the impact of market power on income of the top 10 percent of income earners and the bottom 90 percent. For an illustrative 10 percent mark-up from market power, across 12 countries, we model a decline of purchasing power of about USD 1,600 for the bottom 90 percent and an increase in income of the top 10 percent of income earners of USD 14,400. Such figures illustrate overall impacts, and would then need to be reduced to calculate the impact of illegitimate market power, given that much market power is legitimate, coming from IP rights or competitive business decisions.

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Inequality And Competition Policy

By Bruce Lyons

Not all sources of competition reduce inequality by limiting prices and profits. In developed economies, globalization raises the payoff to those controlling the best products and puts downward pressure on the low paid. Antitrust to limit market power is an important force for restraining inequality, and economists have good reasons not to introduce explicit non-competition arguments, but Baker & Salop have recently opened a debate on whether inequality should be more actively considered. I provide a brief critique of their seven suggestions and add two of my own: empowering consumers to make competition more effective; and introducing inequality into the consideration of price discrimination.

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Antitrust: Tracing Inequality – From The United States To South Africa

By Eleanor M. Fox

A notion of equality has run through antitrust (or competition) law since the beginning of (antitrust) time. This essay traces uses of the equality value in antitrust law since the enactment of the Sherman Act in 1890. It focuses particularly on equality of opportunity: keeping open pathways for outsiders to contest markets on the merits. The essay invokes data showing increasing inequality in societies around the world, and research that, challenging older "wisdom," shows that more equality may be necessary to obtain more efficiency. Finally, the essay describes a new South African project to amend the Competition Act in hopes to make South Africa a more inclusive economy.

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Competition Policy And Inequality: Developing Countries' Prespectives

By Azza A. Raslan

The article investigates the inclusion of broader policy objectives that are linked to development and wealth equality in the competition laws of developing jurisdictions. It discusses the subtleties of the different approaches to policy choices, providing a cross-sectional analysis of the issue. It emphasizes the need for more empirical research of the enforcement activities in these jurisdictions to, on the one hand, understand how they reconcile these different (and sometimes contradicting) objectives, which would enrich this debate and inform other jurisdictions about what has worked (or not) and how, and on the other hand, the possibility of assisting developing jurisdictions in determining when and how competition law becomes relevant to their developmental path rather than having unrealistic expectations of what competition law can deliver.

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Antitrust And Inequality – Time For A Paradigm Change

By Damjan Kukovec

The debate about antitrust and inequality reveals that increased antitrust enforcement and equality are not necessarily connected. It further reveals that there is a lack of evidence on antitrust enforcement's impact on society, including on its ability to increase the pie for the world as a whole. Antitrust law is thus ripe for a paradigm shift if it is to play a serious role in combating abuse of power and the reproduction of concentration of wealth in the twenty-first century. Antitrust lawyers should articulate targeted resistance to particular hierarchical structures rather than pursue abstract goals of equality or competition and articulate new tools for addressing the reproduction of wealth and power in society. This requires the amendment of some of the assumptions of antitrust law, for example, the benevolent effect of low prices, the current understanding of power and the existing understanding of injury.

ANNOUNCEMENTS

ROUNDING THE BEND OF 2017

CPI wants to hear from our subscribers. For the remaining months of 2017, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLE DECEMBER 2017 & JANUARY 2018

The December 2017 Antirust Chronicle will address issues related to the **News and Antitrust**.

As a reminder to potential authors, our topic for the January 2018 Antitrust Chronicle is **Private Equity**.

Contributions to the Antirust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited (follow bluebook style for footnotes) and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions for the January 2018 edition by December 20, 2017 to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers in any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topic. Co-authors are always welcome.

WHAT'S NEXT?

The November 2017 Antirust Chronicle will address issues related to the CPI cosponsored **LeadershIP EU Conference**, which took place in Brussels in late September. We will feature articles from speakers at the conference on panels such as "Law, Policy and the EU Vision for 5G and IoT," "SSOs and IPR Policies: Their Role in Realizing Future Technologies," "The Role of Courts and Antitrust Agencies in FRAND Related Commercial Developments in the EU and Beyond" and "International Antitrust Developments: Impact on the EU."

ANTITRUST POLICY AND INEQUALITY OF WEALTH

BY HERBERT HOVENKAMP [1]

All public policies have consequences for the distribution of wealth. Caps on punitive damages in tort law make tort plaintiffs poorer and tort defendants wealthier. Fines for speeding make speeders poorer and state treasuries wealthier. For most legal policy, however, wealth distribution is not a primary or even an explicit goal. Further, the consequences are typically quite random in relation to social class or economic status. For example, fining speeders may not hit one particular economic group harder than another unless poorer people are either more or less likely to speed. Caps on medical malpractice awards may injure those who are sicker or more likely to be injured, but whether this group of victims is poorer or wealthier than society as a whole is hard to say.

Special interest legislation can distribute wealth more explicitly, because often its actual although often unstated goal is to benefit one particular interest group. Antitrust law's Robinson-Patman Act is an example of this.[2] It was intended to protect small grocers from the rise and development of vertically integrated chain stores such as A&P.[3] The intended beneficiaries were small stores. Other victims, perhaps unintended or at least unmentioned, were consumers who would have to pay higher prices. Of course, the supporters of the statute did not articulate its goals as harming consumers with higher prices.

Antitrust law unquestionably affects wealth distribution. Rigorous antitrust enforcement can make condemned price-fixers and monopolists worse off, while benefitting their customers or sometimes competitors. Once again, however, these wealth transfers are not systematically from the rich to the less rich or vice-versa. For example, cartel members need not be rich firms. Many small, family owned companies that produce things such as milk or cement have been prosecuted for price fixing.[4] Further, cartels often form

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1 James G. Dinan University Professor, Penn Law and Wharton Business, University of Pennsylvania. Thanks to Erik Hovenkamp for commenting on a draft.

2 15 U.S.C. §2 (as amended in 1936).

3 See Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 Fordham L. Rev. 1113 (1983); Rowe, *The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective*, 57 Col. L. Rev. 1059 (1957).

4 See Lanzillotti, *The Great School Milk Conspiracies of the 1980s*, 11 Rev. Indus. Org. 413,

precisely because the cartel members are losing money as a result of adverse shifts in their industry. The long history of railroad collusion bears this out, but it has shown up in other markets as well.[5]

Why would someone want to use the antitrust laws as a wealth distribution device when far more explicit statutory tools are available for that purpose, including tax law, minimum wage laws, welfare laws and Medicaid, to name a few? One feature of antitrust is its very open-textured, nonspecific statutes that are interpreted by judges. For example, Section 1 of the Sherman Act condemns conduct that "restrains trade," while the substantive provisions of the Clayton Act reach conduct that "may substantially injure competition," but leaving all of these terms undefined. The process of definition has been left to the courts. As a result, using antitrust to redistribute wealth may be a way of using the judicial process without having to go to Congress or a state legislature that is likely to be unsympathetic. Of course, a corollary of that position is that someone attempting to use antitrust law to redistribute wealth is going to have to rely on the existing antitrust statutes rather than obtaining a new antitrust provision that is more explicitly distributive. If that is the case, then the question is whether Sections 1 and 2 of the Sherman Act or Sections 3 or 7 of the Clayton Act in their current form are useful wealth distribution tools.

One possible lever for redistributive antitrust is a link between market competitiveness and wealth equality. Some literature suggests that competitive markets are conducive to the more even distribution of wealth.[6] To the extent this is true we might use antitrust to equalize wealth distribution simply by making markets more competitive. Of course, the antitrust laws already have a generally agreed upon goal of increasing competition. The most defensible goal for the antitrust laws is prohibition of practices that serve to reduce output anticompetitively, which is simply a statement of the consumer welfare principle. An output reduction is anticompetitive if its profitability depends on the higher margins.

The same thing is true about the use of antitrust to protect jobs. In general, increased employment results from either higher output, which requires more labor; or else inefficiency, which requires more labor per unit of output. Antitrust encourages greater employment by promoting increased output, but not by decreasing efficiency.

For a long time people have debated the merits of two different welfare goals for the antitrust laws: "general" welfare and "consumer" welfare.[7] General welfare is the ordinary measure that neoclassical economists use to talk about the economy. It calculates the amount of welfare (surplus) enjoyed by everyone, not only consumers and producers, but also competitors, employees, and anyone else who is affected. The general welfare test may approve some practices that harm consumers, provided that the benefit to producers (and others) is greater than consumer losses. For example, suppose a merger results in a price increase that injures consumers in the aggregate by $100,000,000, but also produces production efficiencies of $120,000,000 that accrue to the merging parties and are not passed on via lower prices. That merger is general welfare increasing, because producers are benefitted by a greater amount than consumers are injured.

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440 (1996) (cartels of relatively small dairies); *United States v. Vandebrake*, 679 F.3d 1030 (8th Cir. 2012), cert. denied, 133 S.Ct. 1457 (2013) (cartel of small ready-mixed cement companies).

5 Hovenkamp, Enterprise and American Law, 1780-1860 at 313 (1991); Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 Yale L.J. 1017 (1988). Other markets have exhibit similar situations. See, e.g. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-221 (1940) (collusion resulting from excess capacity and distress in oil industry); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 273 (6th Cir. 1898) (similar; cast iron pipe). Cf. *United States v. Apple, Inc.*, 791 F.3d 290, 332 (2d Cir. 2015), cert. denied, 136 S. Ct. 1376 (2016) (speaking of ruinous competition in book industry); *General Cinema Corp. v. Buena Vista Distribution Co., Inc.*, 532 F.Supp. 1244 (C.D.Cal. 1983) (rejecting ruinous competition defense to market division agreements in motion picture screening).

6 See Khan & Vaheesan, *Market Power and Inequality: the Antitrust Counterrevolution and its Discontents*, 11 Harv. L. & Pol'y Rev. 235 (2017); Baker & Salop, *Antitrust, Competition Policy, and Inequality*, 104 Geo. L.J. 1 (2015).

7 See Dameron, *Present at Antitrust's Creation: Consumer Welfare in the Sherman Act's Statutory Forerunners*, 125 Yale L.J. 1072 (2016); Hovenkamp, *Implementing Antitrust's Welfare Goals*, 81 Fordham L. Rev. 2471 (2013); Alan J. Meese, *Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why We Should Keep It*, 85 N.Y.U. L. Rev. 659, 690-98 (2010).

Under a consumer welfare standard this merger would be condemned, however, because consumers are harmed and we do not count the benefits to producers. This strikes some people as wrong, but I believe it is the best approach to antitrust analysis and the only one that is capable of reasonable implementation. The arguments for an antitrust consumer welfare approach are of three general kinds – those derived from legislative history, those derived from principle and those derived from administrative concerns. The legislative history makes a weak case for consumer welfare, but as between consumer welfare and general welfare the former is a clear winner. Second, the arguments from principle do not get us anywhere because they are very sensitive to assumptions. Third, the arguments from administrability strongly favor a consumer welfare approach. Finally, however, as a practical matter selection of a standard as between general and consumer welfare rarely makes a difference, certainly not often enough to justify the greatly increased cost of antitrust analysis under a general welfare standard.

First, a fair reading of the legislative history of the Sherman Act suggests that it was dominated by two concerns. One is high prices and the other is protection of smaller competitors from what was regarded as the emerging threat of large businesses, or trusts.[8] Neither of these concerns strongly suggests a general welfare approach. The concern with higher prices is at least consistent with a consumer welfare concern. Further, the legislative history of the Clayton Act (1914), Robinson-Patman Act (1936), and the Celler-Kefauver Amendments to the merger statute (1950) indicate that to the extent Congressional concerns changed over time it was in the direction of greater concern for the protection of smaller rivals.[9]

The framers of the Sherman Act clearly did not want to punish someone for being more efficient than rivals. For example, they praised and would have exonerated the rancher who was better than anyone else at producing shorthorn cattle, and thus got the "whole business."[10] But that is hardly the same as supporting a general welfare test. A general welfare test has its bite in situations where consumers are actually injured, whether by higher prices or lower quality, but this injury is more than offset by producer gains. That is hardly the situation when someone gets the whole business by being better than anyone else. Someone does that by benefitting rather than injuring consumers, and nothing in the legislative history account suggests to the contrary. Someone who got the whole business of producing shorthorn cattle because he was better than everyone else was hardly injuring consumers.

Second, the arguments from principle are based mainly on standard models of neoclassical economics, such as Pareto efficiency or Kaldor-Hicks efficiency,[11] that measure the efficiency of an economy but purport to be indifferent to how wealth is distributed. These models are valuable for the function that they perform, which is to measure the economy's overall efficiency. Whether they are the best models for assessing the legality of competitive behavior is a different question.

Bork famously used the term "consumer welfare" when he really meant "total surplus," which is general welfare.[12] Bork generally assumed that what drives economic assumptions about efficiency is its benefits to consumers. To the extent that is true, there is very little tension between a general welfare and a consumer welfare test for antitrust policy. Bork's efficient producer is the legislative history's producer of shorthorn cattle, who "got the whole business" because no one could do it better than he could.[13] Importantly, that piece of legislative history was discussing superior performance by a single actor. It was not discussing mergers, which can present different issues.

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8 See, e.g. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & Econ. 7 (1966) (general welfare); Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: the Efficiency Interpretation Challenged*, 34 Hastings L.J. 65 (1982) (consumer welfare); Stigler, *The Origin of the Sherman Act*, 14 J. Legal Stud. 1 (1985) (small business protectionism); Hovenkamp, The Antitrust Enterprise: Principle and Execution, ch. 2 (2005) (small business protectionism).

9 For a summary, see Hovenkamp, Federal Antitrust Policy: the Law of Competition and its Practice, Ch. 2 (5th ed. 2015).

10 See 21 Cong. Rec. 3151-3152 (1890) (exchange among Senators Kenna, Edmunds and Hoar concluding that the statute's monopolization provision would not condemn someone who "got the whole business because nobody could do it as well as he could….").

11 A state of affairs is Pareto efficient if no change can benefit someone without making at least one other person worse off. A state of affairs is Kaldor-Hicks, or "potential" Pareto efficient even if it produces both gainer and losers, but only if the gainers gain enough fully to compensate the losers, leaving them indifferent.

12 Bork, *Legislative Intent*, supra note 8 at 10; and see Ginsburg, *Legislative Intent and the Courts*, 71 Antitrust L.J. 941, 942 & n. 11 (2014) (collecting sources).

13 Bork relies on this passage in Bork, The Antitrust Paradox: A Policy at War with Itself 12, 28-31, 138 (1978). See Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 Geo. Wash. L. Rev. 1, 18 (1982).

In his highly influential "welfare tradeoff" model, Oliver E. Williamson essentially set competition policy scholars off on a wild goose chase looking for practices such as mergers or joint ventures that simultaneously injure consumers while producing efficiencies that exceed consumer losses. In one of the most storied portrayals in antitrust economics, Williamson illustrated a merger that increased prices but also led to productive efficiencies. He then showed how the size of the efficiencies could exceed that of the consumer losses from the price increase.[14]

In the subsequent literature, this welfare tradeoff conception became the norm for thinking about efficiencies. In fact, most of the "general welfare" vs. "consumer welfare" debate since that time has swirled around it by focusing on what we should do when a practice produces both productive efficiency gains to producers and allocative efficiency losses that accrue to consumers. The answer under the general welfare approach is that we condemn the practice only if the productive efficiency gains are smaller than the consumer losses. The answer under the consumer welfare approach is that we condemn the practice whenever consumer harm has occurred and we do not offset the gains in productive efficiency.

But this entire "welfare tradeoff" debate depends on the existence of a non-empty, verifiable set of instances in which a practice simultaneously injures consumers by reducing output and benefits producers by yielding productive efficiencies. Without denying that such situations occur, the fact is that in 125 years of antitrust litigation, no American court has yet identified one. In virtually every case where a practice has been proven to yield efficiencies it has also been shown to leave consumers unharmed – or perhaps to say it more accurately, it has not been shown to harm them.

Welfare tradeoff modeling appears most frequently in analysis of horizontal mergers. The reason is not hard to identify: mergers have a tremendous capacity to cause significant changes in market structure in a short period of time. The union of two relatively large firms can threaten the immediate creation of market power. Offsetting this, the same union can do a number of things that reduce production costs or improve product quality. Given the amount of merger litigation and the legal and economic resources poured into it, we should have a relatively substantial database of cases requiring tradeoff. But in fact we do not, even though the so-called efficiency defense is raised in a high percentage of litigated merger cases. Courts sometimes cite efficiencies as justifying a merger after holding that the merger is not anticompetitive, meaning that there was no consumer harm.[15] They also sometimes dismiss efficiency claims after finding that the merger is anticompetitive.[16] One thing they have not done, however, is identified a merger that both reduced output and raised prices, but that produced offsetting efficiencies that were thought sufficient to justify it.

The only cases where the choice of a welfare standard makes a difference are when the challenged practice, whether merger or otherwise, actually reduces output. The biggest efficiency gains to come from challengeable antitrust practices such as mergers is economies of scale, but except in idiosyncratic situations these are achieved under higher, not lower, output. The set of efficient but output reducing practices is not necessarily empty, but it is probably not very large. I am not aware of a single antitrust decision in the United States in which a court has found actual consumer harm from reduced output or higher prices, but then went ahead to approve the practice because producer gains exceed consumer losses.[17] In sum, once all the facts are known it is virtually never necessary to apply the welfare tradeoff model, because there is nothing to trade off.

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14 Williamson, *Economies as an Antitrust Defense: the Welfare Tradeoffs*, 58 Am. Econ. Rev. 18, 21 (1968).

15 E.g. *United States v. Carilion Health Sys.*, 707 F.Supp. 840 (W.D. Va. 1989), aff'd mem., 892 F.2d 1042 (4th Cir. 1989) (finding efficiencies, but also that government failed to prove its structural case).

16 *Saint Alphonsus Medical Center-Nampa, Inc. v. St. Luke's Health sys.*, Ltd, 2014 WL 407446 (D.Id. Jan. 24, 2014), *aff'd*, 778 F.3d 775 (9th Cir. 2015); FTC v. H.J. Heinz Co., 246 F.3d 708, 721-722 (D.C. Cir. 2001).

17 Canadian antitrust law, which adopts a total welfare approach, includes one widely debated decision, *Comm'r of Competition v. Superior Propane, Inc.*, (2003) 23 CPR (4th) 316 (FCA) (approving a merger of producers of liquefied gas because, while it led to reduced output and higher prices, efficiency gains more than offset these losses). For commentary, see Neher, Russo & Zona, *Lessons from the Superior-ICB Merger*, 12 GMU L. Rev. 289 (2003); Gifford & Kudrie, *Rhetoric and Reality in the Merger Standards of the United States, Canada, and the European Union*, 72 Antitrust L.J. 423 (2005); Zerbe, Jr. & Knott, *An Economic Justification for a Price Standard in Merger Policy: the Merger of Superior Propane and ICG Propane*, 21 Rec. L. & Econ. 409 (2004).

The third consideration is administrability. How we assess situations in which both consumer harm and efficiency gains are possible depends critically on which measure of welfare we choose. Under a general welfare test, consumer losses would first have to be quantified fairly precisely, at least in close cases. This is true because their size needs to be measured against the size of any efficiency gains that accrue to producers. Consumer losses consist of two parts. First is the output reduction and the amount of lost consumer surplus that each lost unit represents. This loss is depicted by the "deadweight loss" triangle in the standard monopoly graph. So making that measure requires a fact finder to know the size of the output reduction and the size of the surplus that each lost unit represents. The other part of consumer losses accrues to those customers who stay in the market but pay a higher price. Their loss, roughly estimated in antitrust damages actions, is the number of units consumers actually purchase during the monopoly/cartel period multiplied by the price increase. As a general matter, we need not worry about these consumer losses under a general welfare test, because they are precisely offset by producer gains.[18]

Under a general welfare test, consumer losses would have to be offset against the productive efficiency gains that accrue to producers. In the simplest cases where the product is not changed but production costs are lower, these would be assessed as the cost savings per unit. That would require the fact finder to discover how many units per time period the firm produced and how much were the efficiency-induced cost savings on each unit. If efficiency gains show up in other ways, such as improvements in product quality, this calculation would be more difficult because some value would have to be put on the quality increase.[19] For example, if a merger led to both higher prices and an improved product, someone would have to be able to calculate how much of the price increase is a consequence of the output reduction and how much is a function of consumer response to a better product.

By contrast, under a consumer welfare test the fact finder need answer only one question: has output been reduced? We need not know the amount, as long as we can determine that there was a non-trivial output reduction. So if the output consists in a decline in product quality rather than number of units, the fact finder need not measure the decline but only identify that it has occurred. Once we know that output has declined and can infer that this happened for an anticompetitive reason, then we know that there is consumer harm. Of course, damages measurement in a private plaintiff action would still require consumer losses to be quantified, as we already do in damages actions for price fixing.[20]

In sum, assessing welfare losses under a consumer welfare test is much, much easier than under a general welfare test. In fact, assessing effects under a general welfare test in a moderately close case would be heroic. Considering administrability, the best choice for a welfare standard for antitrust is consumer welfare as measured by output.

That then leaves one question pertaining to wealth inequality. Suppose we start out with the premise that antitrust harm consists in a market-power-driven output reduction. Accepting that competitive markets are conducive to greater wealth equality, hasn't antitrust already done all it can do? To ask the question somewhat differently, are there any situations that warrant antitrust intervention on distributive grounds even though intervention would push market output lower rather than higher?

One case that comes to mind as an example is *Brown Shoe*, where the Supreme Court gave effect to a district court decision that condemned the Brown-Kinney Shoe merger precisely because the merger would lead to lower prices, and these would put increased pressure on smaller, independent shoe sellers who were already struggling.[21] We might take the same approach with the Amazons of the twenty-first century world – condemn their actions precisely because their lower prices attract so many consumers that smaller competitors might be unable to survive.[22]

18 For a graphic and more detailed explanation, see Hovenkamp, *Progressive Antitrust*, __ Ill. L. Rev. __ (2018) (forthcoming), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2892336.

19 Ibid.

20 Damages actions based on an overcharge would not require measurement of efficiency gains *per se*. However, to the extent that efficiency gains reduced the size of the overcharge damages would be correspondingly reduced. See Hovenkamp, Federal Antitrust Policy: the Law of Competition and its Practice §17.5 (5th ed. 2016).

21 *United States v. Brown Shoe*, 179 F. Supp. 721, 738 (E.D.Mo. 1959), aff'd, 370 U.S. 294 (1962) (approving district court decision that merger was bad because it led to "lower prices or higher quality for the same price," and thus injured small rivals).

22 E.g. Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710 (2017).

There are a couple of things worth noting about this approach. First, it clearly injures rather than benefits consumers. They are being robbed of the larger firms' lower prices. Second, there is no obvious way of limiting its application. Should antitrust condemn every practice that reduces the defendant's prices or costs, or improves the quality of its product when rivals are injured or suppliers are worse off? That policy would rather quickly drive the economy back into the Stone Age, imposing hysterical costs on everyone. To be sure, there might be ways of limiting the rule. For example, we might say that lower prices or higher quality ought to be condemned only when it creates or threatens to create a monopoly. That approach might not be quite as bad, but it would be a strong barrier to innovation, and particularly to market shifting innovations that result in dominant firms. There would go Ford, Bell, IBM, Kodak, Polaroid, Xerox, Microsoft, Google, Apple and numerous others.

Finally, it is hardly clear that this antitrust policy of condemning firms that produce lower prices or higher quality than their rivals would yield a more attractive distribution of wealth than a policy of simply encouraging maximum, competitive output. To be sure, stockholders of the target of an antitrust prosecution would be worse off. The less competitive rivals who no longer have to compete with lower prices or better products will be better off, but without knowing something about their starting position there is no reason to classify them as relatively "poor" and the antitrust defendant as "wealthy." Indeed, often highly innovative firms are relatively young upstarts facing older money and established technology. For example, one of Amazon.com's principal targets – most likely to be injured by the *Amazon/Whole Foods* merger – is Wal-Mart, which is substantially owned by the wealthiest family in the United States.[23]

Much the same thing is true of impact on employment. One component in the antitrust attack on Amazon, as well as other tech firms, is that they are job killers, and that this should be an antitrust problem. As a matter of historical fact, these complaints have surfaced time and again when market shifting technologies were introduced and have always proved wrong. Second, a policy of facilitating higher output almost always produces more jobs. For example, to the extent that Amazon sells products designed and produced by others, the effect of its lower prices is simply higher output, which is conducive to greater employment.

One thing that does not necessarily produce more jobs, at least in the short run, is increased productive efficiency, which can result in higher output with less labor. Should we have a goal of condemning efficient practices that result in job-reducing labor savings? As a matter of principle, I believe the answer is a robust no. As a matter of management, antitrust is a very poor tool for preserving jobs by making production less efficient. We would do that much more effectively by limiting productive efficiency directly. For example, we could amend the Patent Act so as to deny patents to things whose deployment threatens reduced need for labor. Or perhaps we should have a policy of simply identifying labor saving technologies directly and limiting their deployment. Antitrust reaches these technologies only directly because it reaches only the practices that are challengeable under the antitrust laws, and even then only when they limit competition. Just stating the alternatives, however, should suggest how ridiculous they are as a matter of policy.

Another alternative is that we might decide that the low prices charged by Amazon or other very large firms are a temporary illusion. Perhaps Amazon is engaging in predatory behavior by charging very low prices today and intends to recoup monopoly profits later. Or perhaps it is exercising monopsony power by suppressing buying prices. If these things occur then antitrust can be brought to bear. But such claims need to be more than asserted as an abstract proposition. They need to be proven. The law of predatory pricing is designed to identify instances in which predatory pricing is a plausible strategy.[24] We might dispute the correctness of those legal rules, but that dispute occurs equally among those who believe general welfare or consumer welfare should be the guiding antitrust principle. In the case of Amazon, almost nothing about its market positions suggests that it would be able to sustain monopoly pricing without producing so much consumer defection or competitor entry that the price increase would be unprofitable.

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23 The Walton family, which owns roughly half of Wal-Mart. See: https://www.forbes.com/profile/walton-1/.

24 See 3A Areeda & Hovenkamp, Antitrust Law, Ch. 7C (4th ed. 2015).

And what about the complaint that Amazon engages in monopsony buying, forcing its suppliers to sell to it at anticompetitively low prices? The telltale sign of monopsony is suppression of output, something that requires both market power in the purchasing market and evidence that the buyer is seeking to keep market wide output down. In hard, competitive bargaining a buyer obtains lower prices by getting a better deal, often by increasing the amount purchased. By contrast, a monopsonist forces buying prices down by limiting market-wide purchases. That is, monopsony, just as monopoly, is an output reducing strategy. On casual observation, that hardly seems to be true of Amazon.[25]

Finally, the one class of people that would clearly be injured by a policy of advocating lower output on distributional grounds is consumers. They would pay higher prices. Other losers include employees whose jobs would disappear in a lower output market; creditors, landowners, tax authorities, distributors and retailers, all of whom face reduced business when output goes down.[26] In sum, it seems unlikely that a policy of condemning firms who charge lower prices or produce higher quality goods would yield a distribution of wealth any more desirable than a policy of maintaining high output by condemning anticompetitive restraints.

25 See Blair & Harrison, Monopsony in Law and Economics (2011); Hovenkamp, Federal Antitrust Policy, note 19, §1.2b (5th ed. 2016).

26 While all of these various groups would be injured, most are denied standing to sue for an antitrust violation because their injuries are considered "derivative." See 2A Areeda & Hovenkamp, Antitrust Law ¶¶350-353 (4th ed. 2014).

FURTHER REFLECTIONS ON ANTITRUST AND WEALTH INEQUALITY

BY DANIEL A. CRANE [1]

I. INTRODUCTION

Since I have already published a lengthy academic article on antitrust and wealth inequality,[2] I have the freedom of using this piece to present the key arguments unvarnished by dense citations or technical details (readers interested in those things should consult my earlier article) and to respond to some of the criticisms of my article that have since been levied. My thesis, before and now, is this: claims that antitrust enforcement advances income or wealth progressivity are overstated and rest on simplistic and unrealistic understandings of how antitrust actually operates. While some enforcement actions may generate progressive results, others will generate regressive results, and the net effect is largely unknowable. Therefore, with a few limited exceptions, it would be unwise to cast antitrust as a policy lever for advancing wealth equality.

II. DOES COMPETITION GENERALLY CREATE EQUALITY?

Before getting into the more technical aspects of the issue, consider one important framing question: does the arc of intensive economic rivalry generally bend toward an even or uneven distribution of wealth? If we lived in a world where personal abilities, the vagaries of fortune and kin relationships and family capital were evenly distributed, one might expect that competition would distribute wealth evenly. But that is not the world we live in. People have widely varying natural abilities, the Wheel of Fortune is a fickle and arbitrary patron, and people are born into greatly uneven stocks of economic, social and political capital. Given these background conditions, intensive rivalry will tend toward a grossly unequal distribution of wealth.

If this observation isn't obvious, consider the fact that the Cristiano Ronaldo earns four times the salary of his Real Madrid teammate Marcelo. Ronaldo is not four times better a player than Marcelo, the world's best left back. But the hyper-competitive market for top footballing talent generates immense financial pay-off differences from the comparatively slight differences in the two players' footballing abilities and value to the team. Economy-wide,

1 Frederick Paul Furth, Sr. Professor of Law, University of Michigan.

2 Crane, *Antitrust and Wealth Inequality*, 101 Cornell L. Rev. 1171 (2016).

the variance in natural abilities is many times greater than that between Ronaldo and Marcelo. It is therefore unsurprising that competitive labor markets generate tremendous wage differences.

Karl Marx makes a very similar point with respect to wage labor. Intense competition among wage laborers, argues Marx, drives the working class to the point of subsistence. The antidote, he argues, is the formation of unions, which enable the workers to thwart labor market competition and bargain collectively for higher wages. We need not accept Marx's wider prescriptions to agree with his observation that fierce economic rivalry creates large divides between the haves and have nots.

Much of the modern regulatory state is built on the assumption that market competition breeds unequal results and that one function of the just state is to redistribute income by taming competitive forces. Minimum wage laws and collective bargaining are squarely premised on the assumption that labor competition suppresses wages below socially desirable levels. Much of consumer protection law worries that competition among consumers for scarce resources will permit sellers to extract too much surplus from buyers.

Given the pervasive background assumption of the modern regulatory state that competition tends toward *inequality*, it is a little surprising to hear prominent public intellectuals assert with such confident authority that weak antitrust enforcement breeds inequality and that enhanced enforcement — leading to intensification of economic rivalry — would cause a more progressive redistribution of wealth. That claim seems to rest on the following simple assumptions: Shareholders are comparatively wealthier than consumers, the exercise of market power tends to transfer wealth from consumers to shareholders, and antitrust enforcement prevents these wealth transfers. While valid in some circumstances, these assumptions are grossly over-simplistic.

At the outset, and to dispel some past criticisms based on misunderstandings of my argument, let me repeat that I accept as a broad proposition that shareholders as a class are richer than consumers as a class.[3] Although tens of millions of comparatively lower-income people participate in shareholders through retirement accounts, direct investments, or things like pension funds, the skewed distribution of shareholding means that, generically, a dollar plucked from the consumer class and deposited into the hands of the shareholder class in proportion to their equity entails an increase in the Gini coefficient. The problem, though, is the assumption that violations of antitrust law generally involve wealth transfers from consumers to shareholders. Sometimes they do, and sometimes they don't.

Any comprehensive analysis of the wealth distribution effects of antitrust violations would need thoroughly to address two issues: (1) who captures the monopoly rents, and (2) who pays for them? To simply plug shareholders into the first category and consumers into the second misunderstands the way that antitrust law, firms and markets actually work.

III. WHO CAPTURES MONOPOLY RENTS?

First, who captures the monopoly rents associated with antitrust violations? To the extent that the antitrust violator is a corporation, "the firm" may be said to capture the rents, although even that claim may be overstated. As Posner has long argued, firms spend a considerable share of their expected monopoly rents to become and stay monopolists. But even assuming that "the firm" captures most of the rents, it's facile to assume that shareholders, or even wealthy senior managers, capture the lion's share. Some conventional antitrust wisdom should give us pause about making that assumption: For example, midlevel managers and other firm employees may expend considerable firm resources to exclude rivals simply to obtain Hicks's famous "quiet life"[4] or internally expend monopoly

3 Elhauge seems to think that my earlier paper claimed that shareholders capturing monopoly profits does not create regressive results since shareholding is widely distributed. Elhauge, *Horizontal Shareholding*, 129 Harv. L. Rev. 1267, 1294 (2016). To the contrary, while noting that widely distributed nature of shareholding needs to be taken into account in any argument about market power's regressive effects, my paper made clear that "corporate shareholding is disproportionately concentrated in the hands of the very wealthy." Crane, supra note 2 at 1187.

4 Hicks, *Annual Survey of Economic Theory: The Theory of Monopoly*, 3 Econometrica 1, 8 (1935) ("[Monopolists] are likely to exploit their advantage much more by not bothering to get very near the position of maximum profit, than by straining themselves to get very close to it. The best of all monopoly profits is a quiet life.").

profits through the wastefulness and sloth qualities of monopoly identified by Judge Learned Hand in his famous *Alcoa* decision.[5] Indeed, it is a common assumption in antitrust law that many monopolists do not show high economic profits on their balance sheets, as *Alcoa* did not, but rather internally dissipate monopoly rents through complacency. A long-standing empirical literature has searched with indeterminacy for evidence that dominant firms produce greater returns on capital to their shareholders. As Roe has argued, "rents give managers slack and attract grabs by players inside the firm."[6] Empirical evidence evidences a monopoly labor-wage premium for ordinary employees, but little evidence that the senior managers of dominant firms earn more in compensation than their counterparts in more competitive markets. Union support for arguably anticompetitive mergers in recent years (such *AT&T/T-Mobile* and various airline mergers) suggests that blue collar workers may expect to extract a significant share of the monopoly rents. Thus, without denying that monopoly firms sometimes pass on a large share of their rents to comparatively wealthy shareholders or senior managers, we need to question the generality and magnitude of that effect.

Moreover, the assumption that antitrust law mostly mediates wealth transfers between corporations and consumers ignores the very significant role that antitrust plays in policing anticompetitive conduct in middle-class professions. A long litany of antitrust actions against doctors, dentists, engineers, lawyers, real estate brokers, stock brokers, music teachers, mechanics and all sorts of middle class professions and trade associations makes it challenging to predict what effect on wealth distribution would result from even more enforcement.

Consider, for example, the Justice Department's 2005 action enjoining the National Association of Realtors from preventing its members from using password-protected Internet sites that enabled the brokers' customers to search for and receive real estate "multiple listing services" listings over the Internet.[7] If the Justice Department's factual allegations were correct, the Association's restriction inhibited competition among brokers that would have "place[d] downward pressure on brokers' commission rates." In other words, the restriction facilitated a wealth transfer from home sellers to realtors. The median income of home sellers, who typically bear the incidence of real estate commissions, is approximately $97,500[8] and that of realtors is $43,430.[9] Thus, on average, higher commissions would allow realtors to extract income from clients with more than double their income. The effect of the antitrust enforcement decision was to redistribute that income back up to the sellers.

The effects of antitrust enforcement on noncorporate, middle-class actors cannot be dismissed as insignificant. In the Realtors case, the Justice Department alleged that virtual office website brokers, whose activities the challenged rule tended to suppress, had offered discounted commission rates that had saved their customers tens of millions of dollars in commissions.[10] Given the sheer volume of existing home sales in the United States — $1.2 trillion per year[11] — even a comparatively small change in broker commission rates due to increased competition would have very significant economic effects. For example, a reduction in the average broker commission from 5.5 percent to 4.5 percent[12] would redistribute $12 billion annually from brokers to their clients with strongly regressive effects.

5 *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427 (2d Cir. 1945) ("Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.").

6 See Roe, *Rents and Their Corporate Consequences*, 53 Stan. L. Rev. 1463, 1465 (2001)

7 Amended Complaint at ¶¶ 2, 5–6, *United States v. Nat'l Ass'n of Realtors*, No. 05 C 5140 (N.D. Ill. Oct. 4, 2005), http://www.justice.gov/atr/case-document/amended-complaint-6 [http://perma.cc/ZH5U-WNL6].

8 Nat'l Ass'n of Realtors, Home Buyer and Seller Generational Trends 77 Exhibit 6-2 (Mar. 2014), http://www.realtor.org/sites/default/files/reports/2014/2014-home-buyer-and-seller-generational-trends-report-full.pdf [http://perma.cc/5459-M6A9].

9 *Occupational Outlook Handbook: Real Estate Brokers and Sales Agents*, Bureau of Labor Statistics (Dec. 17, 2015), http://www.bls.gov/ooh/sales/real-estate-brokers-and-sales-agents.htm [http://perma.cc/L4JF-2CSF].

10 See Competitive Impact Statement at 7, *Nat'l Ass'n of Realtors*, No. 05 C 5140, http://www.justice.gov/atr/case-document/competitive-impact-statement-160 [http://perma.cc/BC89-RRX2].

11 Yun et al., Nat'l Ass'n of Realtors, 2014 Profile of International Home Buying Activity: Purchases of U.S. Real Estate by International Clients for the Twelve Month Period Ending March 2014, at 3 (June 2014) (reporting a U.S. existing home sale market of $1.2 trillion during the period of April 2013 through March 2014).

12 Home Prices and Commissions Over Time, U.S. DEP'T OF JUSTICE (July 2, 2015), http://www.justice.gov/atr/home-prices-and-commissions-over-time [http:// perma.cc/5AVJ-8PKR] (reporting steady average commission of 5.5 percent to 5.0 percent over the last decade and observing that if competition among brokers were effective, commission rates should have declined as home values increased).

In sum, when antitrust violations disperse monopoly rents, they are not uniformly or even predominantly captured by wealthy shareholders or senior corporate managers. Many other interested parties, many of them less wealthy than the people paying the bill, have their finger in the till.

IV. WHO PAYS FOR MONOPOLY RENTS?

Let's turn now to the other side of the ledger — the issue of who pays monopoly rents. The progressive critique of antitrust laxity as contributing to wealth inequality has relatively poor consumers paying the lion's share of the rents. As with respect to who captures the rents, this characterization of who pays them is grossly overstated.

First, observe that — depending on your country — a quarter or more of all economic activity is financed by the government. In large slices of the economy — much of healthcare, defense spending, education, public infrastructure, etc. — the government is the payer. If an antitrust violation produces market power in, say, defense contracting or public works, the government bears the rents. Of course, the government is just a pass-through for taxpayers, hence taxpayers pay the rents. In the United States and most OECD countries, the tax system is at least mildly progressive. To the extent that taxpayers are funding monopoly rents, the effect is generally progressive, since rich taxpayers are contributing a higher share of their income to the effort than are poorer people.

The same holds true in many other segments of the economy where consumer purchasing is mediated through structures or institutions that re-distribute costs on a progressive basis. For example, most health-care spending in the United States is mediated through a health insurance system designed by law to be progressive — to have the relatively more affluent subsidize the relatively less affluent. Overcharges due to the exercise of monopoly power therefore extract a higher share of income from the wealthy than the less wealthy, and have a progressive wealth distribution effect. Against this baseline, antitrust enforcement correcting the competitive failure would have a regressive effect.

Another flaw in the assumption that relatively poor consumers tend to bear the brunt of monopoly rents concerns the nature of inter-corporate wealth transfers. Many antitrust violations occur far upstream from retail consumers. Although end consumers may end up bearing some of the overcharge, much of it may also be borne by upstream corporate interests and not passed on. If corporations representing relatively poorer interests extract rents from corporations representing relatively wealthier interests, the net effect on wealth distribution could be progressive. Again, antitrust enforcement to correct these wrongs would be regressive.

Finally, to the extent that consumers do bear the incidence of monopoly rents, are the net effects regressive? In my prior paper, I presented a long list of cases involving antitrust violations in luxury goods or services catering to the wealthy, where it is a fair bet that the economic profile of the antitrust violator was less wealthy than that of the clientele. There are counter-examples, of course, but the incidence of monopoly on consumers does not merely involve a consumer-to-producer transfer. There are also important intra-consumer effects, the most significant one being price discrimination. As considered at length in the 2010 Horizontal Merger Guidelines, anticompetitive mergers may create the potential for price discrimination, which usually has progressive wealth effects, since the wealthy are less price elastic than the poor for most goods and services.[13] As firms acquire market power through anticompetitive acts and begin to increase their prices, they often do so employing pricing schemes that extract significantly more monopolistic rents from the wealthy than from the poor. To the extent that antitrust enforcement creates more competitive markets and more competitive markets diminish price discrimination, the effect in many instances could be to decrease the prices paid by the rich while reducing less, keeping flat, or even decreasing the prices paid by the comparatively less wealthy.

13 See Tirole, The Theory of Industrial Organization 139 (1988).

V. RESPONDING TO CRITICS

I will now respond briefly to some of the critics of my earlier papers or talks on this subject.

Elhauge dismisses my observation that firms with market power do not necessarily show higher returns on capital to shareholders with the assertion that "this claim really goes to the issue of whether there are anticompetitive profits, not who captures them."[14] No, the previously cited observation made by Hicks and Hand is that firms may capture monopoly rents but consume them internally — i.e. not return them to shareholders. In that case, (1) the paradigm on which the market power regressivity claim is premised — rich shareholders further enriched — would be falsified, and (2) other interests within the firm, including perhaps lower income interests, could be capturing those rents, further confounding the income equality effects of monopoly.

Several critics have disputed my observation about taxpayers bearing a significant share of the burden of monopoly, contending that one needs to take into account the possibility that governments would respond to their higher procurement costs by cutting other government spending, including programs that benefit the poor.[15] Once we are talking about these kinds of speculative dynamic effects, we are just underlining my overall point that the wealth distribution effects of antitrust enforcement and monopoly are almost impossible to know systematically or to generalize. As discussed in my earlier paper, social science literature suggests that increases in market power increase the political demand for higher tax rates. It is entirely possible that the long-run effect of a "rising tide of concentration" is a more aggressive and redistributive tax system. Or, governments concerned about the incidence of the tax burden on the wealthy could, as the Reagan administration did, deploy antitrust law aggressively in the public procurement sector to prevent progressive effects of market power.

Khan & Vaheesan dispute my observation about the role of health care intermediaries, believing that I had asserted that health care monopoly charges are borne by wealthy insurance companies rather than insureds.[16] To the contrary, my point was that that, particularly due to mandatory structures implemented by the Affordable Care Act, the health insurance system acts to distribute wealth from the comparatively more affluent to the comparatively less affluent. To the extent that health insurers incur monopoly overcharges and pass those along to insureds, rich people pay a comparatively larger share of those than poorer people, hence the effect is, in economic terms, progressive. Conversely, antitrust enforcement action to prevent those overcharges would be, in economic terms, regressive since it would allow the rich to keep more of their money while offering a comparatively smaller benefit to the poor.

The most salient response I have received is along the following lines: Admittedly, it cannot be said that antitrust enforcement is *generally* progressive in its wealth redistribution effects, for many of the reasons set forth in my paper. However, when one stacks up all of the progressivity effects of market power exercises outlined in my paper and weighs them against the fact that shareholding is so disproportionately held in rich hands, simple order of magnitude intuitions inform us that the latter must outweigh the former. Even if many other interests within the firm capture a share of monopoly rents, shareholders capture enough of them to skew this one effect to such a degree that it necessarily outweighs all countervailing effects.

Maybe. I don't know. Nor, I suspect, do the people making this assertion. And that's my point. Before turning to antitrust as a lever to fight income inequality, we need to admit a degree of modesty about what we really know and don't know. The story is not so simple as it is made to seem.

14 Elhauge, supra note 3 at 1294.

15 See, e.g. Elhauge, supra note 3 at 1296; Kukovec, *Economic Law, Inequality, and Hidden Hierarchies on the EU Internal Market*, 38 Mich. J. Int'l L. 1, 8 n.36 (2016).

16 Khan & Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, Harv. L. & Pol'y Rev. 248, 235 (2017).

THE MULTIFACETED NATURE OF FAIRNESS IN COMPETITION POLICY

BY MICHAEL TREBILCOCK & FRANCESCO DUCCI [1]

I. THE MULTIFACETED NATURE OF FAIRNESS IN COMPETITION POLICY

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

In contrast to wholesale and unclearly defined notions of fairness that usually animate the debate, we identify the following specific notions of fairness that are pertinent to domestic markets: vertical fairness (between producers and consumers); horizontal fairness on the demand side (between consumers); horizontal fairness on the supply side (between producers);

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

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

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

procedural fairness (due process and private enforcement). Not only can the different dimensions of fairness be distinguished using the categories of supply and demand (fairness between and within supply and demand), but they also relate to different notions of justice: redistributive (for example, choosing a welfare standard); procedural justice (due process and institutional design); and corrective justice (private rights of access to enforcement procedures for injured parties); and different notions of equity concerned with outcome (for instance, between consumers and producers), opportunity (between producers) and procedures (due process and private enforcement).

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

II. DIMENSIONS OF FAIRNESS IN DOMESTIC COMPETITION POLICIES

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

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

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

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

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

However, today fairness is regaining prominence in competition policy discourse. This is in part the result of a broader discontent with globalization and related challenges to the free trade consensus, at least partially in response to the market disruptions caused by international trade, technology and other factors.[8] Within domestic markets, the return of fairness concerns is closely linked to the perceived decrease in the levels of market competition, a general trend observable in particular in the U.S., which manifests itself in three specific forms: (1) evidence of increasing levels of market concentration; (2) decreasing levels of new business entry; and (3) increasing importance of winner-take-all markets as a result of technological change. As a result of these trends, a surge of fairness claims permeate contemporary competition policy debates where an increasing number of scholars and commentators have advocated stronger incorporation of equity considerations in order to address distributive concerns.[9] Among others, Anthony Atkinson in his book on inequality has argued that competition policy should embody explicit distributional concerns;[10] similarly, Joseph Stiglitz has called for stronger and more effectively enforced competition laws to help address inequalities created by market power,[11] and Paul Krugman has blamed the collapse of antitrust enforcement as a potentially important factor in the stagnating demand for labor, and increasing inequality more generally.[12] Implicit in the debate between critics and proponents of fairness, is however an overly broad, undefined notion of fairness, which in our view fails to advance the debate. In contrast, we highlight the need to assess specific dimensions of fairness that are pertinent to the domestic competition policy domain, which we evaluate in turn.

A. Vertical Fairness

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

On the contrary, we view the consumer welfare standard as resulting from a mix of poorly defined distributive concerns and more political economy-oriented explanations. Under the latter perspective, the ascendance of the consumer welfare standard may be interpreted as a political bargain between self-interested groups of producers (primarily large firms defending the efficiency benefits of economies of scale) and consumers (including final consumers, small buyers, farmers), where the concept of "consumer

8 Trebilcock, supra, note 2.

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

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

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

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

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

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

welfare" can be seen as a more acceptable form of welfare standard for non-specialist audiences, which would politically allow the advancement of economic goals in the competition policy domain. Bork's famous defense of total welfare can be read under this light, when he stated that:

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

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

B. Horizontal Fairness

1. The Demand Side

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

2. The Supply Side

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

While the apparent decline of competitive levels in many sectors of the economy is a troubling trend that requires appropriate policy responses, each manifestation needs to be addressed by tailored policy solutions that do not include expansive horizontal fairness considerations for competitors. We are generally skeptical about fairness considerations favoring less efficient or smaller competitors. At the same time, we recognize a narrow dimension of horizontal fairness at play on the supply side, as implicit in

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

16 Elhauge, "The Growing Problem of Horizontal Shareholding" Competition Policy Chronicle (2017).

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

ensuring equal competitive conditions over access to markets and in targeting exclusionary forms of conduct and barriers to entry that deter entry of equally or more efficient competitors. We see this narrower form of horizontal fairness on the supply side as the normative basis of competition policy enforcement (a form of equality of opportunity consistent with efficiency goals), which should guide possible responses to decreasing levels of market competition. We also note that notions of horizontal fairness on the supply side are independent of the choice of welfare standards. In fact, concerns over decreasing levels of competition have materialized with particular emphasis in jurisdictions, like the U.S., that have already adopted a consumer welfare standard. We therefore do not see these phenomena as suggesting the need for either a renewed emphasis on vertical fairness concerns or broad horizontal fairness considerations on the supply side.

C. Procedural Fairness

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

D. The Free Trade vs. Fair Trade Debate

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

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

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

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

21 Trebilcock, supra, note 2.

22 Trebilcock & Wong, supra, note 20.

III. CONCLUSION

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

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

23 See id.

THE EFFECTS OF MARKET POWER ON INEQUALITY

BY SEAN F. ENNIS, PEDRO GONZAGA & CHRIS PIKE [1]



I. INTRODUCTION

Some policies drive economic growth, some act to redistribute income or wealth; however, it is rare to find policy instruments that do both. Investment in improving skills and education may fall into that category. New research from the OECD suggests that competition can also help governments to simultaneously achieve these two goals.[2] While competition has long been known to drive economic growth, there is evidence that competition can also make an important contribution to reducing income and wealth inequality. Given the recent concerns about increased inequality across many countries, this relationship bears further exploration.

The reason market power and inequality are related is simple. In the absence of competition, market power drives prices above costs; these higher prices increase everyone's consumption expenditure and redistribute the extra money spent towards business owners and financial asset holders, who are overwhelmingly concentrated at the top of the income distribution. The dual effect is to increase the income of the upper decile while reducing consumption power and savings for the rest of the population. In the long-run, the accumulated money transfers from consumers to businesses is likely to help the richest accumulating wealth and raising their income, while making it more difficult for the poorest to build their savings or to reduce their dependence on credit.[3]

While estimating effects on long-term distributions of wealth and income requires extensive data and complex modelling, in this paper we attempt to calculate a rough measure of the short-run money transfer from

1 OECD, 2 rue André-Pascal, Paris 75775 Cedex 16, France. Sean F. Ennis, Senior Economist, OECD Competition Division; Chris Pike, Competition Expert, OECD Competition Division; Pedro Gonzaga, Policy Analyst, OECD Competition Division. Corresponding author: sean.ennis@oecd.org. The opinions and arguments employed herein do not necessarily reflect the official views of the OECD or the governments of OECD member countries.

2 See preliminary results in Ennis, Gonzaga & Pike (2017), "Inequality: A Hidden Cost of Market Power," available at: https://ssrn.com/abstract=2942791.

3 If the extra profits from firm market power are distributed to their employees, rather than shareholders, the effects of market power are ambiguous and depend on how rents are distributed among employees.

poor to rich due to market power, for 12 OECD economies: Australia, Canada, France, Germany, Greece, Japan, Korea, Mexico, Portugal, Spain, United Kingdom and the United States. Our results indicate that, on average, for each dollar of monopoly profits, a total of USD 0.37 is transferred from the 90 percent poorest to the 10 percent richest.

The relation between market power and inequality has been analyzed more in-depth in some recent OECD studies. Ennis et al (2017) propose a steady-state model that attempts to estimate how measures of market power affect the long-run distribution of income and wealth, by modelling the impact of higher prices on real income and saving behaviors. The preliminary results suggest that, in an average country of the sample, market power would increase by 17 percent the wealth of the best-off 10 percent.

Broadly similar results are also found in Ennis and Kim (2017),[4] suggesting that 10 percent to 24 percent of the wealth of the best-off decile may be attributed to market power, for another sample of OECD countries. The model they use follows the approach of Comanor & Smiley (1975),[5] but with the advantage of considering a wider range of assumptions, covering more countries and using more recent data.

While the analysis of this paper does not actually estimate impacts of market power on income or wealth as the two previous more comprehensive studies, the analysis conducted here still allows us to have a notion of the dimension of the redistribution effect of market power using a simple and intuitive methodology, with few data requirements.

II. MEASURING THE REDISTRIBUTIVE EFFECT OF MARKET POWER IN 12 OECD COUNTRIES

The magnitude of the redistribution effect of market power can be roughly estimated at the aggregate level for a whole economy, by identifying the households that earn the monopoly rents and, at the same time, the ones that are charged with higher prices. In other words, by taking into account how business ownership and consumption are distributed among a population, it is possible to determine who benefits and who loses from market power, and by how much.

In order to understand the reasoning behind such estimation, suppose that half of the economy is responsible for all the aggregate consumption, while the other half owns all the monopolies in the economy. In such a simple example, market power would result in a redistribution of 100 percent of the monopoly profits from the first half to the second half of the population. In contrast, in a hypothetical economy where consumption and business ownership are equally distributed among the whole population, the redistribution effect of market power would be close to zero, as all agents would benefit from higher profits and would be charged higher prices by the same amount. Thus, in an economy where businesses and consumption are evenly distributed, market power decreases efficiency but does not affect equality, as all the monopolies end up cancelling each other out.

In reality, market power will benefit agents proportionally to the share of monopolies they own and harm them in proportion to their level of consumption. While data for the distribution of consumption is widely available, it is harder to know exactly who owns the businesses that generate monopoly rents. Still, the distribution of business ownership is likely to be well approximated by the distribution of wealth, which reflects the share of capital each individual owns and, arguably, the share of monopoly profits.

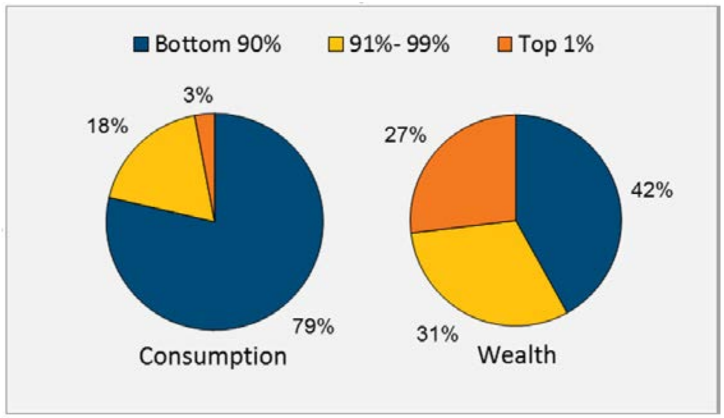
With this reasoning in mind, we collected aggregate data of consumption and wealth by quintile breakdown and for the top 1 percent, 5 percent and 10 percent richest of the population, for a sample of 12 OECD countries: Australia, Canada, France, Germany, Greece, Japan, Korea, Mexico, Portugal, Spain, United Kingdom and the United States. The wealth distribution data was retrieved for the year of 2014 from the Global Wealth Databook of Credit Suisse. The consumption distribution data ranges from 2010 to 2014 and was collected from multiple sources, such as Eurostat for the European countries and, in the remaining cases, from income and expenditure surveys conducted by the respective national statistic offices.

4 Ennis & Kim (2017), "Market Power and Wealth Distribution" in OECD/World Bank *A Step Ahead: Competition Policy for Shared Prosperity and Inclusive Growth*, Washington, DC: World Bank Publishing. https://openknowledge.worldbank.org/bitstream/handle/10986/27527/9781464809453.pdf?sequence=2&isAllowed=y.

5 Comanor & Smiley (1975), "Monopoly and the Distribution of Wealth", *The Quarterly Journal of Economics*, Vol. 89, No. 2, pp. 177-194, http://www.jstor.org/stable/1884423?seq=1#page_scan_tab_contents.

Before even making any preliminary calculations, the mere analysis of the data allowed us to observe a large difference between the distribution of consumption and the distribution of wealth in every single country of the sample. As summarized in Figure 1, in average the top 1 percent richest of the population consumes "only" around 3 percent of the aggregate output, while the same top 1 percent holds more than one quarter of the total wealth. The difference is also considerable for the top 10 percent, which has a share of 20 percent of the aggregate consumption but nearly a 60 percent share of the total wealth.

Figure 1. Distribution of wealth is substantially more unequal than distribution of consumption.*

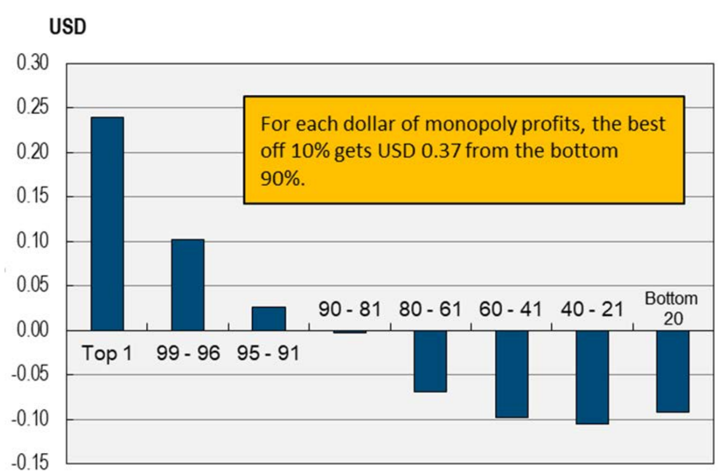


*Average across 12 OECD countries.

The observed data suggests *a priori* that market power has, at least, some non-negligible redistributive effect. Indeed, while consumption is reasonably evenly distributed, the wealth is overwhelmingly concentrated at the top decile of the population, indicating that the richest individuals are able to capture a non-proportional share of the monopoly rents without being negatively affected by the higher prices. In order to get a better idea of the overall magnitude of the redistributive effect, the data collected can be used further to obtain an approximation of how much each group of the population wins or loses with market power, by measuring the difference between their respective wealth and consumption shares.

The results in Figure 2 reveal that, on average, out of each dollar of monopoly profits, there is a transfer of USD 0.37 from the 90 percent poorest to the 10 percent richest. Although only average results are displayed in Figure 2, the distribution of harm is systematically the same across the 12 economies: the bottom 80 percent of the population are typically the ones that become worse-off with market power and the effect is higher for "middle-class" individuals (in the 21 to 60 percentiles) that have a reasonable share of consumption but a small portion of wealth. On the other hand, market power benefits essentially the top 5 percent richest and, in particular, the top 1 percent, in all the countries studied.

Figure 2. For each dollar of monopoly profits, how much do households earn?*



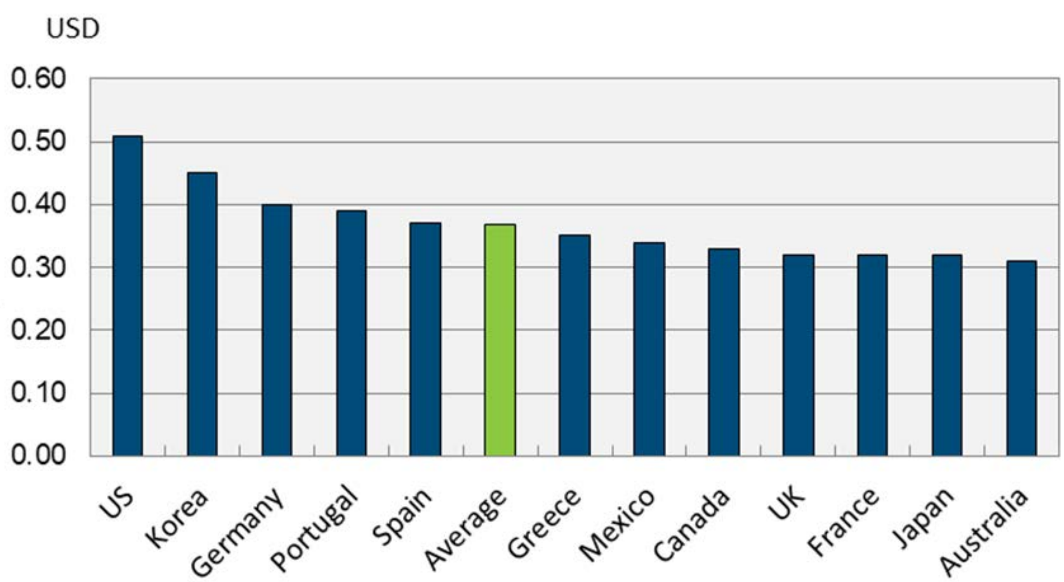
*Average across 12 OECD countries.

Despite the similarity of results across countries in terms of who benefits and who is harmed, the magnitude of the total effect can still differ somehow. In Figure 3, we show that, for each dollar of monopoly profits, the amount that is actually redistributed from the bottom 90 percent to the top 10 percent can range between USD 0.32 and USD 0.51. This is because in some countries wealth is more concentrated in the high-income groups than in others, which fragments further the individuals who earn higher monopoly rents from the ones that suffer with higher prices.

Still, it should be noted that Figure 3 does not take into account that the level of market power differs across the different countries. That is, in countries where public policies overly restrict competition, monopoly profits will be likely much higher, implying that the total amount that is transferred from the poor to the best-off is also more substantial. At the end of the day, it is not only important to determine the share of monopoly profits that is transferred from the bottom 90 percent to the top 10 percent, but also to measure the overall dimension of monopoly profits in the economy. Such additional data would provide a better insight of the whole dimension of the problem.

Although we do not have such data available, we can still provide an illustration of how much an average individual would be affected by an arbitrary level of market power. For instance, if mark-ups from market power range between 10 percent and 20 percent, in average an individual in the bottom 90 percent is expected to lose from USD 1,600 to USD 3,200 per year, while an individual in the top 10 percent earns 9 times that value (from USD 14,400 to USD 28,800).[6] Note that this is just an illustration to provide a better intuition of our results, while determining these figures with precision would require additional data about the actual dimension of monopoly profits.

Figure 3. For each dollar of monopoly profits, how much money is redistributed from the bottom 90 percent to the top 10 percent?



6 For these calculations, we collected data for the GDP per capita in USD PPP from OECD national accounts.

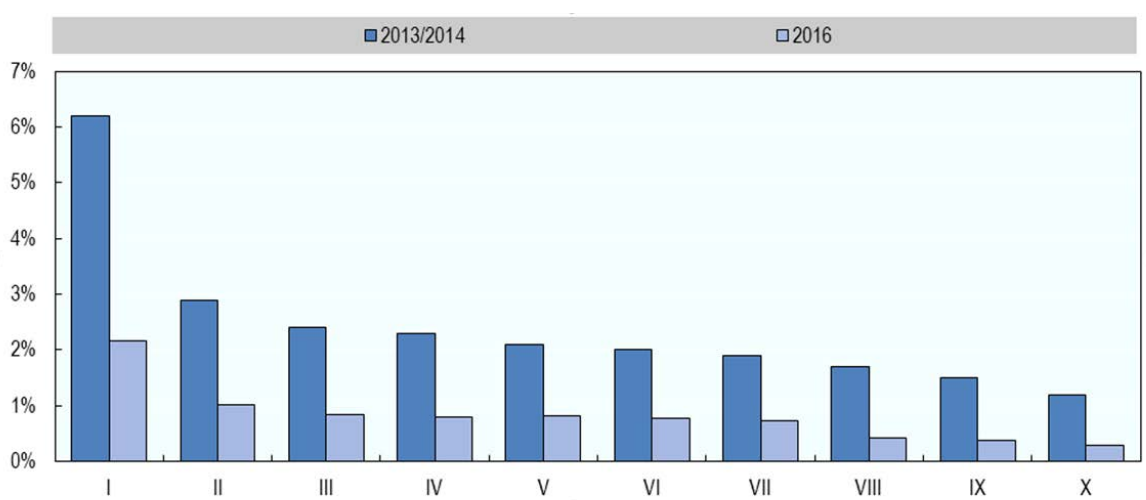
II. A CASE STUDY OF MOBILE PHONE SERVICES IN MEXICO

The nature of the effect that reducing market power (or decreasing prices) for products that account for high spending by the poor has on inequality can also be seen in a recent example in Mexico where retail prices of mobile phone service packages fell by 61 percent to 76 percent between 2013 and 2016.[7]

Figure 4 shows that, in 2014, spending on mobile telephone services constituted about 6.2 percent of income for the poorest 10 percent in Mexico, and 1.2 percent of the income of the richest 10 percent. The impact of price reductions was in many respects more perceptible for the poorest decile than the best-off decile (without considering who would get more profits as a result of those high prices). The poorest households would have seen their spending fall from 6.2 percent of income to 2.2 percent on average (a decline of 4 percentage points), while the best-off households would have seen their spending fall from 1.2 percent to 0.3 percent of income (a decline of 0.9 percentage points). These calculations assume that the poorest households subscribed to limited usage plans while the better-off households subscribe to high usage plans, but the results do not change substantially depending on the assumptions used, as the price reductions for all types of plans are all in a band between 61 percent and 76 percent.

In short, the share of income devoted to mobile telephony for the poorest households witnessed a percentage reduction that was four times the size of that for the best-off households. While this ratio is not necessarily representative of all product categories, this type of effect is illustrative of what can happen to income shares for price reductions of goods that constitute an important part of the basket of goods and services that the poorest regularly purchase. Internationally, other goods that may exhibit similar properties could include food, housing, energy, water, healthcare, broadband and television services.

Figure 4. Percentage of household monthly expenditure in mobile telephony services as a proportion of income, sorted by income group



Note: I-X represent income groups, where Group I is the poorest 10% households in Mexico, and Group X the richest 10% of households in Mexico. For deciles I-IV, low usage plan price reductions are applied, for V-VII mid-usage plan price reductions are applied and for VIII-X, high usage plan reductions are applied.

Sources: OECD elaboration using data from INEGI (2015), *Encuesta Nacional de Ingresos y Gastos de los Hogares (ENIGH) 2014* [National Survey on Household Income and Expenditures 2014], www.beta.inegi.org.mx/proyectos/enchogares/regulares/enigh/tradicional/2014/default.html; and IFT (2016j), "Anuario estadístico 2015" [Statistical yearbook 2015], www.ift.org.mx/estadisticas/anuario-estadistico-2015, OECD (2017) OECD (2017), *OECD Telecommunication and Broadcasting Review of Mexico 2017*, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264278011-en

7 This example is based on information from OECD (2017) *OECD Telecommunications and Broadcasting Review of Mexico*, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264278011-en.

IV. TACKLING ILLEGITIMATE SOURCES OF MARKET POWER

We are by no means suggesting that wealth acquired from market power is in any general sense improper. Much of the profit from market power, and quite possibly the majority, is derived from legitimate sources, such as patents, trademarks and brand differentiation. The value of market power in these areas is that it creates a stream of profits that provide an incentive for investment in new and innovative products and services. Absent market power, many investments would not yield a positive financial return and so would not be made. In particular, some of the profits from market power may be counter-balanced, in investment terms, by losses that were made in R&D for innovations that were ultimately not successful. Thus returns to market power may be lower than the measured level, due to the need to take into account unmeasured losses from alternative, failed investments.

Moreover, given that the net present value of profits is what is necessary to motivate investment, not only the level of mark-ups is important but also the length of the period of market power. If innovation cycles have grown shorter, then higher mark-ups would be needed to provide the same net present value of profits from one innovation, other things being equal.

While much market power, or monopoly power, therefore has its source in legitimate and desirable economic ends, there is also some market power that has more problematic origins: for example, market power that arises from anticompetitive behavior by companies, excessive concentration, protectionism or by government regulations that give companies market power (as a result of lobbying rather than competitively earned product superiority). Competition policy therefore does not generally prohibit market power as such, but rather seeks to remove or prevent illegitimate or unearned market power. For instance, it focuses on fighting illegal cartels, punishing exclusionary conduct, reducing anti-competitive regulation or trade barriers, preventing mergers that create market power and empowering consumers. Attacking illegitimate market power also has the helpful effect of ensuring that opportunities to earn market power through productive investment are not crowded out or overlooked by rent-seeking investors that find it easier to acquire market power illegitimately, than by taking risks and earning it.

V. CONCLUSION

Some argue that competition policy has nothing to say about equality, and that any suggestion that it should do so amounts to using the wrong tools to attack the problem. Others argue that competition policy should explicitly reflect concerns over fairness, and should therefore protect firms from unfair competition, or protect jobs through "public interest" tests. We take the view that competition policy does not need to consider impacts of fairness or distribution but will nonetheless impact distribution of income because it likely has a default redistributive effect, particularly when a consumer surplus test is used as a decision standard. In short, our research suggests that since illegitimate market power itself can distort markets and redistribute towards *better-off* households, competition policy is a tool for preventing that regressive redistribution, and therefore could in fact have a non-trivial role in addressing inequality.

Today, we find that inequality is an increasing priority for many governments around the world. Once again, governments that want to address inequality can choose from a range of different approaches to the problem. On the one hand, they have traditional, reactive redistributive policies that wait for markets to play out and then tax and spend to reach a "just" distribution. On the other hand, they have proactive policies, such as competition policy, that act early to pre-empt market distortions and prevent illegitimate market power from regressively redistributing income and wealth in the first place.

Given the scope that we identify for market power to address concerns over inequality, without creating deadweight loss from taxation, and while driving productivity, we therefore suggest that one priority for governments wishing to reduce inequality is to look at strengthening their competition policy. This might begin with investing in vigorous competition law enforcement. However, it should not overlook the importance of demand side factors, or the need to guard against efforts to lobby for new industrial policies or regulations that protect firms from competition (or to retain existing regulations that do the same).

We are not suggesting that competition policy improvements will quickly result in changed wealth inequality within countries. There may be technological and trade-related reasons why wealth inequality has become stronger in some countries and why this may continue in the future. However, to the extent that political pressure exists to take actions to reduce inequality, it is important to balance the possible benefits that could arise from stronger competition policies compared to direct redistribution via taxation, which may blunt incentives and reduce growth if not accompanied by other policies.[8] In this balancing, it is crucial to emphasize the dual benefits of competition policy compared to many other policy responses, namely as a driver of productivity on the one hand and of more equal distribution on the other.

Future work is needed, particularly to address the extent to which this phenomenon is present in developing countries. In some developing countries, particular sectors may be in some sense allocated and protected, leading to higher margins than would occur in a completely competitive sector. Moreover, wealth may be highly concentrated, with Gini coefficients for some developing countries exceeding those of the countries in this analysis, which could be driven by market power but may also have other explanations, for example related to education. In sum, it would be valuable to gain a broader and more systematic understanding of the potential aggregate effect on wealth and income from uncompetitive sectors in both developed and developing economies.

8 See, e.g. Feldstein (1999), "Tax avoidance and the deadweight loss of income tax," *The Review of Economics and Statisti*cs, November, 81(4): 674–680.

INEQUALITY AND COMPETITION POLICY

BY BRUCE LYONS [1]

I. INEQUALITY AND COMPETITION

Market power affects inequality in at least two ways. First, monopoly profits disproportionately accrue to the rich, even if some can be captured by employees.[2] Second, the consumption patterns of the poor may be disproportionately biased towards low elasticity products sold in less competitive markets.[3] Inasmuch as competition policy reduces market power, it is therefore an important force for limiting inequality. However, not all sources of competition reduce inequality. In particular, globalization has been a major competitive force in recent decades, but it has also raised inequality in developed countries by affecting incomes at both ends of the income distribution.

At the lower end, foreign competition has exerted downward pressure on the wages of unskilled labor, particularly in concentrated markets where workers could previously demand a share of the profits.[4] At the upper end, globalization has increased the reward for success:

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2 An early attempt to capture this was by Comanor & Smiley. They suggest that 93 percent of the population is made worse off by the presence of monopoly power, and that this effect is substantial (e.g. accounting for over half of the wealth of the top 0.27 percent of households who control 18.5 percent of U.S. wealth). However, their methodology makes some very bold assumptions and is based on 1962 data. Comanor & Smiley, "Monopoly and the Distribution of Wealth," *The Quarterly Journal of Economics*, Vol. 89, No. 2 (May, 1975), pp. 177-194.

3 An attempt to link income distribution to consumption patterns and demand elasticities is given by Creedy & Dixon, "The Relative Burden of Monopoly on Households with Different Incomes," *Economica*, Volume 65, Issue 258, May 1998, Pages 285–293. My CCP colleagues Davies & Mariuzzo are currently working on the distributional effects of market concentration using income elasticities of demand.

4 Borjas & Ramey, "Foreign Competition, Market Power, and Wage Inequality," *The Quarterly Journal of Economics*, Volume 110, Issue 4, November 1, 1995, Pages 1075–1110.

> The relative fall in the incomes to be earned by moderate ability, however carefully trained, is accentuated by the rise in those that are obtained by many men of extraordinary ability… The causes of this change are chiefly two; firstly, the general growth of wealth; and secondly, the development of new facilities for communication, by which men, who have once attained a commanding position, are enabled to apply their constructive or speculative genius to undertakings vaster, and extending over a wider area, than ever before.[5]

Alfred Marshall presumably had the railways, steam shipping and recorded voice in mind when considering the effect of "new facilities for communication" in 1890. The mechanism is the same in the twenty-first century, but global development, international trade, the internet and technology based products have increased the scale of Marshall's "wider area" effect by an order of magnitude.

The stagnation of the majority of personal incomes since the Financial Crisis, academic studies of the growth of inequality[6] and a growing awareness that those at the top of large firms and other organizations have been bucking this stagnation by awarding themselves large pay increases, typically unrelated to performance, has fueled the current political interest in whether there should be an enhanced role for competition policy in addressing inequality.[7]

II. THE RECEIVED ECONOMIC WISDOM ON POLICIES TOWARDS INEQUALITY

Many economists derive their intuitions from the Two Fundamental Theorems of Welfare Economics, which provide a very powerful justification for separating concerns about economic efficiency and inequality. The first states that if there is a complete set of competitive markets (and a few other conditions such as no information asymmetries), then no one can be made better off without making someone else worse off (i.e. Pareto optimality).[8] The second states that any income distribution can be sustained by competitive markets if the appropriate tax and social security instruments are in place (in particular, non-distortive [lump sum] taxation and transfers that do not affect incentives). Put simply, if all these conditions are met, we can use competition policy to achieve efficiency and tax/social security policy to achieve the desired distribution across individuals or households. This view is hard-wired into an economics training and it is why the best economists have cool heads when thinking about efficiency and warm hearts when thinking about distribution.

However, economists are also well aware that the strict conditions for this separation of efficiency and distribution policies does not hold in the real world. Furthermore, practical policy always has a historical context which inevitably includes elements which cannot be changed when considering current policy design and implementation. For example, we cannot assume that taxation and social security policies are always set appropriately. The issue then becomes: to what extent should competition policy be used to address concerns other than economic efficiency?

I deviate briefly into another inequality debate before returning to my answer. Press stories on inequality are often framed in terms of disparities within an organization. For example, the UK press has recently been full of stories about the excessive pay of Vice-Chancellors (i.e. heads of universities), which has been rising far faster than academic salaries. This framing of inequality within the firm offers lawmakers a cheap response that avoids the difficulty of raising taxes on the rich or the cost of subsidizing incomes for the poor. For example, the UK Conservative government recently committed to legislate to require quoted companies to:

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5 Marshall, *Principles of Economics* (1890) Book VI ch XII.

6 Baker & Salop (2015) provide a very helpful guide to the literature, including research by Thomas Piketty, Emmanuel Saez and others. See Baker & Salop, *Antitrust, Competition Policy, and Inequality*, The Georgetown Law Journal Online, Vol. 104.1, 1-28.

7 For an analysis of the corporate governance issues that have allowed this to happen, see Bebchuk & Fried, *Pay without Performance: The Unfulfilled Promise of Executive Compensation*, (Harvard University Press, 2004).

8 The Fundamental Theorems are proved rigorously in the context of a general model of neoclassical competition (including a focus on the output of given goods). Many competition economists (and lawyers) also have a view of competition as a process, with the objective of competition policy being to keep open the ability of rivals and entrants to challenge existing suppliers. Although there is no equivalent of the First Fundamental Theorem for, say, Hayek's view of competition, it remains that competition is seen as the driving force behind an efficient economy.

> Report annually the ratio of CEO pay to the average pay of their UK workforce, along with a narrative explaining changes to that ratio from year to year and setting the ratio in the context of pay and conditions across the wider workforce; and provide a clearer explanation… of potential outcomes from complex, share-based incentive schemes.[9]

The hope is that this will encourage greater engagement with shareholders and workers, which might result in remuneration committees modifying their policies. What has this to do with competition policy? It provides an example of how inequality-driven policy does not always operate at the macro level. The introduction of inequality concerns into competition policy would similarly have a focus on individual firms, or possibly markets.

Observed inequality depends on a) inherited endowments of wealth and ability; b) individual preferences over how to use those endowments including how much effort to put into education and work; and c) luck. These combine to result in the level of *ex-post* inequality. They also influence how we form our moral judgements of what is fair or unfair, though not always in a straightforward way. For example, the luck of winning a lottery that anyone can enter does not generate the opprobrium of a CEO exploiting a monopoly (think Martin Shkreli for an extreme case). Our view of fairness comes from the process by which inequality has been generated. If the process is considered fair, the observed inequalities are typically considered fair. This provides a possible basis for addressing inequality within the framework of antitrust, because enforcement takes place precisely against those firms who have been acting anticompetitively (i.e. unfairly), and leaves alone firms whose market position was attained by offering good products at attractive prices. However, this is a subtle argument that may not be widely appreciated. Practical policy must also consider the implications of a particular intervention in one market for other apparently similar markets, and there is a danger of a cascade of interventions against all profitable firms, including those who have achieved their profits fairly by greater efficiency and providing consumers with better products at a lower price.

III. BAKER & SALOP'S OPTIONS FOR INTRODUCING INEQUALITY CONSIDERATIONS

Baker and Salop (2015) provide an excellent starting point for considering the possibilities. They offer seven ways in which competition/antitrust policy might be reinforced to address concerns arising from inequality. Their stated aim is not necessarily to advocate the virtues of each but to open up a discussion. In this spirit, I briefly consider their seven suggestions and highlight how some of them have already been applied in the UK, before adding two more of my own. Their first two suggestions are to maintain a focus on the consumer welfare standard, and to increase antitrust agency budgets to facilitate greater enforcement and deterrence. I consider both to be clearly good ideas in the current context, so I move straight on.

Their third suggestion is to prioritize cases that benefit the middle class and the less advantaged. In practice, an agency that becomes aware of a possible cartel must follow the lead, even if that is, for example, suspected price fixing between elite private schools.[10] It is also important to develop a deep deterrence culture across all types of business. Having said that, this prioritization is justified at the margin both to modestly address inequality, and to encourage public opinion to buy into the advantages of a strong competition policy. In the UK, the market investigation regime has been used recently to investigate payday lending (which is a form of credit used only by the poor), domestic energy and personal current accounts (both of which are income inelastic so pricing practices have a disproportionate effect on the poor).

Baker & Salop's fourth suggestion is to design remedies to benefit less advantaged consumers, "for example, this might involve divestitures or price caps placed on certain products and technologies targeted at less advantaged buyers." In the UK, the energy market investigation set a time-limited price cap on pre-payment meter tariffs (which are exclusively used by the poor). This was justified by the lack of competition in this market segment, and not on direct inequality grounds. A concern remains that the price cap will deter entry and innovation in this market segment, and result in little long term benefit to the poor.

9 *Corporate Governance Reform: The Government response to the green paper consultation*, August 2017.

10 As investigated in the UK by the OFT "Independent schools: exchange of information on future fees," (2006).

Their fifth suggestion is to rebalance regulatory standards in order to worry less about over-deterrence and more about under-deterrence. This seems difficult where independent courts are involved and it could be arbitrary in administrative systems. The basic standard of proof should remain whether the behavior is more likely than not anticompetitive. In any case, it is not clear how this proposal would particularly address inequality issues.

Baker & Salop's sixth suggestion is to recognize excessive pricing by dominant firms as an antitrust offence. This is seen as more radical in the U.S. than it is in Europe, but even European jurisdictions have found that it is fraught with problems.[11] The first set of problems relates to the (dis)incentives created by prosecuting high prices charged by firms that have broken no law. For example, firms may take fewer risks and invest less in quality or R&D if they fear they will not be able to reap the reward. This may be a particular problem where technology is moving fast (e.g. winner-takes-all technology battles mean that the winners must expect to achieve a high reward that reflects not only their own costs but also the costs of the losers). The second set of problems relates to the huge difficulty of benchmarking prices. Even with homogeneous products and simple linear prices, prices must be compared with those in similar, separate geographic markets or with a measure of costs. There then needs to be a judgement of what gap is "too high." Given the complexity of products and pricing, there is a tendency to fall back on a measure of profitability, but this is also fraught with difficulty. In the UK, the CMA has attempted to use profitability to measure exploitative prices in a number of recent market investigations, but its analysis has been far from convincing. In private healthcare, its price comparison analysis was deeply flawed and withdrawn before appeal. Its substitute profitability analysis could not sustain a case for divestiture, which it had wanted to pursue.[12] In domestic energy, the CMA could not find excessive actual profitability so it argued that the leading firms were inefficient. The CMA consequently made an adjustment to each firm's profitability on the grounds that their measured costs were too high, and concluded that consumers were being ripped off. Although these were not dominant firms in the sense Baker & Salop probably envisaged, these cases do illustrate the extreme difficulty of prosecuting excessive prices both conceptually and evidentially.

Baker & Salop's seventh suggestion is to legislate to adopt inequality as an explicit, additional antitrust goal. An inequality consideration alongside competition would in effect be a public interest test. These have a long history, particularly in merger control, but the trend in recent decades has been to move towards a single focus on competition. The reasons are familiar. In particular, a competition test can be applied by an independent expert competition authority at arm's length from elected politicians. This facilitates a clear economic approach to enhancing the efficiency of the economy, with the associated indirect benefits for reducing inequality. Experts in antitrust enforcement have neither the skills nor electoral mandate to weigh competition against inequality if there is a trade-off, and if there is not, then an inequality objective is redundant.

To this list, I add two further types of intervention for consideration. Both have been applied by UK regulators in the context of their market investigation powers, which allow the CMA to apply strong remedies on markets in which no firm has contravened conventional antitrust laws. Sector regulators can also conduct market studies, though they have different remedy powers.

IV. EMPOWERING CONSUMERS TO GET ACTIVE AND MAKE MARKETS WORK

Traditional competition policy focusses on the supply side – anticompetitive behavior by firms. The fundamental idea is that if there are sufficient firms fighting for customers by offering better products at lower prices, then consumers will choose the product that offers them the best value. However, it is clear that in many markets consumers do not do this. This may be for a variety of reasons. For example, firms may be deliberately obfuscating so as to make comparisons difficult. However, the fundamental problem, whether or not it is deliberately exploited by firms, is a simple lack of engagement by consumers who often make their choices by default or some crude rule of thumb (i.e. "behavioral consumers").[13] This is not necessarily an identifiable group of individuals, because most of us act "behaviorally" in some situations. However, inasmuch as the poor are less likely to have access to the right information to make the best choices, then this may contribute to inequality.

11 See Lyons, *The paradox of the exclusion of exploitative abuse* and other chapters in *The Pros and Cons of High Prices* (2007), published by the Swedish Competition Authority.

12 Declaration of interest: I co-authored an expert report commissioned by the main party on the *CMA's analysis of profitability in the Private Healthcare Market Investigation Remittal Inquiry*; I also advised a leading supplier in the energy market investigation.

13 For an accessible introduction to behavioral consumers, see Kahneman, *Thinking Fast and Slow* (2011).

If there is a single price, the existence of disengaged customers reduces the elasticity of demand because only a part of the market responds to price. This conveys market power to firms unless they are competing so fiercely that elasticity does not matter. The consequences of behavioral consumers for competition change substantially if firms can price discriminate. For example, it may be possible to use information on internet searches or on personal histories of purchase to make individual offers of a higher price to disengaged customers and a lower price to active customers. Another important example is where customers have default contracts (e.g. with energy providers or banks) so "loyal" (i.e. disengaged) customers can be left on expensive or otherwise unattractive contracts, while active switchers can get much better deals. The difference can be substantial, running into hundreds of pounds sterling.[14] High levels of competition in the market may limit profits at the same time as driving firms into widening the gap in prices paid by the active and the disengaged.

What remedies should be applied? The identified problem is with consumer behavior, so it is appropriate to remedy the demand side. The possibilities are often market specific, but they generally fall into three categories: providing consumers with better information (e.g. standardized price comparisons, quality and service metrics); facilitating consumer search (e.g. by combining personal usage data with price and quality information on search websites); and facilitating switching (e.g. phone number portability or compensation for interrupted service). The CMA has used its powers in recent UK market investigations to impose a wide range of such measures (e.g. in energy and retail banking but also many other consumer markets). Information technology is making this type of intervention increasingly possible.

However, their effect on inequality is not unambiguous even if the poorest have least access to the information that would help them get the best deal. For example, suppose a utility provider offers lower priced contracts to new customers to attract them away from rivals, and current customers are left on more expensive tariffs (e.g. that no longer include inducements). The gap in prices will be constrained by the threat of current customers switching to a rival who offers inducements. If a demand side remedy makes all customers willing to switch, then that will reduce the price gap. But if the remedy succeeds in making only the marginal non-switchers more active, then it may leave a rump of those least engaged with the market and widen the price gap. Furthermore, demand-side remedies are not costless as they can impose a considerable regulatory compliance burden on firms.

V. DISTRIBUTIONAL CONSIDERATIONS IN THE ANALYSIS OF PRICE DISCRIMINATION

Public finance economists distinguish between vertical equity and horizontal equity in tax systems. Vertical equity is the principle that higher income individuals should pay more tax than those with lower incomes. A similar principle might be applied to price discrimination. In particular, vertical equity would be violated if price discrimination turns out to favor higher income individuals, but not if the rich pay more. It may be that breaches of vertical equity are hidden in complex pricing. For example, the standard personal bank account in the UK is notionally "free" (i.e. no standing charge), but there are very high charges for unauthorized overdrafts. The poor are much more likely to go into unauthorized overdraft than are the moderately wealthy, so they end up paying more for banking.

It would be relatively straightforward to add the observance of vertical equity as a simple constraint in the competition analysis of price discrimination, though enforcement may be more complex. For example, the rich may buy more of a product and so, in a competitive market, be offered savings due to economies of scale. This does not obviously contravene a moral principle of vertical equity, but it highlights the difficulty of implementation.

Supply-side interventions also have a greater potential for counterproductive effects. Picking up from the example used to illustrate potential problems from demand-side remedies, if the remedy were to require firms to put all existing customers on the same tariff as new customers, it is unlikely that everyone would now benefit from the lower tariff. Instead, firms would find it more profitable to bring tariffs up to the current-customer price or higher, because rivals would have to make an expensive across-the-board price cut in order to attract marginal switchers. Thus an intervention motivated by a concern for inequality could end up reducing the incentive to cut prices, and making everyone worse off (except the suppliers).[15]

14 See recent market investigations by the CMA.

15 For a real example of this effect in the UK domestic energy market, see Hviid & Waddams, *The Economic Journal*.

Horizontal equity is the principle that people with the same income should pay the same taxes. It is usually justified on the grounds that it provides a safeguard against arbitrary discrimination. While attractive in the context of tax setting, horizontal equity considerations do not extend well to price discrimination. For example, individuals of similar income will buy a wide range of products and it seems no great issue if person A buys one half of her shopping basket cheaper than does person B, and the other half more expensively.

VI. CONCLUSION

Market power promotes inequality even if it is not the main cause. This means that a well-funded and vigorously enforced competition policy with a consumer focus is an important adjunct to tax and social security policies in reducing inequality. It is possible to go a bit further in applying inequality considerations to competition case selection, analysis and remedies, but there are no simple solutions. Furthermore, there are many pitfalls, including unanticipated response by firms and misleading precedents for activist intervention. These suggest we should adopt a cautious approach to policy developments that try to bring inequality directly into competition policy.

ANTITRUST: TRACING INEQUALITY – FROM THE UNITED STATES TO SOUTH AFRICA

BY ELEANOR M. FOX [1]

I. INTRODUCTION

Antitrust cannot *produce* equality. If the goal of a nation is greater equality for its citizens, the policy makers would not turn to antitrust law as a first best tool.[2] But a notion of equality in antitrust, particularly equality of opportunity, can be constructive[3] as well as morally important; and whether or not it can be, it has been.

This essay traces key points in time at which antitrust jurisprudence and equality of opportunity have been linked. The essay begins with the adoption of the U.S. Sherman Act in 1890, and moves to the equality-leaning jurisprudence of the 1960s, the European Union jurisprudence of openness and access, developing countries' special needs, the UNCTAD nations' adoption of "equitable principles," and, finally, this new era, with its rise in inequality and accompanying claims for greater equity,[4] with focus on a current South Africa project for greater inclusiveness.

1 Walter J. Derenberg Professor of Trade Regulation, New York University School of Law. The author thanks Harry First for his helpful comments.

2 They might, however, regard access to markets without barriers as one first best tool. See Ohlhausen, Death By A Thousand Haircuts: Economic Liberty and Occupational Licensure Reform, Heritage Foundation (July 26, 2017), https://www.ftc.gov/system/files/documents/public_statements/1234173/ohlhausen_-_heritage_foundation_licensure-econ-liberty_7-26-17.pdf. Markets are not everything. See Sen, Development as Freedom (1999). Moreover, other elements must be in place for markets to work as a vehicle for empowerment. These include access to food, medicine, health care, education and training, and capital. See the United Nations Sustainable Development Goals, http://www.un.org/sustainabledevelopment/sustainable-development-goals/.

3 Current interpretations of U.S. antitrust law lean in favor of the *incumbent*'s freedom and incentives. An equality-leaning antitrust would weigh *outsiders*' freedom and incentives. There is a good deal of room in U.S. antitrust law to be equality-leaning in a manner that is efficiency-promoting. See Fox, The Efficiency Paradox, and other chapters in How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust Law (R. Pitofsky ed. 2008).

4 More equality is one kind of equity. Most often, when one speaks of more equity, the reference is to more equity (or equality) for the outsider. In applications of competition law, this normally refers to more equality of opportunity, or a clearer path to competition on the merits; a right not to be closed off by power and leverage.

II. EARLY THREADS OF EQUALITY

I observe that equity for the outsider – or economic opportunity – runs through almost all nations' competition laws at some point in time, whether in preambles to their statutes or in case law.

I begin with passage of the Sherman Act in 1890. The congress that passed the Sherman Act was responding to an unrest among the people, not least the farmers, in the wake of the Industrial Revolution, and the rapid growth of giant business. The people were distressed by "unjustified power, especially one that raised obstacles to equality of opportunity."[5] The language of the Sherman Act is sketchy; Congress handed to the courts the task to interpret it. The courts proceeded to do so, and themes of inequality arose in the first antitrust cases[6] and they continue to this day. The height of explicit equality values in U.S. antitrust, usually in the form of equality of opportunity and rights to contest markets on merits, peaked in the 1960s and early 1970s, especially in opinions by Justice William O. Douglas.[7]

The turn of the tide came with the Reagan administration in 1981, when the U.S. Supreme Court, now with a new majority, shifted antitrust to an efficiency paradigm, usually called consumer welfare. It was common cause at the time, and for a quarter of a century thereafter, that equity undercut efficiency.

Meanwhile, across the ocean, in 1957, six European nations adopted The Treaty of Rome establishing the European Economic Community, trying to assure peace through economic integration in post-war Europe. The Treaty itself contains the competition law. The Treaty privileges free movement. The competition law does not focus on the equity/efficiency debate but Court of Justice judgments did and do include a concern for market access for outsiders. EU law condemns "distortions of competition" and advantages achieved by leverage or privilege, not by merits.[8]

Even as European law was beginning to take root, developing countries raised a point of inequity to an international level. They were concerned that multinational enterprises were expanding into their countries and suppressing the local firms by restraints that often were illegal under U.S. law (for example, prohibiting local partners from exporting to the United States). Developing countries generally liked the U.S. antitrust jurisprudence of the 1960s because it was sympathetic to outsiders and powerless firms. Under the aegis of UNCTAD, to constrain multinational enterprises, they sought antitrust rules for the world. This motivation led to negotiations in the 1970s for a set of equitable principles to be agreed by nations. Ironically, the negotiations culminated in 1980 just as U.S. antitrust law was shifting from equity values (not excluding concern for consumers) to efficiency. The "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices"[9] was adopted by most of the trading nations of the world in 1980. The Set was adopted as a voluntary code (no mandatory rules). Its prohibitions were qualified by a general rule of reason, thus making the Set flexible to adapt to a more economic future.[10]

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5 Letwin, Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act 59 (1965).

6 See, for example, the opinion of Justice John Marshall Harlan (the first), concurring and dissenting in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911): The nation was happily rid of human slavery "but the conviction was universal that the country was in danger of another kind of slavery … the slavery that would result from aggregations of capital in the hands of a few individuals and corporations … controlling the entire business of the country …." Justice Harlan was highlighting the inequality of wealth and power.

7 E.g. *FTC v. Consolidated Foods Corp.*, 380 U.S. 593 (1965) (prohibiting a merger that distorted access to markets on the merits). See also *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962): certain arrangements may act as a "clog on competition …[and] "deprive … rivals of a fair opportunity to compete." Id. at 324. The possible negative effects of antitrust intervention were not sufficiently appreciated in the 1960s; but appreciation of economics does not mean no room for equity. See note 3 supra and notes 13-16 and 24 infra.

8 E.g. *Commission v. DEI (Greek Lignite)*, Case C-553/12P, ECLI:EU:C:2014:2083; *TeliaSonera Sverige*, C-52/09, EU:C:2011:83.

9 http://unctad.org/en/PublicationsLibrary/a35r63_UNCPP_en.pdf.

10 The Set, renamed "the Set of Principles and Rules on Competition" (The "UN Set"), is reaffirmed by the nations every five years.

Beginning with the fall of the Berlin Wall at the end of 1989, scores of countries began to adopt market systems, and they adopted competition laws to control the market power that would foreseeably result. These newcomers to the competition law family were generally societies in which inequalities of wealth and power loomed large. The controlling powers – the State and friends of the State – held privileges and access to all of the best economic opportunities. If markets were to be created and to work, outsiders would have to have a clearer path to economic opportunity and success. Equity to the outsider coincided with the quest for efficiency. Many of these antitrust laws recognize the value of access to markets on the merits. A critical mass include some equity goals in the preamble to their laws.[11]

Developing countries adopted competition laws by the scores after the fall of the Berlin Wall. For many, the impetus was the International Monetary Fund and the World Bank, which required adoption of a list of basic laws including antitrust as conditionality for loans that the countries needed. For developing countries, the equity dimension of competition law is clear. Most of the countries had been colonized. Also, most were emerging from backgrounds of deep state control, with privileges lavished upon state-owned firms and on a few privileged families that owned most of the business in the country. For creation of markets and competition, the law had to be sympathetic to the excluded masses, who needed both incentives and opportunity, where both had been denied in the past.

Of all preambles and statements of purpose in competition laws, South Africa's law is one of the most explicit in insisting on equality as a value.[12] This was natural in view of South Africa's apartheid past. The New South Africa was devoted to overturning the culture that allowed the indignities of the past. Thus, South Africa included, in virtually all of its post-apartheid statutory laws, the mission to include the historically disadvantaged population.

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11 For example, the Latvian Competition Law (2001) states among purposes: "to protect, maintain and develop free, fair and equal competition in the interests of the public …. (Sec. 2). The Barbados Fair Competition Act (2002) states among purposes: "to ensure that all enterprises, irrespective of size, have the opportunity to participate equitably in the marketplace." (Preamble). The Namibia Competition Act (2003) states among purposes to "ensure that small undertakings have an equitable opportunity to participate in the Namibian economy; and promote a greater spread of ownership, in particular to increase ownership stakes of historically disadvantaged persons." (Sec. 2)

It is not just developing and transitional countries that include equity goals in their statutes. Canada presents a typical example of equity recitals. The Canadian statute states:

Purpose of Act

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada**, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy** and in order to provide consumers with competitive prices and product choices. R.S., 1985, c. 19 (2nd Supp.), s. 19. (emphasis added)

12 The Preamble states that the Act requires that the economy must be open etc.

" IN ORDER TO –

provide all South Africans equal opportunity to participate fairly in the national economy; …."

The Purposes section of the Act includes:

"(e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and

(f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons."

III. EQUALITY AND THE NEW MILLENNIUM IMPERATIVE

We come to the new millennium. New research shows that the old shibboleth – equity reduces efficiency – was wrong as a generalization.[13] Moreover, on the heels of globalization, data show that inequality of wealth has increased around the world, and is constantly increasing.[14] Those who are well off or well enabled get an increasingly larger share of the pie going forward.[15] In some circumstances, including where barriers are high and the economy has been captured by vested interests, the society cannot get more efficiency without more equity.[16]

Meanwhile in South Africa, "equality" is higher on the list of rights in the Constitution's Bill of Rights than even freedoms of religion and expression.[17] Yet the cruelly shut out majority[18] have not moved up into the economic mainstream in significant numbers, and ownership of business is nowhere nearly evenly spread across the population.

The recent observations and data on inequality have caused rethinking.[19] In the United States the Democratic Party has announced a project, "A Better Deal," which would include "crack[ing] down on monopolies and the concentration of economic power that has led to higher prices for consumers, workers, and small business …."[20] Bills have been introduced into Congress that would prohibit mergers that significantly increase concentration, and prohibit mega-mergers unless the parties establish that the effect of the merger "will not be to materially lessen competition or tend to create a monopoly or monopsony." Principals of approved mergers would be required to supply, for five years, data that would allow the agencies to assess the merger's actual impact.[21]

In South Africa, the problem is of an even graver cast. The post-apartheid radical economic transformation hoped for has not occurred. President Jacob Zuma, and later Minister of Economic Development Ebrahim Patel, announced earlier this year that the competition law will be amended to "address the need to have a more inclusive economy and to de-concentrate the high levels of ownership and control …."[22] Minister Patel stated that key amendments will require consideration of concentration, structural impediments to entry and expansion, and ownership profile in merger and conduct cases, and that the competition authority will need to be empowered to consider these problems proactively or on complaint of parties unable to overcome the entrenched barriers, and to impose structural remedies indicated by market inquiries. "The proposed amendments could potentially seek to incentivise

13 See Ostry, Berg & Tsangarides, Redistribution, Inequality, and Growth, IMF Staff Discussion Note, February 2014. See Lagarde, Managing Director, IMF, "Lifting the Small Boats," June 17, 2015: "My key message tonight is this: reducing excessive inequality – by lifting the 'small boats' – is not just morally and politically correct, but it is good economics."

14 See Rising inequality threatens world economy, says WEF (Jan. 2017) https://www.theguardian.com/business/2017/jan/11/inequality-world-economy-wef-brexit-donald-trump-world-economic-forum-risk-report; OECD Divided We Stand: Why Inequality Keeps Rising (Dec. 2011), http://www.oecd.org/els/soc/dividedwestandwhyinequalitykeepsrising.htm.

15 See Piketty, Capital in the Twenty First Century (2014).

16 See Levy & Walton, eds., No Growth without Equity? Inequality, Interests, and Competition in Mexico (2009).

17 Constitution of the Republic of South Africa 1996, Chapter 2: Bill of Rights. The Bill of Rights also guarantees access to health care, food, and shelter. The Constitutional guarantees would appropriately inform what constitutes antitrust harm and what are appropriate remedies at least in the areas of explicit Constitutional rights. See Ngcobo, former Chief Justice of the Constitutional Court of South Africa, Does Competition Law and Policy Have a Role in Promoting Social and Economic Rights?, April 2015, Johannesburg, on file with author.

18 See, for a personal account of the treatment of black South Africans under apartheid, Ditkang Moseneke, former Deputy Chief Justice of the Constitutional Court of South Africa, My Own Liberator: A Memoir (2016).

19 See, e.g. Furman & Orszag, Beyond Antitrust: The Role of Competition Policy in Promoting Inclusive Growth, Chicago, Sept. 16, 2016, https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160916_searle_conference_competition_furman_cea.pdf. See also, A Lapse in Concentration: A dearth of competition among firms helps explain wage inequality and a lot of other ills, The Economist, Special Report, Deregulation and Competition, Sept. 29, 2016.

20 https://democrats.senate.gov/abetterdeal/#.WbRHr6JWV_k.

21 Merger Enforcement Improvements Act, S. 1811 (115th Cong. 1st Sess.), Sept. 14, 2017; Bill to amend the Clayton Act to modify the standard for an unlawful acquisition, S. 1812 (115th Cong. 1st Sess.), Sept. 14, 2017.

22 Breaking up South Africa's Cartels, PressReader, March 9, 2017, quoting address by President Jacob Zuma, https://www.pressreader.com/south-africa/finweek-english-edition/20170309/281517930903870.

firms to develop relationships and adopt strategies that would alter market structure; reduce concentrations by encouraging entry of historically disadvantaged South Africans (particularly those who own SMMEs); reduce barriers to entry; and expand ownership to ensure that more enjoy substantive economic citizenship."[23]

South African reformers propose to make the economy both more inclusive and more dynamic. No trade-off is seen between equity and efficiency;[24] rather, the policy makers foresee synergy.

The challenge is great. Efficiency and equity *can* work together. In the view of South African policy makers, they not only can; they must; and if reform can unleash the energies of the left out majority, they will.

IV. CONCLUSION

The form of equality most salient to competition law is equality of opportunity. This essay has traced equality as an antitrust value, which it has been for as long as antitrust laws have existed. But antitrust has fallen short of its promise. Foreshadowed by Gabriel Kolko, there has been yet another "Triumph of Conservatism."[25] Will equity now get its edge?

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23 Patel: Structural features diminish effective competition, limit inclusivity of growth, fin24, Sept. 1, 2017, http://www.fin24.com/Economy/patel-structural-features-diminish-effective-competition-limit-inclusivity-of-growth-20170831.

24 Efficiency can be an elusive concept. Giving more access to outsiders might produce more robust markets (market efficiency) than giving more freedom to incumbents. The best balance might depend on the current posture of the law and the market realities of the particular economy. See Fox, The Efficiency Paradox, supra note 3. In the cases surveyed in The Efficiency Paradox, an equity-leaning competition law would have given a different answer to every question before the Court, and the outsider-preferring answer was, in this author's view, likely to have engendered more efficient and inventive markets.

25 Gabriel Kolko, The Triumph of Conservatism: A Reinterpretation of American History, 1900-1916 (1962) (big business, not reformers, shaped the antitrust legislation).

COMPETITION POLICY AND INEQUALITY: DEVELOPING COUNTRIES' PRESPECTIVES

BY AZZA RASLAN [1]

I. INTRODUCTION

One can argue that we live in an age of discontent. Under the pressure of economic crises, security threats and regional conflicts, populism at both ends of the political spectrum coupled with distrust in laws, institutions and the elites that represent them became more pronounced. Antitrust or competition law & policy is an area where these developments have had a direct impact. A law that was born out of public discontent with the power of trusts and endeavoured to change the *status quo* is again called into action.

II. COMPETITION LAW AS A WEALTH REDISTRIBUTION TOOL - THE YEAS AND NAYS

Economic concentration is considered a suspect for higher prices, slow investments and wage stagnation.[2] Stiglitz points to market power as the main culprit for income inequality,[3] additionally Atkinson further asserts that we should introduce an explicitly distributional dimension into competition policy in order to have a proper balance of power among stakeholders.[4] On the other hand, Hovenkamp finds that even though antitrust enforcement may affect wealth distribution it is not systematically from the rich to the less rich or vice-versa.[5] Crane has also warned against using antitrust law as a tool to fight

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2 Council Of Economic Advisers Issue Brief, Benefits Of Competition And Indicators Of Market Power, Updated May 2016.

3 Stiglitz, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE 28–33 (2012). See also earlier work on the issue of including other goals such as poverty and wealth inequality under competition law: Fox, *Economic Development, Poverty, and Antitrust: The Other Path*, Southwestern Journal of Law and Trade in the Americas, Vol. 13, p. 211, 2007; NYU Law School, Public Law Research Paper No. 07-12; NYU Law and Economics Research Paper No. 07-26.

4 Atkinson, INEQUALITY: WHAT CAN BE DONE?, Harvard University Press, 2015, p. 303.

5 Hovenkamp, *Antitrust Policy and Inequality of Wealth*, CPI Antitrust Chronicle, 2017, U. of Penn, Inst. for Law & Econ Research Paper No. 17-26.

wealth inequality.[6] Nonetheless, he makes a distinction between developed and developing countries noting that the assumption that antitrust violations are regressive and hence that antitrust enforcement is progressive may hold more ground in the former rather than the latter, given that usually "the means of production are concentrated in a very small number of private hands and the vast bulk of society interacts with capital as employees and consumers."[7]

Using the existing legal framework, Gal proposes that competition law, as part of the social contract, may have a role to play yet not solely and recommends some measures to reduce inequality, without significantly altering competition law.[8] These include broadening the goals of competition law in certain circumstances to incorporate distributional effects. Similarly, Baker & Salop emphasize the role competition law and enforcement may play in combating inequality by, among other things, rethinking the goals and objectives of competition law by adopting consumer welfare as the goal of antitrust law rather than economic efficiency and expressly including inequality as an explicit competition policy focus.[9]

III. DEVELOPMENTAL OBJECTIVES AND COMPETITION LAW & POLICY

It is important to note here that these discussions mainly address competition law & policy as they stand in developed countries. Although there may be a common basic understanding about economic efficiency as the main objective of competition enforcement, the objectives of competition law & policy may differ considerably from one country to another.

An important objective for the adoption of competition laws in the developing world is the positive relation these laws have with development, as underlined in the work of various international organizations ("IOs"). From an adopter's perspective, competition law needs to be acclimated with a number of social and developmental goals and policies addressing, among others, inequality. Accordingly, based on these objectives, there is a spectrum of competition law models, where, on the one end, we find a single objective that is economics-based (sometimes referred to as efficiency-based,[10] core,[11] or neoclassical-price theory objectives[12]), and competition laws with a plurality of objectives (sometimes referred to as non-efficiency based[13] or multiple objectives[14]).

The discussion then extended to what kind of competition law & policy would be suitable for developing countries.[15] These policies/laws must account for their "special attributes" rejecting mere transplantation of competition laws from developed countries.[16] Hence, to meet its development promise, competition law in developing countries may have other objectives. This "customization" of competition law may make it a better fit to the context in which it operates but may represent a different model of classical competition law & policy as understood in the origin countries.

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6 Crane, *Antitrust And Wealth Inequality*, Cornell Law Review, Vol. 101 pp. 1171—1128.

7 Id. at 1185.

8 Gal notes that in essence the competition process produces, at least on the short run, winners and losers i.e. inequality, but would reduce inequality on the long-run. Gal, The Social Contract at the Basis of Competition Law, Forthcoming, Competition Policy: between Equity and Efficiency (Lianos & Gerard eds., Cambridge University Press, 2017).

9 Baker & Salop, "Antitrust, Competition Policy, and Inequality" (2015), Working Papers, Paper 41

10 Barnes, *Nonefficiency Goals in the Antitrust Law of Mergers*, 30 William and Mary Law Review (1989).

11 OECD, The Objectives of Competition Law and Policy (Note by the Secretariat ed., 2003).

12 Lianos, *Global Governance of Antitrust and the Need for a BRICS Joint Research Platform in Competition Law and Policy*, CLES Research Paper Series No. 5/2016 (2016). Barnes described it earlier as "narrow or neoclassical view of objectives." Barnes, William and Mary Law Review, (1989), p.797.

13 Barnes, William and Mary Law Review, (1989).

14 OECD, The Objectives of Competition Law and Policy (Note by the Secretariat ed., 2003).

15 Gal & Fox, *Drafting competition law for developing jurisdictions: learning from experience*, *in* Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law (Gal, *et al.* eds., 2014) and Mateus, *Competition and Development: What Competition Law Regime?*, in Competition Law and Development (Daniel Sokol, et al. eds., 2013).

16 OECD, Promoting Pro-Poor Growth, Private Sector Development (2006), at p. 43.

IV. ALTERNATIVE VIEW: AFRICAN COMPETITION LAWS

The diffusion of competition law in South Africa ("SA") represents a case in point. The adoption of the current competition law regime in SA occurred in the 1990s. Post-Apartheid, the political landscape was dominated by the governing party, the ANC, a party based on social democracy. In addition to boosting economic efficiency and competitiveness, the new competition law & policy is also concerned about equality and fighting racial exclusion. Further, subsequent policy documents set priorities for targeted sectors, anti-competitive conduct, and case selection.[17] Fighting inequality was the undercurrent which guided many of the new government's policy choices. The new government had a holistic understanding of its objectives, which affected how it interpreted democracy and human rights. In this context, competition law was framed as part of the "democratization" process rather than "market liberalization," which insured its support by the public and the pro-socialist ANC members.[18] This greatly influenced the reception of the economics-based competition laws. As part of the "democratization" process, competition law had to include broader objectives to serve other stakeholders and reflect a "holistic" policy approach.

This holistic approach is not unique to SA; the competition laws of a number of African countries vary in many ways, but they all display a plurality of objectives that go beyond economic welfare objectives. The spectrum of objectives ranges from protecting SMEs, equitable consideration for disadvantaged segments of the society, protecting employment, meeting development goals and protecting the environment. To understand how these different objectives are applied, we look closely at the merger regimes of jurisdictions in Sub-Saharan Africa, with emphasis on SA as the leading jurisdictions spearheading this model.[19]

A. Most Common Types of Considerations

Unlike SA, the majority of jurisdictions subject to our review adopt a non-exhaustive list of public interest considerations ("PICs"). Very few jurisdictions opted, similarly to SA, for a closed list of PICs which includes assessing the effects of a merger on a particular industrial sector or region, employment, the ability of small, medium and micro businesses ("SMMEs") or firms controlled or owned by historically disadvantaged persons ("BEE") to become competitive, and/or the ability of national industries to compete in the international markets.[20] The remaining jurisdictions either adopt a non-exhaustive list of PICs and/or very broad considerations under the public interest criteria.[21] Botswana,[22] Kenya,[23] Namibia,[24] and Zambia[25] adopted what we call the four-plus ("4+") categories which includes the four categories of PICs similar to SA but as part of a non-exhaustive list of objectives. National development programs, or more broadly economic and social development, are among the declared PICs under the competition laws of Burundi,[26]

17 See the Prioritisation Framework of 2008, OECD Poverty Reduction, p. 245.

18 Lewis, *Thieves at the dinner table: enforcing the competition Act, a personal account*, (2012), p. 10.

19 We identified nineteen countries in Sub-Saharan Africa that, in addition to having merger control, also adopt provisions in relation to public interest considerations as part of their merger review process. At least fifteen of these have functioning competition authorities. These are Botswana, Cameroon, Gambia, Kenya, Malawi, Mauritius, Namibia, Nigeria, Seychelles, SA, Swaziland, Tanzania, Zambia and Zimbabwe. It should be noted that we included Madagascar, Mozambique, and Rwanda where competition authorities are being set-up and Burundi where there is no information available on the functions of competition bodies. We also add Nigeria since it has a functioning merger control regime as well as its economic importance. We make no judgment as to how strictly the laws are enforced.

20 Section 12A(3) of the Act. However, Article 2, Purpose of the Act, includes broader objectives such as economic development.

21 These are Botswana, Burundi, Cameroon, Gambia, Kenya, Malawi, Mauritius, Mozambique, Namibia, Seychelles, Swaziland, Zambia and Zimbabwe.

22 Section 59(2) Competition Act of 2009.

23 Section 46(2) of the Competition Act no. 12 of 2010.

24 Section 47(2) of Competition Act no. 2 of 2003. The Merger Guidelines however states that in general the Commission will limit itself to listed PICs, except in "extraordinary cases." Namibian Comptition Commission, Merger Guidelines (2016), p. 39

25 Article 31 of Competition and Consumer Protection Act of 2010.

26 Article 46 of Law No. 1/06 of 2010.

Cameroon,[27] the Gambia,[28] Madagascar,[29] and Zambia.[30] Mozambique additionally considers national entrepreneurship as a PIC.[31] The competition laws of Mauritius, Seychelles and Tanzania include unique PICs to their counterparts, such as the safety of goods and services and environment protection.[32]

We found that the most featured PIC is international competitiveness/export promotion. This reflects the importance of integrating in the world economy as a priority. It is then followed by the competitiveness of SMMEs and empowerment of historically disadvantaged citizens. This reflects a desire to develop SMMEs as the backbone of their economy and to bring equality to disfranchised segments of the society.

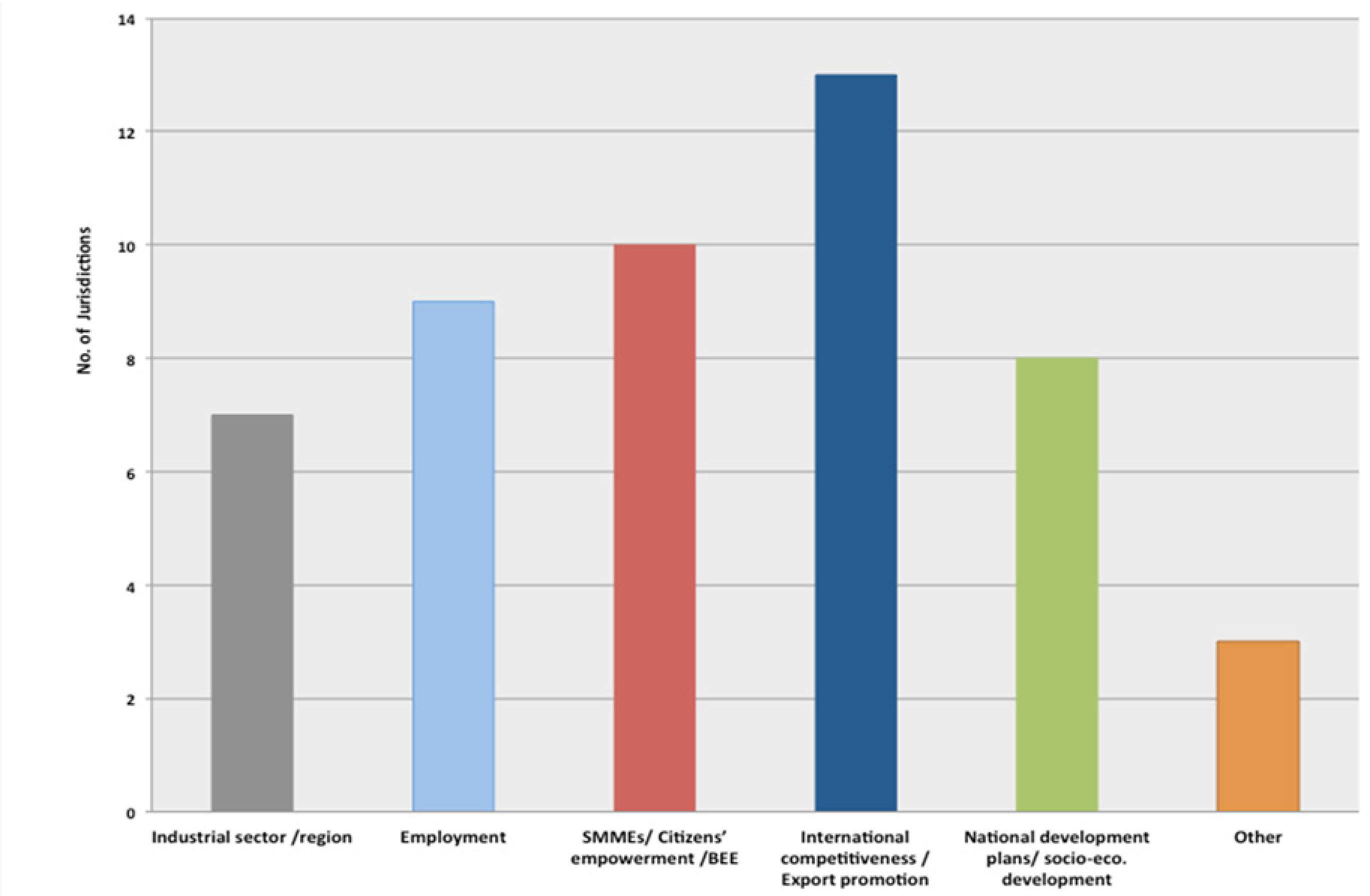

Figure 1 Categories of PICs in in Sub-Saharan Africa (select jurisdictions)
Source: Compilation by author based on the review of national competition laws

Employment takes third place despite being the subject that feature the most in merger conditions. National development and/or socio-economic development follow employment, then competitiveness of industrial sectors or regions. Some jurisdictions adopted, or are in the course of adopting, guidelines addressing how public interest considerations will be dealt with (for example SA, Kenya and Botswana). In others, it is left to the consideration of a competition enforcement body or a political decision by a minister with no further guidance. In any case, a competition analysis of a given transaction must be performed first.

27 Section 17 of The Competition Law no. 98/013 of July 14, 1998.

28 Article 37 (4) Act 4 of 2007.

29 Article 26 Competition Law no. 20 of 2005.

30 Article 31 of the Competition and Consumer Protection Act no. 24 of 2010.

31 Article 21 of Law no. 10 of 2013.

32 Article 22 of Seychelles Fair Competition Act of 2009 and Section 13 of Tanzania Fair Competition Act no. 8 of 2003.

B. Assessing PICs

The competition authorities in these jurisdictions are thus required to assess various public policy concerns, whether in the narrow sense (competition) or the broader sense (such as inequality). This echoes a problem that was much debated among a number of theorists: how to reconcile conflicting principles.[33] The first possible answer is that only one principle should prevail. From a utilitarian perspective, the principle that maximizes utility should prevail, i.e. preference is given to the principle, which would lead to the highest sum of utility regardless of how this utility is distributed.[34] If the outcome is similar then it is a matter of moral indifference which principle we choose. However, we may care not just about the aggregate utility but also about how this is distributed across the population. Consequently, if we need to weigh more than one value, how can we weigh these plural values against each other? Some proposed balancing as a solution to the problem.[35] It is not clear, however, what weight should be given to each principle. This is why this approach has been criticized as not providing a real solution to the problem of balancing competing principles.[36]

Another approach is to order these competing principles so that one knows when and how much weight to give to each of them. Rawls's "priority problem" addresses how to assess weights of competing principles of justice.[37] Either a single overall principle can be identified and takes precedence over any other principles (prioritization), or a lexical order, where a certain sequence must be followed when considering the various principles at play.[38] Prioritization may be suitable if it is possible to identify an "initial choice situation" of a certain priority to be followed based on a given hierarchy between competing principles. In case it is possible to identify some considerations as more important than others, balancing could take the form of lexical order of principles. Lexical order is defined as "an order requires us to satisfy the first principle in the ordering before we can move on to the second…[A] principle does not come into play until those previous to it are either fully met or do not apply."[39] One important qualification of the lexical order is that unless the earlier principles have but a limited application and establish definite requirements which can be fulfilled, later principles will never come into play.[40]

Accordingly, applying the above to the merger analysis, the interaction between competition and PICs may take the form of (a) prioritization, where for example competition analysis trumps public interest; (b) balancing, where both considerations have equal weight and can either cure or prohibit a merger; or (c) a lexical order where a balancing act occurs with the acknowledgment that certain considerations are more important than others. Prioritization is easier to administer with the order usually set under statute. However, there is not always an explicit hierarchy between those two independent sets of considerations set under the merger regime. In such cases, this leaves two policy options: balancing equal considerations or a lexical order of unequal considerations.

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33 This holistic approach also raises other issues of third party intervention, evidence and the type of remedies/conditions adopted and how they are applied (monitored). For more on this see Raslan, *Mixed Policy Objectives in Merger Control: What Can Developing Countries Learn from South Africa?*, 39 World Competition, Issue 4, Kluwer Law International (2016) (hereinafter Raslan 2016).

34 Mill & Sher, Utilitarianism (Hackett Publishing Company 2nd ed. 2001).

35 Ross & Stratton-Lake, The right and the good (Oxford University Press. 2002). Ross identifies seven *prima fascia* duties to balance one's actions giving special weigh to duties of non-malfeasance. Ayal argues that in case a balancing test is to be applied antitrust should follow the rules set under constitutional law in that regard. See Ayal, Fairness in antitrust : protecting the strong from the weak (Hart Publishing. 2014), p.158.

36 See for example Harsanyi, *Can the maximin principle serve as a basis for morality? A critique of John Rawls's theory*, 69 The American Political Science Review (1975) and Amartya, The idea of justice (Penguin Books. 2009).

37 Rawls, A Theory of Justice (Oxford University Press. 1999), pp. 36-46. Rawls criticized the utilitarian approach to the priority problem.

38 Id.

39 Rawls, A Theory of Justice. 1999, p. 244. See also Clark & Gintis, *Rawlsian justice and economic systems*, Philosophy & Public Affairs (1978), p. 310.

40 See Rawls, A Theory of Justice. 1999 p 45 and Barry, *John Rawls and the Priority of liberty*, Philosophy & Public Affairs (1973), pp. 274-290.

1. Balancing Considerations

Under the SA merger regime, there is no explicit hierarchy between the competition test and the public interest test, but rather a certain analytical progression that is being followed.[41] By the same token, the public interest test may not encroach on the competition analysis. Accordingly, the SA merger regime adopts the second approach in giving equal balance to both competition and PICs and attempts to find means to measure these principles and weigh them against each other. The simple version of this exercise is a merger where both competition and public interest analysis lead to the prohibition or clearance of the merger. But what happens in the case where the outcome of the analysis of one is positive and the other is negative? Can a merger which has failed the competition test but justified on public interest grounds be approved? Or can a merger that has passed the competition test but failed the public interest test be prohibited? The answer is in the affirmative in both cases.[42]

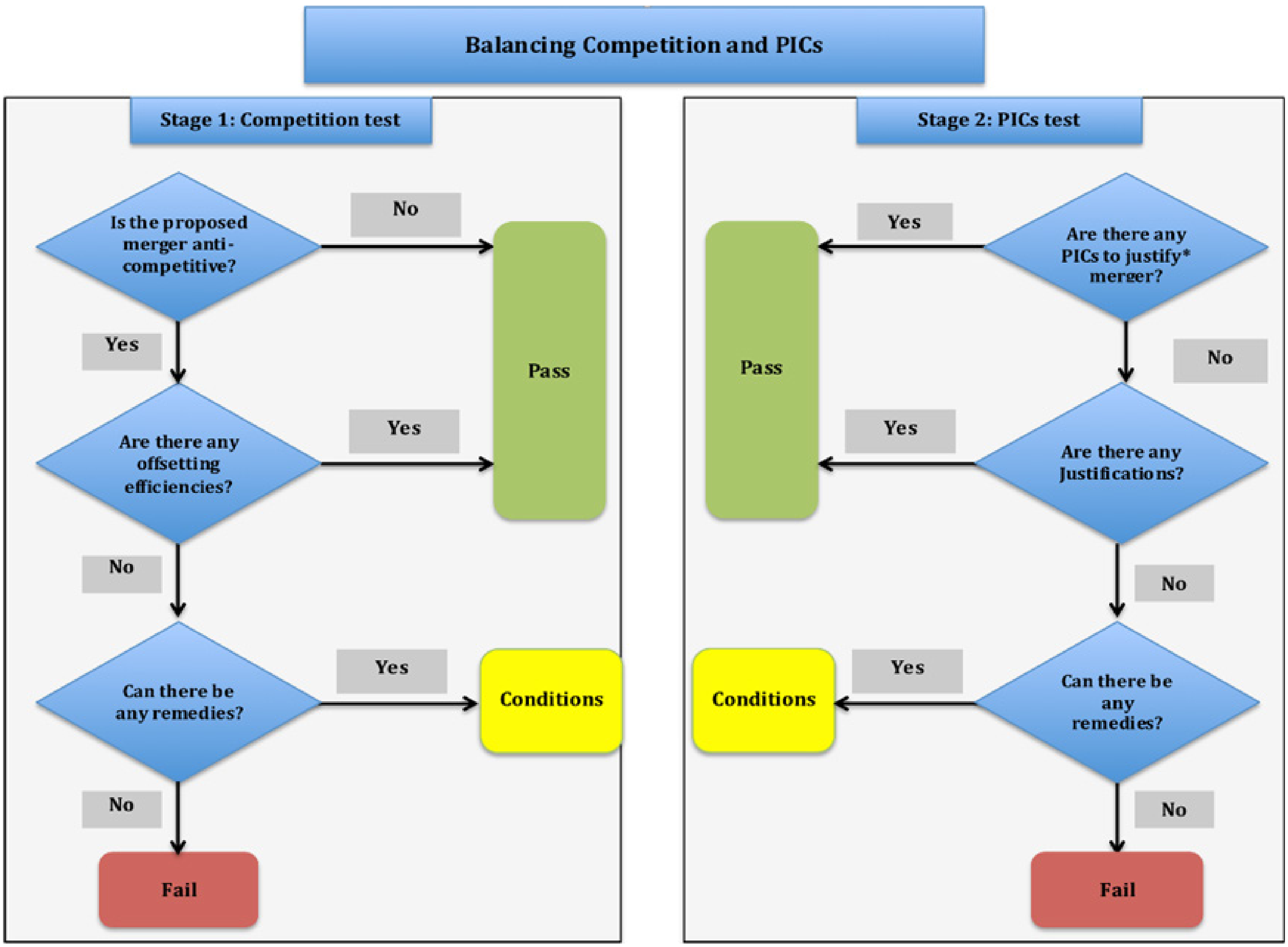

Figure 2 Balancing competition and PICs
Source: Raslan 2016

*Justifications means PIC, whether positive or negative, that justifies allowing or blocking a merger, as the case may be *(Harmony Gold Mining Company and Gold Fields merger).*[43]

41 See *Anglo American Holdings Ltd and Kumba Resources Ltd./Industrial Development Corporation* (intervening), 46/LM/Jun02, (2003). A number of merger regimes under review follow the SA framework for merger analysis. These are Botswana, Namibia, Kenya, Malawi, Zambia and Nigeria.

42 Id.

43 *Harmony Gold Mining Company Limited and Gold Fields Limited*, 93/LM/Nov04, (2005), p.13. It was argued that a merger must be prohibited if there is no

The practice of the SA competition authorities so far is that no merger has been approved for PICs in case it was also found to be anti-competitive. However, pro-competitive mergers may be approved despite their detrimental impact on public interest with conditions mitigating that said impact.[44] A relevant example to note here is the merger of Anglo American Holdings Ltd and Kumba Resources Ltd, with the Industrial Development Corporation ("IDC") intervening, the IDC, a state-owned national development finance institution mandated to promote economic growth, industrial development and economic empowerment where the boundaries of the BEE considerations were put to the test. It was argued that the BEE should be interpreted in accordance with section 2(f) of the Act to promote a greater spread of ownership. The Tribunal however found this interpretation over-reaching as it would have transformed the Act "from an antitrust statute, albeit with a public interest aspect, into an unchecked vehicle for redistribution."[45] This reflects an awareness of the boundaries of applying a holistic competition policy, which directly addresses distribution of wealth.

2. Lexical Order of Objectives

The majority of merger control regimes in the jurisdictions examined adopts a lexical order where competition assessment takes first place. Only if the outcome is negative, a balancing act is then performed in case there are PICs that may outweigh the harm to competition.[46]

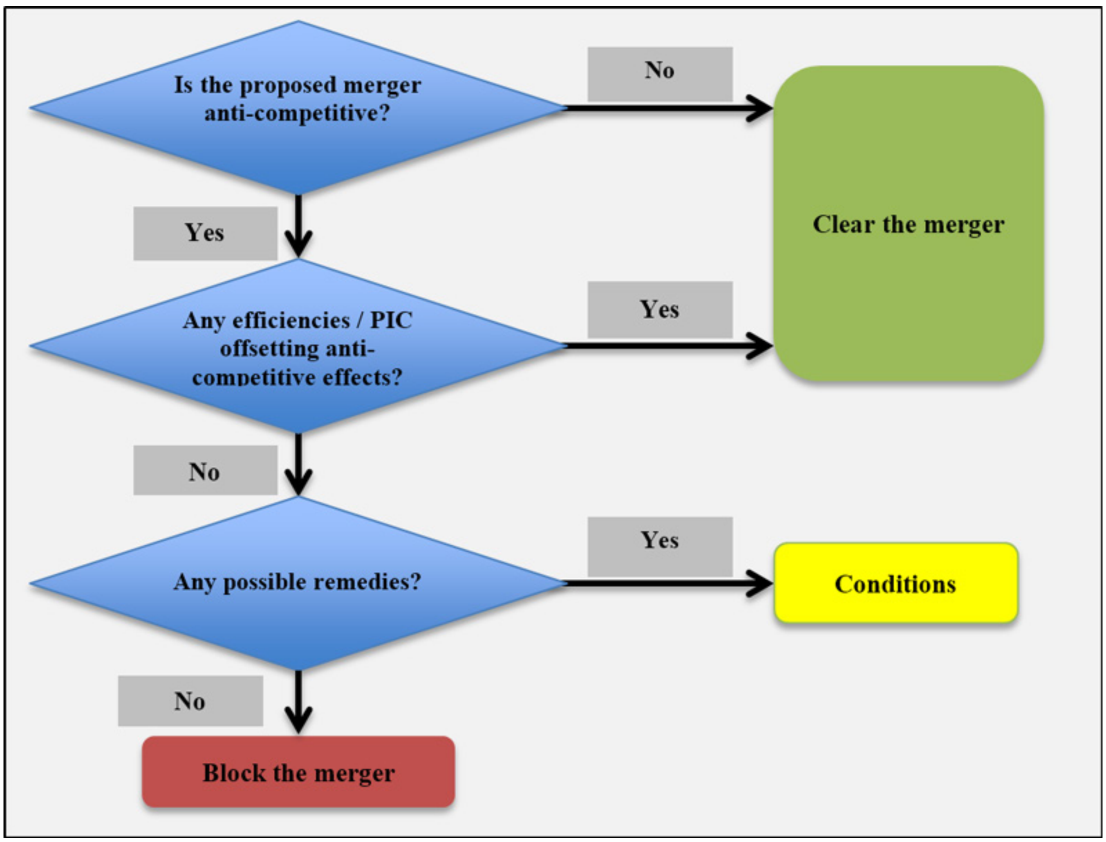

Figure 3 Lexical order of merger analysis
Source: Based on the review of national competition laws of jurisdictions subject of review.

evidence that it can be justified on public interest grounds. The Tribunal did not agree with this interpretation of the Competition Act.

44 See for example *Minister of Economic Development and Others v. Competition Tribunal and Others*, *South African Commercial, Catering and Allied Workers Union (SACCAWU) v. Wal-Mart Stores Inc.*, 110/CAC/Jun11, 111/CAC/Jul11, (2012).

45 *Anglo American Holdings Ltd and Kumba Resources Ltd./Industrial Development Corporation* (intervening), 46/LM/Jun02, (2003).

46 Competition Law no. 1/06 of 2010 (Burundi), Competition Law no. 98/013 of 1998 (Cameroon), Competition Law no. 4 of 2007 (Gambia), Law no. 14 of 1998 (Gabon), Competition Law no. 20 of 2005 (Madagascar), Competition Act of 2007 (Mauritius), Law no. 10 of 2013 (Mozambique), Law no. 36 of 2012 (Rwanda), Fair Competition Act no. 8 of 2003 (Tanzania), Fair Competition Act of 2009 (Seychelles), Competition Act no. 8 of 2007 (Swaziland) and Competition Act of 1996 (Zimbabwe).

V. CONCLUSION

The diffusion process of competition law & policy across the world entails not only the formal adoption of the said law, but also to look at whether, and to what extent, its norms, rules and institutions were transformed based on a given context. Since in most cases in developing countries competition law & policy is an acquired tool, the new adopters should carefully consider the objectives of adopting such policy and be very clear about what the law can and cannot do. We find here that they have opted for a more holistic competition law that addresses broader considerations including in some instances inequality, which raises many enforcement challenges. If a country opts to include such objectives under its competition law there is a need to set clear parameters for the legal and analytical frameworks through a transparent decision making process to limit the possibility of abuse. This is also of direct relevance to the current debate on the relation between competition and inequality in developed countries. It could possibly be that more research and empirical studies should be directed to these countries to understand how they attempt to reconcile these different (and sometimes contradicting) goals, and to demonstrate what has worked (or not) and how. This may also help developing countries in determining when and how competition law becomes relevant to their developmental path, rather than having unrealistic expectations of what competition law can deliver.

ANTITRUST AND INEQUALITY – TIME FOR A PARADIGM CHANGE

BY DAMJAN KUKOVEC [1]

I. INTRODUCTION

The divergence in wealth distribution is occurring on a national and global scale. There is growing inequality in the world and, particularly in the United States, there is a resentment about the concentration of income and economic power in the hands of the one-percent.[2] While the median U.S. income and wealth both declined in real terms between 2010 and 2013,[3] the real income of the top one percent grew by 31.4 percent.[4] With similar developments elsewhere, it should not come as a surprise that inequality is high on the agenda of economists, lawyers, politicians and the population at large across the world.

As the purpose of antitrust law is also to counter the concentration of power and wealth in society,[5] several authors have called on antitrust policy to play its role in the combat of inequality in the world. Joseph Stiglitz has called for "stronger and more effectively enforced competition laws" to help address inequality.[6] Luigi Zingales has argued that "the most powerful argument for antitrust law" is that "it reduces the political power of firms."[7] Paul Krugman[8] and Anthony Atkinson[9] have also claimed that monopoly and anticompetitive market conditions are among the root causes of wealth inequality. Sandeep Vanessan has argued that consumer-oriented antitrust

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1 S.J.D. (Harvard), Senior Lecturer, Middlesex School of Law, London.

2 See J.M.F. & A.C.M., *The Purse of The One Percent,* Economist: Daily Chart (Oct. 14, 2014 3:55 PM), http://www.economist.com/blogs/graphicdetail/2014/10/daily-chart-8.

3 Baker & Salop, *Antitrust, Competition Policy and Inequality,* 104 Geo. L.J. 1, 1 (2015).

4 Id.

5 See Whish & Bailey, Competition Law 21 (2008).

6 Stiglitz, The Price of Inequality: How Today's Divided Society Endangers Our Future 338 (2012).

7 Zingales, A Capitalism for the People: Recapturing the Lost Genius of American Prosperity 38 (2012).

8 See Krugman, *Robber Baron Recessions*, N.Y. Times (Apr. 18, 2016), http://www.nytimes.com/2016/04/18/opinion/robber-baron-recessions.html.

9 Atkinson, Inequality: What can be done? 126-27 (2015).

enforcement can promote more progressive wealth distribution[10] and that the lack of competition in many sectors of the U.S. economy is a powerful driver of economic disparity.[11]

The debate about antitrust and inequality however reveals that increased antitrust enforcement and equality are not necessarily connected. It further reveals that there is a lack of empirical evidence on antitrust enforcement's impact on society, including on its ability to increase the pie for the world as a whole. Antitrust law is thus ripe for a paradigm shift if it is to play a serious role in combating abuse of power and the reproduction of concentration of wealth in the twenty-first century.

II. ANTITRUST AS A TOOL FOR COMBATING INEQUALITY

In his recent book Inequality: What Can Be Done?, British economist Atkinson argues, that the United States has erred in shifting away from the Sherman Act's original focus on wealth inequality towards a pure consumer welfare orientation for antitrust law.[12] Krugman argues that "increasing business concentration could be an important factor in stagnating demand for labor, as corporations use their growing monopoly power to raise prices without passing the gains on to their employees."[13]

Baker & Salop argue that while it is not possible to identify with precision the relative magnitudes of various factors contributing to growing inequality, market power likely has an effect. Relying on Piketty's analysis, they argue that because the exercise of market power tends to raise the return to capital, it can contribute to the development and perpetuation of inequality. As market power grows more common and visible, argue Baker & Salop, an increasing public concern with inequality might be expected to call for a competition policy response.[14]

A more forceful approach to antitrust implementation, may perform a corrective function, assuming market power affects inequality. Furthermore, antitrust regulatory agencies may prioritize lowering the consequences of inequality when advancing their programs.[15] In their vision, improving the distribution of income and wealth by reducing the impact of market power would happen especially if the agencies fully embrace the consumer welfare standard because this standard does not permit conduct that would harm consumers while benefiting shareholders. In contrast, they argue, the aggregate welfare standard, that takes into account the benefits to producers, can contribute to inequality by permitting market behavior that leads to the creation and exercise of market power. When cost savings or other efficiencies associated with the conduct are not shared with consumers, the benefits accrue primarily to shareholders and top executives, who typically are wealthier than the consumers of the products.[16]

Growing concern about inequality, according to Baker & Salop, that leads to the recognition of additional harms from market power, in turn would justify reconsideration of that direction in favor of adopting more interventionist antitrust rules that would recognize greater harm from market power than had previously been identified.[17]

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10 Vanesaan, *The Evolving Populisms of Antitrust*, 93 Neb. L. Rev. 370, 413 (2014).

11 Khan & Vaheesan, *How America Became Uncompetitive and Unequal*, Wash. Post (June 13, 2014), https://www.washingtonpost.com/opinions/how-america-became-uncompetitive-and-unequal/2014/06/13/a690ad94-ec00-11e3-b98c-72cef4a00499_story.html?utm_term=.05359a47eb46.

12 Atkinson, supra note 9, at 126-27.

13 Krugman, *Robots and Robber Barons*, N.Y. Times (Dec. 9, 2012), http://www.nytimes.com/2012/12/10/opinion/krugman-robots-and-robber-barons.html?_r=0.

14 Baker & Salop, supra note 3 at 13.

15 Id. at 14.

16 Id. at 16-18. They do argue that application of a consumer welfare standard in principle could increase inequality in matters where consumers tend to be wealthy and the sellers are small firms owned by middle class entrepreneurs, such as hypothetical cartels among worker-owned manufacturers of luxury goods, such as fine crystal products or yachts. However, they expect those situations are rare. Id. at 17.

17 Id. at 21.

In this analysis, resistance to inequality translates into almost indiscriminate resistance to "market power," without an account as to how and why precisely accumulation of capital, wealth and power occurs and who gains from it. Furthermore, reliance on protectionist considerations and equality in general does not assure change for the benefit of those who find themselves in structurally unprivileged positions in society.[18] Finding a systemic legal regime that will favor the weaker party, such as the class of consumers, is fraught with analytical difficulties. Postulating an abstraction of a "weaker party" as the underlying reality of the world and aiming to help this presumably preexisting category can lead to reproduction of several hierarchical structures.[19] The danger of challenging market power in the abstract, as in Baker & Salop's proposal, without adequately addressing the complexity of the hierarchical structure of society and without developing a clearer analytical picture of concentration and reproduction of power in society leads to a discussion at a purely conceptual level without ever raising the necessary appreciation of the economic, social and ethical issues, which the work of lawyers should engage in the pursuit of advocacy for the most vulnerable. Consequently, such reasoning may well contribute to the reproduction of the existing distribution of material and spiritual values in the world.[20]

The analytical weakness of Baker & Salop's proposal is confirmed by Daniel Crane's distributional analysis. He argues that it is far from certain that antitrust violations (including cartels, anticompetitive mergers and abuses of dominance) systematically redirect wealth from the poor to the rich.[21] In order to sustain a showing that they do, one would have to have information about a large number of factors, including the relative wealth of producers and consumers, overcharge pass-on rates, the effects of market power on employees of the firm, the distribution of rents as between managers and shareholders and the distribution of rents among classes of managers.

The assumption underlying the progressive claim of antitrust enforcement is that senior managers and wealthy shareholders of large companies capture the majority of the rents attributable to anticompetitive conduct, and hence outpacing the typical consumer in the accumulation of wealth. In this picture, relatively poorer consumers bear the brunt of monopoly overcharges.[22] But it is far from certain that CEOs and rich shareholders are "in fact capturing the lions' share of monopoly profits."[23] Monopoly rents are not captured uniformly by the owners of capital (i.e. shareholders), but are distributed in various complex ways throughout the firm, including its workers.[24] According to Crane, drawing any firm conclusions regarding the net effect on wealth distribution of market power exercises and antitrust enforcement is a task that could not likely be done with anything approaching statistical rigor.[25]

A conclusion that an increase in market power of a particular company by monopolization or by another anticompetitive act does not have positive consequences beyond management and shareholders thus cannot simply be drawn. Nor can a simple conclusion be drawn that combating abstract market power with existing tools of antitrust law will lead to reductions of inequality.

18 See Damjan Kukovec, Taking Change Seriously; The Discourse of Justice and the Reproduction of the Status Quo in EUROPE'S JUSTICE DEFICIT? (Kochenov, de Bùrca and Williams eds.) at 324-30.

19 Id. at 329-30.

20 Id. at 329-30. Justice is often understood within a particular framework of interpretation, which contributes to reaffirmation of existing perceptions of social injury rather than challenging them.

21 Crane, *Antitrust and Wealth Inequality*, 101 Cornell L. Rev. 1171, 1174 (2016). Despite some the merits of Crane's distributional analysis, it should not be accepted at face value. For example, Crane's analysis and conclusion as to the progressive effects of monopoly overcharges in government procurement contracts regime is inaccurate. He assumes that wealthier consumers pay more for monopoly overcharges because they pay higher taxes due to progressive taxation. Thus, he concludes, anticompetitive behavior has progressive effects. He does not, however, take into consideration the fact that poorer consumers and citizens may often be the larger recipients of budget transfers and thus carry the cost of monopoly overcharges by the fact that less services, goods, or funds are available to them due to the higher prices of goods and services paid by public authorities because of monopoly overcharges.

22 Id. at 1184.

23 Id. at 1187.

24 Id. at 1192 (citing Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. Pa L. Rev. 2063, 2068 (2001)).

25 Id. at 1208.

III. ANTITRUST AS A FIELD OF COMPETITION BUT NOT DISTRIBUTION

Does this pose a problem for antitrust law? While Crane concludes that there are so many unknowables in antitrust enforcement that antitrust law is not suitable for addressing wealth inequality,[26] he claims that the antitrust system is reasonably competent at generating consumer welfare and economic efficiency, at creating a larger pie.[27] According to Crane, antitrust causes essentially two economic effects. First, it eliminates deadweight losses that arise from monopoly pricing and hence grows the social welfare pie.[28] Second, antitrust enforcement prevents redistribution of wealth from consumers to producers. Thus, Crane concludes that antitrust law works best as a set of objective principles regarding "measurable economic effects" in commercial markets.[29]

It remains unclear, however, what these measurable economic effects are, especially if the effects of antitrust policy are so difficult to predict, as Crane's analysis suggests.[30] If "the net effect on wealth distribution from general increases or decreases in overall antitrust enforcement is virtually impossible to tell,"[31] how can a conclusion be drawn that existing antitrust law based on existing assumptions maximizes consumer welfare and generates a larger pie than its alternative construction?

If the detailed investigation of the actual results could not likely be done with anything approaching statistical rigor, then "measurable economic effects," consumer welfare or total welfare, are just as uncertain as the distribution of wealth. In other words, calculation of the sum of individual welfare runs into the same difficulty and uncertainty as calculation of wealth distribution as Crane portrays. The effects of antitrust enforcement seem coherent and visible when its goal is framed in terms of aiming at "consumer welfare" or at elimination of the deadweight loss. Fulfilling the requirements of formulas and ideological abstractions such as consumer welfare, however, has little to do with the reality of distribution, with actual results and with effects of antitrust enforcement on the daily life of citizens.

The debate on antitrust and inequality thus reveals that consequences of antitrust enforcement remain profoundly unclear. The problem of existing thinking about antitrust enforcement goes far beyond the problem of its inability to address inequality. Just as methodological naivety can lead us to a conclusion that increased antitrust enforcement can actually lead to greater equality, methodological naivety can bring us to substituting tautological conclusions about achieving consumer welfare with actual effects of antitrust enforcement. Both a claim that antitrust law, as currently conceived, produces competition and maximizes welfare, and the claim that it produces social equality rest on uncertain and incoherent assumptions.

IV. PREFERENCE FOR TAX AND TRANSFER?

Is there any role for antitrust law to play in addressing inequality? Some would argue that the antitrust system is far inferior to other branches of law and governmental authority in addressing wealth equality and that therefore distribution should only be addressed through tax and transfer.[32] An assumption that distribution should be left to tax and transfer, bring us to the same conclusion as Piketty's analysis of fighting inequality – to a conclusion of combating inequality through taxation without an analysis of how this redistribution should occur.

26 Crane, supra note 21.

27 Id. at 1177 n.13.

28 Crane, supra note 21.

29 Id. at 1228.

30 Id.

31 Id. at 1174.

32 Crane, supra note 21.

Social processes, including competition and the process of concentration of capital and wealth cannot be adequately depicted or addressed by economic theories or formulas.[33] For example, Piketty's conclusion that a rate of return on capital (r) is greater than economic growth (g), (r > g), is an *ex-post facto* rationalization of the phenomenon of accumulation of capital. While the private rate of return on capital can be significantly higher for long periods of time than the rate of growth of income and output,[34] this finding does not articulate the reasons for this. It does not give us an analytical perspective of what accumulation of capital we would want to resist and what accumulation of capital we would want to honor. Thinking in terms of distribution through taxation misses the essential point and added value of legal analysis – identification of specific injuries that could explain the phenomenon of accumulation of capital or of the concentration of wealth. This identification is fundamental to targeting inequality.

V. ANTITRUST LAW BETWEEN ECONOMICS AND FAIRNESS

The debate on the right balance between economic models and fairness-based models of antitrust also fails to properly address inequality as well as fails to expand the range of understanding of injury and thus the range of social options that antitrust law could help to articulate. Modern antitrust analysis reflects the dominance of the economic model of analyzing antitrust policy. Both in the United States and in the European Union, legal models have embraced an economic methodology based on maximizing consumer or total welfare.[35] Today's economic methodology of global antitrust is met with arguments of equity or fairness.

Often, scholars concerned with fairness and equality complain about the negative effects of economic models or an over-emphasis on economic theory. Today, many ills of society are often ascribed to economic thinking or neoliberalism.[36] For example, in the idea that there is a ubiquitous neoliberal rationality that remakes everything and everyone in the image of *homo oeconomicus* and that transposes the constituent elements of democracy into an economic register.[37]

Reality, however, cannot be described solely by economic theory. It is the ideology of every moment in time that defines reality, not a theory. Thus, resistance to economic theory or economic thinking as such cannot be understood as a recipe for challenging the reproduction of power and wealth. Instead, the existing hierarchical structure of society and ideology and the social understanding of injury that underpins it need to be challenged.[38]

To those who believe that more justice and less economics will solve the issues of inequality or produce a better antitrust regime, antitrust based on fairness will do the trick. The talk of justice, or greater emphasis on fairness over the economic approach, however, tells us little about distribution and the effect that antitrust analysis has on the daily lives of citizens. In other words, the talk of fairness can contribute to the reproduction of the status quo just as much as economic thinking.[39]

Rather than economic theory, what needs to be challenged is the existing social understanding of injury, in economic thinking as well as in thinking about equity or fairness. In arguing for a reversal of social understanding of injury, economic analysis can be used as an important tool for social transformation.[40]

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33 See Damjan Kukovec, *Hierarchies as Law*, 21.1 Colum. J. Eur. L. 131, 165 (2014).

34 Piketty, Capital In The Twenty-First Century 571 (2014).

35 See Baker, supra note 3, at 2178.

36 See, e.g. Sarfaty, Values in translation: human rights and the culture of the world bank 15 (2012).

37 See generally Brown, Undoing The Demos: Neoliberalism's Stealth Revolution (2015). For a critique, see Kukovec, *Hierarchies as Law*, supra note 33, at 137; Damjan Kukovec, Law and the Periphery, European Law Journal at 412; Kukovec, *Taking Change Seriously*, supra note 18, at 325.

38 See id.

39 Kukovec, supra note 18.

40 Damjan Kukovec, Economic Law, Inequality and Hidden Hierarchies on the EU Internal Market, 38.1. Michigan Journal of International Law, 1 (2016).

VI. PARADIGM CHANGE

The tools of global antitrust law can play a role in a pursuit of equality. Rather than interplay of economic and equitable considerations, the starting point of legal and economic analysis should be the hierarchical structure of society. Law and governance should be understood as a constant hierarchical struggle.[41] In this struggle, the hierarchically privileged repeatedly injure those in a structurally subordinate position and these harms perpetuate their hierarchical position.[42]

An analytical approach that challenges the existing concentration of wealth in the world must address the privileges to harm that are allocated differently to different people in the global hierarchical structure. The complex hierarchical structure of production of goods, services, knowledge, authority and prestige in a global society that gives analytic clarity about its construction[43] should thus be the starting point of legal and economic analysis. There are countless hierarchical structures at play in our societies that contribute to the reproduction of wealth, power, knowledge and prestige in the world. Harms, however, are not entirely random, repetitive hierarchical structures can be identified and contested.

Furthermore, lawyers should articulate targeted resistance to particular hierarchical structures rather than pursue abstract goals of equality or competition and articulate new tools for addressing the reproduction of wealth and power in society. Third, a construction of new tools and doctrines requires the amendment of some of the assumptions of antitrust law, for example, the benevolent effect of low prices, the current understanding of power in the analysis and the existing understanding of injury.[44]

To give just one example of how the current analysis can misrepresent power and fails to identify injury: competition law rests on the assumption that power is concentrated in the hands of the few and that the source of power and its abuse can be easily identified. Multinational corporations are often perceived as one of the main evils in the global society. They cater to our primal desire for sugar and meat, for being connected, mobile and seen, but they also, so it is perceived, do environmental damage, abuse their position on the market *vis-à-vis* smaller companies, consumers, the environment, indigenous peoples etc. Once their power to raise prices, hinder innovation, reduce output and choice is curbed, consumer welfare and equality seem to be assured. While competition law focuses on individual or collusive actions of select agents, it fails to acknowledge dispersed structural power. For example, the power that is concentrated in certain regions of the world – in the City of London, in Munich, in the center of the European Union is out of the radar screen of the analysis.[45]

To sum up, three conclusions follow from the discussion. First, the global society needs a thorough rethinking of its perception of justice and of its daily operation. Second, the consequences of existing antitrust enforcement, as well as its ability to generate a larger pie than its alternative are unclear. Third, existing antitrust analysis often misrepresents power, inadequately addresses injury and some of its disciplinary assumptions need rethinking. Together, these conclusions point at the need for an overhaul of antitrust law.

41 See Kukovec, supra note 33 at 168.

42 See id.

43 See Kukovec, supra note 33 at 192 ; Kukovec, Hierarchies as Law (Winter 2014/2015) (unpublished SJD dissertation) (on file with the Harvard Law School library).

44 See id.

45 See Kukovec, supra note 37.

VII. CONCLUSION

Notwithstanding the shortcomings of the current antitrust analysis, there seems to be a strong aversion against paradigm change or even adjustment among competition lawyers, unlike among lawyers in any other legal discipline. There is a sense among competition lawyers that a change of paradigm will result in competition law not being competition law anymore, but will become something else. While international lawyers, family lawyers, constitutional lawyers, trade lawyers and others acknowledge that their discipline comes at the intersection of other disciplines which constantly influence and reinvent their own, competition lawyers often feel that a paradigm change will reduce the discipline of competition law to industrial policy, politics, trade policy or to something else.

Despite this pushback, the time for a paradigm change in antitrust law is now. The fear of challenging and amending the existing assumptions hinders disciplinary and social imagination and prevents us from thinking and developing legal tools that could better address the (reproduction of) inadequate distribution of power and wealth in the world and that could thus better address the "market process."

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