

Antitrust Chronicle

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Inclusive Competition



CPI COMPETITION POLICY
INTERNATIONAL

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LETTER FROM THE EDITORS

Dear Readers,

The latest CPI Chronicle comes at a time when the COVID-19 pandemic continues to disproportionately impact women and minorities around the globe and erects yet another roadblock to the economic and societal advancement of these groups. With this societal and economic backdrop, this edition of the Chronicle fittingly focuses upon the concept of Inclusive Antitrust and the debate about whether and how antitrust policy and enforcement could be a better tool in the fight for equality.

The issue begins with two CPI Talks interviews from competition, consumer and digital law leaders – who both happen to be women. The first is an interview of Margrethe Vestager, Executive Vice President of the European Commission for A Europe Fit for the Digital Age and European Commissioner for Competition. Executive Vice President Vestager highlights some of the important initiatives that are underway in Europe in the broader fight for gender equality and observes that there is scope for competition authorities to consider inequalities of various kinds when selecting and prioritizing antitrust cases or sectors to consider. Our second CPI Talks interview features a discussion with Rebecca Kelly Slaughter, Acting Chair of the Federal Trade Commission, an active inclusivity advocate who has argued that regulators can prioritize addressing inequities through consumer protection and antitrust. In her interview, Acting Chair Slaughter provides a road map for an inclusive approach to antitrust and consumer protection that involves taking a more holistic view of the role that antitrust enforcement and competition policy decisions play in addressing harm and digging deeper to better understand the disparate impacts of these harms.

Following these interviews, we feature a series of articles from a number of thought leaders in the area beginning with Nadia Vassos & Ellen Creighton of Canada's Competition Bureau. For a number of years now, Canada's Federal Government has had in place a "GBA+" or "gender based assessment" tool which assesses the potential impacts of policies, programs, services, and other initiatives on diverse groups of women, men and people with other gender identities (with the "plus" referencing considerations other than gender). Ellen and Nadia outline the efforts of the Competition Bureau to move toward more inclusive enforcement and promotion. The authors discuss the Bureau's ongoing work with the Organisation for Economic Co-operation and Development ("OECD") in this area as well as how the "GBA+" tool has been applied to provide insights which will inform the Bureau's future enforcement, advocacy and compliance work.

Our next author, Maria Stoyadinova, argues that traditional competition analyses fails marginalized consumers and businesses in multiple ways by failing to ask or address important questions. She argues that addressing the current analytical gap will help prevent antitrust enforcement from perpetuating existing systems of inequality in the economy and society more broadly, while bringing competition policy closer to its stated goal of restoring balance in the marketplace.

Chris Pike, who has been at the forefront of the discussions in this area for a number of years, offers a thought-provoking feature. Chris attempts to reconcile the aims of competition and equality within antitrust, and likens this task to John Rawls' efforts to reconcile liberalism and equality within his principles of justice. Applying what he terms as a "Rawlsian" analysis, he proposes the adoption of inclusivity as a secondary objective within competition law (not as an additional primary objective, as under a public interest test).

With their analysis of telephone rates for incarcerated persons, Dr. Coleman Bazelon & Dr. Paroma Sanyal highlight how inclusive antitrust considerations could ensure that the benefits of competition are extended to marginalized groups. The authors argue that bringing phone rates closer to an economically efficient rate would not only benefit prisoners and those they call through lower phone bills, but to the extent these savings lead to additional phone calling (more and/or longer calls), these benefits would extend not just to prisoners and their families but also to society overall through the reduced recidivism that results from keeping prisoners connected to their families and communities.

Bill Kovacic turns to the practical challenges of implementing a gender inclusive policy approach, including resource constraints, competing priorities, and buy-in from agency staff who routinely see "priorities" come and go as swiftly as leadership. He proposes implementation strategies grounded in "bureaucratic guile" that recognizes how organizations and people behave. His agenda for effective implementation begins with a call for agencies reflect upon their own experience including with respect to gender representation, historical antecedents, and efforts to increase market access.

Inclusive Antitrust can clearly encompass a great deal, from institutional design to intersectional lenses to changes in legal and economic analyses. Yet as Gabrielle Kohlmeier & Samm Sacks explain in their article, inclusive antitrust has other inclusive policy examples to which to turn. Looking to the experience of feminist foreign policy, which is the official policy of an increasing number of countries from North America, Latin America to Europe, the authors spotlight guiding principles that are equally applicable for inclusive antitrust. The result is seven lessons with a particular focus on representation, process, and data.

As Kohlmeier & Sacks note, if evidence-based assessments are to help inform antitrust enforcement decisions, we must also acknowledge (and perhaps take aim at correcting) the dearth of data and research that is available concerning women. As Melinda Gates recently explained, “data plays an essential role in driving mobilization, but there’s not yet enough of it when it comes to the lives of women – and especially women of colour.” Unfortunately, the cause of gender equality remains woefully underfunded and as a result, the data available remains, for the time being, similarly poor.

While the COVID-19 pandemic has shone a light on and exacerbated some existing inequalities, it is also an opportunity to re-think and evaluate not just our post-pandemic public policy goals but also all the available tools. There is clearly more work to be done, more research to undertake and further discussions and debates to be had, and we are delighted to have had the opportunity to further contribute to this important discussion.

Just like the antitrust discussions it contains, the issue itself has been a collaborative, inclusive effort, and we thank all of the authors and editorial staff who contributed.

Sincerely,

Anita Banicevic & Gabrielle Kohlmeier

SUMMARIES

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CPI Talks...

...with Rebecca Kelly Slaughter

In this edition of CPI Talks... we have the pleasure of speaking with Rebecca Kelly Slaughter, Acting Chairwoman, U.S. Federal Trade Commission.

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CPI Talks...

...with Margrethe Vestager

In this edition of CPI Talks ... we have the pleasure of speaking with Margrethe Vestager, currently serving as Executive Vice President of the European Commission for A Europe Fit for the Digital Age since December 2019 and European Commissioner for Competition since 2014.

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The Competition Bureau's Journey Towards Inclusive Competition

By Nadia Vassos & Ellen Creighton

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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Rawlsian Antitrust

By Chris Pike

This paper attempts to reconcile the goals of competition and equality within antitrust, and suggests that this task corresponds to John Rawls' efforts to reconcile liberalism and equality within his principles of justice. Applying a Rawlsian analysis, I propose the adoption of inclusivity as a secondary objective within competition law (not as an additional primary objective, as under a public interest test), and suggest that this approach might be labelled *Rawlsian Antitrust*. In locating this approach among the existing established schools of thought, I emphasize both its economic basis, and the clarity of its values, and how the reconciliation between those might be operationalized. I identify pro-enforcement and more cautious factions within this approach, and suggest that between them lie the tools that will hardwire inclusivity into competition policy. These will help make competition policy play its role within a coherent policy response to the need for greater inclusivity, arguably the great challenge of our time, which was first stirred, and then made urgent by successive crises that have shaken our world, and which now threaten to burn down the technocratic antitrust chateau.

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Towards Inclusive Competition Analyses: The Questions We Overlook

By Maria Stoyadinova

One of the stated goals of competition policy and antitrust enforcement is to maintain balance and fairness in markets by preventing harm from unchecked market power. However, most traditional competition analyses do not consider how marginalized consumers or businesses in a society may be impacted differently or experience more harm than market participants with more social or economic privilege. Finding ways to address this analytical gap will prevent antitrust enforcement from perpetuating existing systems of inequality in the economy and society more broadly, while bringing competition policy closer to its stated goal of restoring balance in the marketplace. This paper provides examples of questions currently missing from most competition analyses, as well as examples of existing models of inclusive competition enforcement from across the world that can serve as blueprints for incorporating these missing analytical questions and expanding the scope of antitrust regulation in other jurisdictions.

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Captive Audiences: A Case Study of Phone Rates for Incarcerated Persons

By Coleman Bazelon & Paroma Sanyal

Phone calls from prisons and jails are extremely costly for inmates and their families. In this article, we examine the market structure of inmate calling services and the inherent market failures that lead to such high calling rates. We determine that there is a classic anticompetitive problem involving vulnerable populations captive to a monopolist service provider, and discuss the Federal Communications Commission's attempts to lower these rates. In addition to phone call expenses, we discuss other costs such as the disproportionate effects on People of Color and lower-income individuals, the impact on recidivism and inmate mental health, and other welfare harm, and show that lowering these rates would further the goal of inclusive competition.

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Incorporating Gender as a Prioritization Principle and Project Selection Criterion in Competition Agencies

By William E. Kovacic

This article presents the preliminary results of an OECD-sponsored project to consider how competition agencies might achieve greater gender inclusiveness in setting priorities and in selecting specific projects. The Article identifies obstacles to successful implementation and offers initial suggestions for surmounting them. The approach suggested here includes the achievement of greater gender diversity at all levels of a competition agency – especially top leadership – and in agency teams responsible for prioritization and project selection. The paper also suggests that careful study of past agency practice (e.g. in setting budgets, allocating resources, and choosing cases and studies) may identify useful antecedents for a more gender inclusive program. Finally, the paper proposes greater emphasis on the dismantling of artificial entry barriers that tend to block new business development by women.

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Seven Lessons for Inclusive Antitrust from Feminist Foreign Policy

By Gabrielle Kohlmeier & Samm Sacks

Inclusive antitrust – the idea that antitrust should be deliberately focused on hearing from and serving everyone – aspires to make antitrust better by improving data inputs, options, and outcomes. An inclusive antitrust policy may encompass a spectrum of options for how antitrust and its drivers are shaped and deployed to achieve healthy competition with minimal unintended negative ancillary effects. In laying out and considering these options, Feminist Foreign Policy – already the official government foreign policy of Canada, Mexico, France, Luxembourg, the European Parliament, and Spain – presents lessons for inclusive antitrust. The lessons gleaned provide steps that can be undertaken in both the near and long terms, from leadership to process to data use – and could not be timelier in light of calls for antitrust and competition law reform and upheaval taking place around the world. Feminist Foreign Policy provides guideposts to improve antitrust policy by offering principles in expanding information and data that can contribute to more effective analysis.

WHAT'S NEXT?

For May 2021, we will feature Chronicles focused on issues related to (1) **Healthcare**; and (2) **Section 230**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2021, 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 CHRONICLES JUNE 2021

For June 2021, we will feature Chronicles focused on issues related to (1) **Buyer Cartels**; and (2) **Interoperability**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited 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 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 on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.



CPI TALKS...



...with FTC Acting Chairwoman Rebecca Kelly Slaughter

In this edition of CPI Talks we have the pleasure of speaking with Rebecca Kelly Slaughter, Acting Chairwoman of the U.S. Federal Trade Commission.

Thank you, Ms. Slaughter, for taking this time to talk to CPI.

1. Two years ago, you were on the cutting edge of supporting additional research into gender inclusive competition and the application of a gender lens to enforcement decisions. More recently, you have emphasized pursuing racial justice in antitrust enforcement. Can you clarify what “inclusive antitrust” means to you?

It's interesting to reflect on the fact that, two years ago, I spoke about gender inclusive competition and the application of a gender lens to enforcement decisions. In the fall of 2019, I could not have imagined that we'd be hit by a global pandemic. More than 30 million Americans have been diagnosed with COVID-19. More than half a million Americans have died. I also would not have predicted that the economic consequences of the global pandemic would have a disproportionate effect on women so profound that the economic downturn would be deemed a “she-cession.” On top of all of this, America has also been confronting the enduring legacy of systemic racism in a more open and far-reaching way than we have in a long time — if not ever.

These are the facts that I have front of mind when thinking about what inclusive antitrust means. Inclusive antitrust means taking a more holistic view of the role that antitrust enforcement and competition policy decisions play in addressing harm and digging deeper to better understand the disparate impacts of these harms. It also means acknowledging that value judgments are inextricably linked to antitrust enforcement decisions. Antitrust law may seem like a narrow area of the law, but its impact is broad, and we should consider its full potential to promote fair competition and ensure economic justice for American consumers and workers.

We need to accept and acknowledge the fact that antitrust enforcement, or the lack thereof, necessarily involves making value judgments: We choose to spend our enforcement dollars, and those choices affect economic structure and opportunities. Antitrust is not and cannot be value-neutral. We need to explore how we can use our enforcement tools to ensure that markets are competitive and that opportunity and access are available to historically underrepresented and economically disadvantaged consumers and workers rather than incumbents.¹

2. What does pursuing racial justice in antitrust enforcement look like in practice?

As a general proposition, to me inclusive antitrust in practice focuses on markets and anticompetitive practices where harm disproportionately falls on people of color. I have talked about this for some time now and began discussing in September 2020 with my extensive Tweets reflecting my view that antitrust can and should be deployed in the fight against racism. I am not suggesting that we pretend that U.S. antitrust statutes explicitly considers race or racism. They do not. I am simply suggesting that we begin to think strategically about using antitrust as a tool for combatting structural racism — a system built on a social construct that favors incumbents. We should ask how we can use our enforcement tools to ensure that markets are competitive and working to the benefit of historically underrepresented and economically disadvantaged consumers.

As I have said in the past, we should start these efforts with data. We should make a concerted effort to collect demographic data where possible in our investigations so that we can understand where and how communities of color are disproportionately harmed by proposed mergers or anticompetitive conduct. I am confident that we can incorporate these questions into our analysis of the competitive effects of mergers and conduct alike. This analysis could inform decisions we make with respect to case selection and resource allocations; specifically, I want to prioritize cases in which harm falls disproportionately on historically disadvantaged communities, such as Black and Latinx communities.

¹ The views expressed here are my own and do not necessarily reflect the views of the Federal Trade Commission or any other commissioner.

Beyond the substance of antitrust practice, we should also focus on diversity within the profession. That means considering diversity in leadership, in recruitment, and even in panel discussions. We must be intentional about the professional development and advancement of all underrepresented people.

3. How do you envision this prioritization taking place?

The gig-economy labor market is a great example. Studies have shown that monopsony power is pervasive across the country. Specifically, when using the metrics in the DOJ and FTC's Horizontal Merger Guidelines, evidence shows that the average labor market is highly concentrated.² This high concentration of employer power especially harms low-wage workers, as well as Black and Latinx workers. Taking concrete steps on behalf of workers and consumers to address this particular monopsony issue is a question of setting priorities. In other words, the FTC can take a more strategic approach towards our case selection. Virtually all criminal and civil law enforcers set priorities for how they will devote their limited resources to serving their mission. My proposal is the same: We must prioritize enforcement and other actions that affect those who are structurally disadvantaged and dedicate our resources to consumers and workers with the greatest needs. In addition to case prioritization, the FTC should use the full range of its tools to stop unfair methods of competition, including more stand-alone Section 5 enforcement and unfair-methods-of-competition rulemaking to prohibit anticompetitive conduct that is difficult to litigate on a case-by-case basis.

4. What would you say to those who argue that this perspective is politicizing antitrust?

This argument presumes that antitrust is value-neutral and apolitical. I do not accept that premise — antitrust addresses deep questions about economic and market structure, which have unmistakable racial dynamics in the United States because of our history. Choosing to apply the law in a “race-blind” manner reinforces existing structural inequalities. And more to the point, why should antitrust be a value-neutral area of the law when no other area of law enforcement is expected to be value-neutral? Prosecutors and civil enforcers often set values-based priorities, such as prioritizing, say, insider trading or fraud targeting veterans. Why should antitrust be treated as a uniquely “value-free” zone?

5. How does this enforcement prioritization affect the Commission's consumer protection sector?

The prioritization of enforcement to address racial inequities and economic injustice absolutely ties to consumer protection, and, unlike antitrust, that is an area where we have long been comfortable setting priorities related to racial justice. One example is our Every Community Initiative project, a longstanding effort by our Bureau of Consumer Protection to center marginalized communities in our enforcement and outreach efforts. A more specific recent example concerns discrimination in auto financing. I strongly supported our *Equal Credit Opportunities Act* discrimination case against Bronx Honda, but I also called for the Commission to initiate a rulemaking, under the Dodd-Frank Act, to regulate dealer markup to address the urgent and overdue need for significant structural reform to the auto financing and sales markets.³

AI-driven algorithms present a unique challenge. On the one hand, they offer the potential to advance economic justice by distributing opportunity more broadly, resources more efficiently, and benefits more effectively. On the other hand, there are many troubling examples of flawed algorithms in the marketplace in recent years. I hope that these flaws can be prevented, or their resulting harms mitigated by smart solutions. In addition to using current laws and authorities at our disposal, it is worth exploring new legislation at the state or federal level. A great illustration is the proposed federal Algorithmic Accountability Act, which would impose new requirements on companies using automated decision-making. I would like to see all important algorithms that contribute to important decisions, such as those about housing, credit, employment, education, and health, vigorously audited to prevent any disparate impacts.

² José Azar et al., *Concentration in US Labor Markets: Evidence from Online Vacancy Data*, 66 Lab. Econ. 101886 (2020), <https://www.sciencedirect.com/science/article/abs/pii/S0927537120300907>; U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* §5.3 (2010), https://www.ftc.gov/system/files/documents/public_statements/804291/100819hmg.pdf.

³ *Statement of Commissioner Rebecca Kelly Slaughter in the Matter of Liberty Chevrolet, Inc. d/b/a Bronx Honda*, Fed. Trade Comm'n (May 27, 2020), https://www.ftc.gov/system/files/documents/public_statements/1576006/bronx_honda_2020-5-27_bx_honda_rks_concurrence_for_publication.pdf.

6. Beyond enforcement priorities, is there anything else antitrust lawyers and economist can or should do to further equality and inclusion?

I hope that the entire antitrust community will take responsibility for furthering the conversation about how antitrust law and competition law can help to make our nation and our economy more equitable and just. COVID-19 has had a dramatic impact on the workforce: Women are leaving the workforce, both involuntarily and voluntarily, at shockingly high rates. In September alone, 865,000 women dropped out of the workforce.⁴ The effects are especially pronounced for women of color. White men and women have seen about 60% of lost jobs come back, but only 39% of job loss has been regained for Black women. I take heart from the fact that the antitrust community as a whole has taken significant steps to recognize the importance of diversity and inclusion, including through professional development and substantive inclusivity. I hope it continues to do so.

7. The Canadian Competition Bureau has been applying a Gender Based Analysis Plus framework to its policy work, and the OECD in partnership with the Canadian Government is spearheading research projects to provide data, research, and evidence for gender inclusive competition across enforcement, regulation, and policy. Do you think there will or should be more of the same in the U.S. – including extending the research into race? Other dimensions of inclusion?

The short answer is yes. We have a strong relationship with CCB, and I am confident we can learn from all of the great things that they are doing and how we might apply those things to the FTC's work.

8. Given that social equity is a key policy pillar of the Biden/Harris administration, especially on race but also on issues such as gender, LGBTQ+ status, disability – do you anticipate the FTC working across agencies on these issues?

Interagency cooperation in areas of shared experience, expertise, and mission is a bedrock of the United States and our well-functioning government. Promoting and protecting competition is an important goal of the federal government; while furthering this goal is mission critical for the FTC, every executive department and agency can and should contribute to the effectiveness of that mission by using its relevant authority to help promote competitive markets. It is always a good thing when agencies that work on similar issues consider each other's perspectives on those shared issues, from combatting systemic racism and all forms of discrimination to promoting competition and protecting consumers.

⁴ See Chabeli Carrazana, *865,000 women left the workforce last month*, USA Today (Oct. 11, 2020), <https://www.usatoday.com/story/news/politics/2020/10/11/865-000-women-were-laid-off-last-month/3609016001/>.



...with Margrethe Vestager

In this edition of CPI Talks, we have the pleasure of speaking with Margrethe Vestager, Executive Vice President of the European Commission for A Europe Fit for the Digital Age, since December 2019, and European Commissioner for Competition since 2014.

Thank you, EVP Vestager, for taking this time to talk to CPI.

1. You have spoken about the importance of inclusion in the digital context, including in December at the EU Council's Conference on Rights and Values in the Digital Decade.¹ Do you see a role for antitrust in fostering inclusion? What does “inclusive antitrust” – the title of this CPI Antitrust Chronicle – mean to you?

Antitrust definitively has a role to play in fostering inclusion. Since the foundation of the EU, competition law enforcement has been paramount to preserve and foster European democratic values, inclusiveness, and a European business culture. These values are about fairness and equal opportunities, both of which are closely linked to inclusiveness.

Competitive markets are key drivers of economic growth and productivity, enhancing innovation and choice for consumers. This is particularly important during economic crisis times so that the best, most productive and innovative companies, big and small, can grow and compete on the merits to the benefit of all consumers, women and men alike. In that sense, it plays a significant role in achieving sustainable, inclusive growth and also social inclusion. By ensuring that alternatives are available in the market, competition law enforcement protects EU citizens' freedom to choose and ability to find products and services catering to their different needs.

For example, strong antitrust enforcement in the pharmaceutical sector has been instrumental in ensuring affordable access to medicines in the EU, to the benefit of all EU patients, health systems, and taxpayers. We have had four prohibition decisions against agreements between branded and generic pharma companies what we call “pay for delay cases.” The latest, most important, contribution was the settlement decision in the *Aspen* case last February: the commitments will ensure a reduction by 73 percent in the whole EU for the prices for six blood cancer treatments.

Competition law enforcement also complements other commission policies in achieving sustainable and inclusive growth. For example, the strategic goal of delivering on the ambitious green transition. The European Green Deal is our roadmap for making the EU's economy sustainable. We can achieve this by turning climate and environmental challenges into opportunities across all policy areas. We are gearing up to provide guidance on how companies can join efforts to pursue green sustainability objectives, without foregoing pro-competitive opportunities for fear of breaching antitrust rules. The guidance will build on the premise that effective competition is the best incentive for green innovation, while putting safeguards against “greenwashing.”

We can ensure that competition policy helps making the transition just and inclusive for everyone together with the more direct instruments to make our economy greener: such as environmental regulation, taxation, and green investment.

¹ “Social justice and inclusion are among the core objectives of the European Union. So as more and more of our activities move to the digital space, digital inclusion and ensuring our European rights and values are respected becomes an increasingly important part of our overall promise to Europe's people. This is why it is so important that the Berlin Declaration begins with rights and values, and follows immediately with social inclusion.” Speech by EVP Margrethe Vestager at the EU Council's High-level Presidency Conference: “A Europe of Rights and Values in the Digital Decade,” Dec. 8, 2020 (https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-margrethe-vestager-eu-councils-high-level-presidency-conference-europe-rights-and-values_en).

One of our initiatives is directly relevant for the promotion of inclusiveness. This is our process for ensuring that EU competition rules do not stand in the way of collective bargaining for those who need it. The initiative aims at ensuring that working conditions can be improved through collective bargaining agreements for self-employed who need protection. Both in the digital economy and beyond, some solo self-employed might be in a situation of unbalanced negotiating power *vis-à-vis* certain companies/buyers of labor. In such situations, collective bargaining can be a powerful tool to achieve better working conditions. We recently launched a public consultation that will feed into our ongoing evaluation process to decide on what can be done in the coming months.

Several antitrust decisions have also been contributing to creating a fairer digital single market, by safeguarding the conditions for companies, including SMEs, to grow and compete fairly. In the ongoing *Amazon Data* case, the Commission has preliminarily found that, by using its dominant position in the marketplace, Amazon collected and used non-public commercially sensitive data from independent retailers to support its own retail business. With our proposal last December of the Digital Markets Act, we aim to address the entrenched position of digital gatekeepers harming the interests of business users and consumers in the EU. It complements competition law enforcement by regulating systemic issues caused by digital gatekeepers and unfair practices that cannot be tackled effectively by antitrust rules. This initiative aims at facilitating the development of businesses of all sizes that heavily rely on platforms to access their customers. This includes SMEs, but also self-employed individuals.

- 2. In the past few years, some countries have started applying a gender lens to policy and enforcement decisions. Sweden, Canada, Luxembourg, France, and Mexico, for example, have announced Feminist foreign policies that apply such a lens in the foreign policy context. To the extent you have followed these, what is your perception of how useful and/or effective these frameworks have been? Is it time to be as definitive and clearly signal support for inclusivity in antitrust? Is it time for a “feminist* antitrust policy” [*noting that feminist policy has been used to denote not just gender equality, but an approach that is more inclusive of all underrepresented people]?**

While there has been some significant but uneven progress achieved in advancing women’s and girls’ rights, no country in the world is on track to achieve gender equality. The COVID-19 crisis disproportionately affects women and girls. For example, because a higher proportion of women work informally and in vulnerable sectors, their job loss rate is 1.8 times greater than that of men. Violence against women has also increased during the crisis, because of prolonged lockdowns.

On foreign policy, the Commission and our European External Action Service (“EEAS”) adopted a new Action Plan on Gender Equality and Women’s Empowerment in External Action 2021–2025. This plan aims to accelerate progress on empowering women and girls, and safeguard gains made on gender equality during the 25 years since the adoption of the Beijing Declaration.

The action plan provides the EU with a policy framework with five pillars of action for accelerating progress towards meeting international commitments. It makes the promotion of gender equality a priority of all external policies and actions; offers a roadmap for working together with stakeholders at national, regional, and multilateral levels; steps up action in strategic thematic areas; calls for the institutions to lead by example; and ensures the transparency of the results. In parallel, the EU Gender Equality Strategy focuses on actions within the EU.

The action plan also supports the EU Gender Equality Strategy, which focuses on our own goal. For instance, in DG Competition, we have improved the gender parity: as of April 1, 2021, female representation in middle management is 48 percent, while the corresponding figure for senior management is 38 percent.

- 3. The Canadian government developed a “Gender Based Analysis (Plus)” framework used by the Council of Europe in some instances, and spurring workshops and study at the OECD. Does the European Commission apply any such structured lens or have plans to do so? Do you think that such a lens can be valuable in the antitrust or broader digital context?**

Gender equality is a fundamental right and key principle of the European Pillar of Social Rights. Our EU Gender Equality Strategy presents policy objectives and actions to make significant progress by 2025 towards a gender-equal Europe. It sets gender equality as a crosscutting priority. The key objectives behind the policy are: ending gender-based violence, challenging gender stereotypes, closing gender gaps in the labor market, achieving equal participation across different sectors of the economy, addressing the gender pay and pension gaps, closing the gender care gap, and last but not least, achieving gender balance in decision-making and in politics.

The strategy targets measures to achieve gender equality, combined with strengthened gender mainstreaming. That means systematically including a gender perspective in all stages of policy design in all EU policy areas, internal and external.

In the digital context, I would like to mention the 2020 Women in Digital Scoreboard. It monitors women's participation in the digital economy. It assesses Member States' performance in the areas of Internet use, Internet user skills as well as specialist skills and employment based on 12 indicators.

Women's contribution to Europe's digital economy is crucial. Women have spearheaded innovation essential to the advancement of digital technology, from computer algorithms to programming.

Yet, they are still far less likely to have specialist digital skills and work in this field compared to men. The scoreboard shows that only 18 percent of information and communications technology specialists in the EU are women. Therefore, we still have to a lot to do to ensure that women can seize the opportunities they rightly deserve.

4. Antitrust is evidence and data driven – and that evidence is increasingly tied to data science. But numerous studies and scholars indicate that much data and data science is not particularly inclusive: from women not being represented in data,² to algorithms that have racial, gender, and other biases incorporated,³ to the way data categorization and structure can create assumptions of white, male defaults,⁴ and how data visualization can shape opinions and perceptions⁵ – including those of enforcers, fact finders, decision makers, legislators, regulators. Is there a role that the European Commission can play in contributing to inclusivity of the evidence used in competition investigations and policy?

Yes. Studies show that data is often based on existing biases and then fed into Artificial Intelligence (“AI”). Since machine-learning systems often train their models on data that reflects real-world bias, there is a real concern that the extensive use of AI based on such data input will maintain stereotypes. We have to be aware of these pitfalls in our policy and enforcement.

So, when designing or interpreting market investigations we need to consider whether gender or other factors affect prices and consumer purchasing decisions.

The aim is to try to understand how gender or other aspects of identity influence demand substitutability. In some circumstances, these preferences may be strong enough to require the definition of a separate market for gendered products. We know that men and women have different preferences, price-sensitivities and propensities to switch products. This means that depending on gender, certain products could be either complementary or substitutable.

By ensuring that we are not biased in our surveys or market investigations, we not only ensure that we define markets correctly but also draw the right conclusions about competition in those markets, including market power and effect on competition. Dividing markets based on gender is not new and something we have already done in past merger cases (*Unilever/Sara Lee*).

But there can be scope for competition authorities when selecting and prioritizing antitrust cases or sectors to consider inequality. This applies to gender inequality, to discrimination, but also to small business development, innovation, and environmental sustainability.

2 See, e.g. Carolina Criado Perez, *Invisible Women: Data Bias in a World Designed for Men* (2019); Melinda Gates, *Moment of Lift: How Empowering Women Changes the World* (2019).

3 See, e.g. Cathy O'Neill, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (2016); Ruha Benjamin, *Race After Technology: Abolitionist Tools for the New Jim Code* (2019); Meredith Broussard, *Artificial Unintelligence: How Computers Misunderstand the World* (2018).

4 Safiya Noble, *Algorithms of Oppression: How Search Engines Reinforce Racism* (2018).

5 Catherine D'Ignazio & Lauren Klein, *Data Feminism* (2020).

5. **Switching to more competition specifics, study of inclusive antitrust to date has identified several areas where competition enforcement, theory, and policy may have an impact on areas such as gender and racial equity.⁶ For example, enforcers could prioritize enforcement or market studies in areas that would have a greater impact on underrepresented populations (women, minorities, immigrants, etc.); antitrust theory could better understand the role of gender and other characteristics in product market definition, policies could be tested for disparate impact. What do you think are some promising avenues or actions for building inclusive competition policy over the next several years? Do you see specific areas of competition policy-making that can benefit from a more inclusive approach to competition?**

There is an interesting ongoing OECD project that looks into these issues. In particular, I am curious to understand if a more effective competition policy could help address gender inequality and if a “gender lens” could allow enforcers to identify additional relevant market features and consumer behavior.

It seems that a lack of diversity in management boards is linked to higher risks of collusion. It would be good to establish whether this correlation is also a causation. If so, gender quotas in management boards might actually decrease collusion in companies, to the benefit both of women and of society at large.

These discussions are also ongoing at the national level on markets that are important for minorities and women. We have to further study these issues before jumping to conclusions. Awareness and exchange of best practices to ensure that we are not biased in our enforcement actions is very important.

6. **Are there ways that competition enforcement can help address economic, social, racial, or other disparities while maintaining other competition priorities including quality, cost, and consumer/competition focus?**

The two goals are complementary, not mutually exclusive. Sustainable and inclusive growth provides better opportunities for everyone. Therefore, by enforcing competition law, we help address economic, social, and racial disparities.

In particular, competition law enforcement stimulates companies to invest, to be innovative, to reduce their costs, and to deliver quality services and products for all consumers and businesses at competitive prices. It does so by safeguarding the conditions for companies to develop, grow, and compete fairly. This improves living standards and protects consumers’ purchasing power.

Also, the EU State aid control is a part of EU competition law enforcement. It aims at avoiding subsidy races between the Member States. By ensuring that private investments and related job creation are not crowded out, State aid control reduces the burden on taxpayers and ensures that public resources are used to the full benefit of society.

As mentioned earlier, we see our initiative on collective bargaining for certain solo self-employed as directly contributing to greater equity.

7. **Do antitrust regulators need to consider the specific effects of market power and market distortion on women and other marginalized communities?**

It is important to bear in mind that markets are not always efficient. This may lead to higher prices or less innovation and choice for certain customer groups. However, our rules are already flexible enough to consider this in our enforcement.

What is important is that we are aware of potential biases and ask the right questions on consumer demand in our investigations. Therefore, when we collect data to define the relevant markets, we should consider possible submarkets and if appropriate, identify distinct product markets for women or marginalized communities.

Based on those market definitions we can then consider and address the impact on competition in those relevant markets, including market power and possible distortions.

⁶ Gender and Competition, OECD Global Forum on Competition, Aug. 11, 2020 at [https://one.oecd.org/document/DAF/COMP/GF\(2018\)19/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2018)19/en/pdf); Estefania Santacreu-Vasut & Chris Pike, Competition Policy and Gender, OECD Global Forum on Competition, Nov. 6, 2018 at [https://one.oecd.org/document/DAF/COMP/GF\(2018\)4/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2018)4/en/pdf).

8. Some have argued that market consolidation and monopolization have an outsized impact on gender, racial, and social inequality. Would you agree, or is the issue worth further study?

Several studies have indicated that this might be the case. More evidence and research will help us better frame these issues. In any event, our enforcement actions are already contributing to inclusion: There is increasing evidence that greater competition or more evenly balanced market power play a role in reducing some of the causes of inequality. For example, companies with market power have an interest in defending their position and are slower in bringing new products and services to the market. They are more likely to shed employment rather than create it, and this could raise inequality if employment cuts are disproportionately targeted at certain groups.

Higher prices charged to customers resulting from abusive conduct or cartels will disproportionately harm the poor: They pay proportionally more of their disposable income for goods and services, without receiving any benefits from the increased profits of the companies, unless they happen to own any shares in these companies, which is unlikely.

9. What do you think are the biggest impediments to more inclusive antitrust in the coming years? What are the greatest opportunities?

I believe that there are only opportunities going forward. The more we learn, the more we discuss and raise the issue, the better we will become in considering such issues in our enforcement actions.

The ongoing work at the OECD will generate new evidence to inform the debate and help us to develop better guidance on how to develop a more inclusive competition policy. This conversation is still at an early stage, and we are keen to follow it and give our contribution.

10. There has been much discussion over the past few years about antitrust divergence, particular between the U.S. and Europe. Do you think inclusive antitrust presents an opportunity for collaborative exploration, particularly given the work being done by the OECD and the new U.S. administration's focus on diversity and inclusion across all policy areas – including antitrust and digital policy?

We have longstanding excellent cooperation between the European Commission and the U.S. enforcement agencies, such as the Department of Justice and the Federal Trade Commission (“FTC”).

Over recent months, we have witnessed strong and encouraging signs of transatlantic alignment in enforcement. As regards the specific issue of inclusiveness, I note that Rebecca Kelly Slaughter, Acting Chair of the FTC, has already spoken about the importance of diversity and inclusion and commented on the research carried out by the OECD in this regard.

So, I am looking forward to working even closer with our U.S. partners on these issues.

11. In the area of sustainability and antitrust, some of the discussion revolves around coordination, and when actors may coordinate to achieve significant sustainability aims (such as coordinating with competitors on carbon emissions targets). Do you foresee a similar discussion around corporations coordinating on gender or other inclusivity targets to make a measurable impact on diversity and inclusion – particularly in light of the disproportionate impact the COVID-19 pandemic has had on women and minorities?

For both sustainability and gender issues, certainly other policy instruments and laws pursue such objectives in a more direct manner. For example, in the EU, the Green Deal seeks to ensure a green transition that is just and all-inclusive. To make this happen, it envisages an ambitious legislative package and significant investments from both the EU and its Member States, as well as the private sector. For our part, we are taking a careful look at existing antitrust rules to ensure that they are not standing in the way of – for example – procompetitive cooperation in new and innovative green technologies.

On gender and other inclusivity targets, I think that there are more direct ways for government to address these issues than competition policy.

12. Are there areas that you are particularly interested in seeing more research and examination on this topic of inclusive antitrust? Which areas?

Our work on collective bargaining aims at bringing concrete improvements by clarifying the applicability of EU competition law for collective bargaining by genuine self-employed that are considered undertakings.

Some research avenues identified by the OECD are also very interesting.

On cartels, despite the prominence given in economic literature and in legal criteria and analysis to the incentives of firms to collude, cartels are clearly negotiated and agreed by individuals. Available sociologic literature indicates that each person has personal traits and characteristics that are shaped by a range of factors, including their gender. Research is ongoing on whether gender plays a role in individuals' propensity to cartelize and whether potential causal links can be identified between the persistence of cartels and a lack of diversity in corporate boards and senior management.

On the impact of gender in market analysis, men and women apparently have different preferences, price-sensitivities, and propensities to switch. In practice this means that, depending on gender, certain products could be either complementary or substitutable. The research highlights that caution should be observed when defining markets for homogenous but highly-gendered products (for example, wet shave razors). A higher level of concentration in one of the gender-based segments may indeed increase the risk of gendered price discrimination, also known as "Pink Taxes."

13. We've focused mainly on how competition enforcement and policy can benefit social equity. Taking the flip side, is there an argument to be made that competition benefits when we work towards a level playing field for women and minorities in society? How?

Compared to men, women exhibit lower labor force participation rates, earn lower wages per hour, and are twice as likely to work in the informal sector. Recent estimates suggest that these disparities result in an aggregate loss of 16 percent of global income and on an individual level result in women losing USD 24,000 over the course of their lifetime.

It means that women have less purchasing power in the marketplace, and this is aggravated by the fact that they often pay higher prices for products structured around gender identity – the "pink taxes" I already mentioned.

By its very nature, active and effective competition law enforcement will tackle anticompetitive rents or behavior and their effects on consumer welfare. As to whether competition will benefit when we work towards a level playing field for women and minorities in society, I think this is an interesting academic question, but with limited relevance for competition enforcers. But for me it would be a happy by-product, not the main reason for us to achieve a level playing field for women and minorities. That goal deserves our best efforts in its own right. So that competition will benefit from a more equal and just society.



THE COMPETITION BUREAU'S JOURNEY TOWARDS INCLUSIVE COMPETITION

BY NADIA VASSOS & ELLEN CREIGHTON¹



¹ Nadia Vassos is a Senior Competition Law Officer with the International Affairs Directorate of the Competition Bureau Canada. She is responsible for negotiating competition policy chapters of Canada's free trade agreements. She has also been championing research on competition and gender, and advocates for an inclusive approach to competition policy. Ellen Creighton is the Assistant Deputy Commissioner of the International Affairs Directorate of the Competition Bureau Canada. She is responsible for managing the Competition Bureau's international engagement and is the Accessibility Champion for the Department of Innovation, Science and Economic Development Canada. The views expressed in this article are the personal views of the authors.

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=PLyBGvyEYBNlrbowPd8Y7D-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-acsc/course-cours-en.html> (last modified September 26, 2018).

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

7 *The history of GBA+*, STATUS OF WOMEN CANADA, https://cfc-swc.gc.ca/gba-acsc/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-acsc/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-covery': 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-covery-using-gender-inclusive-competition-policy-to-build-back-better/>.

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.comptrib.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-acsc/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 questions 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).

RAWLSIAN ANTITRUST



BY CHRIS PIKE¹



¹ The author is a competition expert, formerly of the OECD Competition Division, and an associate at the Centre for Competition Policy at the University of East Anglia. Corresponding address: chris.pike.wh@gmail.com.

I. INTRODUCTION

As the full impact of COVID-19 continues to shake our world, we find ourselves retreating to our homes, and unsure of the long-term implications for our health, our societies and our economies. However, in competition policy, as in other policy areas, we are at the same time, still observing the effects of the aftershock of the last financial crisis, and are only just beginning to see the emerging outline of a realignment triggered by that shock. Whether this has time to solidify, or is reinforced, or indeed washed away by the impact of COVID-19 on the debate remains to be seen at this stage.

However, what is evident is that we are in a moment where globalisation and digitalisation, and the policy response to these phenomena have helped to deliver huge improvements to our lives, but also huge disruption and a degree of fragility that these twin crises have ruthlessly exposed. This had unfortunately already led to a loss of trust in the efficiency and fairness of markets, even before COVID-19.² This loss seems to be visible in a number of areas.

Firstly, there is rising resentment at the inequality that our markets have generated, both in terms of income and wealth inequality, and specifically in the interplay between that and racial and gender-based inequalities that result from structural discrimination.

Secondly, there has been a dramatic productivity slowdown that some have attributed, fairly or not, to the growth of market power,³ and which suggests that the palpable unfairness of outcomes has not even managed to buy us greater efficiency.

Thirdly, there is a popular feeling that our markets, and our meritocracy, are in fact rigged.⁴ Certainly, the bail-out of banks during the financial crisis (however necessary for systemic stability), sent a message that some would be protected from the market forces that were deemed inescapable in other industries. However, the same conclusion has been drawn by those observing the support provided to state-owned enterprises in China, and the low tax rates paid particularly by large digital firms.⁵ Absent recognition of a truly level-playing field, the legitimacy of market mechanisms is therefore inevitably weakened.

Then, fourthly, as we struggled (painfully under the weight of misguided austerity measures) to slowly emerge from the wreckage of the financial crisis, we found that the quickly growing digital economy and its superstar firms, seemingly our best ticket for future prosperity, was also creating huge complications. We watched as it increased the precarious nature of work for many, manipulated our attention and distorted our public debate, and increasingly monopolized markets, creating concentrated centres of power (both market power and lobbying power). This is nowhere more evident than in the threatening behavior that certain firms have unleashed against nation states, most recently in Australia.⁶

In parallel to all this, over the decade, recognition of the sustainability problem has finally turned into a much broader-based alarm at the climate emergency, and the apparent inability of markets and market-based policymaking to address it.⁷

Taken together this loss of trust has resulted in a damaging shift towards over-simplistic and ineffective populist answers to often-difficult policy questions. Walls, tariffs, anti-immigration, isolationism, national champions, market share caps, price caps and nationalisations have bounced back onto the agenda. This in turn has created a threat both to our shared prosperity, and in some cases even to our democracies.

Against this background of a loss of trust in markets, the role of antitrust is perhaps a modest one. However, alongside most other market-based policy fields, it finds itself buffeted by the same winds, and so its future path will be shaped by the way that these forces, and the debates that they stir, ultimately play out.

² Edelman, Trust Barometer, 2020.

³ Barkai 2017, De Loecker et al. 2020, Gutiérrez and Philippon 2017, Philippon 2020.

⁴ See Wolf, [why rigged capitalism is damaging liberal democracy](#), 2019, and Reich, [The System: Who Rigged It, and How We Fix It](#) (2020). As noted, this can also be seen in the evident meritocratic failings within the job market that Sandel (2020) and others have identified as resulting from entrenched privilege, whether it be the result of private or selective schooling (see [OECD, 2019](#)) or unpaid and hence highly exclusive internships. All of which has become visible within the data on declining social mobility.

⁵ See for instance the lower tax rates obtained in exchange for decisions to locate headquarters and facilities, the advantages of not being liable to pay the business rates paid by rivals on high streets, and the selling of products that are sourced from off-shore sellers. See also the tax advantages of using misclassified “self-employed” contractors.

⁶ <https://www.theguardian.com/media/2021/jan/22/google-threatens-to-shut-down-search-in-australia-if-digital-news-code-goes-ahead>.

⁷ This is not to suggest that such a critique is necessarily fair, but to identify that it exists and is driving a loss of trust. In fact, while markets left to their own devices have shown themselves unable to address the issue (unsurprisingly given the inevitable market failure), many would argue that market-based policy solutions have not been adopted on the scale or magnitude that would have been required in order to succeed.

For instance, we have already seen the re-emergence in the U.S. of the Brandeisian structuralist school of antitrust, who reject even the Harvard school approach as an inadequate countervailing force to the influential Chicago perspective. In contrast, in Europe, we have the longstanding ordo-liberal school, and the more economic approach (which includes, but should not be confused with, a Chicago faction), and a greater openness to regulatory solutions. That openness is for instance particularly evident in the current debate over competition in digital markets, where the neo-Brandeisians and the Chicago school find themselves sometimes aligned in opposing the type of pro-competitive regulations to which Europe is turning (albeit for different reasons).⁸

As these different groups collide across zoom panels and social media, the goals of antitrust once again find themselves centre-stage. The uneasy agreement on consumer welfare was always loosely drawn in a fashion that enabled many different groups to each see their own position reflected within it, but this has been upended by the direct challenge posed by the neo-Brandeisian structuralists. In addition, the economic nature of antitrust law, the role of worker welfare, the impact of non-controlling ownership of a firm, the evidentiary standards used, and the proportionality of different remedies have all been opened up for debate.

II. WHERE THEN DOES INCLUSIVENESS FIGURE IN ALL THIS?

Firstly, it can be found anywhere. Certainly, those in the structuralist school are concerned about inequality. However, while Chicago-school antitrust may sometimes coincide with a distaste for any policy with a re-distributionary flavor, there are Chicago-school thinkers that are happy to see re-distribution through fiscal policy (which they see as the appropriate policy mechanism for addressing the concern), while arguing against the use of antitrust to pursue such goals. Many of these might even welcome the re-distributionary consequences of the reduction of rents that the OECD has identified as an inevitable consequence of an effective antitrust policy,⁹ though they would presumably see this as a perhaps fortunate side-product that should be studiously ignored, and certainly not prioritized.

However, for some, inclusiveness can, or should, be located at least in some form within the goals of antitrust. *Inclusive antitrust* (the title of this collection), must therefore include each of these different groups, which I attempt to describe below.

For some, *inclusive antitrust* might mean the use of **public interest tests** to ensure that competition policy delivers inclusiveness, regardless of the impact on competition, efficiency, or consumer or citizen welfare. This is evident both in South African antitrust, and indeed in many OECD countries' media antitrust policies (which prize plurality above all else).

For the Neo-Brandeisian school, *inclusive antitrust* will mean a **structuralist** approach, which looks to protect consumers, workers and small businesses, and to guard against inequality by preventing the concentration of power, regardless of whether that is market power, or a more nebulous concept of corporate power (which we discuss further in section 4).

For some in Europe it will mean an **ordo-liberal** approach that looks to protect the equal opportunity for smaller firms to compete, regardless of effect.

Meanwhile in the U.S. it might still mean a Harvard school approach that worries about market power rather than corporate power, but which looks to prioritize the protection of consumers (or sellers, in labor and other purchasing markets) by assuming that such market power will be misused.

Finally, *Inclusive Antitrust* can also mean an approach that is economic, but which explicitly sets out inclusiveness as a secondary objective in antitrust policy. Here an inclusive secondary objective simply means achieving the primary objective in the most inclusive way possible. Indeed competition can itself be a secondary objective for some regulators, such as the Bank of England, who seek to achieve their primary objective of financial stability in the most pro-competitive way possible.¹⁰

⁸ See [Chilson, 2020](#).

⁹ [Ennis et al \(2019\)](#).

¹⁰ [Baker and Salop \(2016\)](#) consider the possibility of introducing an inequality objective *alongside* consumer welfare and efficiency, however they identify a number of problems regarding trade-offs that would arise in doing so. While they are therefore sceptical of including inequality as an objective, introducing inequality or inclusivity more generally as a secondary objective might offer a way to address the difficulties they identify.

This last approach is a strand within the post-Chicago and ‘more economic’ schools of thought, and therefore focuses on the effects on welfare.¹¹ This welfare, as Hovenkamp (2019a) sets out however, is not simply consumer welfare (which he identifies as badly mislabelled and hence falsely equated with consumer surplus), but also includes the welfare of workers to the extent that this is inefficiently restricted (for instance through monopsony market power).¹² This might therefore be more helpfully referred to as an ‘efficient citizen welfare standard’.¹³

Therefore, this approach is effects-based, but conscious of, and for some, predominantly concerned about, the risk that under-enforcement will lead to anticompetitive effects, and the use of market power against consumers, workers and other sellers in purchasing markets. For example, for some, this concern reflects the view that under-enforcement errors tend to have a higher inequality cost than over-enforcement errors. This is because under-enforcement errors result in higher prices (or poorer quality) for low-income purchasing groups amongst others, rather than resulting in missed opportunities for the owners of firms to reduce their costs (which may or may not be passed on to low-income purchasers).

For others however, there is no focus on concerns over under-enforcement, and for them the secondary objective can manifest in terms of an appetite to prioritize resources and nuance the detail of its analysis in order to maximize its impact on inclusivity. In practice this approach can already be discerned in the OECD’s pioneering work on a gender inclusive competition policy, in the CMA’s explicit strategic focus on vulnerable consumers, and, as Pike & Santacreu-Vasut (2019) and the Acting Chair of the U.S. FTC, Commissioner Slaughter, have flagged, it also offers a promising means to reflect anti-racism efforts within antitrust policy.

III. A ROLE FOR RAWLS?

Indeed, what I want to suggest here is that this last, as yet nameless approach, in seeking to reconcile the goals of competition and equality within antitrust, can be seen to correspond to the efforts that John Rawls made to reconcile liberalism and equality within his principles of justice, and that this approach might therefore be labelled *Rawlsian Antitrust*. This would distinguish it from the broader Post-Chicago school, and the “more economic” approach, each of which are also economic effects-based, and which also recognize the risks of under-enforcement, but which, in their orthodox forms remain strictly technical, in that they do not necessarily have a view on inclusiveness, nor on how to balance the risk of under or over-enforcement. Indeed, some of the eminent post-Chicago scholars have expressed reservations about reflecting concerns over inequality within the goals of antitrust.¹⁴

In contrast, as the Acting Chair of the U.S. FTC has eloquently set out: “*I do not believe antitrust can be value-neutral... When we make decisions about whether and where to enforce the law or how to deploy our enforcement resources, we are making decisions that will have an effect on structural equity or inequity. Our decisions can either reinforce existing structural inequities or work to break them down.*”¹⁵ In this context, a post-Chicago economic approach that has nothing to say about inclusiveness is not value-free or value-neutral, but rather its values are focused solely on efficiency (maximising the size of the pie) or perhaps on maximising total consumer surplus (the size of the pie that consumers as a whole obtain). This is a perfectly coherent set of values, but it is a set of values nonetheless. The question may therefore be posed: *which set of antitrust values best reconcile liberalism and equality?*

11 Elsewhere within the post-chicago school of thought you can also find what Hovenkamp (2007) refers to as a chastised (by Chicago) Harvard school approach (located around the work of Areeda and Turner) which differs from early-Harvard school, but which has arguably been successful in capturing antitrust decision making in the courts and the enforcement agencies (See Kovacic, 2007, Hovenkamp, 2007, and Crane, 2009). This chastised and yet dominant Harvard school approach has therefore worked in what Kovacic (2007) describes as a double-helix with the Chicago school to deliver the low-enforcement antitrust environment that we’ve seen in the US. Shapiro (2021) describes this approach as Chicago-school (thereby emphasising its influence within the double-helix) and argues that it has failed to rein in market power, and therefore requires strengthening, he therefore proposes a modernist approach, rather than a populist (by which he refers to the neo-Brandesian or early Harvard structural approach). Shapiro’s modernist approach is broadly recognisable as a tougher post-Chicago approach, and like Hovenkamp’s (2019b) ‘Technical Antitrust’, it is sympathetic to what Hovankamp calls ‘collateral interests’ such as full employment and more egalitarian wealth distribution, but is unwilling to put these within the primary objectives of antitrust. The secondary objective status that this paper proposes for these inclusive objectives might therefore find favour amongst those attracted to Shapiro’s modernist approach and Hovenkamp’s Technical Antitrust.

12 This is therefore distinct from the public interest considerations that capture worker welfare more generally, such as those used with South African competition law.

13 This is intended to convey that the ordinary citizen’s welfare is the focus, but that there is also an efficiency requirement upon that the defence of that welfare, and therefore that citizens should not expect that their welfare will be generally protected. For instance, a worker’s welfare might suffer from the efficient removal of duplicated via a merger, in such a case the inefficient welfare would not be protected. Equally, a consumer’s welfare might be reduced by efficient price discrimination that increases the welfare of other purchasers (who are able to purchase), the welfare lost to such price discrimination would not be protected. Unfortunately, this label may conjure an image of an ultra-efficient robotic citizen, and this will no doubt further antagonise those that enjoy criticising the assumption of a hyper-rational agent. However, on balance, in the present context the risk of continued confusion over the consumer welfare standard is the more important to address.

14 Shapiro (2018).

15 https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf.

On this question, those of an orthodox post-Chicago position would profess indifference, at least within the context of antitrust, or point instead towards fairness of processes (see for instance Akman, 2018).¹⁶ However, other schools of thought within what might generally be labelled as Inclusive Antitrust, would have their own views on how to do so, and we will come to that in section 4, but first, let us elaborate on what I have labelled Rawlsian Antitrust.

To begin with let's take Rawls' thought experiment, which was to ask us to consider which principles we would use for the basic structure of society, if we had no knowledge ahead of time of what position we would end up having in that society. This means we have no idea of our ethnicity, social status, gender or of our individual perspective on how to lead a good life. We do not know what we consume, where we work, if we work and we do not know if we benefit from anti-competitive rents of any form.

For Rawls, the answer was that we would set out three principles: firstly to achieve the greatest equal liberty for all; secondly, to achieve equal opportunity, and thirdly, to deliver the greatest benefit to the least advantaged members of society, consistent with what he called a "just savings" principle. How might these principles apply to Antitrust and Competition Policy?

A. The Greatest Equal Liberty Principle

First, we might interpret the greatest equal liberty principle as requiring that when operating within markets, people should have access to the best value possible in terms of price, quality and innovation, certainly in respect of primary goods, since the cost of these eat into an individual's ability to invest in themselves, their community and their experiences.^{17,18} This might mean prices should be low, quality should be high, innovation should be plentiful, and wages should be at the marginal revenue product of labor. The greater value offered by such markets would give individuals the greatest freedom to achieve their goals and live a fulfilling life. This might correspond to the 'efficient citizen welfare' standard that is described above.¹⁹

In traditional selling markets, this citizen welfare standard equates to a consumer welfare standard, but in purchasing markets, it would mean protecting the welfare of workers and small businesses to the extent that this does not reduce efficiency. As many have now recognized, the common assumption that any and all cost-cutting by firms is efficient, is demonstrably false, and the exercise of monopsony market power against workers of suppliers is an efficiency risk that must be guarded against. Equally, however, a total surplus standard is unacceptable since it would credit the anti-competitive rents that incumbents accumulate when they improve their ability to exploit buy or sell-side market power.

B. The Equal Opportunity Principle and the Difference Principle

We might then interpret the equal opportunity principle (2b) as meaning that, in addition to the equality of opportunity for individuals that Rawls focused upon; there is also an equal opportunity to compete. This might be taken to mean that competitors should be free from being *excluded* from the opportunity to compete on the merits (as is standard under antitrust law), and that there must be a level playing field (as set out in the OECD's recently agreed recommendation on competitive neutrality).²⁰

However, in antitrust these are each *instrumental* offences which are problematic because they threaten to cause an increase in prices (or lower quality, innovation or wages) and hence these are *already* likely to be inconsistent with the greatest equal liberty principle. For example, conduct by a firm (or a regulator) that excludes rival black or female entrepreneurs from apparently highly competitive markets might be of concern because it risks having an effect on market outcomes, for example by reducing innovation, alternative perspectives, and the introduction of products that cater to under-served communities.

¹⁶ Presentation at OECD Global Forum on Competition: <https://www.slideshare.net/OECD-DAF/how-can-competition-contribute-to-fairer-societies-akman-november-2018-oecd-gfc-discussion>.

¹⁷ Primary goods were those that the citizens need as free people and as members of the society.

¹⁸ This is not to suggest however that liberty is *only* about maximising residual income in order to use that to lead a fulfilling life, rather that this is the aspect of liberty that is most relevant when applying this principle within an antitrust setting. Quite clearly there are numerous other fundamental aspects to liberty that are not examined further here.

¹⁹ Again, the efficient citizen welfare standard is an attempt to better describe the fullness of the consumer welfare standard.

²⁰ <http://www.oecd.org/daf/competition/competitive-neutrality.htm>.

We might interpret this principle as suggesting that exclusionary conduct and non-level playing fields are not only *instrumentally* important, but that they can also be seen as *intrinsic* offences against an equal opportunity principle for entrepreneurs.²¹ This would mean that exclusion from a highly competitive market that had *no effect* on market outcomes, would still offend this principle due to its impact on the opportunity of the entrepreneur (so not because of the effect on consumers, but because everyone deserves the opportunity to make the most of their talents). Notably this might be particularly important for entrepreneurs from disadvantaged groups that might face barriers to entry that prevent them enjoying the same opportunities that others have (even if these may not always translate into harm to consumers' and workers' liberty).

However, if there is no effect on market outcomes, then this takes us outside the primary goal of antitrust, and into the possible secondary objectives. We are therefore in the realm of policy, advocacy and prioritisation. More importantly perhaps, we will often arrive at this question of secondary objectives in the all-too-common cases of uncertainty over effects. Specifically, the heightened uncertainty that exists *before* an agency has decided to devote resources to the case or market in question.²² At this stage, the effects and hence the strength of the case under the primary objective is often highly uncertain. Competition agencies therefore have to make decisions over which cases to take, and which markets are worth studying, all with little or no information on the effects at stake.

A Rawlsian approach to these problems would be to propose that where the potential effects are not significantly different, these decisions be made on the basis of a secondary inclusiveness objective. For example, *which cases are likely to improve equal opportunity*, and if that does not help, then on the basis of *which cases are likely to deliver the greatest benefit to the least advantaged members of society* (the difference principle). This "difference principle" (or maxi-min strategy in game theoretic terms) would therefore require that when there is great uncertainty over effect, a focus should be placed upon those cases in which any reduction of anti-competitive rent would be likely to have the most re-distributionary consequence (if it were to be substantiated).

Note that none of this is to disagree that equal opportunities and re-distribution are each policy goals that require their own specific policies and tools, and that those dedicated policy tools offer the most effective way of achieving those goals. However, this is not to say that competition policy cannot and should not contribute to forming a *coherent policy response* to those objectives by defining equal opportunities and re-distribution as secondary policy objectives. For example, as noted, achieving financial stability requires its own policy tools, but as part of a *coherently pro-competitive policy response* across the breadth of government, it does help that secondary competition objectives are defined for regulators that operate the policy tools that focus primarily on delivering financial stability (and indeed other public policy objectives).²³

C. Summary

In summary, this would suggest that the primary objective of competition law should be to deliver greater liberty for all through lower prices, better quality, efficient wages and more innovation. But that secondly, given the often high degree of uncertainty prior to opening an investigation or market study, that it should then seek to deliver an equal opportunity to compete on the merits on a level playing field, and a redistribution towards the least advantaged members of society.

Taking this further, this might also lead us to ask whether decisions over the outcome of a case should ever be made on the basis of a secondary objective? Arguably, this would not be necessary as after an investigation the agency will always be in a position to make a balanced (though not infallible) assessment of the expected effect.

However, if the secondary inclusivity objective is easier to assess than the primary objective, then there might be a good case that the secondary objective should be used to establish a presumption, or to inform the evidentiary standard that applies. For instance, in a market like [pay-day loans](#), if there is any anticompetitive effect from an abuse of dominance or a merger, then the inequality cost of that behaviour or agreement will clearly be extremely high (since the anti-competitive rent would inevitably be redistributed from some of the poorest in society towards the shareholders of pay-day loan firms). In such cases where the inclusivity impact is high, a rebuttable presumption of an anti-competitive effect might help to ensure that the benefit of any doubt sits with the marginalised users. Similarly, a rebuttable presumption of an anti-competitive effect might be adopted in cases where that would improve equality of opportunity, *if a competitive effect were indeed to be shown*. For example, behaviour that allegedly excludes or discriminates against minority-owned SMEs might be identified as having a high potential inclusivity impact, and hence begin with a rebuttable presumption of an anti-competitive effect. Crucially however, the test should remain one that is based on effects, since this determines whether the primary objective (and the first principle of greatest equal liberty) is met or not. However, as has

²¹ Alternatively, given Rawls' focus of the greatest equal liberty principle on primary goods, we might consider that this principle broadens the scope to anticompetitive conduct with significant effects in markets for non-primary goods.

²² This is different therefore from the uncertainty that agencies encounter during a case, particularly in potential competition cases (see Caro de Sousa & Pike, 2020).

²³ See OECD (2019).

become clear in the debate on the risks of over and under-enforcement, an effects-based test need not start from a presumption of no effect.²⁴

Alternatively, if the secondary inclusivity objective is more likely to be harmed by under-enforcement than by over-enforcement (as suggested in section 2), then the secondary objective might justify agencies erring on the side of over-enforcement. For example, in practice this might either mean targeting a non-zero loss rate in court, or the adoption of a rebuttable presumption of an anti-competitive effect as the starting point for the analysis.

Finally, we might also note the important caveat over the *just savings* principle. This is used by Rawls to require that respect is left for future generations, and that redistribution should not ignore the intergenerational dimension. This might therefore be interpreted as creating precisely the type of sustainability as a relevant efficiency defence that Holmes (2020) and others have identified as an important component of an inclusive competition policy.²⁵

IV. WHAT WOULD OTHER SCHOOLS OF THOUGHT MAKE OF THIS?

Naturally, rivals schools of thought will disagree with the reasoning of those that might subscribe to this Rawlsian Antitrust school. However, might they also dispute the claim to the label?²⁶

For instance, structuralists and supporters of a public interest might each well contend that they also share Rawls' concern for inequality. However, fundamental to Rawls' principles is the idea that equal opportunity takes priority to reducing inequality. This suggests that the opportunity for a firm to operate more efficiently without damaging the liberty of others by raising prices (or reducing quality) should be permitted, even if it increases inequality (though redistribution might nevertheless occur via fiscal policy). This principle would therefore clash with the application of public interest tests that seek to prevent mergers that result in efficient rationalization of the workforce (that is, job losses that do not flow from monopsonistic behavior).

Now those favoring a public interest test might retort that equal opportunities should be protected even if they result in higher prices and lower quality for all (that they should not be a *secondary* objective). For example, providing subsidies or asymmetric regulation that helps to provide equal opportunities for historically disadvantaged persons as entrepreneurs even if this raises prices (or reduces quality) for historically disadvantaged and other persons as consumers or workers. This is certainly a coherent position, and one that Michael Sandel might well agree with given his critique of the importance that Rawls places upon meritocracy. However, it would not fit within this analysis because equality of opportunity is second order to the greatest equal liberty principle, and so would not be traded-off against it.²⁷

However, other public interest tests might be adopted in order to protect more fundamental liberties that also sit within, and perhaps higher within, the first principle of greatest equal liberty. For example, as noted, public interest tests for plurality in media markets are commonly part of competition policy in many OECD countries. This therefore perhaps reflects an acknowledgement that there are more fundamental liberties (in this case the fact that preserving a plural media is a necessary condition for freedom of speech) that are more important than obtaining better value. As a result the primary objective of obtaining better value is displaced, not by one of the suggested secondary objectives (equal opportunity or the interests of the least advantaged members of society), but by another aspect of Rawls' first principle, the greatest equal liberty.

The same is true in relation to national security, which again constitutes a defence of the greatest equal liberty principle. How policymakers should decide which parts of the economy should be governed by the need for better value (the primary objective for competition policy) and which should be governed by these different aspects of the greatest equal liberty principle is beyond the scope of this paper. However, it is not difficult to imagine that the categorisation of absolute, limited, and qualified rights that are used within human rights law might be helpful in sub-dividing Rawls' greatest equal liberty principle.

²⁴ See Caro de Sousa & Pike (2020), Motta & Peitz (2019), and Valletti (2018).

²⁵ <https://academic.oup.com/antitrust/article/8/2/354/5819564?login=true>.

²⁶ Ayal (2012), contains a non-Rawlsian analysis on the thought experiment set up by Rawls in order to consider how to treat producer surplus and monopoly rents given the possibility that those choosing behind the veil of ignorance might ultimately benefit from them. Notably the author disagreed with a Rawlsian analysis of that choice and argued that instead individuals might in fact choose to create anticompetitive rents in the hope that they might benefit from it. As Ennis et al (2019) demonstrate that hope would be far-fetched for most.

²⁷ As a result rigorous examination of the creation and abuse of monopsony market power against workers or small businesses would be consistent with this approach, but permitting practices that deliver anticompetitive rents to small businesses would not (though enforcement in those cases, particular to those where there is uncertainty on the effect, would be a lower priority since the cost in terms of inequality or inclusivity would be relatively small).

Finally, those with a more structuralist approach might also feel their perspective to be Rawlsian in some respects, since they too are concerned for justice and fairness.

Indeed the harm created by corporate power can be important for marginalised consumers and workers even if it does not stem from an ability to increase rent by restricting substitutability. For example, mergers that increase the merged entity's ability or incentive to lobby might have an indirect effect on substitutability and market power by foreclosing rivals in the same way that mergers that make a firm too-big-to-fail can (see Cowgill et al, 2021 on the first, and Hellwig, 2017 on the second of these). However, in each case the lobbying power might also harm consumers (or workers) via non-market power channels. For instance, prices might rise (or quality or wages fall) because a merger increases the systemic importance of a firm (perhaps by increasing its importance as an employer within an area, its influence on political debate, or the contagion risk that its failure poses to others), each of which might increase its bargaining power with government.²⁸ In such cases, the creation or abuse of this lobbying power might allow a firm to extract rent, for example by reducing the protection from exploitation that is offered to consumers or workers by regulations.

However, a non-rebuttable structuralist approach would for example focus not on the effects of a merger, but more narrowly on the change in structure, e.g. the HHI (albeit in the expectation that this would often have an adverse effect on different stakeholder groups). This would therefore entail restricting a firm's scope to act to attempt to improve its efficiency (e.g. by merging to obtain economies of scale), even when the specific evidence of the case suggests this would not lead to higher prices, lesser quality and innovation or inefficient wages. It would therefore involve action against mergers (or conduct), the effects of which are not expected to create a realistic prospect of harm, and hence are unlikely to reduce liberty.

If instead, a legal framework for addressing such non-market power concerns were available, then economists would be able to test different potential theories of harm that stem from the creation or abuse of lobbying power (as opposed to market power or dominance). This would allow them to work towards distinguishing the harmful from the harmless rather than simply prohibiting size. After all, it is not clear that a structuralist approach that sets bright line tests to limit a firm's size and which cannot be rebutted would achieve either of the secondary objectives discussed above, since like price, quality, innovation and wages, neither are straightforwardly correlated with market structure.

V. WHAT WOULD RAWLSIAN ANTITRUST MEAN IN PRACTICE?

It might be argued that in practice we already have a cautious and limited version of Rawlsian Antitrust. For instance, as Bill Kovacic points out, we do not typically see competition agencies focusing their limited resources on anti-competitive conduct in luxury yacht or sports car markets.²⁹ Indeed as noted, in the UK, the CMA, since the financial crisis, has explicitly targeted markets that matter to those vulnerable consumers and those on low incomes.

However, as recent examination of the treatment of gender and racial inequality within antitrust makes clear, this has for most agencies not extended to other disadvantaged groups. There would therefore seem to be considerable scope for prioritising resources and cases for those markets that matter to the least advantaged members of society. As I have argued elsewhere (Pike & Santacreu-Vasut, 2018 and 2019), for gender inequality there is a strong case for focusing upon child, elderly and social care markets, and predominantly female labor purchasing markets, as well as the variety of markets that impact upon unpaid work within the home (the burden of which falls disproportionately upon women across the world). There will no doubt also be a list of important markets that might be tackled by those seeking to address racial inequality. Again this is might include some labor markets, but might also include certain housing markets, in addition to other markets that might be disproportionately important for particular minorities, either as consumers, as entrepreneurs, or as workers. Engaging with inequalities researchers here might offer promising insight into which services or capabilities these communities are lacking, and which they rely upon but might overpay for, or suffer the provision of poor quality products (for instance in publicly-funded markets these communities are likely to suffer poor quality rather than high prices).³⁰

Other proposals have included the idea that within an investigation a gender or racial lens should be used to ensure that due consideration is given to differences in preferences and behavioral biases between disadvantaged groups and the average consumer. This is therefore not about case selection or prioritisation, but instead an analytical measure that can result in a more careful analysis of markets that matter to these

²⁸ Furthermore, this power might not occur at the level of relevant antitrust markets (based on degrees of substitutability). Instead, it might exist at or across industries or administrative regions.

²⁹ See https://www.youtube.com/watch?v=s7gg7w7M_9E.

³⁰ See for example, recent market studies into elderly care and children's social care. Education markets may also be relevant here (OECD, 2019).

groups. For instance, it might result in different market definitions being adopted, the identification of different competitive constraints between products for different groups, and the need for different remedies.³¹

Finally, in recent years there has been increasing recognition of the case for a recalibration of the relevant tests and evidentiary standards for antitrust intervention. This has been proposed in digital mergers (CMA, 2020, Klobuchar, 2021), start-up acquisitions (Valletti, 2018, Motta & Peitz, 2019), potential competition cases (Caro de Sousa & Pike, 2020, Simons, 2020), all merger cases (Baker et al, 2020, Delrahim, 2021) and in anticompetitive conduct cases (as established under the new German competition law amendments, and under the EU's proposed Digital Markets Act).³² These are motivated by past under-enforcement, and a view that the established standards of evidence and burden of proof have been set up in a way that gives the benefit of the doubt to a narrowly drawn shareholder base in order to obtain the benefit of possible (often speculative and illusory) efficiencies, rather than to consumers and workers.

Rawlsian antitrust might therefore be seen to include both a pro-enforcement wing, and a more cautious wing. The pro-enforcement wing see scope for the adjustment of the relevant tests in order to facilitate more active enforcement. They might also consider that under-enforcement errors tend to have a higher inequality cost than over-enforcement errors, and therefore see the need for a thumb on the scale in favor of consumers. In contrast, the more cautious wing might be keen for competition policy to obtain the double-dividend of both greater efficiency and an impact on inclusiveness, but are broadly content with the system as is, though many would like to see faster decision-making and more effective remedies when problems are identified.

VI. CONCLUSION

This paper argues that a Rawlsian approach to reconciling inclusivity and competition would suggest that the primary objective of competition law should be to deliver greater liberty for all through lower prices, better quality, efficient wages and more innovation. But that secondly, greater inclusivity should feature (ideally in legislation) as an explicit but secondary objective of antitrust and competition law (not as an additional primary objective, as for example under a public interest test). Greater inclusivity here would mean an equal opportunity for marginalised groups to compete on the merits on a level playing field, and a redistribution towards these less advantaged members of society.

This approach would be based on an economic understanding of the competitive effects of a particular behaviour, and a clear set of values, and would be transparent on how the reconciliation between those might be operationalised.

The paper also argues that this approach would mean clarifying that the consumer welfare standard does not, or should not, simply identify harm to consumer surplus, but should also guard against inefficiently low wages for workers or sellers in input purchasing markets. While the paper labels this an “efficient citizen welfare standard,” in substance this aligns with Carl Shapiro’s recent description of a “protecting competition standard.”

The paper identifies the existence of both pro-enforcement and more cautious factions that may co-exist within a Rawlsian approach. Depending on the faction, you might therefore expect to see those from this Rawlsian school advancing different proposals for reform or for enforcement in order to deliver a more inclusive competition policy. However, what they would share would be a belief that inclusiveness is a welcome product of competition policy, and that, subject to the need for an effects-based analysis (perhaps with differing rebuttable presumptions) that prioritizes value, innovation and the other primary goals of antitrust, this side-product of greater inclusiveness should be maximized to benefit the most disadvantaged within society.

In contrast, you would not find them supporting public interest tests for non-absolute liberties (e.g. employment), or non-rebuttable structuralist presumptions that disregard the expected effects of a specific conduct or merger. In this respect, their values would lead them to seek to reconcile inclusiveness with the need to use the evidence available to help identify whether anticompetitive practices can be expected to result in higher prices, lower quality, lower wages or less innovation. The hope would be that this reconciliation might then help to make a small but perhaps significant contribution to achieving greater inclusivity, which is arguably the great challenge of our time, and which was first stirred, and then made urgent by successive crisis that have shaken our world, and which now threaten to burn down the antitrust chateau.³³

31 See the presentations by Oxera and Analysis Group at the recent OECD workshop on Gender Inclusive Competition Policy (<http://www.oecd.org/competition/gender-inclusive-competition-policy.htm>).

32 The Digital Markets Act does so through ex-ante regulation of certain conduct, not through Antitrust.

33 Weyl (2018). <https://ecp.crai.com/events/cra-annual-brussels-conference-economic-developments-in-competition-policy-2018/>.

TOWARDS INCLUSIVE COMPETITION ANALYSES: THE QUESTIONS WE OVERLOOK

BY MARIA STOYADINOVA¹



¹ Senior Vice President Compass Lexecon, Washington, DC. The views and opinions expressed in this paper are solely those of the author and do not necessarily reflect the views and opinions of Compass Lexecon or any of the organizations with which the author is or has previously been associated.

I. INTRODUCTION

One of the stated goals of competition policy and antitrust enforcement is to maintain balance and fairness in markets by preventing harm from unchecked market power.² Although competition analyses generally focus on the impacts business conduct has on consumer or social welfare, they traditionally do not evaluate how marginalized consumers or businesses in a society may be impacted differently or experience more harm in the marketplace than market participants with more social or economic privilege.³ In the past year, that gap in competition analyses has been brought to the forefront of discussions about the future of competition policies across the world.⁴ Finding ways to address the gap will prevent antitrust enforcement from perpetuating existing systems of inequality in the economy and society more broadly, and will bring competition policy closer to its stated goal of restoring balance in the marketplace.⁵

The goal of this paper is to provide examples of analytical questions that are currently missing from most competition analyses and that economists, agencies, and policymakers across the world can consider in designing more inclusive competition policies. I also discuss examples of existing models of inclusive competition enforcement from across the world that can serve as blueprints for incorporating these missing analytical questions and expanding the scope of antitrust regulation in other jurisdictions.

II. QUESTIONS MISSING FROM TRADITIONAL COMPETITION ANALYSES

In this section, I outline some of the social equity questions that are currently missing from most traditional competition analyses. This list is by no means comprehensive; rather, it is intended as a starting point for further discussion and research into how competition policy could expand, evolve, and become more inclusive.

A. A More Nuanced Evaluation of Prices

In many jurisdictions across the world, price levels are used as key benchmarks in assessing whether business conduct or potential mergers and acquisitions would be pro- or anti-competitive. Higher prices resulting from increased market power and more market consolidation are generally considered anti-competitive, as are below-market prices used by a dominant firm to drive smaller competitors out of the market.⁶ However, several important pieces are missing from most traditional merger reviews and market evaluations.

One such component is the study of how price changes might impact marginalized communities, such as racial minorities, differently than they would more privileged counterparts. While merger analyses may look at whether certain customer groups would be left with fewer product or service options and higher prices post-merger, less political and regulatory attention is generally dedicated to understanding whether customers from marginalized social groups would experience worse outcomes than more privileged customer groups. For instance, as Prof. Darrick Hamilton discussed recently, in the U.S. there is a different level of tolerance for price discrimination and lower-quality products depending on the neighborhoods where such practices take place, and that tolerance is very racialized.⁷ Similarly, traditional price analyses do not consider the

2 See e.g. “Mission: Antitrust Laws,” The United States Department of Justice, accessed March 19, 2021, <https://www.justice.gov/atr/mission>, (“The goal of the antitrust laws is to protect economic freedom and opportunity by promoting free and fair competition in the marketplace.”)

3 The focus on how business conduct affects consumers, known as the consumer welfare standard, is applied in some countries, including the United States. In other countries, competition policy focus extends beyond the interests of consumers and covers the broader social interest. Examples include the total welfare and the multiple goals standards. See Christine Wilson, “Welfare Standards Underlying Antitrust Enforcement: What You Measure Is What You Get,” Luncheon Keynote Address at George Mason Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads?, February 15, 2019, https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf.

4 Rebecca Kelly Slaughter, “Antitrust at a Precipice,” Remarks as Prepared for Delivery During GCR Interactive: Women in Antitrust, November 17, 2020, https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf and “Workshop on Gender Inclusive Competition Policy: Agenda,” OECD, February 25, 2021, <https://www.oecd.org/daf/competition/workshop-on-gender-inclusive-competition-policy-agenda-february-2021.pdf>.

5 As FTC attorney Synda Mark explained during a recent panel, the goals of antitrust (“ensuring appropriate balance within markets”) and racial equity (“balancing that which is unbalanced”) are ultimately similar. See “Equity and Antitrust – a Framework for the Future?,” Committee Program Archive, American Bar Association, Antitrust Law Section, January 11, 2021, https://www.americanbar.org/groups/antitrust_law/committees/committee_program_audio/january-2021/011121-equityandat/ (hereinafter “Equity and Antitrust ABA Panel.”)

6 See e.g. “Horizontal Merger Guidelines,” U.S. Department of Justice and the Federal Trade Commission, Issued August 19, 2010, <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010#10> (“(a)dverse unilateral price effects can arise when the merger gives the merged entity an incentive to raise the price of a product previously sold by one merging firm.”). Below-market pricing (also called predatory pricing) is defined in the competition laws of many jurisdictions across the world. See e.g. “The Competition Act, 2002,” Competition Commission of India, https://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf.

7 Darrick Hamilton, Equity and Antitrust ABA Panel.

fact that the same price increase may have a significantly lower impact on customers in high-income brackets than it may have on low-income consumers.⁸

On the flipside, in situations when business conduct would lead to lower prices, often left out of competition analyses are the factors contributing to those lower prices. For instance, a firm may be able to offer lower prices because it has buyer power in the labor market and it is able to use that power to provide worse compensation or working conditions to its employees.⁹ As an example, ride-sharing companies in the U.S., whose drivers are predominantly members of ethnic minorities, have been able to offer lower prices than taxi providers by, among other things, classifying their drivers as independent contractors. That classification allows the companies to offer lower pay and worse working conditions (such as the absence of health insurance or protection from discrimination) and prevents drivers from engaging in collective bargaining. In fact, in some regions ride-sharing companies have proactively used antitrust law to prevent their workers from unionizing.¹⁰

On the subject of predatory pricing, enforcement agencies can look beyond the question of whether competitors in general are being excluded from the market and delve into the ability of minority-owned businesses to compete in the face of below-market prices or other exclusionary conduct by dominant firms.¹¹ A blueprint for this is available in South Africa's competition law, which explicitly directs the country's enforcement agency to consider the impact of several pricing practices on businesses owned by historically marginalized communities.

B. Access to Goods and Services

Just as price changes can have disproportionate impacts on marginalized customers and businesses, certain types of business conduct can lead to unequal access to goods and services in marginalized communities. For instance, market power may lead to lower investment, inferior products or retail deserts in areas and neighborhoods where people of color make up a higher percentage of the population.¹² In the United States, several market sectors that are frequently subject to market consolidation and antitrust review — such as the grocery and healthcare sectors — are also well-known for having unequal access to goods and services for people of color.¹³

Research shows that neighborhoods with predominantly white populations in the U.S. have better access to grocery stores compared to similar neighborhoods with a higher percentage of people of color.¹⁴ On the healthcare front, marginalized communities in the U.S., particularly people of color, have limited and unequal access to health care and, as a result, experience worse outcomes related to numerous health conditions. For instance, people of color have higher incidence of chronic diseases compared to white people in the country, while Black women are 3-4 times more likely to die from complications related to pregnancy than are white women.¹⁵ In terms of market conditions, both industries have seen rising levels of market consolidations in the past 20-30 years. The top 20 largest grocers in the country increased their combined market

⁸ "Antitrust & Antiracism: What Lies Ahead," Spring Meeting Panel, American Bar Association, Antitrust Law Section, March 24, 2021.

⁹ Sandeep Vaheesan, Equity and Antitrust ABA Panel.

¹⁰ On the rights of independent contractors vs. employees, see "Independent Contractors," Workplace Fairness, accessed March 19, 2021, <https://www.workplacefairness.org/independent-contractors#1>. On the use of antitrust law to prevent drivers from unionizing, see Sandeep Vaheesan, "How Antitrust Perpetuates Structural Racism," The Appeal, September 16, 2020, <https://theappeal.org/how-antitrust-perpetuates-structural-racism/>. On the demographics of ride-share company drivers, see Mansoor Iqbal, "Uber Revenue and Usage Statistics (2020)," Business of Apps, March 8, 2021, <https://www.businessofapps.com/data/uber-statistics/> and Mansoor Iqbal, "Lyft Revenue and Usage Statistics (2020)," Business of Apps, March 9, 2021, <https://www.businessofapps.com/data/lyft-statistics/>.

¹¹ In addition to predatory pricing, other factors can also affect the ability of minority-owned businesses to enter the market, such as more limited access to capital. See Darrick Hamilton, Equity and Antitrust ABA Panel.

¹² Darrick Hamilton, Equity and Antitrust ABA Panel.

¹³ Nell Abernathy, "The Effects of Market Power on Women and People of Color," Roosevelt Institute, March 7, 2018, <https://rooseveltinstitute.org/2018/03/07/the-effects-of-market-power-on-women-and-people-of-color/> and Lauren Feiner, "How FTC Commissioner Slaughter Wants to Make Antitrust Enforcement Antiracist," CNBC, September 26, 2020, <https://www.cnbc.com/2020/09/26/ftc-commissioner-slaughter-on-making-antitrust-enforcement-antiracist.html>.

¹⁴ Nathaniel Meyersohn, "Groceries Were Hard to Find for Millions. Now It's Getting Even Worse," CNN Business, June 9, 2020, <https://www.cnn.com/2020/06/09/business/food-deserts-coronavirus-grocery-stores/index.html>.

¹⁵ Sofia Carratala & Connor Maxwell, "Health Disparities by Race and Ethnicity," Center for American Progress, May 7, 2020, <https://www.americanprogress.org/issues/race/reports/2020/05/07/484742/health-disparities-race-ethnicity/> and Karie Stewart, "Tackling Disparities in Black Maternal Health," UChicago Medicine, January 8, 2021, <https://www.uchicagomedicine.org/forefront/womens-health-articles/disparities-black-maternal-health>. Similar racial disparities in health care access have also been found in other countries, including the United Kingdom, Canada, and France. See e.g. "'We All Bleed the Same Color': Why Do Black Women in the UK Experience Disparities in Gynecological Care," Medical News Today, <https://www.medicalnewstoday.com/articles/we-all-bleed-the-same-color-why-do-black-women-in-the-uk-experience-disparities-in-gynecological-care>, accessed March 24, 2021; Ngozi Iroanyah & Madi Cyr, "Navigating Systemic Racism in Canadian Healthcare," Healthy Debate, July 13, 2020, <https://healthydebate.ca/2020/07/topic/navigating-systemic-racism/>; Arno Pedram, "Virus Exposes Economic, Racial Divide in French Health Care," ABC News, August 13, 2020, <https://abcnews.go.com/Health/wireStory/virus-exposes-economic-racial-divide-french-health-care-72344469>.

share from 39 percent to 67 percent between 1992 and 2016.¹⁶ In the hospital sector, the percent of community hospitals belonging to health systems increased from just over 50 percent in 1999 to more than 65 percent in 2016.¹⁷ These two sectors illustrate that carefully considering unequal access to goods and services among marginalized communities when evaluating business conduct or proposed mergers, especially in industries that provide essential goods and services, would be a critical step towards making competition policies more inclusive.

C. Who Gets to Complain?

One of the key aspects of competition policy enforcement in many jurisdictions is the opportunity for both consumers and businesses to report potential antitrust violations to competition authorities. In the United States, both federal agencies responsible for competition policy — the Federal Trade Commission (“FTC”) and the Department of Justice (“DOJ”) — provide options for antitrust violations to be reported through their websites.¹⁸ Other jurisdictions across the world provide similar reporting channels.¹⁹

Providing consumers and business owners with the option to report competition concerns is important for a well-functioning and open competition enforcement system. However, it also raises the important question of whether everyone in society is on an equal footing when it comes to the opportunity to complain. Although complaints might in theory be open to all, consumers or businesses with limited access to legal counsel and representation may be less likely to learn about the option to file a complaint or the process required to do so. Similarly, communities with limited internet or technology access would stand at a disadvantage in researching or investing the time and resources needed to file a complaint. In addition, some communities of color and immigrant communities may be more distrustful of interactions with authorities and avoid filing reports with the government for that reason.²⁰

Analyzing data on past complaints to uncover the characteristics of individuals and businesses who participate in the antitrust complaint process would provide valuable insight into potential inequities inherent in the system that may not be otherwise apparent. Using that information to improve equitable access to reporting would be an important step towards creating competition policies that are more inclusive and equitable.

D. Impacts of Competition Policy on Employment and Worker Protection

The types of business conduct that are frequently subject to scrutiny from competition enforcement agencies often also lead to changes in employment conditions or termination of employment for workers in their industry. For example, a normal part of mergers, acquisitions, or joint venture agreements includes combining the work forces of previously competitive firms and laying off redundant personnel. In the United States, labor force reductions that are transaction-specific and result in a lower variable cost of production could be considered cognizable efficiencies from a merger and, as such, would be credited against any potential price increases resulting from the transaction (thus making the path to merger clearance easier).²¹ A more equitable approach to merger evaluation would include an analysis of the impacts such potential employment termination has on marginalized communities and adjusting or eliminating the synergy credit given to the merging parties depending on the severity of the impact. On the remedy side, part of the required remedies for antitrust clearance could include the provision of retraining programs for impacted employees.

16 Nell Abernathy, “The Effects of Market Power on Women and People of Color,” Roosevelt Institute, March 7, 2018, <https://rooseveltinstitute.org/2018/03/07/the-effects-of-market-power-on-women-and-people-of-color/>.

17 Emily Gee & Ethan Gurwitz, “Provider Consolidation Drives Up Health Care Costs,” Center for American Progress, December 5, 2018, <https://www.americanprogress.org/issues/healthcare/reports/2018/12/05/461780/provider-consolidation-drives-health-care-costs/>.

18 See “Report Violations,” The United States Department of Justice, <https://www.justice.gov/atr/report-violations> and “Report an Antitrust Violation,” Federal Trade Commission, <https://www.ftc.gov/faq/competition/report-antitrust-violation>.

19 See e.g. “Contacts: Antitrust and General Correspondence,” European Commission, https://ec.europa.eu/competition/contacts/electronic_documents_en.html, accessed March 24, 2021; “Feedback/Complaint/Miscellaneous Information,” Competition Commission of India, <https://www.cci.gov.in/feedback>, accessed March 24, 2021.

20 “Consumer Protection for Diverse Communities,” Spring Meeting Panel, American Bar Association, Antitrust Law Section, March 25, 2021.

21 “Horizontal Merger Guidelines,” U.S. Department of Justice and the Federal Trade Commission, Issued August 19, 2010, <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010#10>.

Competition enforcement agencies can also look at how and whether firms with monopsony power use that power to negatively impact workers, especially workers from marginalized social groups.²² On the labor market side, there is evidence to suggest that, at least in the United States, there is a high level of market concentration in labor markets and that this concentration has a negative impact on employee compensation.²³ There is also evidence that the use of antitrust enforcement to protect workers in the U.S. is rare and may, in many cases, be hampered by the focus on the consumer welfare standard.²⁴ Stepping up monopsony inquiries and consistently including analyses of the impacts of monopsony power on the working conditions and compensation of marginalized workers would be key next steps in the creation of more inclusive competition policies across the world. Part of this process could also include further analysis of the wage elasticities of different groups of employees, since lower wage elasticities make some workers particularly vulnerable to unfavorable working conditions.²⁵

III. EXAMPLES OF MORE INCLUSIVE COMPETITION POLICIES ACROSS THE WORLD

Several jurisdictions across the world have already taken steps towards making competition policies more inclusive by considering the specific impacts of competition practices on women and people of color, as well as on unemployment and access to goods and services. In this section, I summarize some of the efforts that can serve as blueprints for more inclusive competition policies in other countries as well.

A. Considering Gender

In 2018, the Organization for Economic Co-operation and Development (“OECD”) raised the question of whether applying a gender lens to competition policies across member states would make competition enforcement more informed, comprehensive, and inclusive. In mid-2020, the OECD, supported by the government of Canada, launched the Gender Inclusive Competition Policy project, soliciting research on the impact gender could have on competition policies around the world and in February, 2021, the Organization hosted a workshop on the topic, sharing some of the findings to date.²⁶

According to Chris Pike, an OECD competition expert, the research suggests that incorporating gender as an analysis pillar could lead to more accurate market definitions in competition analyses and, consequently, more effective remedies required from businesses.²⁷ At the same time, a closer look at monopsony market power could prevent firms from taking advantage of women’s lower wage elasticity by offering lower pay and worse working conditions to women in the workplace.²⁸ Policy proposals coming out of the research include addressing gender-specific restrictions in labor mobility, increasing pressure from competition agencies for more diverse company leadership, evaluating entry barriers that more disproportionately impact women-owned businesses, and policy support for credit markets that contribute to the creation of such businesses.²⁹

22 In 2020, the United States antitrust agencies released a joint statement highlighting the importance of competition in labor markets (See “Joint Antitrust Statement Regarding Covid-19 and Competition in Labor Markets,” Joint Statement of the Bureau of Competition of the Federal Trade Commission and the Antitrust Division of the Department of Justice, April 2020, https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-bureau-competition-federal-trade-commission-antitrust-division-department-justice/statement_on_coronavirus_and_labor_competition_04132020_final.pdf). This increased focus on labor market competition can and should be extended to evaluate impacts of monopsony power on workers from marginalized social groups.

23 Marshall Steinbaum, “Evidence and Analysis of Monopsony Power, Including but Not Limited to, in Labor Markets,” Public Comment to the Federal Trade Commission, August, 2018, https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0054-d-0006-151013.pdf and “Competition in Labour Markets,” OECD, 2020, <http://www.oecd.org/daf/competition/competition-in-labour-markets-2020.pdf>.

24 Sandeep Vaheesan & Matthew Buck, “Antitrust’s Monopsony Problem,” ProMarket: The Publication of the Stigler Center at the University of Chicago Booth School of Business, February 3, 2020, <https://promarket.org/2020/02/03/antitrusts-monopsony-problem/>.

25 For instance, a 2017 study of gender differences in job mobility and earnings in Brazil found that women had wage elasticities between 1.22 and 1.502, while men had elasticities ranging from 1.638 to 2.175. Brandon Vick, “Measuring Links Between Labor Monopsony and the Gender Pay Gap in Brazil,” IZA Journal of Development and Migration 7, no. 10 (2017), <https://doi.org/10.1186/s40176-017-0099-x>.

26 “Workshop on Gender Inclusive Competition Policy: Agenda,” OECD, February 25, 2021, <https://www.oecd.org/daf/competition/workshop-on-gender-inclusive-competition-policy-agenda-february-2021.pdf>. In July 2019, the Canadian Competition Bureau released its Annual Plan for competition policy and enforcement in the country. As part of the plan, the Bureau included a section on gender and competition and discussed its work with the OECD on researching the impact of applying a gender lens to competition review and analyses. See “2019-20 Annual Plan: Safeguarding the Future of Competition,” Competition Bureau Canada, July 25, 2019, <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04480.html>.

27 Chris Pike, “Shaping the ‘She-Covery’: 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-covery-using-gender-inclusive-competition-policy-to-build-back-better/>.

28 *Ibid.*

29 *Ibid.*

The OECD findings and policy proposals provide valuable ideas for more inclusive competition enforcement across the world. However, as discussed in the following section, a clear gap in these proposals is the analysis of how policies strictly focused on gender may negatively impact racial minorities and members of other marginalized social groups.

B. Considering Race

Considering the impacts of existing and future policies on people of color and people with other marginalized identities, alongside and in conjunction with a focus on gender, is essential for making competition analyses more inclusive. Such an intersectional framework will also ensure that a focus on gender alone does not lead to perpetuating and further aggravating other existing disparities in society.

For instance, part of the aforementioned OECD research focuses on a metric called the Grossly Undervalued Domestic Product (“GUDP”), the purpose of which is to quantify and introduce into market analyses the value of unpaid domestic labor. A suggested action step in the GUDP study is turning unpaid domestic work into paid labor by hiring people to perform the tasks that women currently perform for free, thus increasing women’s workforce participation and minimizing the amount of women’s unpaid labor.³⁰ While recognizing the value of unpaid domestic labor is undoubtedly important, a call for employing more domestic workers without considering the racialized aspect of domestic work and without concurrently advocating for labor protections and rights for domestic workers would perpetuate existing inequality and racial disparities.

In the United States the majority of domestic workers are women of color and domestic employment is marked by low compensation and ineligibility for overtime pay or minimum wages, while also being widely excluded from workers compensation insurance, unemployment benefits, and protection against sexual harassment.³¹ Expanding the number of domestic workers without addressing their working conditions is, thus, likely to afford more workforce participation and benefits for wealthier women (who in the United States are disproportionately white and Asian women), while exacerbating disparities faced by lower-income women (who are disproportionately Black and Hispanic women).³²

A prominent example of a national competition policy focused on addressing racial inequality and reversing the historic economic exclusion of people of color is South Africa’s Competition Act. When it was first introduced in 1998, one of the Act’s stated purposes was “to increase the ownership stakes of historically disadvantaged persons” (or “HDPs”).³³ In 2017 in the State of the Nation Address, then-President Jacob Zuma outlined the need for additional steps in making the country’s economy more inclusive by, among other things, working to “open up the economy to new players” and “give black South Africans opportunities in the economy.”³⁴

This led to the adoption of the 2018 Competition Amendment Act that included several provisions explicitly aimed at balancing the economy and addressing the historic exclusion of Black South Africans from the marketplace. Under the Act, public interest considerations in merger review include higher levels of ownership by HDPs in the market. Also considered are the impacts of mergers on HDP-owned businesses and on small and medium-sized businesses. The Act also prohibits dominant buyers in certain government-designated sectors from charging unfair prices or imposing unfair trading conditions on HDP-owned suppliers and the use of price discrimination to impede the effective market participation of HDPs. Finally, the Act mandates that, in performing market inquiries, the Competition Commission take into account whether market structure negatively impacts HDP-owned businesses.³⁵

30 Sarah Long, “Gender Inequality, Market Distortion and Consumer Welfare: A Call to Action for Competition Authorities,” *Journal of European Competition Law & Practice* 10, Issue 5 (May 2019): 267–268, <https://doi.org/10.1093/jeclap/lpz020>.

31 Alexia Fernández Campbell, “Kamala Harris Just Introduced a Bill to Give Housekeepers Overtime Pay and Meal Breaks,” *Vox*, July 15, 2019, <https://www.vox.com/2019/7/15/20694610/kamala-harris-domestic-workers-bill-of-rights-act>.

32 “Labor Force Statistics from the Current Population Survey,” U.S. Bureau of Labor Statistics, <https://www.bls.gov/cps/earnings.htm>, accessed March 28, 2021.

33 Eleanor M. Fox, “South Africa, Competition Law and Equality: Restoring Equity by Antitrust in a Land Where Markets Were Brutally Skewed,” *Competition Policy International Antitrust Chronicle*, December 2019, <https://www.competitionpolicyinternational.com/south-africa-competition-law-and-equality-restoring-equity-by-antitrust-in-a-land-where-markets-were-brutally-skewed/> (hereinafter “South Africa, Competition Law and Equality Paper”).

34 “President Jacob Zuma: 2017 State of the Nation Address,” South African Government, February 9, 2017, <https://www.gov.za/speeches/president-jacob-zuma-2017-state-nation-address-9-feb-2017-0000#>.

35 South Africa, Competition Law and Equality Paper.

C. Considering Unemployment and Access to Goods and Services

In several jurisdictions gender or race may not be explicitly included as competition policy pillars, but the broader social impacts of business conduct are embedded in competition reviews and enforcement. These broader impacts include effects on employment, as is the case in South Korea and France, or the impacts on access to goods and services, as in Canada.

In South Korea, efficiencies credited under merger reviews include the impacts on employment growth and local economy growth.³⁶ Similarly, in France, the Minister of Economic Affairs, Finance, and Industry — who is responsible for the ultimate approval or rejection of mergers — takes into account a variety of public interest factors in merger investigations. One of these factors is the transaction's impact on job creation or maintenance.³⁷ In Canada, merger evaluations in the banking sector include an assessment of the impact the transaction would have on access to financial services in rural and low-income communities, as well as ensuring fair treatment of employees affected by the merger.³⁸

IV. CONCLUSION

An analysis of the ways in which business conduct impacts marginalized groups in society is currently missing from many competition policies across the world. Incorporating such an analysis would bring competition policies closer their states goals of restoring balance in markets. More importantly, it would prevent competition enforcement and business practices from supporting and perpetuating existing structures of inequality in markets, and in society more broadly.

To make competition policy more inclusive, we first need to consider the questions that are currently missing from competition analyses. Some of those rarely considered questions are:

- Do price changes have a more detrimental impact on marginalized communities than on more privileged consumers?
- Are we paying equal attention to the exercise of market power in areas predominantly populated by racial minorities or other marginalized social groups?
- Are low prices in a market achieved at the expense of working conditions for marginalized workers?
- Are minority-owned businesses disproportionately excluded from the marketplace?
- Is access to goods and services unequal among marginalized consumers?
- How can we ensure more equitable access to the reporting of competition violations?
- Does certain business conduct have a more detrimental impact on unemployment rates or employment conditions for marginalized workers?

It is important to remember that this list is not exhaustive and is intended as a starting point for further research and scholarship into the ways in which current competition policies bypass and reinforce systems of inequality in the marketplace and how we can start to reverse and change that.

Governments and competition authorities can start to incorporate those missing questions into competition reviews and policies. On that front, South Africa's competition policy, which considers the racial impacts of competition enforcement, and the OECD research on including gender as a pillar of competition analyses can be used as blueprints for policy changes. Examples of more broadly comprehensive competition policies from South Korea, France, and Canada also provide valuable ideas for ways to expand competition policies and make them more inclusive. It is imperative that further research and discussions consider the intersection of race, gender, and other marginalized identities, or else any proposed policy changes run the risk of perpetuating systems of oppression within each of the individual pillars.

³⁶ "Guidelines for Combination of Enterprises Review," Public Notification of the Fair Trade Commission of South Korea, No. 2017-22, December 20, 2017.

³⁷ Oliver Budzinski & Annika Stöhr, "Public Interest Considerations in European Merger Control Regimes," Ilmenau Economics Discussion Papers, No. 130, <https://www.econ-stor.eu/bitstream/10419/203144/1/1671887840.pdf> and "France: The Role of Competition Policy in Regulatory Reform," OECD Country Studies, 2003, <https://www.oecd.org/france/31415943.pdf>.

³⁸ "Competition Bureau Submission to the OECD: Competition Committee Roundtable on Public Interest Considerations in Merger Control," Competition Bureau Canada, June 14, 2016, <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04101.html>.

CAPTIVE AUDIENCES: A CASE STUDY OF PHONE RATES FOR INCARCERATED PERSONS



BY COLEMAN BAZELON & PAROMA SANYAL¹



¹ Dr. Coleman Bazelon is a Principal with The Brattle Group and co-leader of the Intellectual Property Practice; corresponding author, Dr. Paroma Sanyal (Paroma.Sanyal@brattle.com), is a Senior Consultant with The Brattle Group and co-leader of the Telecom, Internet, Media & Entertainment Practice. For the past decade, Brattle has been supporting the Wright Petitioners on a Pro Bono basis and has authored numerous reports supporting the lowering of rates. This article reflects the perspectives and opinions of the authors and does not necessarily reflect those of The Brattle Group, its clients or other consultants. We would like to thank Michelle Cleary, Branko Jovanovic, Renée Duplantis, Andrea Helfant and others who have provided comments on the draft.

The concept of Inclusive Competition means that antitrust should not improve or preserve competitive dynamics to the benefit of only certain parts of the population, but rather, takes into account how competitive dynamics may be improved for the benefit of all segments of the population. Indeed, it might look particularly at vulnerable populations captive to certain providers of goods or services or market dynamics, who are not reaping the benefits of competition that antitrust seeks to provide. In this article, we discuss our experience analyzing the competitive dynamics that impact one such captive audience.

Market power is always a concern when customers are captive to a single provider. And few customers are more captive than U.S. prisoners and their families trying to make phone calls. Unlike regular citizens who have access to numerous calling services, including via mobile phones, inmates in correctional facilities “only have [permitted] access to payphones operated by a single provider,” as all prisons and jails contract with a sole phone provider to serve their inmate populations, creating a monopoly in inmate calling services.² Furthermore, many facilities receive “commissions” in return for awarding these contracts, making the competition for the contracts largely about the size of the commissions. In terms of the captive audience, there are nearly 2.2 million Americans who are incarcerated today.³ The U.S. inmate population also skews heavily toward People of Color. For example, in 2019, Blacks and Hispanics accounted for only 31 percent of the U.S. population, but made up 56 percent of the incarcerated population.⁴ Addressing this monopoly and inherently anticompetitive market not only corrects a market failure, but one that disproportionately affects non-white Americans.

Phone calls from prisons and jails usually require inmates to create accounts with a private phone company that serves the facility, and to hold money in these accounts for prepaid calls. What they are charged for these calls is significantly more than a comparable call outside of the correctional facilities.⁵ The high charges paid by inmates and their family and friends for inmate calling services (“ICS”) has made it difficult for incarcerated people to communicate with their families, friends and other support networks. A 2018 survey found that a 15-minute call for inmates could cost as much as \$25, with the first minute billed at \$5.34 and the rest billed at a rate of \$1.39 per minute.⁶ Not all calls are this expensive, but most are significantly overpriced. Although there are some additional costs to providing phone service in prisons and jails – call recording and other security functionality – they do not explain why these rates are so much higher than the rates the rest of us pay to make phone calls.

Communication between incarcerated people and their families is important for reducing recidivism, maintaining inmate mental health and a host of other related benefits.⁷ This has become even more important due to COVID-19 lockdown restrictions – often visitations are not possible.⁸ As to recidivism alone, small reductions in reincarceration rates can translate to large savings. In our past research, we found that if lower ICS calling rates led to even very modest reductions in recidivism (less than a 1 percent reduction in reincarceration rates) the lost revenues to the correctional facilities from lower commissions from ICS providers that would result from lower calling rates would be more than offset by the savings from the lower prison population.⁹

2 FCC, “In the Matter of Rates for Interstate Inmate Calling Services,” WC Docket No. 12-375, Notice of Proposed Rulemaking, DA/FCC No. FCC 12-167, Docket/RM No. 12-375, ¶ 5, adopted December 24, 2012, <https://docs.fcc.gov/public/attachments/FCC-12-167A1.pdf>, (“FCC ICS 2012 NPRM”).

3 Tara O’Neill Hayes & Margaret Barnhorst, “Incarceration and Poverty in the United States,” American Action Forum, June 30, 2020, <https://www.americanactionforum.org/research/incarceration-and-poverty-in-the-united-states/>, (“Incarceration and Poverty in the United States”).

4 For the U.S. population see, U.S. Census Bureau, “Quick Facts,” July 1, 2019, <https://www.census.gov/quickfacts/fact/table/US/PST045219>, (“U.S. Census Bureau Quick Facts, 2019”). For the incarcerated population figures see, E. Ann Carson, “Prisoners in 2019,” Table 3, U.S. Department of Justice, October 2020, <https://www.bjs.gov/content/pub/pdf/p19.pdf>.

5 FCC, “Telephone Service for Incarcerated Individuals,” accessed March 21, 2021, <https://www.fcc.gov/consumers/guides/telephone-service-incarcerated-individuals>.

6 Prison policy Institute, “2018 Phone Rate Survey,” Original Survey November 2018, Updated April 2019, accessed March 15, 2021, https://www.prisonpolicy.org/phones/appendix_table_2.html.

7 Kelle Barrick, Pamela K. Lattimore & Christy A. Visser, “Reentering Women: The Impact of Social Ties on Long-Term Recidivism,” *The Prison Journal*, Vol. 94(3), June 11, 2014, pp. 279 – 304, <https://journals.sagepub.com/doi/10.1177/0032885514537596>.

8 Avi Asher-Schapiro, “Locked Up During COVID-19: Costly Phone Calls Strain Families,” Reuters, September 23, 2020, <https://www.reuters.com/article/us-usa-prisons-tech-idUSKCN26E3DQ>.

9 Declaration of Coleman Bazelon, “In the Matter of Rates for Interstate Inmate Calling Services,” WC Docket No. 12-375, filed March 25, 2013, ¶ 55, <https://ecfsapi.fcc.gov/file/7022134794.pdf>. Note – that the lost revenues to prisons and jails would arise from the fact that with lower calling rates, the ICS service providers would potentially offer lower site commissions to the facilities, thus lowering the revenues to the facilities. The cost savings would come from the lower number of incarcerated people.

I. THE MARKET FOR ICS SERVICES

In the ICS market, the telecommunications provider typically competes for the contract to serve a facility, or a set of facilities, and is granted exclusive rights to serve the facility if it wins the contract.¹⁰ A key aspect of the competition for contracts is the size of the payment the correctional facility will receive from the telecommunications provider for awarding the exclusive contract. Therefore, ICS providers in each facility have a monopoly over all the communication services for the length of their contract period, with inmates having only one choice if they want to call their loved ones.

One might imagine that competition for obtaining the contract would result in lower prices. However, the Federal Communications Commission (“FCC”) has previously found that “competition during the competitive bidding process for ICS does not exert downward pressure on rates for consumers.”¹¹ Winners of the contract are not always the lowest price competitor. Rather it is often the opposite. As noted, to obtain these exclusive monopoly service rights, the contracts often include a site commission paid to the correctional facility, and the bidder providing the highest site commission, i.e. a side payment paid to the correctional facility, often wins the contract.¹² These site commissions for ICS are not trivial. In 2013, the Commission calculated an average per-minute cost for interstate calls of \$0.12 per minute with site commissions and \$0.04 per minute without site commission – i.e. the inclusion of the site commission results in a three-fold increase in average per minute costs.¹³

Providers recover site commissions through higher charges to inmates and their families.¹⁴ The FCC has previously stated, “under most contracts, the commission is the single largest component affecting the rates for inmate calling service” and “because the bidder who charges the highest rates can afford to offer the confinement facilities the largest location commissions, the competitive bidding process may result in higher rates.”¹⁵ This finding is in line with what economists have learned from the early years of the cable industry where authorities can “craft rent-seeking competitions” in which “cities were more likely to award franchises to firms with high output prices and concluded that political agents acted to maximize politically-appropriable rents, not welfare.”¹⁶ With the consumer – cable customers decades ago or inmates and their families today – not being a party to the negotiation, their interests – lower prices – are not considered.

The market failures of the prison payphone market – prisoners’ lack of choice of service providers and no mechanism to moderate rates – means that the prices charged are almost certainly not efficient and that alternative rates could improve social welfare. Absent competitive pressures or effective regulation, the current price of most prison calling is far above the costs of providing the call. Consequently, the price does not properly signal the costs of the resources used when making a phone call from a prison.

In most other markets, obtaining an exclusive franchise to operate as a monopoly would have garnered antitrust scrutiny, especially if prices were seen as extraordinarily high. In the early years of the cable industry for instance, when municipalities granted exclusive geographic franchises to cable companies, who then became monopoly providers in their area, there was a lot of criticism about the resulting market structure and possible remedies.¹⁷ Lawsuits by other potential entrants can often remedy the monopoly situation. For instance, in 1987, the Cable Commission stopped monopoly franchise agreements in the Sacramento market after a jury found that “the claim of ‘natural monopoly’ was a sham used by defendants as a pretext for granting a single cable television franchise... to promote the making of cash payments and provision of ‘in-kind’ services.”¹⁸ In other industries, such as utilities, the issue of higher than efficient prices from a monopoly provider is solved by rate

10 “FCC ICS 2012 NPRM,” ¶ 5.

11 FCC, “In the Matter of Rates for Interstate Inmate Calling Services,” WC Docket No. 12-375, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 12-375, ¶ 41, adopted August 9, 2013, <https://docs.fcc.gov/public/attachments/FCC-13-113A1.pdf>, (“FCC ICS 2013 R&O & FNPRM”). The 1996 Communications Act gives the FCC jurisdiction for regulating communications services. For inmate calling services it “empowers the Commission to regulate interstate and international communications services and preserves for the states jurisdiction over intrastate communications services.” See FCC, “In the Matter of Rates for Interstate Inmate Calling Services,” Order on Remand and Fourth Further Notice of Proposed Rulemaking, WC Docket No. 12-375, FCC 20-111, Fact Sheet, adopted August 6, 2020, <https://docs.fcc.gov/public/attachments/DOC-365581A1.pdf>, (“FCC ICS 2020 FNPRM”).

12 “FCC ICS 2013 R&O and FNPRM,” ¶ 41.

13 “FCC ICS 2013 R&O and FNPRM,” ¶ 26.

14 “FCC ICS 2013 R&O and FNPRM,” ¶ 41.

15 “FCC ICS 2012 NPRM,” ¶ 37.

16 Thomas W. Hazlett, “Duopolistic Competition in Cable Television: Implications for Public Policy,” Yale Journal of Regulation, Vol. 7(65), 1990, pp. 74, 116, <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1151&context=yjreg>, (“Duopolistic Competition in Cable Television”).

17 “Duopolistic Competition in Cable Television,” pp. 66, 102-103.

18 “Duopolistic Competition in Cable Television,” pp. 102-103.

regulation.¹⁹ Given the structure of costs and revenues in the ICS industry, is antitrust scrutiny needed to bring down rates, or are there other remedies that can lower the very high calling rates faced by the incarcerated population?

II. POSSIBLE REMEDIES

In the past twenty years, the FCC has made several attempts at reforming the ICS rates. In 2000, a landmark civil rights case, *Martha Wright v. Corrections Corporation of America*, challenged the high ICS rates charged by the Correction Corporation of America, and in 2001, the case was referred to the FCC.²⁰ After several rounds of orders at the FCC and court proceedings, in 2013, the FCC decreased rates to \$0.21 per minute for debit and prepaid calls and to \$0.25 per minute for collect calls.²¹ In 2020, the FCC proposed reducing the rates further to “\$0.14 per minute for debit, prepaid, and collect calls from prisons and \$0.16 per minute for debit, prepaid, and collect calls from jails.”²²

Over the years, there have been discussions about introducing competition within the ICS market. The Commission has sought comments on “whether there are ways to promote competition within the ICS market.”²³ This proposal has met resistance as various commenters have pointed to security concerns if there are multiple providers.²⁴ There have also been concerns about fixed costs at facilities, suggesting that multiple providers may be inefficient.²⁵ The greatest impediment to introducing competition, however, may be that neither providers nor facilities have much of an economic interest in competing given the current market structure. Without the current market structure, providers would not be able to charge prices high enough to offer commissions and other inducements to jails and prisons.

Although the technical barriers to competition may be declining, the practical and regulatory barriers – and disincentives to fix them – persist.

In the absence of market discipline, the obvious remedy is regulating the rates paid by the inmates by capping how much the ICS providers can charge for calls. From an economic perspective, reducing prison phone rates is expected to improve welfare. Reducing the price of prison calls closer to an economically efficient rate has two primary benefits. First, any reduction in costs of calls from prisons would directly benefit prisoners and those they call in the form of lower phone bills. Second, to the extent these savings lead to additional phone calling (more and/or longer calls), the prisoners and their families will certainly benefit, but so will society overall through the positive externality of the reduced recidivism that results from keeping prisoners connected to their families and communities. As noted previously, even small reductions in recidivism would likely pay for themselves, but, of course, would have much greater benefits to society overall.

Access to phone calls in jails is important because it allows people to contact support for getting bail, have their children taken care of (so as to avoid losing custody), contacting an employer so as not to lose their job, etc.²⁶ In prisons, studies have shown that calls are important for mental health, promote good behavior, and help with transitions back into society that reduce recidivism rates. While reducing prison phone rates makes sense from a purely economic perspective, the case is only reinforced when we recognize the direct beneficiaries of this policy. As

19 Richard A. Posner, “Natural Monopoly and Its Regulation,” Cato Institute, Washington, D.C. April 1, 1999, <https://books.google.com/books?hl=en&lr=&id=Nv6QAAAAQ-BAJ&oi=fnd&pg=PR5&dq=natural+monopoly,+utilities,+rate+regulation&ots=Su6ikOnOLs&sig=yOrn7v5dX0aTQKdJBETLOOQIX4M#v=onepage&q=natural%20monopoly-%2C%20utilities%2C%20rate%20regulation&f=false>.

20 Fuchs, Zachary, “Behind Bars: The Urgency and Simplicity of Prison Phone Reform,” *Harvard Law & Policy Review* (2020), p. 206; *Wright v. Corr. Corp. of Am.*, No. 1:00-CV-00293(GK), 2016 U.S. Dist. LEXIS 6855, (D.D.C. Jan. 21, 2016).

21 “FCC ICS 2020 FNPRM,” ¶ 3.

22 “FCC ICS 2020 FNPRM,” ¶ 3. Note that the prison and jail rates are different as these are two distinct types of correctional facilities with different cost structures, with jails having higher costs, on average, compared to prisons. Jails are usually run by local government/ law enforcement and are for short-term incarcerations or those awaiting trials. Prisons are larger and are typically run by the state or federal government. There are far fewer prisons than jails. For the difference between prisons and jails, see <https://www.hg.org/legal-articles/what-is-the-difference-between-jail-and-prison-31513>. Also note that there are three types of calls, Pre-paid, debit and collect calls, that an inmate can make, and these are classified by their payment method. Some inmates set-up pre-paid accounts or use debit calling facilities, while some use the collect call feature where the calling charges are paid by the person they are calling, i.e. the friends and families of the prisoner.

23 FCC, “In the Matter of Rates for Interstate Inmate Calling Services,” Second Report and Order and Third Further Notice of Proposed Rulemaking, WC Docket No. 12-375, ¶ 291, adopted October 22, 2015, <https://www.fcc.gov/document/fcc-releases-inmate-calling-services-second-ro-and-third-fnprm>, (“FCC ICS 2015 Second R&O and Third FNPRM”).

24 “FCC ICS 2015 Second R&O and Third FNPRM,” ¶ 293.

25 “FCC ICS 2015 Second R&O and Third FNPRM,” ¶ 293.

26 Wendy Sawyer, “Why Expensive Phone Calls Can Be Life-Altering For People in Jail – and Can Derail the Justice Process,” Prison policy Initiative, February 5, 2019, <https://www.prisonpolicy.org/blog/2019/02/05/jail-phone-calls/>.

discussed earlier, prisoners and their families are disproportionately People of Color. They also tend to be low income individuals. The Brookings Institute found, for example, that only half the men incarcerated were employed in the three years before incarceration, and of those working, the annual median income was approximately \$6,000 compared to a national per capita income of \$34,000 in 2019.²⁷ In terms of impact on income, this means on average that a dollar saved in paying for phone calls to incarcerated loved ones is worth more, much more, than a dollar to the average American. In general, as you have more and more of a good, you value each successive unit less and less (the law of diminishing marginal utility). The corollary is that the marginal utility is higher, the less of a good you have. Thus, for the families of inmates, whose income is so much lower than the general U.S. population, the value of a saved dollar is much higher than for the average person.

III. CONCLUSION

Given the market failures in the provision of ICS, the agency – here the FCC – has an important role in ensuring that inmates and families of the incarcerated do not pay “unconscionable rates” just to keep in touch.²⁸ The twenty-year struggle to lower prison phone rates is still ongoing, and the opposition from the ICS providers continues to prevent the Commission from helping one of the most vulnerable segments of society. The economic, real world evidence points to a market failure with direct and unequal effects on a captive – and particularly vulnerable – segment of customers. Inclusive Competition should include exactly this type of captive audience.

²⁷ For the income figures of incarcerated population see, Adam Looney & Nicolas Turner, “Work and Opportunity Before and After Incarceration,” The Brookings Institution, March 2018, p. 4, https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf. For the U.S. statistics see “U.S. Census Bureau Quick Facts, 2019.”

²⁸ Statement of Commissioner Jessica Rosenworcel on “FCC ICS 2020 FNPRM.”

INCORPORATING GENDER AS A PRIORITIZATION PRINCIPLE AND PROJECT SELECTION CRITERION IN COMPETITION AGENCIES



BY WILLIAM E. KOVACIC¹



¹ Global Competition Professor of Law and Policy, George Washington University Law School; Visiting Professor, King's College London; Non-Executive Director, United Kingdom Competition and Markets Authority. The author is most grateful to Mariana Fernandez and Destiny Stokes for outstanding research assistance. All views expressed here are the author's alone. Contact: wkovacic@law.gwu.edu.

Nearly three years ago, the Competition Committee of the Organization for Economic Cooperation and Development (“OECD”) launched a Gender Inclusive Competition Policy initiative “to explore whether a gender lens might in fact help deliver a more effective competition policy by identifying additional relevant features of the market, and of the behavior of consumers and firms, as well as whether a more effective competition policy can help address gender inequality.”² To this end, the OECD is sponsoring a collection of research projects to consider how competition agencies might give gender-related considerations receive greater emphasis in setting priorities and selecting projects to achieve them.³

This Article provides an overview of progress to date of one of the OECD-sponsored research projects. My element of the OECD program focuses on policy implementation: how to cross the distance between the idea and its effective realization in practice. In a formative study fifty years ago of government decision making, Graham Allison recounted how discussions of public policy often dwell chiefly on the issue of *what* governments should do and treat questions of *how* to do it as pedestrian technical matters to be sorted out once a grand vision takes shape. Allison noted the public’s deepening disappointment with the failure of governments to fulfill their policy commitments and wrote:

If analysts and operators are to increase their ability to achieve desired policy outcomes, . . . we shall have to think harder about the problem of “implementation,” that is, the path between the preferred solution and the actual performance of government.⁴

I. OBSTACLES

Several implementation obstacles are likely to stand in the path of competition agencies as they seek to give gender-based considerations greater weight in policymaking. In my mind, two stand out. The first is the formidable task of integrating gender-related considerations into an already elaborate array of factors that competition agencies today are urged to account for when executing their mandates. The multiplicity of suggested policy focal points is suggested in the modern work program of the OECD’s Competition Committee. Since 2000, the Competition Committee has convened numerous proceedings that address current issues affecting competition agencies. In its Policy Roundtables, the Competition Committee has identified a wide range of objectives that agencies ought to consider, including:⁵

- Poverty reduction
- Alleviation of harm arising from racial discrimination and the historical repression of ethnic minority groups
- Environmental protection and sustainable development
- Protection of vulnerable individuals (e.g. senior citizens, individuals afflicted with serious medical conditions, individuals dealing with emotion-laden transactions such contracting for funeral services)
- Promotion of innovation and technological development
- Preservation of opportunities for small and medium enterprises to enter markets and compete
- Reduction in inequalities of wealth and income distribution

The Competition Committee’s deliberations have raised these (and other) aims as desirable goals of competition law policymaking. The OECD competition program also has underscored the importance for competition agencies of shaping policy to account for the interconnection of competition law with other policy domains, such as consumer protection, data protection, government procurement, and intellectual property. Thus, in seeking to achieve specific policy goals, agencies should be mindful of the operation of collateral (and sometimes conflicting) policy domains and seek to account for these regimes in applying competition law.

2 Organization for Economic Cooperation and Development, *Gender inclusive competition policy*, at <https://www.oecd.org/competition/gender-inclusive-competition-policy.htm>. A crucial inspiration for the OECD initiative was a proposal by Canada’s Competition Bureau.

3 Estefania Sautacreu-Vasut & Chris Pike, *Competition Policy and Gender* (Directorate for Financial and Enterprise Affairs, Competition Committee, Organization for Economic Cooperation and Development, Nov. 6, 2018), at [https://one.oecd.org/document/DAF/COMP/gf\(2018\)4/en/pdf](https://one.oecd.org/document/DAF/COMP/gf(2018)4/en/pdf).

4 Graham T. Allison, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS 267-68* (Little, Brown & Co. 1971).

5 The agenda of roundtables appears at Organization for Economic Cooperation and Development, Best Practice Roundtable on Competition Policy, at <https://www.oecd.org/daf/competition/roundtables.htm>.

The OECD has not been alone in urging competition agencies to situate competition law in a larger economic, political, and social context and derive policies from a more comprehensive (or in the jargon favored by international organizations and academic commentators, a more “holistic”) framework of policy influences and goals. An increasingly influential body of commentary, emerging mainly in the United States, has proposed that competition agencies exercise their mandates with an eye to promoting the interests of individuals not only as consumers of goods and services but also as workers, as owners of small and medium enterprises, and as citizens who value the dispersal of economic power as a safeguard for democracy.⁶

This is the context of goals multiplicity in which we must situate the OECD’s recommended addition of another consideration – gender – to the competition policy decision making calculus. Competition agency managers and case handlers might be forgiven for asking how they are to do all of this. How should an agency apply the wider range of policy aims, and account for adjacent or overlapping policy domains, in addressing the nondiscretionary matters that come before the agency (e.g. mergers subject to mandatory notification and suspensory requirements)? What should the agency do in exercising the discretionary component of its mandate, for example, in deciding which new projects to undertake? What collection of measures will enable an agency simultaneously to help safeguard the environment, eradicate poverty, reduce disparities in wealth, account for gender considerations, all the while fostering an enabling environment for technological dynamism that spurs economic progress? What happens when some of the policy desiderata pull in different directions and, perhaps, create conflicts that the agency must resolve?

A second significant implementation problem is convincing the professional staff who do the heavy lifting of designing and executing projects that senior leadership’s commitment to a new policy objective is sincere and enduring. Agency personnel, especially career staff who have been around for a while, have heard it all before. Each team of top political appointees enters office with an inventory of “new” and “exciting” initiatives that, at least ever so slightly, have as much to do with differentiating incumbent leaders from their predecessors as they do with generating true policy change.⁷ Permanent agency staff have seen this movie before, and they know how often it ends in betrayed hopes. Grand ideas often decay into clichés, fads, and slogans that leave their imprint only upon t-shirts, coffee mugs, carrying bags, and human resources training materials.

In contemplating new initiatives, agency leaders must understand the lasting cultural adjustments that anchor successful reforms and recognize the institutional skepticism that earlier ephemeral initiatives have created. The adoption of enduring reforms requires leaders to demonstrate their sincerity of purpose, fidelity to the long-term best interests of the institution, commitment to persist in gaining acceptance for their ideas, and skill in promoting a norm that future leadership will respect. The failure to approach reforms with this state of mind not only will doom the leader’s own agenda, but it breeds cynicism that can poison the reform efforts of future leaders, even the farsighted policy champions who ignore the sirens of self-aggrandizement and fix their eyes foremost on genuine long-term institutional improvement.

Competition agency policy champions committed to developing more gender-inclusive policy approaches must be ambitious, clever, selfless, and realistic. Awareness of the potential policy benefits of the endeavor supplies the ambition. The cleverness takes the form of bureaucratic guile that stems from an understanding of how organizations and their people behave. The selflessness comes from a willing recognition that the full realization of the reform vision may take place long after the champion has left the agency, and credit for the result may descend, mainly or exclusively, upon others. Realism comes from an unflinching understanding of implementation obstacles – to perceive barriers clearly in order to devise effective ways to overcome them. The development of competition agency programs that account successfully for gender considerations likely will be a gradual process that demands perseverance and sustained persuasion. Agency leaders and their successors must convince agency personnel to undertake reforms not simply because they are commanded or exhorted to do so, but because they see the value in them. Viewed this way, professional staff regard reforms as good for them, their agency, and their country, not simply as obligations to be carried out with reluctance.

⁶ See, e.g. Majority Staff Report, *The Investigation of Competition in Digital Markets*, U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law 391 (Oct. 6, 2020) (“[T]he Subcommittee recommends that Congress consider reasserting the original intent and broad goals of the antitrust laws, by clarifying that they are designed to protect not just consumers, but also workers, entrepreneurs, independent businesses, open markets, a fair economy, and democratic ideals.”).

⁷ When I mention this phenomenon, I speak with authority. I once was one of these leaders, and I doubtless had what an objective observer might regard as my own collection of new and exciting (and differentiating) initiatives. See also David A. Hyman & William E. Kovacic, *Consume or Invest: What Do (and Should) Agency Leaders Maximize?*, 91 WASH. L. REV. 295 (2016) (discussing tensions that can arise between the short-term credit claiming impulses of politically appointed agency leaders and the need to make investments that enable their institutions to develop good policy results over the long term).

II. IMPLEMENTATION STRATEGIES

Taking account of the obstacles set out above, how are competition agencies to implement a gender-inclusive program successfully? The discussion below sets out a tentative set of practical steps that competition agency leaders (and the political officials who appoint them) can take to see that a more gender sensitive program in the formation of priorities and the selection of projects is realized in practice.⁸ The measures set out here reflect the results of the research project to date and will be refined going forward.

A. Representation

A starting point for increasing an agency's attention to gender is to examine the gender representativeness of the competition authority. One might reasonably assume that gender-specific considerations are more likely to be accounted for in organizations with gender diversity that corresponds with the composition of the jurisdiction's population.⁹ As described further below, I regard representativeness as a necessary, though not sufficient, condition for successful implementation of the OECD's vision for a gender inclusive competition policy

To assess their representativeness with respect to gender (or other characteristics), competition agencies might perform a self-assessment of their personnel focusing upon the diversity of:

- Top agency leadership
- Heads of the principal operating units
- Committees or teams that set priorities or select individual projects
- Case handling teams that perform projects

The aim of the self-assessment would be to identify the gender diversity of the individuals and units which exercise power within the agency. The review should involve taking a snapshot of the existing composition of agency personnel and key organizational units and developing a profile of trends over time. Among other applications, the profile of personnel over time provides a baseline for identifying whether the mix of the agency's priorities and programs has changed as the diversity of the institution changes. The study of adjustments in priorities and projects over time would supply a basis for testing the hypothesis that greater gender diversity yields greater attention to gender considerations in the formulation and execution of the agency's programs.

This research project is not assembling a complete profile of the gender diversity of competition agencies and the organizational units that set priorities, establish case selection criteria, and choose projects. Nor is the project attempting to measure the extent to which greater gender diversity in key agency decision making functions has affected the content of agency programs over time. Research along these lines would eventually be important to assess the impact of gender representation on agency behavior.

Although I have not conducted a systematic study of agency gender diversity trends and program evolution of the type described immediately above, I have observed interesting trends in selected agencies with respect to top agency leadership. I propose that a useful exercise for each competition agency is to review the membership of its top leadership (the agency's president or the chair of a multimember board) and identify the level of diversity in these appointments throughout the history of the agency or any of its institutional predecessors. My own research has revealed a striking number of instances in which no woman has held the top leadership post of institutions we regard as the world's leading competition agencies. I would suggest that a jurisdiction whose competition system has been in business for, say, 25 years or more and has never had a woman as chair of the national competition authority is doing itself no favors.¹⁰ I do not list such jurisdictions here, but they know who they are. I suspect they recognize that their record on this score is not exemplary.

⁸ On the importance of priority-setting and project selection to competition agency performance, see William E. Kovacic, *Deciding What to Do and How to Do It: Prioritization, Project Selection, and Competition Agency Effectiveness*, 12 *COMP. L. REV.* 9 (2018).

⁹ To be meaningful, the representation must be sufficient in numbers to encourage individuals to express their views without the inhibition that may come from being the only person who brings diversity to the group.

¹⁰ In pursuing this project, I have received a number of comments that say this question also should be posed to professional societies and international organizations that play important roles in the competition policy community. The question for them would be the same: When is the last time, if ever, the committee or body responsible for competition policy within your institution was led by a woman? Institutions that answer this question by saying "never" or "we cannot recall" deserve critical questioning about their commitment to gender diversity.

I believe there would be a further benefit of assembling a profile over time of the top leadership of all competition agencies (especially the older institutions). Even without a detailed examination that links the identity of leaders to the treatment of gender considerations in prioritization and project selection, a review of the gender composition of agency leadership would help create awareness of the urgency for competition authorities to engage talent wherever they can find it. I am convinced that a review of historical trends in appointments to top leadership posts will go a long way to demonstrating that gender diversity in top management is not a burden to be borne but instead an opportunity to be seized – with enthusiasm – because so much of the best talent now present in the field of competition law is diverse.¹¹

Gender diversity in recruiting for key leadership positions is not a box to tick. It can be a foundation for agency success. As noted at the top of this article, a key step in the successful implementation of reforms is to move the relevant institutions from seeing the reform as a tedious mandate and instead regard it as an opportunity for improvement.

One way to build this awareness is to highlight how institutions that have opened their field of vision have grown in quality and stature as a consequence. A step in this direction is for individual competition agencies, professional societies, and international organizations to convene events that draw attention to how greater gender diversity has enriched competition policy. All who aspire to careers in competition law, or, most certainly, hold themselves out to be expert in the field should be familiar with the formative contributions of pioneers such as Betty Bock,¹² Maureen Brunt,¹³ Eleanor Fox,¹⁴ and Valentine Korah.¹⁵ All of these women advanced the state of the art of competition learning in their own countries, and each helped build the intellectual infrastructure of what we today call international competition law. Yet none chaired the competition agencies of their countries or sat on the governing board of such agencies. How could any right-thinking jurisdiction, especially those which espouse a commitment to superior public administration, not have recruited them to serve in such capacities?

A similarly informative exercise would be to study the emergence of new competition systems in the 1990s and note the extraordinary role that many women played in launching new agencies, often doing so in environments in which few, if any, of the institutional foundations for the development of an effective competition law system existed. Any student of musical theatre of the 20th century would be expected to know the work of Lerner and Lowe, Rogers and Hammerstein, and Sondheim. Similarly, every student of competition policy should know the remarkable work, in the formative era of the 1990s, of new agency leaders such as Beatriz Boza (Peru), Anna Fornalczyk (Poland), and Ana Julia Jatar (Venezuela).¹⁶ To study their leadership of new agencies in this period is to understand where superior talent resides, and to see how a competition system can ascend by putting the best talent to work at the top.

B. Historical Program Antecedents

One hypothesis of this research project is that gender inclusiveness as a prioritization and case selection principle may already have played a role, explicitly or implicitly, in agency policymaking in the past.¹⁷ A careful examination of an agency's past initiatives (e.g. investigations, the prosecution of cases, the preparation of market studies and other reports) may reveal that the institution has used gender-related considerations

¹¹ One need not know anything about baseball (or have any interest in sport) to grasp the core lesson that Michael Lewis drives home in *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* (2003). Lewis emphasizes that organizations rise or fall depending on their ability to attract the best talent, wherever it exists. Lewis documents the myopia of organizations whose recruiting philosophy consists of doing exactly what they have done in the past, without asking whether they are measuring capabilities that are vital to success or expanding their field of vision to consider previously unnoticed possibilities. A process of revisiting deeply embedded recruiting habits can be a source of powerful advantage.

¹² On Betty Bock's career as an industrial organization economist, see William E. Kovacic, *Creating Competition Policy: Betty Bock and the Development of Antitrust Institutions*, 66 *ANTITRUST L.J.* 231 (1997).

¹³ Maureen Brunt's vital role as an industrial organization economist in the formation of the competition policy systems of Australia and New Zealand is traced in Allan Fels, *Distinguished Fellow of the Economic Society of Australia, 2006: Maureen Brunt*, 83 *THE ECONOMIC RECORD* 204 (2007).

¹⁴ For a collection of essays that celebrate the work of Eleanor Fox and examine themes developed in her scholarship, see *RECONCILING EFFICIENCY AND EQUITY: A GLOBAL CHALLENGE OF COMPETITION POLICY* (Damien Gerard & Ioannis Lianos eds., 2019).

¹⁵ For a summary of Valentine Korah's contributions to the development of competition law in the European Union and the United Kingdom, see Roger J. Goebel, *Dedication to Professor Valentine Korah*, 28 *FORD. INT'L L.J.* vi (2004).

¹⁶ The contributions of Beatriz Boza, Anna Fornalczyk, Ana Julia Jatar to the establishment of new competition law systems in the early to mid-1990s are described in William E. Kovacic, *The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries*, 11 *AM. U. J. INT'L L.* 437 (1996).

¹⁷ In earlier work I have discussed how elements of the Federal Trade Commission's competition policy and consumer protection programs have coincided with the objective of reducing economic disadvantage and serving the interests of vulnerable groups of consumers. William E. Kovacic, *Competition Policy, Consumer Protection, and Economic Disadvantage*, 25 *WASH. U. J. L. & POL'Y* 101 (2007). Among other results, this earlier research identified how FTC cases and advocacy programs in the 2000s sought to give underserved populations greater access to professional services, such as dental care. See, e.g. *South Carolina State Board of Dentistry v. Federal Trade Commission*, 455 F.3d 436 (4th Cir. 2006) (challenging state restrictions that limited introduction of new service delivery models that gave greater access to preventative care to students in public schools; the most deeply affected schools involved school districts whose students mainly were African American children from low income families).

in bringing cases; retrospective study also may show that the agency has developed prioritization and case selection methods that readily could be adapted to account for gender considerations more extensively. Past experience not only can illuminate implementation paths for future programs, but it also can give agency professionals confidence (and reassurance) that a more gender inclusive policy does not entail a radical departure from past practice and instead extends sound practices that already guide the agency's work.

Several examples illustrate how a competition agency might bring its accumulated experience and institutional memory to bear upon building a more gender-inclusive program. How might one devise a competition program that simultaneously serves multiple social and economic goals, such as promoting gender inclusiveness by giving priority to matters that affect gender inequality, serve historically disadvantaged ethnic and racial minority groups, and reduce income inequality generally? One approach is to focus on programs that will tend to deliver substantial benefits with respect to all of these objectives. My examination of the FTC's annual budget requests to Congress and the composition of the FTC's competition cases since the late 1960s reveals that a pattern of resource requests and resource allocation decisions that is consistent with this approach. The chief sectoral priorities for the FTC over the past fifty years have been energy, food, health care (pharmaceutical and non-pharmaceutical), and transportation.¹⁸ Within these areas, one observes a number of notable enforcement matters where the victims of competitive harm would mainly be women.¹⁹

In some instances, in agency internal records that have been placed in the public domain, one sees comments that suggest the agency was consciously accounting for concerns about gender inclusiveness or other larger social concerns (such as economic disadvantage related to race).²⁰ This suggests that gender and other social factors have influenced the decision to prosecute cases or initiate other projects, even though public announcements of these matters did not emphasize such considerations. Public discussion of gender inclusiveness and other considerations might have the effect of bringing out of the shadows unacknowledged prioritization and project selection criteria. Here, again, fuller recognition of such criteria would not mark a major adjustment in policy making processes that in fact have shaped agency decisions.

C. Market Access

One possible focal point for a more gender inclusive competition policy is to emphasize measures, through law enforcement and advocacy, that remove artificial barriers to new business development by underrepresented groups, including women. Such an approach would build upon a large body of theoretical and empirical studies that have documented the exclusionary effect of such restrictions and the impediments they create to entry by entrepreneurs starting their first business ventures.²¹ Competition agency law enforcement and advocacy that reduce artificial entry restrictions seem well-suited to facilitate new business development by entrepreneurs who might otherwise encounter crushing opposition from market incumbents.²²

18 See e.g. William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 *TULSA L.J.* 687 (1982) (reviewing FTC budget requests and program prioritization from 1969 through 1980). An internal FTC planning document prepared early in 1981 noted that: "The FTC targets its current antitrust enforcement on the most critical areas of the economy in order to bring consumers as much direct benefit as is possible in product and service markets where they need it most." Federal Trade Commission, "Fact Sheet on Recent FTC Antitrust Enforcement" (circa February 1981).

19 See e.g. Federal Trade Commission, Press Release, *FTC Seeks to Block Cytyc Corp.'s Acquisition of Digene Corp.* (June 24, 2002) (announcing Commission decision to seek preliminary injunction to bar acquisition that would reduce competition in market for primary cervical cancer screening tests), at <https://www.ftc.gov/news-events/press-releases/2002/06/ftc-seeks-block-cytyc-corps-acquisition-digene-corp>. An internal FTC planning document prepared in 1980 describes an FTC project to challenge medical profession restrictions upon efforts by nurse practitioners and nurse midwives to deliver pre-natal, delivery, and post-partum care. One stated aim of the project (undertaken within the umbrella of the Commission's competition health care program) was to expand access to health care by encouraging the use of lower-cost service delivery models. Federal Trade Commission, Bureau of Competition, "Nurse Practitioners" (Feb. 15, 1980).

20 An internal FTC planning document prepared in 1980 described the agency's efforts to persuade the Interstate Commerce Commission to relax restrictions on new entry into the trucking sector. The document noted that "Freer entry will lead to greater opportunities for small businessmen who are now virtually foreclosed from obtaining significant licensing authority. It will particularly aid minority businessmen, few of which have trucking licenses." Federal Trade Commission, Bureau of Competition, "Transportation Intervention Activities" (Feb. 20, 1980).

21 A classic account of this phenomenon, addressing the exclusionary impact of government restrictions in the developing economy context, is Hernando de Soto, *THE OTHER PATH* (1989). See also Eleanor M. Fox & Deborah Healey, *When the State Harms Competition – The Role for Competition Law*, 79 *ANTITRUST L.J.* 769 (2014); James Cooper & William E. Kovacic, *U.S. Convergence with International Competition Norms: Antitrust Law and Public Restraints on Competition*, 90 *BOSTON U. L. REV.* 1555 (2010).

22 Ng Huiwen, Café owners worried as home bakers rise as 'rivals,' *The Sunday Times* (Singapore), Apr. 24, 2016, at A15.

III. CONCLUSION

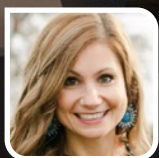
One finding of the research project described above is that the implementation of a more gender inclusive competition policy program can benefit from the efforts of competition agencies to reflect upon their own experience.²³ The study of past experience can illuminate appointment and recruitment patterns that suggest an agency is not achieving the fullest realization of the talent available to it. The examination of past practice and the study of individual projects also may suggest that the agency already has in place customs and criteria that can serve as foundations for a more gender inclusive competition program. As in many other aspects of competition policy, greater historical awareness, partly based on stronger analytics that taps the potential of what might be called big competition policy data, can help serve the attainment of gender inclusiveness goals by identifying practical steps for attaining them.

²³ The possible gains from greater historical awareness by competition agencies are discussed in William E. Kovacic, *Keeping Score: Improving the Positive Foundations for Antitrust Policy*, 23 U. PA. J. BUS. LAW 49 (2020).

SEVEN LESSONS FOR INCLUSIVE ANTITRUST FROM FEMINIST FOREIGN POLICY



BY GABRIELLE KOHLMEIER & SAMM SACKS¹



¹ Gabrielle Kohlmeier is Associate General Counsel for Antitrust, Strategic Projects and Competition Policy at Verizon Communications, and Chair of the American Bar Association Antitrust Section's Women.Connected. Samm Sacks is a Senior Fellow at Yale Law School's Paul Tsai China Center and a Cyber Policy Fellow at New America, and leads the U.S.-China Women's Tech Summit discussion series.

I. INTRODUCTION

Inclusive antitrust aims to use better (inclusive) data to inform decision making and achieve (more inclusive) policy outcomes and decisions that serve competition goals more effectively and broadly. Whether the justifications for antitrust to be inclusive are value, purpose or efficiency-based, the concept of incorporating more complete information and evidence with a broader lens to better capture market complexities seems compelling. Being inclusive is especially important as antitrust aims to create space for competition and more level playing fields to benefit consumers across society, and prides itself on data driven decision-making.

This article looks to inclusive policy forerunners to explore approaches to inclusive antitrust. Similar to antitrust, foreign policy – historically driven by a focus on defense and military force² – is a field where inclusion has not been the dominant policy driver. And yet an increasing number of countries are officially adopting an inclusive foreign policy approach, boldly named Feminist Foreign Policy (“FFP”).

FFP provides both experience and lessons for inclusive antitrust. While foreign policy may have different objectives, players, and dynamics than competition law, those differences do not diminish the transferability of the principles discussed here. Notably, foreign policy and antitrust share core commonalities: both focus on mitigating the negative effects that can occur from power imbalances. Applying an inclusive lens on a traditionally “hard power” field carries lessons for the “hard economics” and “hard data” driven field of antitrust and competition law.

II. A BRIEF HISTORY (OR HERSTORY) AND OVERVIEW OF FEMINIST FOREIGN POLICY

To set the stage, a brief overview of FFP.³ FFP emerged in 2014, when Swedish Foreign Minister Margot Wallström announced Sweden’s new official foreign policy: a Feminist Foreign Policy that put gender equality at the center of the nation’s diplomacy, defense, development, and trade, and which focused on rights, resources and representation for underrepresented groups.⁴ According to a recent policy brief arguing for FFP to be operationalized in the U.S. government, the authors define FFP as “a common sense approach to governing that includes a focus on who makes decisions (people), how and what policies are created (purpose) and how those policies are implemented (process).”⁵

As Wallström describes, the policy was initially met with giggles⁶ and raised eyebrows,⁷ then silence. Nevertheless Wallström and FFP persisted. FFP is now firmly entrenched in Sweden and has since spread – both in its focus and geographic reach. Canada, Mexico, Luxembourg, France, Spain, and the European Parliament have all announced official feminist foreign policies, and other countries – including the United Kingdom and the United States – have introduced resolutions or legislation towards the same.⁸ The precepts of FFP now appear embedded in

2 See Julian W. Korab-Karpowicz, “Political Realism in International Relations,” *The Stanford Encyclopedia of Philosophy* (Summer 2018 Edition), Edward N. Zalta (ed.), at <https://plato.stanford.edu/archives/sum2018/entries/realism-intl-relations/>.

3 For more on FFP and the differences between the official FFP announced and adopted by various states, compared to the aspiration of FFP activists, see Sweden Ministry of Foreign Affairs, *Handbook for Sweden’s Feminist Foreign Policy*, 2019, at <https://www.government.se/492c36/contentassets/fc115607a4ad4bca913cd8d11c2339dc/handbook---swedens-feminist-foreign-policy---english.pdf> [Sweden Handbook for FFP]; Government of Canada, *Canada’s Feminist International Assistance Policy*, 2020, at https://www.international.gc.ca/world-monde/issues_developpement-enjeux_developpement/priorities-priorites/policy-politique.aspx?lang=eng&_ga=2.214810583.1756738672.1615567873-789670169.1615401502 [Canada Feminist Foreign Policy]; International Center for Research on Women (ICRW), “Defining Feminist Foreign Policy,” 2019, at <https://www.icrw.org/publications/defining-feminist-foreign-policy> [ICRW Report]; Rollee Lal, “How a ‘Feminist’ Foreign Policy Would Change the World,” *Global Citizen*, March 11, 2021, at <https://www.globalcitizen.org/en/content/feminist-foreign-policy-united-states/>; Centre for Feminist Foreign Policy, “The CFFP Glossary” (March 2021), at <https://centreforfeministforeignpolicy.org/the-cffp-glossary>.

4 Sweden Handbook for FFP, *supra* note 3.

5 Stephenie Foster, Susan Markham, Sahana Dharmapuri, “Concrete Steps Towards a Feminist Foreign Policy,” *Policy Brief*, Winter 2021, at <https://www.oursecurefuture.org/sites/default/files/Concrete%20Steps%20Towards%20FFP.pdf> [hereinafter Foster et al.]; see also Gabriela R. A. Doyle, Madeline Olden, Leah Sheunemann & Christopher Skaluba, “Why NATO should adopt a feminist foreign policy,” *Atlantic Council*, Mar. 9, 2021.

6 “Sweden’s Foreign Minister Has No Time for Giggles, Foreign Policy,” at <https://foreignpolicy.com/2016/04/06/swedens-foreign-minister-has-no-time-for-giggles>.

7 “What do Sweden and Mexico have in common? A feminist foreign policy,” *New York Times*, July 21, 2020, at <https://www.nytimes.com/2020/07/21/us/sweden-feminist-foreign-policy.html>.

8 Council on Foreign Relations, “Advancing Gender Equality in Foreign Policy,” [CFR Report] April 7, 2020 See also Canada Feminist Foreign Policy, *supra* note 3; French Ministry of Foreign Affairs, *Feminist Diplomacy*, at <https://www.diplomatie.gouv.fr/en/french-foreign-policy/feminist-diplomacy/>; Mexico Adopts Feminist Foreign Policy, Jan. 9, 2020, at <https://www.gob.mx/sre/prensa/mexico-adopts-feminist-foreign-policy?idiom=en>; Spain’s Feminist Foreign Policy, 2021, at http://www.exteriores.gob.es/Portal/es/SalaDePrensa/Multimedia/Publicaciones/Documents/2021_02_POLITICA%20EXTERIOR%20FEMINISTA_ENG.pdf; Luxembourg Presents Feminist Foreign Policy at International Meeting, Feb. 19, 2021, at <https://chronicle.lu/category/abroad/35646-luxembourg-presents-feminist-foreign-policy-at-international-meeting>; UK Labour Party, *A World for the Many, Not the Few*, Proposal, March 2018, at https://www.policyforum.labour.org.uk/uploads/editor/files/World_For_The_Many.pdf; U.S. House of Representatives, H.Res.1147 (expressing support of FFP), Introduced Sept. 23, 2020, https://www.congress.gov/bill/116th-congress/house-resolution/1147/text/_cf. Cf. State of Hawai’i, *A Feminist Economic Recovery Plan for COVID-19*, April 2020, <https://humanservices.hawaii.gov/wp-content/uploads/2020/04/4.13.20-Final-Cover-D2-Feminist-Economic-Recovery-D1.pdf>.

initiatives promulgated by the Biden Administration, including the March 8, 2021 Executive Order creating a Gender Policy Counsel.⁹

FFP is not a code marshalled uniformly by each of the countries that have formally adopted it. Policy in action generally must be different given contextual and structural differences between states. It is, however, worth noting that uniformity is also anathema to inclusivity as a dynamic concept that demands continual examination and integration of different groups and changes in real world events. Yet key tenets emerge across the board:

- FFP begins by naming its embrace of inclusion boldly and explicitly.
- FFP unpacks assumptions and begins with first principles. FFP seeks to look at the full life cycle of foreign policy, and how different policies and actions affect other parts of the cycle.
- FFP focuses on broadening perspectives, including through representation, qualitative data gathering, and collaboration. It is focused on expanding the circle, not replacing one dominant group with another. It aims to use more holistic data to make better policy decisions to avoid unintended policy consequences.
- FFP strives to create accountability mechanisms to ensure inclusivity is applied and progressed.
- FFP expands the tool kit, but does not mandate a specific choice, leaving to policymakers and enforcers to assess and use the tools best fit for the desired purpose in specific instances.

With these principles in mind, we turn to how FFP approaches inclusivity before turning to lessons for inclusive antitrust.

III. HOW FFP APPROACHES INCLUSIVITY

As noted, the application of FFP by countries that have adopted it is varied.¹⁰ Sweden focused initially on representation of women in leadership positions, Canada incorporated a Gender-Based Analysis, and Mexico has trained all of its ambassadors and diplomats on its FFP approach. The above tenets help sketch some bounds of what FFP is. We add here how FFP broadly approaches inclusivity. Specifically, FFP – and arguably any comprehensive inclusive policy – demands assessments of (1) who is making decisions, (2) who is being heard and seen in that analysis, and (3) what is a policy's impact – narrowly and broadly.

A. Inclusive Decisionmakers

In line with the axiom that representation matters, FFP calls for a critical look at who is in decision-making roles across organizations, and commits to working towards meaningful diversity. This generally means diversity not only among top leaders, and not only in specific areas, but at every level across areas of expertise. Given the feminist or gender lens, the focus is primarily on ensuring that women are represented. Yet the importance of intersectional representation is gaining attention, as is the need for diversity generally.

It bears noting that, to be heard, underrepresented people must not only be present, but must have the opportunity to speak up and have an impact. Leadership and organizational culture that creates that space is important, as is achieving critical mass of representation.¹¹ French Ambassador-at-Large Delphine O, for example, has observed that organizations need a critical mass of at least 25-35 percent women for their voices to be heard.¹²

9 Executive Order on Establishment of the White House Gender Policy Council, March 8, 2021. at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/03/08/executive-order-on-establishment-of-the-white-house-gender-policy-council/>.

10 For an overview of how different countries have adopted FFP, see CFR Report, *supra* note 8.

11 Drude Dahlerup, "The Story of the Theory of Critical Mass," *Politics and Gender*, Vol. 2, Issue 4, Nov. 28, 2006, at <https://www.cambridge.org/core/journals/politics-and-gender/article/abs/story-of-the-theory-of-critical-mass/592171C05B9B828DBBDC121B05780D4#article>.

12 Panel Interview at Sciences Po on "Feminist Foreign Policy: Comparing France, Sweden, and the United States," March 10, 2021, at <https://www.sciencespo.fr/en/news/news/feminist-foreign-policy-comparing-france-sweden-and-the-united-states/5453> [Sciences Po Panel on FFP] (discussing also the benefits of quotas in achieving that critical mass).

Even when diverse representation is present, the assumption that inclusive principles are represented may be wrongheaded. As numerous FFP advocates note, not all females are feminists, and not all feminists are female.¹³ What is needed are teams that understand the gender lens principles, which increasingly focus on intersectionality as well, and continually seek to represent those not in the room.¹⁴ Seeking and recognizing the value of third party contributors is thus another key aspect of FFP.

B. Inclusive Data and Contributors

Core to FFP is also the notion of broadening the lens that informs analysis and decision paths taken. This means bringing in qualitative data in the form of perspectives from a wide range of affected parties. It also involves a broader concept of “affected” to begin to identify who may hold relevant sources of information, in part by also broadening the view of which issues that are seen to be part of the policy. In the foreign policy context, for example, it involves recognizing the importance of issues such as global health and climate change to national security.¹⁵

A second key aspect of broadening the lens involves improving quantitative data by striving to make sure data includes women and other underrepresented people,¹⁶ and that the data is disaggregated by key demographics, including but not limited to gender. Ideally this data should be included in all briefings and assessments as part of every analysis – not just “gender” issues. The Canadian Gender-Based Analysis Plus models the practice of collecting and deliberately using disaggregated data.¹⁷

C. Inclusive Impact Assessment

In addition to assessing who is represented in decision-making and in data, FFP involves an assessment of the impact of decisions. This includes not just the immediately apparent impact of decisions, but also the broader impact and second and third order effects.¹⁸ Such an analysis takes into account indirect or unintended consequences that can undermine the stated goals of policy measures when overlooked. Such assessments can help set agendas, set implementation priorities, and shape budgets and the allocation of resources.

According to the countries that have adopted a FFP, especially Sweden, which has the longest record, the policy has yielded significant benefits, both in terms of advancing gender equity, and also in making the countries’ foreign policies more robust, resilient, and effective in an increasingly complex world where cross-border issues such as climate, technology, and global health affect states’ security.¹⁹

The experience of FFP in implementing these core aspects of representation, data, and impact assessments, discussed below, provides guideposts for inclusive antitrust. The success of FFP also highlights the opportunity that inclusivity presents at a time when antitrust faces calls for reexamination, retooling, and even overhaul.

13 Briefing by Stephenie Foster, Sarah Kemp & Wenchi Yu to the National Committee on U.S. China Relations, on Feminist & Inclusive Foreign Policy and the US-China Relationship (Sept. 18, 2020), at <https://www.ncuscr.org/event/feminist-foreign-policy> [Foster, Kemp & Yu].

14 Intersectionality refers to the recognition that identities are not shaped by a single trait, but that the experience of a Black woman, for example, is different from a white woman and from a Black man because she cannot silo those traits. See Canada’s Gender-based Analysis Plus (GBA+), at <https://women-gender-equality.canada.ca/en/gender-based-analysis-plus.html> [Canada GBA+] (citing among others Kimberlé Williams Crenshaw, who coined the term intersectionality).

15 *Id.*

16 For a deep dive into many areas where women are not represented in data, from city planning to health care to technology design, see Caroline Criado Perez, *Invisible Women* (2019).

17 Canada GBA+, *supra* note 14.

18 Interestingly, this is akin to business and human rights analyses done by various companies, who examine not just the business or financial impact of creating products, operating in certain locales, negotiating with workers, government actors or others – but also the potential impact on human rights. See Christine Bader, *The Evolution of a Corporate Idealist*; see also Verizon’s Business and Human Rights Approach, at <https://www.verizon.com/about/investors/human-rights-at-verizon>.

19 Sweden Handbook for FFP, *supra* note 3.

IV. SEVEN LESSONS FOR INCLUSIVE ANTITRUST POLICY

Antitrust is being examined around the world to assess whether it is fit for purpose in light of twenty-first century business, competitive, technological and societal dynamics. New legislation and regulation proposes to update or overhaul antitrust everywhere from the United States to Europe to Australia. A key complaint spurring these legislative and regulatory changes is that antitrust is not serving consumers or society. The ostensible weakening of competition brought about by network effects in multi-sided markets, tipping, “zero price” goods, envelopment and ecosystem theories, contestability, and consumer autonomy and choice tend to dominate these discussions.²⁰ Many of the proposals are part of digital regulation agendas, and entail increased resources and development of digital units, agencies and tools.²¹

In parallel, scholars, practitioners, and journalists are documenting the ways in which technology is among the least inclusive spaces, both in terms of demographics, culture, and user design.²² With growing calls for companies to prioritize diversity to create more equitable, accessible, and safe technologies,²³ it bears considering both what role inclusivity might play in addressing the current concerns of antitrust. Without inclusivity as a central part of antitrust – particularly as the need for technology competence expands and intensifies – policy outcomes and enforcement may inadvertently undermine competition that better serves all.

At the same time, in the U.S., inclusivity is a new but strong policy priority, as evidenced in the Biden Gender Policy Council Executive Order of March 8, 2021 (Executive Order). The Executive Order reflects the same broad principles as FFP but applies these across all areas of U.S. policy – which of course includes U.S. antitrust and all penumbra of competition law and policy. The seven lessons outlined below offer a timely guide for what antitrust may take from FFP in progressing a deliberately inclusive antitrust policy, whether in the U.S. or elsewhere.

Lesson 1: Boldly Name the Policy

Words have power. Linguists, philosophers, anthropologists, and psychologists study the way words send explicit and implicit signals; they shape what is viewed as correct, desirable, and even possible.²⁴ They also make ideas more readily susceptible to analysis. As cogently explained by category mathematicians whose job involves categorizing and naming complex concepts, the act of naming a concept helps one readily organize thoughts, analyze complexities, and work through the underlying issues more effectively.²⁵

20 Jacques Cremer et. al, “Competition policy for the digital era,” European Commission, 2019, <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>; Jason Furman, “Unlocking digital competition,” Report of the Digital Competition Expert Panel, 2019, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf; Antitrust and Competition Conference - Monopolies and Politics, University of Chicago, Stigler Center, 2020 at <https://www.chicagobooth.edu/research/stigler/events/antitrust-2020>; “Platform Accountability and Contemporary Competition Law: Practical Considerations,” Shorenstein Center, Nov. 20, 2018, at <https://shorensteincenter.org/platform-accountability-contemporary-competition-law-practical-considerations/>; “The Courage to Learn: A Retrospective on Antitrust and Competition Policy During the Obama Administration and Framework for a New Structuralist Approach,” Jan. 2021, American Economic Liberties Project, <https://www.economicliberties.us/our-work/courage-to-learn/>; UK CMA, “A new pro-competition regime for digital markets,” Dec. 2020, https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf; ACCC, “Digital advertising services inquiry - interim report,” Jan. 28, 2021, <https://www.accc.gov.au/system/files/Digital%20Advertising%20Services%20Inquiry%20-%20Interim%20report.pdf>.

21 See *supra* sources cited in note 17.

22 The author Emily Chang has written about the male-dominated culture of Silicon Valley. “Emily Chang’s Brotopia takes aim at sexism in Silicon Valley,” Feb. 8, 2018, <https://www.theverge.com/2018/2/8/16982000/emily-chang-brotopia-book-review-sexism-silicon-valley>. And Caroline Criado Perez has written a book about how the biases of tech developers ultimately infects their innovations as well. “Invisible Women by Caroline Criado Perez – review,” The Guardian, Mar. 11, 2019, <https://www.theguardian.com/books/2019/mar/11/invisible-women-exposing-data-bias-by-caroline-criado-perez-review>. Remote work seems to be worsening this problem for tech workers. “Remote Work Is Leading To More Gender And Racial Harassment, Say Tech Workers,” NPR, March 30, 2021, at <https://www.npr.org/2021/03/30/982449551/remote-work-is-leading-to-more-gender-and-racial-harassment-say-tech-workers>.

23 See, e.g. Lisa Winning, “It’s Time To Prioritize Diversity Across Tech,” Forbes, March 13, 2018, at <https://www.forbes.com/sites/lisawinning/2018/03/13/its-time-to-prioritize-diversity-across-tech/?sh=3ce8ac6816f8>.

24 See “Does Language Shape Thought?: Mandarin and English Speakers’ Conceptions of Time,” *Cognitive Psychology*, 43, 1–22 (2001), at http://www.cogsci.bme.hu/~ktkuser/KURZUSOK/BMETE47MC15/2018_2019_1/boroditsky2001.pdf.

25 Category theory helps with this challenge of naming abstract ideas, as it involves identifying patterns, naming them to expedite analysis, and using abstraction to help explain the why behind the patterns. Eugenia Cheng, *X + Y* (2020). In the same book, Cheng also discusses the challenges of the word feminism due to the many different interpretations, and proposes the terms “ingressive” and “congressive” to describe what are often characterized as masculine and feminine. Ingressive means more competitive, prioritizing individualism and independence as measures of success, whereas congressive means collaborative, emphasizing community and interdependence. These are viewed not as binary, but as on a spectrum and capable of changing.

FFP embraces inclusion boldly and explicitly.²⁶ Then Swedish Foreign Minister Margot Wallström named it FFP despite being aware that the F word – feminism – triggers negative assumptions and even derision in some. Wallström used the name as an opportunity to reframe the issue of foreign policy, disabuse derisive interpretations of feminism, and create a laser sharp focus on the issue of inclusivity and promotion of gender equality.²⁷ As she explains, using a bold and provocative name also set clear expectations and resulted in greater accountability both internally and externally.²⁸

Inclusive antitrust as a concept should not be inherently controversial, especially to the extent that it mandates antitrust policy and enforcement based on inclusive leadership, and inclusive data that drives towards achieving best results. The term “inclusive” may nonetheless raise some eyebrows, just as “feminist” did and does in the foreign policy arena. It may also engender (pun intended) criticisms that inclusivity does not fit in this “gender neutral” or “value neutral” space. Yet the label “inclusive antitrust” sends a clear signal that antitrust is for everyone and will be led, analyzed and enforced accordingly.²⁹

Lesson 2: Diverse Leadership Is Requisite But Not Sufficient

Diverse leadership is important, and study after study has shown it improves outcomes and results and efficiency.³⁰ Touting the importance of diversity in policy and decision-making is mainstream and has become tablestakes at this point.³¹ Diversity is touted as an asset that generally changes both the equation and focus of policy discussions, and improves outcomes.³² According to studies cited by the Council on Foreign Relations in their project on advancing gender equity in foreign policy, FFP leads to increases in economic growth, decreases in human rights abuses, and sustainable peace.³³ And according to the American Academy of Diplomacy, “representatives of U.S. foreign policy need to look like America” in order to most effectively assess and predict foreign actors’ behavior, avoiding assumptions that can lead to dangerous policy outcomes.³⁴

Diversity is a start, but beyond a box-checking or optics exercise, any initiatives aimed at creating inclusive leadership must give voice to different perspectives. This requires both critical mass of diversity, and leadership that creates psychological safety for differing opinions and viewpoints to be brought to the table.

26 Sweden, Canada, France, Mexico, Luxembourg, and Spain have all explicitly adopted a FFP. Notably, some are not fully bought in to using the term “feminist,” because the term evokes visceral negative reactions for some in power. Cf. Malena Rosén Sundström & Ole Elgström, “Praise or critique? Sweden’s feminist foreign policy in the eyes of its fellow EU members,” *European Politics and Society*, 2020, 21:4, 418-433, at <https://www.tandfonline.com/doi/full/10.1080/23745118.2019.1661940>. Using alternate terms for the same concept, such as gender inclusive FP or other terminology has been proposed, and prominent proponents of the principle of FFP have shied away from officially naming it “feminist” (see, e.g. former U.S. Ambassador-at-Large Melanne Verwee, Sciences Po Panel on FFP, *supra* note 12, I), but FFP has become accepted as the international nomenclature. ICRW Report, *supra* note 3.

27 The description by most all countries that have adopted FFP demonstrate a commitment to intersectional feminism that serves all – especially non-white women and other underrepresented groups. See, e.g. Canada Feminist Foreign Policy, *supra* note 3; European Parliament Resolution, https://www.europarl.europa.eu/doceo/document/TA-9-2020-0286_EN.html (including LGBTQ rights).

28 Sciences Po Panel on FFP, *supra* note 12.

29 While the term feminist as deployed by FFP proponents has inclusivity, including antiracism, at its core, the term “Inclusive Antitrust” more clearly signals that it is both for all, and incorporates an inclusive and holistic methodology. See The Wright Show interview with Marissa Conway, Jan. 19, 2021, <https://podcasts.apple.com/us/podcast/feminist-foreign-policy-robert-wright-marissa-conway/id505824847?i=1000505839835> [Conway Interview].

30 See, e.g. Stuart Levine, “Diversity Confirmed to Boost Innovation and Financial Results,” Jan. 15, 2020, *Forbes*, at <https://www.forbes.com/sites/forbesinsights/2020/01/15/diversity-confirmed-to-boost-innovation-and-financial-results/?sh=2b2c0d2bc4a6>.

31 Assistant Attorney General Delrahim Delivers Remarks at the Antitrust Division’s Seventh Annual Diversity Celebration, Dec. 9, 2020, <https://www.justice.gov/opa/speech/assistant-attorney-general-delrahim-delivers-remarks-antitrust-division-s-seventh-annual>; Commissioner Slaughter, Antitrust at a Precipice, Nov. 17, 2020, https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf; <https://www.competitionpolicyinternational.com/cpi-talks-with-margrethe-vestager-2/>; <https://www.competitionpolicyinternational.com/cpi-talks-with-rebecca-kelly-slaughter>; Bill Kovacic speaking at OECD Gender Inclusive Competition Workshop, February 2021, at https://www.youtube.com/watch?v=s7gg7w7M_9E&list=PLYBGvyEYBNlpHYPgcEdxhnsghO2oyuYIJ&index=3 [Kovacic Talk].

32 In the foreign policy context, increasing representation of women is tied to more successful and enduring peace negotiations, for example. <https://www.cfr.org/womens-participation-in-peace-processes/>.

33 CFR Report, *supra* note 8.

34 Carla Robbins, “Maybe Next Time: Groupthink makes bad policy. So why are there still so few women at the Pentagon?,” *American Purpose*, February 5, 2021.

The focus on creating not only diverse representation but also a lens of inclusion is likewise key. Given the spectrum of identities, especially when considering intersectionalities,³⁵ no team can ever fully represent consumers or competitors or society broadly. What matters then instead is that the team is both diverse and constantly exploring blindspots and unpacking assumptions. For teams to be inclusive – no matter how diverse they are – they should be constantly increasing their awareness of different experiences, and apply that learning in a regimented way. The example set by the Mexican government, which trained all of its foreign service officials in one model, is to be emulated, especially if the training is ongoing and not expected to deliver all benefits after one session. The Canadian government's GBA Plus offers another model – one which has already been applied in the competition law and policy context.³⁶

Lesson 3: Unpack Assumptions and Broaden the Lens

Broadening the aperture of what is examined and prioritized involves not only representation in places of power, but also input from sources beyond just those sitting at the table. This includes seeking information from affected people, rather than assuming that the experts at the table making decisions for others inherently know best.³⁷

In the FFP context, this broader perspective lies in particular contrast to traditional “realist” foreign policy approaches. Yet as proponents of FFP describe, more diverse perspectives from girls and women (in or outside the decision room) lead to more options and ideas brought to the decision-making discussion, which leads to more peace.³⁸ It also opens the doors to others beyond women and girls. Creating a gender lens through FFP, for example, has led to questions about who else is not represented, along with demands for greater input from other underrepresented groups - including racial minorities, people with disabilities, the elderly, and other underrepresented groups. The European Parliament, for example, has expanded FFP's purview to include LGBTQ rights.³⁹

Opening that door also brings attention and efforts to issues that have been men's issues but were not previously discussed. For example, men have been victims of sexual assault in the military and sexual violence as a tool of war for millennia, but did not raise these as key policy issues until women spoke out and action was demanded to address this “women's issue” – which then led to men coming forward as well.⁴⁰

Similarly, in the antitrust context, focusing on “women's issues” such as childcare markets may more directly impact women, who bear most of the child care burden - but will directly impact single fathers or other men with primary or equal childcare responsibilities, and will indirectly impact virtually all men (those with children, those working with women with children, those relying on the work of people with children, etcetera). In other markets, men may benefit from the greater price sensitivity of women if that sensitivity is disaggregated and considered in enforcers' antitrust analyses.⁴¹ Inclusive antitrust could extend this lens to other underrepresented groups as well.

As the foregoing makes clear, FFP is not about advantaging women to disadvantage men; in nearly all cases, all benefit from inclusive policies. Men benefit as a whole from more comprehensive solutions to cross-border issues such as armament, health pandemics, climate change, and digital regulation. FFP also does not mean reducing funding for other priorities, instead it focuses on spending resources more effectively in a way that “is inclusive in its reach and benefits, and therefore accelerates progress towards global security and prosperity.”⁴² FFP notes the two way street of a feminist foreign policy: it focuses on promoting gender equality, but it also yields better foreign policy outcomes.⁴³

35 For example, you may have a team with a white woman, a black man, a transgender woman, a disabled man, a non-native English speaker, a Midwesterner, a Millennial, a Boomer, a Gen Zer, etc but still fail to capture the experience of a Black woman, or a Black Millennial Woman, or a Black Millennial woman who is not a native English speaker, or countless others.

36 Canada GBA+, *supra* note 14.

37 Sweden Handbook for FFP, *supra* note 3; Canada Feminist Foreign Policy, *supra* note 3.

38 Interestingly, Sweden has found that contrary to expectations that its FFP would alienate some partner governments, its FFP instead “opened new conversations and opportunities.” CFR Report, *supra* note 8.

39 European Parliament resolution of 23 October 2020 on Gender Equality in EU's foreign and security policy, at https://www.europarl.europa.eu/doceo/document/TA-9-2020-0286_EN.html.

40 Sanam Naraghi Anderlini, Podcast Interview with Omid Nouripour, Oct 31, 2020, at <https://anchor.fm/omid-nouripour/episodes/feminist-foreign-policy-with-Sanam-Naraghi-Anderlini-elr7s8>.

41 Oxera is conducting studies as part of the OECD Gender Inclusive Competition Project with preliminary results, described in the February 25, 2021 workshop, showing as much. <https://www.youtube.com/watch?v=yyw8aFGZzQI&list=PLyBGvYEBNlpHYPgcEdxhnsgh02oyuYIJ&index=2>.

42 ICRW, All Foreign Policy Spending Should Take Gender Into Account, 2020, at https://www.icrw.org/wp-content/uploads/2020/12/All-Foreign-Policy-Spending-Should-Take-Gender-into-Account_12.2020.pdf.

43 Catalina Crespo-Sancho, “Can gender equality prevent violent conflict?,” World Bank Blog, March 28, 2018 (collecting studies on impact of gender inequality on security, such as armed conflict, breaking with norms and treaties, and use of military force), at <https://blogs.worldbank.org/dev4peace/can-gender-equality-prevent-violent-conflict>.

Antitrust may similarly benefit from broadening the aperture and examining whether assumptions are entrenched in policy, economic analysis, and enforcement decisions. As an example, consider that in the United States, women owned businesses generated \$1.8 trillion; and generally achieve greater business results despite less resources, especially in the technology sector.⁴⁴ Examining potential differences in terms of business leadership and incentive may be relevant as antitrust policy makers seek to change the business incentives of companies – will there be unintended negative consequences? Might changes benefit these more productive women-led businesses? Unpacking assumptions about who is leading companies and business incentives, and getting qualitative and quantitative data, enhances the analysis, and potentially policy outcomes.⁴⁵

Lesson 4: Data Is Key and Should Be Inclusive

Data is a key accountability mechanism for inclusive policy. FFP broadens the type of information available to analysts and decision-makers. Data – both quantitative and qualitative – is needed to measure problems and drive results.

Data and metrics do pose challenges. Often, relevant quantitative data on gender or other demographics is not disaggregated – or not collected at all – leaving important data gaps that impede progress. Often the fact that data is not representative or even biased is not readily apparent and the data is assumed to be representative of all. On the issue of qualitative data, capturing it may create challenges in how that data is combined, used, and/or presented effectively. Creating metrics that measure inclusion to serve as such drivers can be challenging, especially as policies are still being developed and implemented.⁴⁶

Using data can, however, start simply. A first step is to always to collect gender disaggregated data (and race and other relevant demographic data).⁴⁷ FFP prioritizes gender in information collection and analysis.⁴⁸ This disaggregated data can meaningfully show gender and other impacts. It also strives to include these inclusivity and disparate analyses as part of all decision-making and leadership briefings.⁴⁹

Given the data-driven DNA of antitrust, this lesson may pay immense dividends for inclusive antitrust. The OECD's gender and competition project is funding projects that are already shedding light on gaps and opportunities. Oxera Consulting, for example, in its work examining consumer survey results for disparate gender impact, price sensitivities and other competitively relevant effects, noted that many consumer surveys were not usable because they did not collect or record gender data.⁵⁰ Prioritizing collection of relevant demographic data that can then be disaggregated and incorporated in all policy and enforcement briefings is a concrete step towards inclusivity.⁵¹

44 <https://www.commerce.gov/news/blog/2021/03/women-owned-business-ownership-america-rise#:~:text=Women%20owned%20employer%20firms%20report-one%20or%20more%20paid%20employees>; <https://www.forbes.com/sites/allysonkapin/2019/01/28/10-stats-that-build-the-case-for-investing-in-women-led-start-ups/?sh=4d5ce3559d5f>; <https://www.inc.com/kimberly-weisul/boston-consulting-group-female-founders-higher-revenues.html>.

45 Chris Pike & Estefania Santacreu-Vasut, "Competition Policy and Gender," *Concurrences*, November 2019, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3503384 (describing two-way benefits: gender inclusive antitrust can enhance not only antitrust but also gender equality).

46 CFR Report, *supra* note 8 (explaining that participants noted that "the challenges of creating a framework and monitoring tools while simultaneously implementing new policies and programs").

47 Foster, Kemp & Yu, *supra* 13; Conway Interview, *supra* note 29.

48 Foster et al., *supra*, at 3.

49 There may not always be a disparate impact on women or other groups, but undertaking the impact-assessment every time a policy decision is made remains a key component of robust foreign policy analysis under FFP.

50 OECD Workshop on Gender and Competition, February 25, 2021 at <https://www.youtube.com/playlist?list=PLyBGvyEYBNlpHYpGcEdxhnsgh02oyuYIJ>.

51 Acting Chair Slaughter agrees: "we should start these efforts with data. We should make a concerted effort to collect demographic data where possible in our investigations so that we can understand where and how communities of color are disproportionately harmed by proposed mergers or anticompetitive conduct. I am confident that we can incorporate these questions into our analysis of the competitive effects of mergers and conduct alike." CPI Talks with Rebecca Slaughter, CPI Chronicle, April 2021.

Data collection and identifying and filling data gaps⁵² is a starting point, but data practices may contribute to exclusive antitrust in numerous other ways. Biases embedded in data categorization and hierarchies,⁵³ representation in the data,⁵⁴ who the data is being deployed against,⁵⁵ data visualization,⁵⁶ and even insufficient or ineffective data auditing all may lead to exclusion and undermine the goals of antitrust policy and enforcement – especially inclusive antitrust.

Lesson 5: Take a Holistic View

FFP pulls back from narrower questions of military operations and defense, to focus on the broader goal of peace and security. In doing so, it dispenses with the assumption that a military and defense focus is the only endpoint that can assure peace and security. It seeks instead to incorporate a more holistic assessment of peace and security that includes the complexities of many different threads, such as trade agreements, economic growth, climate, cybersecurity, global health, and other domestic policies with cross border effects.⁵⁷ It essentially calls for a systems design approach to foreign policy⁵⁸ that also involves a culture of collaboration across institutions.⁵⁹

As antitrust becomes increasingly complex, it cannot isolate itself from other areas. To be robust, antitrust policy and enforcement must consider interactions with other areas such as intellectual property, privacy, cybersecurity, national security, supply chain... yes, even foreign policy. Looking at how FFP is enhancing the ability of foreign policy to assess complex problems by improving the data used and strategic analysis is a model for those making antitrust policy – and providing strategic antitrust advice.

Lesson 6: Use Tools Fit for Purpose

Being able to identify when an inclusive approach is warranted versus a more traditional approach may be key to dynamic antitrust needed in dealing with increasingly complex industries, competitive dynamics, and fourth industrial revolution technologies.

For example, computational antitrust⁶⁰ may be ideal in certain instances, but may exclude specific groups. Inclusive design may mitigate that risk – but there is reason to doubt it always will.⁶¹ Focus on inclusivity requires vetting automated decision making that may undermine inclusivity – even when the intent is to enhance inclusivity.

52 See Caroline Criado Perez, *supra* note 16, for a comprehensive overview of how the exclusion of women from data sets impacts everything from science and innovation to product development.

53 Safiya Noble, *Algorithms of Oppression* (2018) (explaining how data categorization can entrench power by privileging some views and information over others, making it harder to find or surface certain information. Noble explains how library information science informed by inclusivity such as critical race theory can inform ICT innovation in things such as search engines); see also “In ‘Algorithms of Oppression,’ Safiya Noble finds old stereotypes persist in new media,” Feb. 16, 2018, at <https://annenberg.usc.edu/news/diversity-and-inclusion/algorithms-oppression-safiya-noble-finds-old-stereotypes-persist-new>.

54 Criado Perez, *supra* note 16 (demonstrating that women are repeatedly left out of data used for research, product development, policy making and more); Coded Bias (2021) [documentary] (documenting AI researcher Joy Buolamwini’s experience and subsequent research into representation gaps leading to common inaccuracies in Microsoft, IBM, and Amazon’s services) at <https://www.pbs.org/independentlens/films/coded-bias/>.

55 Cathy O’Neill, *Weapons of Math Destruction* (2016); Frank Pasquale, *A Rule of Persons, Not Machines: The Limits of Legal Automation*, 87 *George Washington Law Review* 1 (2019); ; Meredith Broussard, *Artificial Unintelligence* (2018); UK Centre for Data Ethics and Innovation, *Review into bias in algorithmic decision-making*, Nov. 27 2020, at <https://www.gov.uk/government/publications/cdei-publishes-review-into-bias-in-algorithmic-decision-making/main-report-cdei-review-into-bias-in-algorithmic-decision-making>.

56 Catherine D’Ignazio & Lauren Klein, *Data Feminism* (2020) (describing the power of charts, graphs, and other data visualizations to change the way we look at issues due to their inherent power, that charts and graphs are not “neutral” but actually represent a certain viewpoint, and are dependent on the data that they are based on, and if data is missing or not collected, the charts will also be skewed); see also Catherine D’Ignazio, “What would feminist data visualization look like?,” Jan. 22, 2017 at <https://medium.com/@kanarinika/what-would-feminist-data-visualization-look-like-aa3f8fc7f96c>.

57 Foster, Kemp & Yu, *supra* note 13.

58 “What is Systems Design? How to Surface Opportunities for Change,” Ideo U, at <https://www.ideo.com/blogs/inspiration/what-is-systems-design-how-to-surface-opportunities-for-change>.

59 Comments by former Ambassador Bonnie Jenkins, Panel Discussion, *Toward a Feminist Foreign Policy in the United States*, May 21, 2020, New America Foundation, at <https://www.newamerica.org/political-reform/events/online-toward-feminist-foreign-policy-united-states/>.

60 Stanford Computational Antitrust Project, <https://law.stanford.edu/codex-the-stanford-center-for-legal-informatics/computational-antitrust/>.

61 Meredith Broussard, *Artificial Unintelligence* (2018); Daryl Lim, “Can Computational Antitrust Succeed?,” 2021, <https://law.stanford.edu/wp-content/uploads/2021/04/lm-computational-antitrust-project.pdf>.

Evaluating differential impacts may lead to use of different types of economic models⁶² or enforcement analyses. Scholars and reporters have examined the ways in which a race or gender lens may enhance antitrust analysis and enforcement, and the research stemming from the OECD's 2020 call for papers provide further insights when inclusivity tools specific to antitrust analysis may have particular impact.⁶³

The ability to “toggle back and forth” between inclusive and traditional approaches also has precedent in foreign policy. As Anne-Marie Slaughter, former director of Policy Planning at the State Department writes in her book *The Chessboard & The Web*, leaders must learn to see in “stereo” in making policy for a networked world, to “toggle back and forth” between a “chessboard” version of the world that maps along traditional sovereign state lines, and a “web” version of the world comprised of connections and flows of people and ideas. Women foreign policy leaders, she argues, may be uniquely suited for such toggling since they have more experience exercising power from within a web, rather than the top of a hierarchy.⁶⁴ These same principles have lessons for antitrust, and the need to apply different tools for different circumstances.

Lesson 7: Embed Inclusive Antitrust in a Clear Process for Impact and Longevity

People change, priorities change, and workloads are heavy. To get and maintain traction, FFP proponents have learned that inclusive policy must be embedded through processes, documentation and accountability.⁶⁵ As a Council on Foreign Relations Report describes, “though a sitting government can shape priorities or programs, the commitments of a feminist policy should persist regardless of changes in leadership.”⁶⁶ Canada's GBA Plus embodies precisely this approach. It also provides an example of how mandating such processes, documentation and rigor in applying inclusivity analysis can yield unexpected benefits.⁶⁷ The application of this framework by the Canadian Competition Bureau is described in further detail in this issue in the article by Vassos and Creighton.⁶⁸

As FFP shows, and Canada's gender lens confirms, gender is a gateway to other types of inclusion. FFP urges application of an intersectional gender (and broadly inclusive beyond gender) lens to foreign policy decisions. The same might be applied in antitrust, whether in policy or enforcement. Acting Chairwoman Slaughter has expressed support for the idea of using antitrust to combat structural racism.⁶⁹ As FFP shows, doing so in a way that is routinized, documented, and included in all briefings and policy analyses has the greatest chance for real and sustained impact.

V. WHERE SHOULD WE APPLY INCLUSIVE ANTITRUST (FIRST)?

One additional lesson from FFP is to be prepared for criticisms that this all sounds good in theory, but the idea of applying it seems unrealistic.⁷⁰ The lessons above highlight several areas where changes towards inclusive antitrust are straightforward and can be immediately implemented without substantive changes to antitrust or even significant funding increases. Changes already afoot in antitrust, especially in terms of institutional changes and enhanced technology expertise, also present particular opportunities to apply other inclusive policy lessons in the near term. In the longer term, where significant additional resources might be required and additional study desired, empirical research is already underway and can be further supported and bolstered.

62 Perhaps even application of different economic theories, such as behavioral economics, or consideration of different philosophical approaches, such as feminist economics – but that is outside the scope of this article.

63 Sally Hubbard started the focus on gender and competition with an article on the impact of monopolies on women in 2017. Sally Hubbard, “How Monopolies Make Gender Inequality Worse,” Dec. 20, 2017, *Forbes*, at <https://www.forbes.com/sites/washingtonbytes/2017/12/20/how-monopolies-make-gender-inequality-worse-and-concentrated-economic-power-harms-women/?sh=77e171841b11>. The OECD has since spurred generation of numerous papers on this topic, including among others Chris Pike & Estefania Santacreu-Vasut, *supra* note 45; Sarah Long, “Gender inequality, market distortion and consumer welfare: A call to action for competition authorities,” *Journal of European Competition Law & Practice*, May 2019. Examinations of race and antitrust have likewise been studied and are receiving renewed attention. See Hosea H. Harvey, “Race, Markets, and Hollywood's Perpetual Antitrust Dilemma,” 18 *Mich. J. of Race & L.* (2012); ABA Antitrust Spring Meeting Panel, Making Antitrust Antiracist (March 2021).

64 Anne-Marie Slaughter, “How to Succeed in a Networked World: A Grand Strategy for the Digital Age,” *Foreign Affairs*, 95 no. 6, November/December 2016, 76-89.

65 See, e.g. CFR Report, *supra* note 8 (“Participants emphasized the need for feminist foreign policies to be institutionalized to ensure continuity.”)

66 CFR Report, *supra* note 8.

67 Canada GBA+, *supra* note 14.

68 Nadia Vassos & Ellen Creighton, *The Competition Bureau's Journey Toward Inclusive Competition*, CPI (April 2021).

69 FTC Commissioner Becca Slaughter, Antitrust at a Precipice, Nov. 17, 2020, at https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf; Vassos & Creighton, *supra* note 68.

70 Cf. Kovacic Talk, *supra* note 31; Conway Interview, *supra* note 29.

Given the immense workload already besetting antitrust and competition authorities, the appropriate place to begin may be with low hanging fruit: start with leadership, data collection, and embedding top-to-bottom inclusive norms, data use, and processes in any new institutional structures. Creating diverse teams is widely acceptable and has become a key part of the U.S. and EU governments.⁷¹ This should be complemented with regular inclusivity development education that helps individuals identify and address perspectives not represented who should be brought into the analysis. The Canadian process has made many tools and training broadly available, which can serve as a foundation to build upon.

Creating inclusive institutions can be challenging when it involves addressing structures and cultures firmly entrenched. The creation of new competition units, however, especially data focused units such as the CMA's DaTA Unit, the FTC's Tech Enforcement Division,⁷² and the Data Center proposed by Senator Klobuchar's CALERA legislation,⁷³ offer an opportunity to make these organizations inclusive by design – from the outset and from top to bottom: leadership and personnel to data use to analysis and decision-making. The CMA's DaTA unit seems to be doing some of this already, for example through its work focused on algorithm bias.⁷⁴ Creating explicit commitments, objectives and plans for thorough inclusion could lay foundations that will embed inclusivity and serve as a model for more established organizations to embrace inclusive antitrust principles. The benefit here, given the focus on data of these new organizations, is that they can embrace the focus on making data use inclusive from the beginning through their “digital DNA”⁷⁵ while also avoiding entrenching the well documented biases and exclusive practices that notoriously pervade some Silicon Valley organizations.⁷⁶

There are many next steps beyond these initial ones, such as those detailed by Bill Kovacic and others calling for retrospective studies, encouraging and funding more empirical research,⁷⁷ and designing ways to better capture different viewpoints, including through greater use of qualitative data and behavioral economics. All of these warrant further exploration and consideration.

Finally, research and studies that can lead to long term progress should receive increased and ongoing support. Work is already underway thanks to efforts by the OECD, spurred and funded in large part by the Canadian government, to conduct empirical research on gender inclusive antitrust.⁷⁸ Further research can help shape not just cultural,⁷⁹ process,⁸⁰ and data design,⁸¹ but also may shape economic models, standards, and decision making paradigms.

71 Biden Pledged Historic Cabinet Diversity. Here's How His Nominees Stack Up, NPR, Feb. 5, 2021, <https://www.npr.org/sections/president-biden-takes-office/2021/02/05/963837953/biden-pledged-historic-cabinet-diversity-heres-how-his-nominees-stack-up>; President von der Leyen vows to fight lack of diversity in E.U. institutions, PBS, June 17, 2020, <https://www.pbs.org/newshour/world/president-von-der-leyen-vows-to-fight-lack-of-diversity-in-e-u-institutions>; <https://www.competitionpolicyinternational.com/cpi-talks-with-margrethe-vestager-2/>.

72 CMA, “The CMA DaTA unit – we’re growing!,” May 28, 2019, at <https://competitionandmarkets.blog.gov.uk/2019/05/28/the-cma-data-unit-were-growing/>; “FTC’s Bureau of Competition Launches Task Force to Monitor Technology Markets,” Feb. 26, 2019, FTC, at <https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology>.

73 S.225 - Competition and Antitrust Law Enforcement Reform Act of 2021 (CALERA), at <https://www.congress.gov/bill/117th-congress/senate-bill/225/text?r=8&s=1>.

74 CMA, “Algorithms: How they can reduce competition and harm consumers,” Jan. 19, 2021, at <https://www.gov.uk/government/publications/algorithms-how-they-can-reduce-competition-and-harm-consumers/algorithms-how-they-can-reduce-competition-and-harm-consumers> (citing Catherine O’Neill among others).

75 “New Digital Realities; New Oversight Solutions in the U.S.,” Aug. 2020, Shorenstein Center, p. 19, at https://shorensteincenter.org/wp-content/uploads/2020/08/New-Digital-Realities_August-2020.pdf.

76 Opportunity is present in established institutions and industries as well. The establishment of a Multilateral Working Group to Build a New Approach to Pharmaceutical Mergers is one example of using different tools and collaborative approaches to tackle entrenched challenges. “FTC Announces Multilateral Working Group to Build a New Approach to Pharmaceutical Mergers,” March 16, 2021, at <https://www.ftc.gov/news-events/press-releases/2021/03/ftc-announces-multilateral-working-group-build-new-approach>.

77 The research underway through the OECD, the work done by Paroma Sanyal & Coleman Bazelon, and others featured in the Inclusive Competition issue of CPI, are some examples of research advancing inclusive antitrust grounded in data.

78 OECD, Gender-Inclusive Competition Policy, <https://www.oecd.org/competition/gender-inclusive-competition-policy.htm>.

79 Lauren Collins, “Expand Your Culture Through Conversation,” at <https://www.ideo.com/blogs/inspiration/lets-talk-expand-your-culture-through-tough-conversations>.

80 Melanie Bell-Mayed, IDEO, “What Is Systems Design? How to Surface Opportunities for Change,” March 2021; Adrienne Maree Brown, Emergent Strategy (2017).

81 See, e.g. Catherine D’Ignazio & Lauren Klein, Data Feminism (2020).

VI. CONCLUSION

Outrage in the United States over systemic inequality coincides with a global antitrust upheaval. Both movements are fueled by concerns about concentrations of power, and the way that concentration leads to exclusion. Systemic exclusion, inadvertent exclusion, unconscious bias: all suggest that a *laissez faire* approach defaults to codification of perspectives and approaches that benefit past holders of power.

Inclusive antitrust creates more resilience, value alignment, and highlights the nuances and complexities as we navigate the fourth industrial revolution and beyond. Deliberate – and as we learn from FFP, explicit – focus on inclusion is warranted.

The lessons from FFP can help guide where inclusive antitrust may focus first and where to build: 1) broadening representation; 2) embedding processes that routinize inclusive analysis and scrutinize assumptions; 3) making data use an asset rather than impediment to inclusivity; and 4) appreciating context and which tools are best fit for purpose.

Perhaps the time has come to upgrade homo economicus from a one dimensional “rational” white male to an intersectional being with varied motivations facing different societal obstacles. An inclusive lens that does just that can reveal new competitive complexities, and multidimensional new approaches to data will help optimize competition law.



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