

TOWARDS INCLUSIVE COMPETITION ANALYSES: THE QUESTIONS WE OVERLOOK



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Towards Inclusive Competition Analyses: The Questions We Overlook

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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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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

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) diverse 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.

the neighborhoods where such practices take place, and that tolerance is very racialized.⁷ Similarly, traditional price analyses do not consider the 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

7 Darrick Hamilton, Equity and Antitrust ABA Panel.

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>.

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 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

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>.

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.

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.

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

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>.

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>.

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

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

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.*

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#>.

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

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?

³⁵ South Africa, Competition Law and Equality Paper.

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>.

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.



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