

Project #7

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

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Introduction

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 sponsored 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 focuses on the question of how a competition agency might carry out a gender inclusive competition policy. The emphasis here is on policy implementation how to cross the distance between the aspiration and its effective realization in practice. In a formative study of government decision making, Professor 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

This Article takes on the challenge that Professor Allison posed a half-century ago in two parts. It first identifies obstacles that competition authorities are likely to face in developing a gender inclusive approach to executing their mandates. It then presents possible implementation approaches for overcoming these obstacles.

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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/qf\(2018\)4/en/pdf](https://one.oecd.org/document/DAF/COMP/qf(2018)4/en/pdf).

⁴ Graham T. Allison, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS 267-68* (Little, Brown & Co. 1971). Inadequate attention to implementation has doomed a number of policy reforms in the field of competition law. Alison Jones & William E. Kovacic, *Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy*, 65 ANTITRUST BULL. 227 (2020).

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. 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 as contracting for funeral services)
- Promotion of innovation and technological development
- Preservation of opportunities for small and medium enterprises (especially new entrants) 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.

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 perhaps most prominently in debates about the future of competition policy in the United States, has proposed that competition agencies exercise their mandates with an eye to promoting the interests of individuals not only as consumer of goods and services but also as employees, as owners of small and medium enterprises, and as citizens who value the dispersal of economic power as a safeguard for democracy.⁶

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>.

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."). See also William E. Kovacic, *Root and Branch Reconstruction: The Modern*

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 staff, especially careerists 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 cliches, fads, and slogans that leave their imprint only upon t-shirts, coffee mugs, carrying bags, and human resources training materials. It is the destiny of new agency leaders to overestimate the compelling attraction of their ideas and to underestimate the ability of the career staff to take superficial steps to embrace the new program, to wait out the new leaders, and then restore the status quo.

In contemplating new initiatives, agency leaders must understand the sources of 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.

The recognition that sustainable reforms require a persistent long-term commitment can help incumbent leads avoid the temptation to indulge in parochialism and partisanship that often manifests itself in portraying predecessors as inadequate as a way to magnify the incumbent's splendor. The reform advocate should keep in mind the question posted by Professors Richard Neustadt and Ernest May: "Will it stick?"⁸ Making things "stick" requires efforts to nurture a widely shared consensus that survives leadership handovers, especially in the face of regime changes that shift power between political parties.

Transformation of U.S. Antitrust Law and Policy?, 35 ANTITRUST 46 (Summer 2021) (discussing modern debate about the goals framework for the U.S. antitrust system).

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).

⁸ Richard E. Neustadt & Ernest R. May, THINKING IN TIME 270 (1986).

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 supply the ambition. The cleverness takes the form of bureaucratic guile that stems from an understanding of how organizations and their people behave.⁹ 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 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.

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.¹⁰ The measures set out reflect the results of the research project to date and will be refined going forward.

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.¹¹ 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, including members of governing boards
- 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

⁹ On the challenges this entails. see Malcolm K. Sparrow, *THE REGULATORY CRAFT* (2000).

¹⁰ 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).

¹¹ 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.

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.

For this research project I did 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 did I attempt 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. Multinational networks such as the OECD, the International Competition Network, and the United Nations Conference on Trade and Development are well-situated to collect data on diversity trends and to trace adjustments over time. A useful focus of attention for these networks would be to pursue the creation of these data sets and the maintenance of a data base that tracked patterns in the development of cases and other competition policy initiatives. These steps would be foundations for future efforts to draw connections between diversity and project selection. More than any other institutions, the multinational networks have continuing engagement with the competition policy bodies whose cooperation would be vital to such an endeavor.

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 antecedent predecessors. My own research has revealed a striking number of instances in which no women have held the top leadership post of institutions often regarded as the world's leading competition agencies. I would suggest that competition systems that have been in business for, say, 25 years or more and have never had a woman as chair of the national competition authority have a gender problem.¹² I do not list these jurisdictions here. They know who they are, and I suspect they recognize that their record on this score is not exemplary.

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 identify 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 appointment 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.¹³

¹² In pursuing this project, I have received a number of comments that say this question 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.

¹³ One need not know anything about baseball (or to 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

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 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,¹⁴ Maureen Brunt,¹⁵ Eleanor Fox,¹⁶ and Valentine Korah.¹⁷ All of these women were vital to the development of competition law in their own countries, and each helped build the intellectual infrastructure of what we today call international competition law. 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 recite the work Lerner and Lowe, Rogers and Hammerstein, and Sondheim. Similarly, no student of competition policy should fail to recognize the remarkable body of 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).¹⁸ To study their leadership of new agencies in this period is to understand where the talent is, and how a competition system can ascend but putting the talent to work at the top.

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.

¹⁴ 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).

¹⁵ 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).

¹⁶ 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).

¹⁷ 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).

¹⁸ 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).

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.¹⁹ 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 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 illuminates 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 to all of these groups. My examination of the FTC's annual budget requests to Congress since the late 1960s and the composition of the FTC's competition cases 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 or so have been energy, food, health care (pharmaceutical and non-pharmaceutical), and transportation.²⁰ Within these areas, one observes a number of notable enforcement matters where the victims of competitive harm would mainly or exclusively be women.²¹

¹⁹ 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).

²⁰ 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) (

²¹ See, e.g., Federal Trade Commission, Press Release, *FTC Seeks to Block Cytoc 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-cytc-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) is 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).

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).²² 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.

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 has documented the exclusionary effect of such restrictions and the impediments they create to entry by entrepreneurs starting their first business venture.²³ Competition agency law enforcement and advocacy that reduced artificial entry restrictions seem well-suited to enable facilitate new business development by entrepreneurs who might otherwise encounter crushing opposition from market incumbents.²⁴

Conclusion

One finding of the research program 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.²⁵ 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 tap 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.

²² An internal FTC planning document prepared in 1980 describes the agency's efforts to persuade the Interstate Commerce Commission to relax restrictions on new entry into the trucking sector. The document notes 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).

²³ 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).

²⁴ Ng Huiwen, *Café owners worried as home bakers rise as 'rivals,'* *THE SUNDAY TIMES* (Singapore), Apr. 24, 2016, at A15.

²⁵ 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).