



...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.

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

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.

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/>.



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