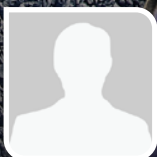


THE COMPETITION BUREAU'S JOURNEY TOWARDS INCLUSIVE COMPETITION



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The Competition Bureau's Journey Towards Inclusive Competition

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The Competition Bureau Canada is moving towards more inclusive competition law enforcement and promotion. We have been working with the Organisation for Economic Co-operation and Development and applying the Government of Canada's Gender-based Analysis Plus ("GBA+") tool to understand the link between competition, gender and other intersecting identity factors. These insights will inform our enforcement, advocacy and compliance work going forward. By striving to be inclusive, we can make more informed decisions and better protect and promote competition for consumers and businesses.

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I. INTRODUCTION

Competition law and policy address anti-competitive business activity and promote competition to ensure that consumers and businesses prosper in a competitive marketplace. Competition policy and analysis are often described as “neutral” and objective, considering the actions and behaviors of consumers and businesses. At times, leaders in the field have avoided drawing connections to “social issues,” and pointed to other legislative levers as more appropriate avenues to address broader issues. The view that competition enforcement is “neutral” ignores that consumers and businesses are not homogenous, and that measures to address anti-competitive conduct may have different effects on different groups. It ignores that concentrated economic power can be a reflection of social dynamics and existing structural economic inequalities. By addressing economic concentration and its effects, competition law and policy can play a role in addressing inequalities and promoting equitable opportunities to participate in the economy. By understanding the impact of intersecting identity factors, we can aim to make better decisions that not only improve competition, but also to better serve all communities in Canada.

The communities we serve are made up of intersecting identity factors such as gender, sexual orientation, race and disability. Identity factors can affect and influence consumers’ and businesses’ experiences, including how they experience government policies, enforcement, and services. In the case of competition authorities, competition law enforcement, policies, and advocacy may affect communities differently.

The COVID-19 pandemic’s disproportionate economic effect on women (the “she-cession”) provides further evidence that gender affects how individuals experience economic conditions differently. This highlights the need to understand the link between gender and competition and the implications of our work on diverse groups of people. Inclusive competition law and policy is an important part of an inclusive economic recovery.

II. WHY THE BUREAU EMBARKED ON THIS JOURNEY

In 2018, the Competition Bureau (“Bureau”) was asked to evaluate how competition policy chapters in trade agreements impact women and other groups of people.

To answer this question, the Bureau used the “Gender-Based Analysis Plus” (“GBA+”) tool to review the competition policy chapter of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. GBA+ is a tool used throughout the Government of Canada to assess how diverse groups of people may experience policies, programs and initiatives.

This work prompted a broader review of the relationship between gender and competition. Finding little information available on this topic, the Bureau turned to the Organisation for Economic Co-operation and Development (“OECD”) for assistance.

Three motivators led the Bureau to champion research on gender and competition. First, there was the need to understand the policy and program implications. As government officials, Bureau staff are tasked with enforcing competition law and advocating for competition for the benefit of all Canadians. In order to do that effectively, we need to understand gaps in our analysis, including how various groups of people may experience services differently. When it comes to gender considerations, we did not have enough knowledge or data to fully understand how the Bureau’s work affects different genders let alone people with intersecting identity factors, if at all.

The second motivator was that understanding the relationship between competition and identity factors aligns with the Government of Canada priority of incorporating the consideration of gender and other identity factors into all areas of work. This also aligns with international priorities under the United Nations Sustainable Development Goals², specifically Goal 5: gender equality and Goal 10: reduced inequalities.

Finally, this was an opportunity to lead. With so little research and information about the relationship between gender and competition, this was an area ripe for exploration and leadership. There is so much for competition authorities, businesses, practitioners, and academics to learn and apply to their work when it comes to the effects of competition law and policy on diverse individuals and communities.

There have been many positive developments over the last three years. Research is ongoing through the Gender Inclusive Competition Policy project at the OECD. Bureau employees, OECD staff, and others have established a network of interested individuals. There are now frequent informal and formal discussions about this topic.

² *The 17 Goals*, UNITED NATIONS, <https://sdgs.un.org/goals> (last visited February 18, 2021).

Since 2018, the Government of Canada has issued statements that reflect a changed understanding and acknowledgement of systemic discrimination. The Clerk of the Privy Council's Call to action on anti-racism, diversity, and inclusion in the Federal Public Service³ underscores the urgency of removing systemic racism from our institutions and from our culture. Additionally, Canada's Commissioner of Competition, Matthew Boswell, noted that beyond the social value of greater gender equality, there is also economic value in promoting greater participation of women in the workforce.⁴

III. WHAT IS GBA+?

GBA+ is an analytical process that aims to help public servants ask questions, challenge assumptions, and identify the potential impacts of various diversity factors in their work.⁵ It is a tool to help assess systemic inequalities so that actions can be taken to address them.

GBA+ goes beyond gender to include a variety of identity factors. These include race, sexual orientation, disability, age, income, education and more. Every public servant is responsible for applying a "GBA+ lens" to their work by analyzing how various identity factors might influence the way people experience government policies and initiatives.⁶ Understanding those differences is the first step towards taking action to address them.

GBA+ is not new to the Canadian Federal Public Service. The analytical process is the result of a progression over the past half-century. It has become increasingly accepted as a tool for better policy and program development,⁷ and it continues to evolve.

According to Women and Gender Equality Canada, "All programs and policies affect people. While gender and diversity issues may be more obvious in some areas, such as education and health, and less obvious in others... this does not mean that gender is not relevant. GBA+ can and has been used in all federal sectors and domains."⁸

IV. HOW CAN GENDER IMPACT THE WORK OF COMPETITION AUTHORITIES?

A background note ("OECD Note") written by Estefania Santacreu-Vasut & Chris Pike to support the November 2018 OECD Global Forum event on gender and competition suggested that, by looking at gender, competition authorities can identify additional relevant features of the market and better understand the behavior of consumers and businesses.⁹ The authors describe a bi-directional relationship between competition and gender. Competition can influence gender equality and gender can also influence competition. By improving competition in markets that affect participation in formal labor, competition authorities can prioritize cases that are likely to improve gender equality. This can unlock what the authors refer to as a "double dividend" of increasing competition and reducing inequalities at the same time.

The OECD Note outlined three main areas where a greater understanding of the relationship between competition and gender will change the work of competition authorities: enforcement, advocacy, and compliance. While the current OECD research is focused on the relationship between gender and competition, the Bureau will be keen to explore how the lessons learned could apply to a broader suite of identity factors.

3 Ian Shugart, *Call to action on anti-racism, equity, and inclusion in the Federal Public Service*, GOVERNMENT OF CANADA, <https://www.canada.ca/en/privy-council/corporate/clerk/call-to-action-anti-racism-equity-inclusion-federal-public-service.html> (last modified January 22, 2021).

4 Commissioner Matthew Boswell, *Remarks on gender and competition policy*, YouTube (January 18, 2019), <https://youtu.be/W9RrCUmbLsg?list=PLYBGvyEYBNirtobwPd8Y7D-KGz0EaKeN2T>.

5 Anyone can access the GBA+ tool and free online training to learn how to apply the analytical process. *Take the GBA+ course*, STATUS OF WOMEN CANADA, <https://cfc-swc.gc.ca/gba-acs/course-cours-en.html> (last modified September 26, 2018).

6 *What is GBA+?*, STATUS OF WOMEN CANADA, <https://cfc-swc.gc.ca/gba-acs/index-en.html> (last modified October 28, 2020).

7 *The history of GBA+*, STATUS OF WOMEN CANADA, https://cfc-swc.gc.ca/gba-acs/course-cours/eng/modA1/modA1_01_01.html (last modified September 26, 2018).

8 *Mythbusters - 3. Myth: GBA+ only applies to the "social" sectors*, STATUS OF WOMEN CANADA, <https://cfc-swc.gc.ca/gba-acs/index-en.html#myth> (last modified October 28, 2020).

9 Estefania Santacreu-Vasut & Chris Pike, *Competition Policy and Gender*, OECD GLOBAL FORUM ON COMPETITION (November 29, 2018), [https://one.oecd.org/document/DAF/COMP/GF\(2018\)4/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2018)4/en/pdf).

A. Enforcement

Gender and identity factors can have implications for several aspects of enforcement. For example, authorities can consider gender and other identity factors during case prioritization, product market definition, and when developing remedies.

Competition authorities have limited resources. They prioritize based on a variety of factors including severity of the conduct, history of compliance, and ability to collect sufficient evidence. Recognizing who is impacted by anti-competitive activity can also play a role in prioritization. Competition authorities can consider who stands to be disadvantaged by anticompetitive business conduct or misleading or deceptive marketing, and whether there is potential to achieve the double dividend by reducing inequalities at the same time.

Identity factors can also affect the definition of markets since they can influence switching behavior for substitutable or interchangeable products. Gendered products, such as deodorant or razors, may be very similar in terms of physical characteristics; however, they may not be seen as substitutable to consumers.

When developing remedies, competition authorities can consider whether different groups of consumers would be affected differently and whether different remedies should be considered.

B. Advocacy and Market Studies

Advocacy and market studies are other important areas where gender and other identity factors can have implications. By targeting markets that have the potential to not only improve competition, but also reduce barriers for participation in the formal workforce, competition authorities can achieve the double dividend. Key sectors identified by the OECD Note related to women's participation in the formal workforce include childcare, elder care, infrastructure, and financial markets.¹⁰ For example, if increased competition in childcare services makes these services more accessible and affordable, more parents (particularly women as they are more likely to provide childcare) will be able to enter the formal workforce. This results in significant economic benefits while increasing gender equality. We hope this analysis can be applied to a broader range of identity factors.

C. Compliance

It is worth considering how identity factors influence compliance and whistleblowing programs. The OECD Note references prior research finding that gender can potentially influence compliance with the law, and that effective incentives for whistleblowing can vary between genders.¹¹ A better understanding of the interaction between compliance and identity factors could lead to better programs and policies to encourage compliance with the law, and better detection measures.

D. Outreach and Consultations

Although not addressed in the OECD Note, many areas of competition law and policy involve outreach and consultations with communities and business groups. It is important to approach these engagements with cultural sensitivity and in accessible ways to ensure that we are taking into account a variety of perspectives. Doing so and ensuring we gather disaggregated data allows us to gain more nuanced insights.

¹⁰ *Id.* at para.107.

¹¹ *Id.* at section 3.2.

V. FROM THEORY TO PRACTICE – EXAMPLES OF HOW COMPETITION AUTHORITIES ARE BEING MORE INCLUSIVE

Inclusive competition may be more easily understood through examples. The following are examples from different jurisdictions that illustrate how identity considerations can have an impact on the process and the analysis undertaken by competition authorities.

A. *The Bureau's Broadband Market Study*

A Canadian example is the Broadband Market Study.¹² This study aimed to understand whether Canadians are fully benefiting from competition in the provision of broadband internet services. As part of its research, the team used a survey to understand consumer preferences and behavior. The survey incorporated demographic questions to allow the team to analyze answers from different groups of consumers.

Taking gender as an example, the team found that women respondents were more likely to report that they share decisions regarding home internet with another member of their household, whereas men were more likely to respond that they were the sole decision maker. The team also identified four main groups of consumers who tended to respond and behave similarly: “loyal customers,” “speed-seekers,” “deal-seeker,” or “balanced consumers.” Balanced consumers were more likely to be women.

These findings stress that a competition analysis needs to understand the factors that different consumer groups value. This way, competition analysis can focus on the relevant suppliers that are likely to offer the best choices for each group. Adding a few questions up front was a simple and cost-effective way for the team to have a more nuanced understanding of how different groups of consumers purchase and switch between internet service providers.

B. *The United States Federal Trade Commission's Otto Bock Case*

Another interesting example is the U.S. Federal Trade Commission's (“U.S. FTC”) *Otto Bock* case which required the divestiture of Freedom Innovation assets.¹³ Prior to the merger, both companies were top sellers of microprocessor prosthetic knees (“MPKs”). The U.S. FTC consulted a variety of prosthetic knee users and experts. As a result of these consultations the U.S. FTC concluded that MPKs were in a different product market than other prosthetic knees because they allow for greater mobility, comfort, and reduce injuries in prosthetic knee users. The innovations from these companies prior to the merger had real benefits for prosthetic knee users. This outcome not only restored competition in the market for MPKs, but also preserved accessibility options for persons requiring MPKs. This is a good example of the double dividend mentioned in the OECD research: maintaining competition and innovation, while ensuring persons with disabilities benefit from innovation and competition.

C. *The Japan Fair Trade Commission's Market Study on Childcare*

The third example is the Japan Fair Trade Commission's (“JFTC”) market study on childcare services.¹⁴ As part of the Japanese government's broader goal to improve access to childcare, the JFTC surveyed users to better understand the reasons behind the lack of supply of childcare services. It identified a number of barriers to entry, and recommended changes to regulations to improve competition, finding that greater competition could increase the supply of childcare services and their quality.

Childcare is an important factor in enabling workforce participation for parents. Where childcare options are minimal or prohibitively priced, women tend to be disproportionately impacted and exit the workforce. The COVID-19 pandemic and the resulting “she-cession”¹⁵ has highlighted this phenomenon. A disproportionate number of women have exited the workforce to provide unpaid labor in the home as a result of the closure of external childcare options. Targeting markets that can impact workforce participation can also achieve the double dividend of increasing competition while reducing inequalities.

¹² *Delivering Choice: A Study of Competition in Canada's Broadband Industry*, COMPETITION BUREAU (August 7, 2019), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04470.html>.

¹³ *Otto Bock HealthCare North America, Inc., In the Matter of*, U.S. FEDERAL TRADE COMMISSION, <https://www.ftc.gov/enforcement/cases-proceedings/171-0231/otto-bock-health-care/freedom-innovations> (last updated November 6, 2019).

¹⁴ *Study Report on Childcare Sector*, JAPAN FAIR TRADE COMMISSION (JUNE 2014), https://www.jftc.go.jp/en/pressreleases/yearly-2014/June/140625_files/Report.pdf.

¹⁵ Chris Pike, *Shaping the 'she-covey': Using gender inclusive competition policy to build back better*, OECD ON THE LEVEL (August 18, 2020), <https://oecdonthellevel.com/2020/08/18/shaping-the-she-covey-using-gender-inclusive-competition-policy-to-build-back-better/>.
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D. South African Competition Law

South Africa's competition law has incorporated elements that take into account its history, and its effects on historically disadvantaged people. The purpose of the Competition Act of 1998 reflects this by codifying the goal to "promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons."¹⁶ This is an example of a jurisdiction that has explicitly recognized that competition law enforcement has the potential to have social effects, particularly when it comes to remedying historical inequalities.

VI. WORKING INCLUSIVELY

Beyond how we conduct our analysis and case examples, there are many ways for us to be more inclusive in our work. For example, the Government of Canada recently introduced the Accessible Canada Act which sets out requirements for federal entities to identify, remove, and prevent barriers to accessibility.¹⁷ The Nothing Without Us Accessibility Strategy for the Public Service of Canada is a complementary strategy with the goal of becoming the most accessible and inclusive public service in the world.¹⁸ The Government of Canada is also working to advance reconciliation and renew its relationship with Indigenous peoples, based on recognition of rights, respect, cooperation, and partnership.¹⁹ Finally, the Government launched the Building a Foundation for Change: Canada's Anti-Racism Strategy 2019–2022.²⁰

The Bureau is working towards implementing these strategies in many ways. Employees are encouraged to draft emails, correspondence, and presentations in accessible formats and in plain language. We are taking stock of the diversity of our own organization to understand gaps in representation, and focusing on hiring to reflect the diversity of the communities we serve. This includes reviewing the membership of the Bureau's governance committees and to ensure those making decisions reflect the diversity of Canada. We are beginning to seek out more disaggregated data to understand how our work may impact different groups of people. We are thinking more about how to respectfully engage with different communities. We offer services in different formats to help accommodate different needs and preferences. We encourage staff to add their pronouns to their signature blocks on emails. The Bureau's Little Black Book of Scams²¹ is available in several languages to reach more communities.

The Bureau is also developing a GBA+ guide for staff along with training, building on a general job aid²² developed by the Department of Women and Gender Equality Canada. The Bureau's Diversity and Inclusion Working Group, made up of 30 staff volunteers from diverse backgrounds, is taking action aimed at making the culture of the Bureau more inclusive.

While some of these measures may seem small, they can collectively change the culture of an organization.

16 *The Competition Act*, COMPETITION TRIBUNAL SOUTH AFRICA, <https://www.comtrib.co.za/legislation-and-forms/competition-act> (last visited February 18, 2021).

17 *Making an accessible Canada for persons with disabilities*, EMPLOYMENT AND SOCIAL DEVELOPMENT CANADA, <https://www.canada.ca/en/employment-social-development/programs/accessible-canada.html> (last updated February 17, 2021).

18 Press Release, Treasury Board of Canada Secretariat, New strategy for a more accessible and inclusive public service (May 27, 2019), <https://www.canada.ca/en/treasury-board-secretariat/news/2019/05/new-strategy-for-a-more-accessible-and-inclusive-public-service.html>.

19 *Reconciliation*, CROWN-INDIGENOUS RELATIONS AND NORTHERN AFFAIRS CANADA, <https://www.rcaanc-cirnac.gc.ca/eng/1400782178444/1529183710887> (last modified September 30, 2019).

20 *Building a Foundation for Change: Canada's Anti-Racism Strategy 2019–2022*, CANADIAN HERITAGE, <https://www.canada.ca/en/canadian-heritage/campaigns/anti-racism-engagement/anti-racism-strategy.html> (last modified July 17, 2019).

21 *The Little Black Book of Scams 2nd edition*, COMPETITION BUREAU (March 1, 2018), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04333.html>.

22 *Demystifying GBA+ Job Aid*, STATUS OF WOMEN CANADA, https://cfc-swc.gc.ca/gba-acs/course-cours/assets/modules/Demystifying_GBA_job_aid_EN.pdf (last visited February 16, 2021).

VII. A WORK IN PROGRESS

Embedding inclusion in our systems and culture is a work in progress. It takes commitment, time, and resources. While the goal may seem daunting, there is a simple way to start thinking differently. We can ask ourselves some questions,²³ including:

- Are there specific groups that may be affected more adversely than others due to alleged conduct? What does this mean for enforcement priorities?
- Are there different types of consumers? Do they behave differently?
- Is disaggregated data available? If so, can we gather this data?
- Are we communicating and consulting in an accessible and culturally appropriate way?
- Are we missing different perspectives?
- Are our teams and leadership diverse enough? Do they represent the communities we serve?
- How do my own experiences, identity factors, and biases affect my perspective?

The Government of Canada has provided funding to the OECD to do further research on gender-inclusive competition policy. Seven proposals²⁴ were accepted and research is underway, with the findings due to be presented to the OECD in June 2021. These proposals examine the link between gender or diversity and product market definition, corporate compliance, case and project prioritization, and public interest considerations. The OECD will also produce a toolkit to help competition authorities apply gender considerations to their work.

From a practical perspective, this work is not without its challenges. There is a lot to learn at the individual and organizational levels, including enhancing our understanding of consumers and businesses within our legal frameworks. Access to disaggregated data, which is key for improving our understanding of how different groups may be affected, remains a particular challenge. Embedding diversity and inclusion into our everyday work and systems takes real resources to properly execute, including for training and development, planning and reporting, change management, and sustaining efforts aimed at culture change. Shifting from “neutral” to inclusive takes time, effort, learning and resources, but the Bureau is committed to identifying and breaking down systemic barriers and becoming more inclusive.

VIII. CONCLUSION

As an organization, the Bureau has begun a journey towards inclusion. It is an opportunity to be better. To more fully understand market dynamics. To improve our ability to collect and analyze disaggregated data. To consult different groups of people in culturally appropriate and accessible ways. To be open to different perspectives and ways of doing business. To gain a more nuanced understanding of the needs and experiences of all Canadians. To be more responsive, and more relevant. Ultimately, to do our job better.

The decisions and approaches we take as competition law enforcers matter, and they affect people. By striving for inclusive competition, we can protect and promote competition for consumers and businesses more effectively and ensure a more inclusive economy at the same time.

²³ This list of question was developed after reviewing the Demystifying GBA+ Job Aid, see Status of Women Canada, *supra* note 22.

²⁴ *Selected Proposals, Competition Policy and Gender – Developing the Evidence*, OECD, <https://www.oecd.org/daf/competition/gender-inclusive-competition-policy-selected-proposals.pdf> (last visited February 16, 2021).

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