

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Cancels & replaces the same document of 24 October 2024

Global Forum on Competition

Session 1: Competition and Inequality

- Background Note by Eleanor M. Fox -

2-3 December 2024

This paper by Eleanor M. Fox (Walter J. Derenberg Professor of Trade Regulation New York University) was submitted as background material under Session I at the 23rd Global Forum on Competition to be held on 2-3 December 2024.

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Please contact Ms. Misha Kaur [E-mail: Misha.Kaur@oecd.org], if you have any questions regarding this document.]

JT03556037

Competition and Inequality

Background Note

by Eleanor M. Fox¹

¹ Eleanor Fox is Walter J. Derenberg Professor of Trade Regulation Emerita at New York University School of Law. Professor Fox thanks Frédéric Jenny for discussions and correspondence, from which this Note draws. She thanks Emmett Tabor, JD candidate, NYU Law 2025, for his helpful research assistance.

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1 Introduction

1. Since the start of the new millennium, there has been an outpouring of literature highlighting steeply rising inequality of wealth and income along with persistent and even growing poverty. Markets are charged with being a part of the problem, and competition law and policy is named as part of the solution. Meanwhile, the United Nations released the Millennium Development Goals and then the Sustainable Development Goals, aspiring to end poverty and hunger at target dates that will arrive too soon, while multitudes decried the 1% as holding half of the wealth of the world.

2. These anxieties and concerns were at first received by much of the competition law family as "human rights, not antitrust; not our problem." But gradually the competition community began to make connections, both on causes of underlying problems and possible partial cures.

3. This Global Forum will examine the various issues entailed by the subject "competition and inequality." Part II of this Background Note examines the dimensions of the problem in its relation to competition. Part III briefly summarizes the literature. Part IV observes complexities of the linkages. Part V examines how the equality value has been applied in competition law of selected jurisdictions. Part VI discusses options for reform: what competition law/policy can contribute to alleviating inequality, through enforcement, advocacy and adjudication. Part VII concludes. A selective bibliography is annexed.

2 Defining competition and Inequality, and why alleviating the disparities matters

4. What do we mean by “competition and inequality” in a sense relevant to the competition law community? What dimensions are relevant to the competition conversation?

5. There are many dimensions of inequality. The three most commonly discussed are inequality of opportunity, of income, and of wealth. Of these, inequality of opportunity is most directly relatable to competition law because competition law in many jurisdictions aims to afford equal opportunity to contest markets on one’s merits, free of anticompetitive obstructions. Equality (or less inequality) of outcomes, as in wealth and income, is not commonly a stated goal of competition law other than in South Africa, and indeed competition itself naturally produces winners and losers. As long as firms’ conduct is on the merits and not anticompetitive, this aspect of competition is normally a socially accepted part of a system designed to produce a best array of goods and services that people want -- and can afford to buy at cost or more. One might regard inequalities produced naturally by fair market competition as not a bad phenomenon; even if various jurisdictions might want to cure some of the disparities, by aid, taxes, or otherwise.

6. Within the three categories of opportunity, wealth and income, there are subcategories. Subcategories include inequality within countries, inequality between countries, geographic such as North-South inequality, and gender and racially based inequality. Racial and gender inequalities may derive from historically imposed barriers to full participation in the market. North-South inequality and the legacy of colonialism may similarly result from deliberately constructed barriers to participation.

7. Widespread persistent barriers to participation can undermine efficiency of markets by screening out large segments of the population who could add dynamism, creativity, and options to the market. For both dignity and efficiency reasons, embedded discriminations can lead policy makers to adopt an “inclusivity” goal for competition law, as has been done in South Africa and followed in other African countries. Historical suppressions can result in a deficit of capacities – e.g. difficulties of small businesses to advance in the digital economy without a helping hand from Gatekeepers to be lifted onto their platforms – and can produce an expanded view of competition law duties.

8. Income disparities tend to be lower than wealth disparities.² As of the end of 2021, the top 10% accounted for half the world’s income, and the bottom 40% held only 8.4% of the world’s income.³ The World Inequality Database shows:

² Zia Qureshi, Rising Inequality: A major issue of our time, Brookings, May 16, 2023, <https://www.brookings.edu/articles/rising-inequality-a-major-issue-of-our-time/>.

³ Mapping income inequality: the bottom 40 and top 10 percent, 23 January 2022, <https://data.undp.org/insights/mapping-income-inequality>, based on World Inequality Database.

“The increase in inequality has been especially marked at the top end of the income distribution, with the income share of the top 10 percent (and even more so that of the top 1 percent) rising sharply in many countries.... Those in low- and middle-income groups have suffered a loss of income share, with those in the bottom 50 percent typically experiencing larger losses of income share. These trends in inequality have been associated with an erosion of the middle class and a decline in intergenerational mobility”⁴

9. Causes of wealth inequality are in part historical – industrial conditions that resulted in great accumulation of wealth by a few, such as the Industrial Revolution magnates (the Robber Barons in the US), royalty and ruling families elsewhere, and tax policy that let them keep their wealth. New wealth is accumulated by technology leaders and superstars, similarly enjoying favorable tax policy.

10. Both forms of inequality are exacerbated by new technologies, globalization, and high-skill premiums for the digitally adept;⁵ while at the low-skill end of the income scale, workers face diminished returns by reason of outsourcing, the waning power of labor unions, loss of unskilled jobs to technology, and racial segregation.⁶

11. In capitalist and market systems, not all inequalities are deemed bad and to be avoided and corrected. Absolute equality of outcomes is not the goal. But the immense and increasing disparities between the very rich and the middle class and poorer populations sounds social and political alarms.⁷ A recent Brookings article reports:

Rising inequality and related disparities and anxieties have been stoking social discontent and are a major driver of the increased political polarization and populist nationalism that are so evident today. An increasingly unequal society can weaken trust in public institutions and undermine democratic governance. Mounting global disparities can imperil geopolitical stability. Rising inequality has emerged as an important topic of political debate and a major public policy concern.⁸

12. Martin Wolf, chief economics commentator at the Financial Times and author of *THE CRISIS OF DEMOCRATIC CAPITALISM*, stated: "if people cannot gain a sufficient standard of living, a peaceful and democratic order becomes difficult to maintain."⁹

⁴ Qureshi, supra note 2; WORLD INEQUALITY DATABASE, <https://wid.world/>.

⁵ *Income Inequality: Introduction to Inequality*, INTERNATIONAL MONETARY FUND, <https://www.imf.org/en/Topics/Inequality/introduction-to-inequality#What%20Causes%20Inequality>.

⁶ Matthew Johnston, *A History of Income Inequality in the United States*, INVESTOPEDIA (Sep. 18, 2023), <https://www.investopedia.com/articles/investing/110215/brief-history-income-inequality-united-states.asp>.

⁷ See generally THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014); JOSEPH STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE* (2012); Ariel Ezrachi, Amit Zac and Christopher Decker, *The effects of competition law on inequality—an incidental by-product or a path for societal change?* 11 J. ANTITRUST ENF'T 51 (March 2023), <https://doi.org/10.1093/jaenfo/jnac011>.

⁸ Qureshi, supra note 2.

⁹ Vasudha Mukherjee, *Poor standard of living makes democracy difficult to maintain: Martin Wolf*, BUSINESS STANDARD (New Delhi), March 27, 2024, https://www.business-standard.com/specials/bs-events/poor-standard-of-living-makes-democracy-difficult-to-maintain-martin-wolf-124032700894_1.html. See also *Inequality – Bridging the Divide*, UNITED NATIONS UN75 2020 AND BEYOND, <https://www.un.org/en/un75/inequality-bridging-divide>; Bill Gates, *Why Inequality Matters*, GATESNOTES (Oct. 13, 2014), <https://www.gatesnotes.com/Why-Inequality-Matters-Capital-in-21st-Century-Review>. Gates writes:

*“Another problem is political. The wealthiest have a disproportionate influence on public policy. This gives them an ability and incentive to skew public investments and government policies to favor themselves. *** This political effect can make inequality self-reinforcing: the economic power of those at the top gives the wealthy political power, which can be used to entrench and enhance their economic power, further increase their*

13. The poverty problem may be included in concern for wealth/income disparities. But the problem is different, and to many it is more compelling and the better point of focus. Millions of people are starving, and unnecessarily so, for enough food is produced to feed everyone on the planet.¹⁰ More millions of people are so desperate for their next pennies that they must make tragic choices between sending their children to school and having a slice of bread to eat.¹¹

14. While large disparities in wealth and income may be unfair, unbalance society, and even threaten democracy, macroeconomics adds subtleties. Some studies indicate that inequalities have positive effects on growth and development in early stages of economic development, following Kuznets' inverted U-curve hypothesis -- which is both supported and criticized.¹²

political power, and so on. This vicious cycle creates the possibility that inequality could threaten our democracy."

¹⁰ *World Hunger Facts and Statistics*, ACTION AGAINST HUNGER, <https://www.actionagainsthunger.org/the-hunger-crisis/world-hunger-facts/> ("There is more than enough food produced in the world to feed everyone on the planet. Yet 733 million people still go hungry.")

¹¹ *The learning and development of millions of children and youth are at risk due to the global food and nutrition crisis*, GENEVA GLOBAL HUB FOR EDUCATION IN EMERGENCIES (Dec. 8, 2022), https://eiehub.org/news/the-learning-and-development-of-millions-of-children-and-youth-are-at-risk-due-to-the-global-food-and-nutrition-crisis#_edn6. ("As the global food and nutrition crisis worsens, we are seeing ever more children and youth dropping out of school and unable to enjoy their right to education. Families are forced to make the difficult choice between sending their children to school or having them look for food, collect water or go to work.")

¹² See Seher Gulsah Topuz, *The Relationship Between Income Inequality and Economic Growth: Are Transmission Channels Effective?*, 162 SOC. INDICATORS RSCH. 1177 (2022), https://link.springer.com/article/10.1007/s11205-022-02882-0#auth-Seher_G_I_ah-Topuz-Aff1.

3 A brief summary of the literature on competition law and inequality¹³

15. This section cuts a path through the growing body of literature on competition law and inequality. It draws from four seminal articles that illuminate the competition-inequality links, while noting literature that disputes the links. The four selected articles make a powerful case for a role for competition law and give flavor, even passion, to the claims.

16. We begin with the work of Lina Khan and Sandeep Vaheesan, who stress market power as a principal vehicle for transferring wealth to the very rich. While they focus on the United States, their observations can fairly be generalized to the world. In their article *Market Power and Inequality: The Antitrust Counterrevolution and its Discontents*,¹⁴ they write:

In recent years, economic inequality has become a central topic of public debate in the United States and much of the developed world. ... As top intellectuals, politicians, and public figures have come to recognize inequality as a major problem that must be addressed, they have offered a range of potential solutions [in fields such as tax, labor, trade, investment, and financial institutions].

One underexplored theme in this larger debate is the role of monopoly and oligopoly power. Given the current distribution of business ownership assets in the United States, market power can be a powerful mechanism for transferring wealth from the many among the working and middle classes to the few belonging to the 1% and 0.1% at the top of the income and wealth distribution.¹⁵

17. Second, Tommaso Valletti and Hans Zenger document a “significant body of empirical research showing increases in margins across a wide range of industries ...”. They write in their article, *Increasing Market Power and Merger Control*:

A significant body of empirical research has documented a structural increase in margins across a wide range of industries and countries. On average, firms enjoy appreciably greater pricing power today than used to be the case in prior decades. Research also showed that this increase in mark-ups coincide[s] with a decline in the labour share of output, higher aggregate concentration, larger corporate profitability, and a slump in business dynamism¹⁶

¹³ This and the following section are an adaptation from Eleanor Fox and Philipp Baschenhof, *Antitrust and Inequality: The History of (In)Equality in Competition Law and Its Guide to the Future*, in COMPETITION LAW AND ECONOMIC INEQUALITY 91 (Jan Broulík & Katalin Cseres eds., Hart Publishing, an imprint of Bloomsbury Publishing 2022), with permission of Bloomsbury Publishing, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3897944.

¹⁴ Lina M. Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL’Y REV. 235 (2017).

¹⁵ *Id.* at 235-36.

¹⁶ Tommaso M. Valletti and Hans Zenger, *Increasing Market Power and Merger Control*, 5 COMPETITION L. & POL’Y DEBATE 26, 26 (2019).

Third, Sean Ennis, Pedro Gonzaga and Chris Pike construct a model to measure the effect of market power on inequality. They report a sizeable effect of market power on the middle class and the poorest segment of the population. Their article, *Inequality: A Hidden Cost of Market Power*, concludes:

This paper provides evidence that market power can contribute substantially to wealth inequality, augmenting wealth of the richest 10% of the population on average by 12% to 21%, depending on ... saving behaviour, and reducing the income of the poorest 20% of the population by 11% or more. The groups of the population who are typically harmed by market power are the 0 to 80th percentiles, and interestingly the harm appears to be particularly accentuated on a middle class comprised somewhere between the 20th to 60th percentiles.¹⁷

Fourth, Shi-Ling Hsu offers a nuance. Hsu is skeptical that increased concentration produces greater inequality, and skeptical that concentration harms consumers, but identifies a major shift in the capital-labor ratio as relevant to inequality. He writes in his article *Antitrust and Inequality: The Problem of Super-firms*:

[L]arge, consolidated "super-firms" have grabbed ominously large market shares, limited consumer choices, and threatened to render local provision of goods and services anachronistic. ... [Unrest has exploded into politics and] populist anger. ... Monopoly or oligopoly rents transfer wealth from consumers to producers, which would seem to naturally lead to an increase in inequality.

But the linkage between inequality and the rise of this new trend towards industrial concentration is not always so clear. For one thing, as Daniel Crane argues,¹⁸ heterogeneity among consumers and producers render it extremely difficult to determine whether on net, industrial concentration redistributes wealth from poor to rich. On the consumer side, the rise of these super-firms that seek to dominate markets for internet search, retail, social media, telecommunications, electronics, and seemingly everything important have, despite their ominously large market shares, incontrovertibly produced enormous consumers surplus. ...

... [Still, competition law may] contribute to inequality in a subtle but important way: by contributing to a shift in the capital-labor ratio of some of the most dominant firms.¹⁹

18. Other scholars dismiss or qualify claims of linkages between business concentration and inequality. They dispute the claim that concentration is increasing beyond a handful of markets that require large scale for better service (high tech, health care, energy, transportation, on-line retailing). They disagree with the broad generalization that business concentration undermines competition, pointing to markets with few firms where competition is intense. They would not infer monopoly profits from higher prices, which could reflect higher quality or better service. They question whether, when higher mark-ups are observed, the increment is traceable to concentration, not efficiency. They dispute the narrative that firms are currently making higher than normal profits. They question whether monopoly profits, when made, go systematically and disproportionately to the rich and high-income earners.²⁰

¹⁷ Sean Ennis, Pedro Gonzaga, and Chris Pike, *Inequality: A Hidden Cost of Market Power*, 35 OXFORD REV. ECON. POL'Y 518, 539 (2019).

¹⁸ [Author's footnote] Daniel A. Crane, *Antitrust and Wealth Inequality*, 101 CORNELL L. REV. 1171, 1177-79 (2016).

¹⁹ Shi-Ling Hsu, *Antitrust and Inequality: The Problem of Super-Firms*, 63 ANTITRUST BULL. 104, 105-06 (2018).

²⁰ For recent empirical literature that qualifies or disputes some claims of linkages, see Nathan H. Miller, *Industrial Organization and The Rise of Market Power*, NBER Working Paper w32627, June 2024, <https://www.nber.org/papers/w32627> (US economy); Carl Shapiro and Ali Yurukoglu, *Trends in Competition in the United States: What Does the Evidence Show?* (July 2024), NBER Working Paper No. w32762, <https://ssrn.com/abstract=4908573>; both papers critiqued in part by Jonathan B. Baker and Fiona Scott Morton, *Market Power Has Grown and Antitrust Needs Strengthening, Despite What Shapiro & Yurukoglu and Miller Suggest*, ProMarket October 1, 2024, <https://www.promarket.org/2024/10/01/market-power-has-grown-and-antitrust-needs-strengthening-despite-what-shapiro-yurukoglu-and-miller-suggest/>. See also Nancy Rose, Concerns about

19. For those of us who have not prepared the studies or mined the data, it is not easy to work through this briar patch of literature. There appears to be a tendency of scholars writing on competition and inequality to cite the narrative that fits predilections for either more robust or more reluctant competition law enforcement.

Concentration, Aspen Institute Papers, November 21, 2019, <https://www.economicstrategygroup.org/publication/concerns-about-concentration/>.

For an article by lawyers arguing against “populist antitrust” and disputing many of the claimed linkages between [rising] market power and inequality, see Elyse Dorsey, Geoffrey A. Manne, Jan Rybnicek, Kristian Stout, and Joshua Wright, *Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement*, 47 PEPP. L. REV. 861 (2020).

4 Observations on the Complexity of the Problem

20. This section makes six observations that add complexity to the inquiry into whether competition or competition law is a cause or partial solution to the wide inequality gap.

21. First, there are many causes for the rising inequality gap.²¹ First among causes commonly given are globalization, technological advances, and the catapulting of super firms especially in the digital sector. The world is witnessing “The Rise (and Rise and Rise) of the 0.01%.”²² It is also witnessing stagnation in the middle class and the fall of the standard of living of people on the bottom rungs of the inequality ladder.²³ While competition *law* has not caused the rise or the fall, market competition has played a role. The market, in the context of new technologies and their global deployment, pushes towards greater concentration of wealth and income; it plays into the hands of those who have the skills and money.

22. Similarly, competition *law* has not *caused* the growth of market power. Nor, apart from the important category of mergers, is it charged with preventing growth of market power. In other words, competition law is positioned to control just a fraction of market power, and only in specific circumstances. Nonetheless, a number of scholars and policymakers claim that competition law has stood by while market power has accumulated and flourished.

23. Second, where economic power is created by mergers or anticompetitive conduct or is used to harm competition, that is a problem that competition law does and ought to address for efficiency/consumer welfare concerns, without regard to increasing equality. When competition law is successfully enforced against firms with market power, the enforcement tends to help people without power or privilege and thus tends to move the law in the direction of less inequality.

24. Third, in a number of jurisdictions, competition law primarily addresses allocative efficiency, not distributive equity. The question – how to reduce the wealth-and-income inequality gap – is distributive. Those who support the allocative-only view of competition law argue that introduction of non-economic factors will shrink the pie, undermine incentives to invent and invest, and make even the poorest people worse off.

²¹ Indeed, the size of the gap differs from country to country and between haves and have-nots. See Carlos Gradin, Finn Tarp, and Murray Leibbrandt, *Global inequality may be falling, but the gap between haves and have-nots is growing*, THE CONVERSATION (Sep. 2, 2021, 7:16 AM), <https://theconversation.com/global-inequality-may-be-falling-but-the-gap-between-haves-and-have-nots-is-growing-159825>.

²² See Derek Thompson, *The Rise (and Rise and Rise) of the 0.01 Percent in America*, THE ATLANTIC, February 13, 2014.

²³ See Ember Smith, Ariel Gelrud Shiro, Christopher Pulliam, and Richard V. Reeves, *Stuck on the ladder: Wealth mobility is low and decreases with age*, BROOKINGS (Jun. 29, 2022), <https://www.brookings.edu/articles/stuck-on-the-ladder-wealth-mobility-is-low-and-decreases-with-age/>.

25. Fourth, focus on wealth and income inequality obscures other equality problems. Two prominent such problems are: deep systemic poverty, and corporate power procured by and used for vested interests. Much of the literature on inequality of wealth and income veers off to discuss poverty and power. We look here briefly at deep systemic poverty and corporate power.

26. Deep systemic poverty: The problem of poverty and of the people who are the worst off is different from the problem of the skewed spread of wealth and income. The skewed spread is a huge sociological, psychological, and political-democracy problem, with consequences to economic growth. The constant flow of wealth to the elite and the hollowing out of the middle class undermine dignity, breed personal disaffection and depression, and weaken democracy and its legitimacy, as discussed above. The wealth/income gap is different from the poverty problem on three counts. Its causes are different, its effects are largely different, and its cures are largely different. As noted above, the main causes of the skewed spread include inherited wealth, globalization and technological advances – especially in high tech and data, the rise of superstars – entertainers and firms, and rags-to-riches financial successes (especially from globalization and high-tech advancements) such as Elon Musk with \$250 billion net worth. The persistence of educational inequalities is a critical structural factor. The effects of the skewed spread on people are diffuse; they include disaffection and a feeling of a stacked deck, loss of control, and profound unfairness; but the problem is not typically where starving people will get their next meal. An obvious cure for extreme inequality of wealth would be a generous wealth tax on the very rich. This would immediately shrink the wealth gap without (directly) making the poor better off. Similarly, increasing taxes on high incomes and closing tax loopholes would shrink the take-home income gap. Lifting up the bottom is another story, and is urgent.

27. The two, however, interrelate. Jain-Chandra et al. relate that higher income inequality may “caus[e] the rich to block growth-enhancing redistributionary policies”; it can “hamper growth in the presence of credit constraints causing underinvestment in human capital and health ... and entrepreneurial activity” Higher inequality can slow growth and slowing growth is bad for the poor.²⁴ Moreover, prioritizing pro-poor and inclusive issues in competition enforcement and advocacy, and more aggressive enforcement, can help both groups.²⁵

28. Corporate power: Competition law is about power, its accumulation and abuse. In modern times it is about efficiency and undistorted markets, but in earlier times it was centrally also about socio-economic and political power. As Big Tech/Big Data got bigger and more invasive, people began to worry (again) about grabs of power and manipulation of power in the interests of the rich and powerful.²⁶

29. Fifth, there are tasks that competition law can and cannot do well. Preventing anticompetitive conduct cannot perceptibly shift the existing wealth distribution. Competition law cannot cap CEO or superstar income. But competition law can do something significant about keeping markets open, thus

²⁴ Sonali Jain-Chandra, Tidiane Kinda, Kalpana Kochhar, Shi Piao, and Johanna Schauer, *Sharing the Growth Dividend: Analysis of Inequality in Asia*, IMF Working Paper, WP/16/48 (March 2016), pp. 4-8.

²⁵ See Latin American and Caribbean Competition Forum, Competition and Poverty – Background Note by the Secretariat (Paulo Burnier da Silvera), 28-29 September 2023, <https://www.oecd-ilibrary.org/docserver/69813097-en.pdf?expires=1729354637&id=id&accname=guest&checksum=2B40609703143EFBE894875649C55813>

²⁶ See SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM* (2018); ZEPHYR TEACHOUT, *BREAK 'EM UP: RECOVERING OUR FREEDOM FROM BIG AG, BIG TECH, AND BIG MONEY* (2020); KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* (2019).

enhancing mobility and helping people and firms without power. Competition law can directly help promote equality of opportunity, empowering people and giving them a better chance.²⁷

30. Competition law can help prevent growth of economic power through preventing anticompetitive mergers, and can prevent use of dominant power to create more power; and both merger and monopoly litigations can prevent appropriation of income and wealth by those who tend to be at the top of the scale from those further down. But competition law has been doing this all along -- preventing wealth transfers that often would have gone to the wealthier quadrant as a by-product of condemning anticompetitive behavior and transactions, and even so we are experiencing or have recently experienced an unprecedented widening of the inequality gaps, probably because the major causes of the attenuation such as technological progress overwhelm what competition law can contribute to a fairer distribution.

31. The five points above relate exogenously to competition and competition law's effect in creating or reducing inequality. A sixth point relates to a stand-alone equality value and to the possibility of adding an equality value to competition law (in jurisdictions where it is not already there). Equality, like democracy, can be embedded in competition law, as it is in South Africa. It can be the music behind the words. It can entail a vision of society in which people have opportunity to join the economic enterprise on their merits, in which they can expect to get a fair share of value in goods and services that they make or buy, and in which they have a reasonable share of the ownership of assets. The next section instantiates various ways in which jurisdictions do incorporate equality.

²⁷ See Jonathan Kanter, Assistant Att'y Gen., Dep't of Justice, Remarks at the 2024 Georgetown Law Global Antitrust Enforcement Symposium (Sep. 10, 2024), *available at* <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-2024-georgetown-law-global>.

5 How “equality/inequality” is received into competition law

32. In this section, we look at how an equality value is received into competition law in three selected jurisdictions: the US, the EU, and South Africa. Thereafter we comment more briefly on reception in Latin America and Asia.

5.1. The history of US competition law and equality

33. At its origins, US antitrust law had a sympathetic relationship with equality. The symbiosis reached its high point in the 1960s. But the sympathetic relationship waned in the late 1970s; and, especially since the early 1980s, equality and all other non-market factors have been systematically expunged from US antitrust. Contemporary US Supreme Court caselaw, especially since the *Trinko* case in 2004,²⁸ has ushered in a long wave of devotion to “the market,” even when “the market” comprises only a few producers/suppliers.²⁹

34. A backlash may be occurring. Public perceptions by the people that the market has not worked for them, and a consciousness of severe inequalities exacerbated by the Covid pandemic, led to powerful popular rhetoric for turning the tide. The neo-Brandeis School arose³⁰ and the Biden administration appointed antitrust enforcers with an equality-consciousness.³¹ At the moment of this writing, the political future of humanistic-centered antitrust in the US is uncertain.

²⁸ *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

²⁹ See Eleanor Fox and Philipp Baschenhof, *Antitrust and Inequality: The History of (In)Equality in Competition Law and Its Guide to the Future*, in *COMPETITION LAW AND ECONOMIC INEQUALITY* 91 (Jan Broulík & Katalin Cseres eds., Bloomsbury Publishing 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3897944. See Fox and Baschenhof, pp. 99-109, for a full account of equality in US antitrust law.

³⁰ See Lina Khan, *The New Brandeis Movement: America’s Antimonopoly Debate*, 9 J. European Competition Law & Practice 131 (March 2018).

³¹ See Joseph Stiglitz, *The Biden Administration’s Recent Antitrust Wins Help Us All*, Project Syndicate, Jan. 10, 2024, <https://www.project-syndicate.org/commentary/us-merger-guidelines-important-tool-fighting-harmful-market-power-by-joseph-e-stiglitz-2024-01>; Assistant Attorney General Jonathan Kanter Delivers Remarks at the 2024 Georgetown Law Global Antitrust Enforcement Symposium, Sept. 10, 2024, <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-2024-georgetown-law-global>.

5.2. The history of EU competition law and equality

35. Whereas US antitrust valued equality in its first phase and disowned it in its second phase, EU law has followed a steady course. Equality is a basic EU Treaty value.³² It is diffused into all EU law. While the most basic equality principle is equality of treatment of all EU citizens regardless of their Member State,³³ the equality principle in EU law has a stronger purview.

36. EU law is driven by a goal of market integration. Pursuit of market integration is inherently inclusive,³⁴ and inclusivity is inherently pro-equality.³⁵ Market integration demands openness of and access to markets; thus contestability of markets. It demands a level playing field, not to be distorted by power and privilege, including state-granted privilege. The openness principle creates an environment welcoming and incentivizing outsiders (those not in the inner circle of power).³⁶ A second and third thread promote equality independently from market integration. They derive from a posture on political economy and control of power. They are: equality of opportunity to contest markets on the merits, and a right not be (excessively) exploited. Of course, EU competition law also proscribes mergers and dominant firm conduct that increase market power without offsetting benefits, and these prohibitions can tend towards a better distribute wealth. Finally, EU law shows special regard for workers through exemptions or immunities.

37. The significance of equality of opportunity in EU competition law is underscored in the recent judgment of the Court of Justice of the EU in *Google Shopping*.³⁷ As background to *Google Shopping*, Google, with a super-dominant position in online search engines, entered the online shopping comparison market and demoted its rivals on its platform to give preference its own service. The judgment stresses the importance of a clear path for competition on the merits. A dominant firm in the position of Google may not use its leverage to enjoy competitive advantages over rivals; it must not repress competition on the merits.³⁸

5.3. The history of South African competition law and equality

38. South Africa tells its own brutal story of inequality and, in New South Africa, the affirmative use of competition law as a tool to correct it. In South Africa competition law is one means to help lift up, empower, and provide mobility for the great majority of the population who were heinously excluded from economic life by the white supremacist government during the dark years of apartheid, 1948 to 1994. Apartheid was formally abolished only when Nelson Mandela was freed from prison. The new competition law was designed both for economic performance and for black empowerment and empowerment of poorer,

³² See Consolidated Version of the Treaty on European Union, 2016 O.J. (C 202) 17 (Article 2 states that “[t]he Union is founded on the values of . . . equality”).

³³ *Id.* at 20 (Article 9 states that “[i]n all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies.”)

³⁴ See Eleanor M. Fox, *Monopolization and Abuse of Dominance: Why Europe is Different*, 59 ANTITRUST BULL. 129 (2014). *But see* Konstantinos Sidiropoulos, *Economic Inequality and Abuse of Dominance in EU Competition Law* (2022), in *COMPETITION LAW AND ECONOMIC INEQUALITY* 147–184 (Jan Broulík & Katalin Cseres eds., 2024) (noting that the EU competition law’s objective of tackling partitions of the single market may in some applications transfer wealth from poorer consumers to wealthier consumers).

³⁵ See Chris Pike, *Rawlsian Antitrust*, COMPETITION POL’Y INT’L ANTITRUST CHRON. (CCP Working Paper No. 4, 2021), papers.ssrn.com/sol3/papers.cfm?abstract_id=3832594.

³⁶ See Fox, *supra* note 34.

³⁷ Case C-48/22P, *Google and Alphabet v. Commission*, ECLI:EU:C:2024:726, ¶¶ 185, 187.

³⁸ See Fox and Baschenhof, *supra* note 29, pp. 117-27, for a full account of equality in EU competition law.

weaker and excluded persons in general.³⁹ More than any other nation in the world, South Africa affirmatively uses competition law and policy to provide greater equality and to be a cornerstone of justice in society.

39. Equality is deeply embedded in the South African competition law and its jurisprudence. It is a source of wisdom both to prioritize enforcement and to decide cases. The competition authorities use competition law decrees for extensive conditionality in favor of SMEs, small suppliers, workers, and historically disadvantaged persons (HDPs). The substantive law embodies affirmative action for HDPs and SMEs. If the world wants a touchstone for how far a competition law might go to advance equality, it is South Africa's.⁴⁰

40. In 2004, then Deputy Chief Justice Dikgang Moseneke captured the depth of the Constitutional guarantee:

*The achievement of equality goes to the bedrock of our constitutional architecture. The Constitution commands us to strive for a society built on the democratic values of human dignity, the achievement of equality, the advancement of human rights and freedom. Thus the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance.*⁴¹

41. The society had hoped that competition law would be a strong instrument for economic transformation, but it had not met this promise. The President and Minister accordingly proposed, and got enacted, sweeping amendments to facilitate the transformation, giving special rights to historically disadvantaged persons and small business, including a provision requiring the Commission and Tribunal to consider whether every notified merger promotes a more equitable spread of ownership.⁴² In view of the mandate to consider promoting the spread of ownership in approval of mergers, the Competition Commission has issued guidelines that would require merging parties to give a percentage of assets to workers and/or to sell a minimum percentage of equity to HDP entrepreneurs.⁴³

³⁹ See David Lewis, *THIEVES AT THE DINNER TABLE: ENFORCING THE COMPETITION ACT* (2012), esp. 5-9; Trudi Hartzenberg, *Competition Policy and Practice in South Africa: Promoting Competition for Development*, 26 Nw. J. INT'L L. & Bus. 667, 668-670 (2006).

⁴⁰ The South Africa trajectory has critics. The critics charge that tilting the law to favor equality may create uncertainty and unpredictability, open the door to unbridled ministerial, commission and court discretion and thus undercut rule of law and invite politics and corruption, handicap efficiency, and chill innovation. See John Oxenham, Michael-James Currie and Andreas Stargard, *Changing South Africa's Competition Law Regime: A Populist Departure from International Best Practices*, 10 J. EUR. COMPETITION L. & PRAC. 232 (2019).

⁴¹ *Minister of Finance v. van Heerden* 2004 (6) SA 121 (CC) at ¶ 22 (S. Afr.).

⁴² For additional detail, see Fox and Baschenhof, *supra* note 29, pp. 128-29, 133.

⁴³ "The Commission considers that section 12A(3)(e) confers a positive obligation on merging parties to promote or increase a greater spread of ownership, in particular by HDPs and/or Workers in the economy." COMPETITION COMMISSION SOUTH AFRICA, REVISED PUBLIC INTEREST GUIDELINES RELATING TO MERGER CONTROL § 6.5.2 (March 2024). As such, "[a] finding that a merger does not promote a greater spread of ownership as contemplated by this Public Interest ground will inform the Commission's determination of whether the merger can or cannot be justified on substantial Public Interest grounds." *Id.* at § 6.5.4. Where a merger fails to meet this requirement, the Commission will consider ownership remedies, including "the sale of minimum range between 5% to 25% of the equity of a merging party or the merged entity to one or more HDPs" or "direct share ownership schemes in terms of which Workers will acquire shares in a merging party." *Id.* at § 6.5.13.

Critics question whether the obligations imposed on merging firms could deter foreign investment and whether the Commission's approach undercuts a holistic analysis of merger impact. *E.g.*, Derek Lotter, Claire Reidy, Judd Lurie and Nazeera Mia, *Competition Commission's public interest guidelines may deter investment in SA*, BUSINESS DAY (Nov. 17, 2023 5:00 AM) <https://www.businesslive.co.za/bd/opinion/2023-11-17-competition-commissions-public>

42. In October 2021 in a merger case, *Mediclinic South Africa*,⁴⁴ the Constitutional Court affirmed the critical role of equality and dignity in the competition law. Chief Justice Mogoeng famously said:

*[4] Colonialism, neo-colonialism and apartheid orchestrated an institutionalised concentration of ownership and control of all things of consequence in our national economy along racial lines. Unsurprisingly, the commanding heights of the corporate sector are seemingly the exclusive terrain of our white compatriots. It is this indisputable reality and our shared commitment to ensuring that South Africa really does get to belong to all who live in it, that the constitutional imperatives, laid out in the Preamble, to improve the quality of life of all citizens and free the potential of each are realised, that the likes of the Competition Act had to and got to see the light of day. * * **

[7] Institutions created to breathe life into these critical provisions of the Act must therefore never allow what the Act exists to undo and to do, to somehow elude them in their decision-making process. The equalisation and enhancement of opportunities to enter the mainstream economic space, to stay there and operate in an environment that permits the previously excluded as well as small and medium-sized enterprises to survive, succeed and compete freely or favourably must always be allowed to enjoy their preordained and necessary pre-eminence. The legitimisation through legal sophistry or some right-sounding and yet effectively inhibitive jurisprudential innovations must be vigilantly guarded against and deliberately flushed out of our justice and economic system.⁴⁵

5.4. Equality and competition elsewhere in Africa, Asia, and Latin America

43. Elsewhere in Africa, nations commonly adopt a perspective motivated by inclusiveness. The new African Continental Competition Protocol, still subject to ratification, recognizes inclusive growth among its aims.⁴⁶ The Protocol includes Article 11, a provision against “Abuse of economic dependence and any other anti-competitive practices.” This provision prohibits abuse of economic dependence, including by gatekeepers. It may look forward to competition rules that would impose duties on dominant gatekeepers to help empower small businesses, gig workers, and financially excluded consumers to engage with the platforms, and thus to help meet the promise for these disadvantaged or not sufficiently capacitated entities to engage satisfactorily with the digital economy. Otherwise, it is feared, the global inequalities will simply expand.⁴⁷

interest-guidelines-may-deter-investment-in-sa/; Dennis Davis, *Competition Commission aims too high in applying act*, BUSINESS DAY (Jul. 18, 2024 5:00 AM), <https://www.businesslive.co.za/bd/opinion/2024-07-18-dennis-davis-competition-commission-aims-too-high-in-applying-act> .

⁴⁴ Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another (CCT 31/20) [2021] ZACC 35; 2022 (5) BCLR 532 (CC); 2022 (4) SA 323 (CC); [2023] 1 CPLR 2 (CC); [2022] HIPR 200 (CC) (15 October 2021).

⁴⁵ See Fox and Baschenhof, *supra* note 29, pp. 127-37, for a full account of equality in South African competition law.

⁴⁶ Protocol to the Agreement Establishing the African Continental Free Trade Area on Competition Policy, https://www.bilaterals.org/IMG/pdf/en_-_draft_afcfta_protocol_on_competition_policy.pdf.

⁴⁷ Francis Wang'ombe Kariuki and Rafe Mazer, *Africa: The need for a new competition policy approach in digital economies*, May 2024, and attached Report, Concurrences N° 2-2024, Art. N° 118328, www.concurrences.com.

44. Asian countries pioneered the competition offense of abuse of superior bargaining power. Indeed, examining and explaining this offense was the special project of Japan when it hosted the annual conference of the International Competition Network in Kyoto in 2008.⁴⁸

45. In the Caribbean, comprised of many small island economies, the vulnerability of the economies and the need for inclusiveness and regard for the marginalized masses informs all laws.⁴⁹

46. In Latin America in general, the extreme inequalities and severe poverty have led the competition authorities to give primary emphasis to these issues in their enforcement and advocacy. The OECD Background Note for the session on Competition and Poverty of the Latin American and Caribbean Competition Forum, June 6, 2023, specifies poverty-related initiatives in Argentina, Brazil, Chile, Columbia, Costa Rica, Ecuador, Mexico, and Peru. Attention is given to bid-rigging and procurement, to relief in megamergers to protect small farmers, and to expansion of microfinance services that would improve the lives of poor women.⁵⁰

47. Summary. The US, EU and South African competition laws can be seen as three points along a continuum, from a neo-liberal approach in current US Supreme Court antitrust law, which holds no quarter for an equality value in US antitrust; to EU law, which, by its nature of integrating markets and under the umbrella of the Treaties which would safeguard a notion of equality, stresses open markets and a right to contest markets by competition on the merits; to South Africa, which, in the aftermath of the devastating apartheid regime, uses competition law as a vehicle to bring about the still dearly sought-after transformation. Numerous other countries, especially developing countries and emerging or recently emerged economies, follow the example of equality-sensitivity in their competition law or enforcement.

⁴⁸ ICN Special Program for Kyoto Annual Conference, Report on Abuse of Superior Bargaining Position, ICN 7th Annual Conference, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/11/SP_ASBP2008.pdf.

⁴⁹ See Taimoon Stewart, *The Need for Relevant and Inclusive Competition Laws in Small Vulnerable Economies*, in Liber Amicorum for ELEANOR FOX, ANTITRUST AMBASSADOR TO THE WORLD, Concurrences 2021, at 187. See also, highlighting class along with race inequalities, Arnold Nciko Wa Nciko and Sidney Tambasi, *Problematising Dr Stewart's 'Competition Regimes in the Caribbean Community and Sub-Saharan Africa' - Thinking not only Race but also Class*, Afronomicslaw, Nov. 20, 2022, <https://www.afronomicslaw.org/category/analysis/problematising-dr-stewarts-competition-regimes-caribbean-community-and-sub>.

⁵⁰ Background Note, supra note 25.

6

Options for reform: How competition law can play a role in decreasing the inequality gap consistently with its core tasks

48. Numerous possible reforms have been identified. They entail various degrees of ease of implementation, likelihood of implementation, and likelihood of having an impact. Nearly all proposals include more aggressive enforcement and prioritization of cases likely to help middle class, working class, and poorer populations. Both tacks – aggressive enforcement and prioritization -- are very important but we should take note: more aggressive enforcement is high on the list of reformers' proposals without regard to inequality, and prioritizing cases most likely to help the masses is a task most enforcers say they do.

49. This section on possible reforms categorizes the options as follows: 1) appreciation of the problem, 2) rethinking competition law and economics – concepts of efficiency and distribution, 3) rethinking goals and perspective, 4) changes in substantive law and refocus of existing substantive law, 5) changes in procedural law and process, 6) remedies, 7) prioritization, 8) more aggressive enforcement, and 9) affirmative action.

6.1. Appreciation⁵¹

50. Understanding the impact of market competition and lack of it on attenuating inequalities is a first step. Equally important is understanding the impact on inequalities of: enforcement, choices not to enforce, and remedies. For example, a higher consciousness that lack of competition in basic goods such as food hurts the poor before and much more than it hurts the rich⁵² can influence choices of enforcement and remedies.

⁵¹ See Fox and Baschenhof, supra note 29, p. 144.

⁵² Tania Begazo and Sarah Nyman, Competition and Poverty, Viewpoint, World Bank Group, 2016, <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/662481468180536669/competition-and-poverty>.

6.2. Rethinking competition economics⁵³

51. Classical economics aggregates the rich and the poor, the strong and the vulnerable, in calculating whether a particular transaction or conduct causes harm and whether a particular remedy will cure the harm. If the rich win more than the poor lose, that is “efficient” by the Kaldor-Hicks paradigm. Equality-sensitive economics would consider whether the poorer population are systematic losers from certain behaviors or rules of law. It may question remedies that, despite making the richer better off, make the poorer worse off.⁵⁴ Equality-sensitive economics may also value friendly market conditions for entry and participation even if, for example, merging parties “prove” that enough firms remain in the market to maintain “competitive conditions.”

6.3. Rethinking goals and perspective

52. All competition laws aim either (just) to keep business acts or transactions from undermining market performance or, more robustly, to help make markets work better. Formulations and perspectives on goals range from non-interventionist (often in the name of “consumer welfare”) to safeguarding the market process for the benefit of all stakeholders. Equality-sensitive policymakers may tend to embrace the latter formulation and may include fair distribution of the gains as part of the analysis.⁵⁵

6.4. Changes in substantive law⁵⁶

53. Since market power has been identified as creating inequalities, equality-sensitive policymakers might wish to proscribe accretions of market power (in addition to the job done by merger law), the status of having significant market power,⁵⁷ or at least the status of having extremes of market power such as sustained monopoly.⁵⁸ Defenses could be available for loss of efficiencies. Other changes could include more attention to entry conditions, as by adding an inclusiveness value. Jurisdictions could facilitate easier shifts of burdens in abuse of dominance and merger cases, and easier proof of concert – especially in view of AI – among oligopolists. The law can be clarified or if necessary amended to prohibit market harms to upstream players – workers, farmers, and small suppliers. It can be amended or clarified to cover exploitative offenses, which often result in unaffordable life-saving medicines and health care. An exemption could be created for joint bargaining of very small players such as gig workers who do not have

⁵³ See Fox and Baschenhof, supra note 29, p. 144.

⁵⁴ For example, in the US, T-Mobile, the number 3 firm in a telecoms oligopoly, was allowed to acquire Sprint, the number 4 firm and designer of more affordable packages, in return for its divestiture of Sprint assets to Dish, which was not yet in the market. By a measure of aggregate wealth, calculations (based on over-optimism towards Dish) showed the merger would not harm consumers, even if more individual people would lose than win. (In fact, the Dish solution failed. See Karl Bode, Dish Network, The Trump Era ‘Fix’ For The Sprint T-Mobile Merger, Heads Into Its Final Death Spiral, March 8, 2024, <https://www.techdirt.com/2024/03/08/dish-network-the-trump-era-fix-for-the-sprint-t-mobile-merger-heads-into-its-final-death-spiral/>.)

⁵⁵ See Khan and Vaheesan, supra note 14; Jonathan B. Baker and Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 Geo. L.J. Online 1, 20 (2015), suggesting rebalancing towards more interventionist antitrust.

⁵⁶ See Khan and Vaheesan, supra note 14, Baker & Salop, supra note 55; Ezrachi, Zac and Decker, supra note 7; Fox and Baschenhof, supra note 29.

⁵⁷ See Lina Khan and Sandeep Vaheesan, *The Antitrust Counterrevolution*, 11 Harv. L. & Policy Rev. 235 (2017).

⁵⁸ See P. Areeda and D. Turner, *Monopoly Status as the Statutory Concern*, ANTITRUST LAW (1978) ¶s 614-15.

the benefit of a labor exemption and are caught in the wide net of cartel law; the exemption can be consistent with consumer welfare.⁵⁹

6.5. Changes in procedural law and process

54. Ezrachi, Zac and Decker⁶⁰ propose several innovative changes in procedure and process. These include: a) Targeted compensation. The competition agency, at the end of an investigation, may not only impose a fine but also grant an award of compensation to the injured class. This equitable compensation might help address unequal access to justice.⁶¹ b) Additional support for damage claims. Jurisdictions can consider “increased incentives, subsidies, and measures for cost and risk mitigation . . .”, recognizing that these cases may involve weaker communities and individuals with limited access to justice.⁶² c) Facilitating initiation of a complaint with the competition authority for groups with lower incomes. Inspiration can be taken from the super-complaint procedure in the UK that privileges certain consumer bodies.⁶³

6.6. Remedies

55. Remedies (including investigated firms’ proffered fixes) are critical and too often get insufficient attention. Remedies for cartels – as well as calculations of the benefits of enforcement -- could take account of the fact that, post cartel, prices do not usually go down and especially do not fall to pre-cartel levels.⁶⁴ In global merger cases such as *Bayer/Monsanto*, recognition that the biggest harms in seeds and fertilizers especially impact the most vulnerable farmers and consumers could inform judgments to prohibit the merger rather than to accept spin offs and behavioral promises.

56. Baker and Salop list as possibilities for merger clearance: divestitures or price caps placed on certain products or technologies, including drugs, and other commitments to low-priced distribution. Sector regulators can do the same.⁶⁵

6.7. Prioritization

57. Ezrachi, Zac and Decker offer rich detail on prioritization.⁶⁶ They draw from the World Bank’s approach to “the asymmetric impacts that natural disasters have on the well-being of poorer citizens in a community,” acknowledging “that the same harm or losses can have differential effects on wealthier and poorer citizens of a society and the *severity* of a loss depends on who experiences it . . .” They suggest a

⁵⁹ A. Douglas Melamed and Steven C. Salop, *An Antitrust Exemption for Workers: And Why Worker Bargaining Power Benefits Consumers, Too*, 85 *Antitrust L.J.* 739 (2024).

⁶⁰ Ariel Ezrachi, Amit Zac, and Christopher Decker, *The effects of competition law on inequality—an incidental by-product or a path for societal change?*, 11 *J. ANTITRUST ENFT* 51 (March 2023).

⁶¹ *Id.*, 69-71. This is not envisaged to replace damage claims.

⁶² *Id.*, 71.

⁶³ *Id.*, 71-72.

⁶⁴ See John M. Connor and Robert H. Lande, *Does Crime Pay? Cartel Penalties and Profits*, 33 *ANTITRUST* 29 (ABA 2019).

⁶⁵ Baker and Salop, *supra* note 55, p.20.

⁶⁶ Ezrachi et al., *supra* note 60, pp. 68-69.

possible “equality impact checklist” in which indicators relate to distributional impacts.⁶⁷ They reference work of the UK and Dutch competition authorities as well.

58. Subjects for priority that could help push back the inequalities include health care, medicines, food, transport, energy, communications, information, and payment systems – access to financial services. Important issues include attention to ease of entry and market participation on merits, and attention to offenses against labor that deprive workers of competitive wages or opportunity.

59. Prioritization also entails choices not to bring suit where the litigation would harm the most vulnerable, as Baker and Salop point out.⁶⁸ Equality-minded U.S. enforcers are unlikely to have sued the low-income public-interest lawyers who lobbied the Council of the District of Columbia to pay higher than pittance wages to the lawyers who represented indigent criminal defendants.⁶⁹

6.8. More aggressive enforcement

60. More vigorous enforcement would call to account aggrandizing and protecting market power, including by merger, and abusing market power. More vigorous enforcement in the priority areas, above, would especially help the most vulnerable. The agencies would need increased budgets to match the greater activity.⁷⁰

6.9. Advocacy

61. Advocacy can contribute on two fronts. First, the agency can draw attention to conduct or deals, or formulation of rules of law, that exacerbate inequalities and hurt the vulnerable. They can further the message that “the losses associated with less competition would likely be most acutely experienced by those on lower incomes.”⁷¹

62. Second, competition authorities can increase their efforts to identify and oppose harmful government barriers. Government-imposed barriers have a major negative effect on poorer populations. World Bank experts report compelling examples in which removing protectionist barriers on food and agricultural products can lead to immense consumer welfare gains and decrease poverty by significant percentages.⁷²

63. China’s Fair Competition Review sets up a system to examine laws, rules and regulations before they are adopted, to excise measures that would restrict market entry or block the flow of goods and services. It gives China’s competition authority, SAMR, the responsibility to oversee the system.⁷³ This

⁶⁷ Id. at 68.

⁶⁸ Baker and Salop, *supra* note 55, pp. 19-20.

⁶⁹ *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1990).

⁷⁰ Baker & Salop, *supra* note 55, pp.18-20.

⁷¹ Ezrachi et al., *supra* note 60, p. 72.

⁷² Begazo and Nyman, *supra* note 52. See also Hernando de Soto, **THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE** (2000) (arguing for recognition and security of property rights of the poor in their assets, moving the poor from the informal to the formal economy).

⁷³ Arendse Huld, *China Issues New Fair Competition Review Regulations in Effort to Improve the Business Environment*, posted by China Briefing, June 24, 2024.

gives SAMR an excellent position to advocate against the adoption of regulations that would otherwise privilege the elites and vested interests at the expense of the people.

64. Advocacy can take the form of or lead to market studies in areas critical to the poorer population.

6.10. Affirmative action

65. South Africa is the prime example of a society that has chosen to impose positive action obligations on dominant firms and merging parties to further the transformation of the society. Still deeply scarred by the exclusions and indignities of apartheid, South Africa imposes special obligations on dominant firms not to use buyer power against historically disadvantaged persons (HDPs) and small business, and it requires merging firms to contribute positively to a greater spread of ownership by devoting a percentage of assets to worker stockholding plans and/or selling a percentage of assets to HDP entrepreneurs, while also providing capacity-building funds and training sessions.⁷⁴

⁷⁴ See text and notes at notes 43-45 supra.

7 Conclusion

66. Severe, systemic inequalities are plaguing society. Market competition may be a contributing cause. Competition law and policy may offer tools and perspectives that work in the direction of alleviating the growing disparities. This Background Note has explored the extent to which competition law and policy does, can and should play a role.

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