

The Vestager Effect: Engendering Gender in Competition Law Enforcement

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I. INTRODUCTION

The role of competition law is frequently described as “making markets work better,”¹ on the belief that the ultimate, if not the sole, goal of competition law is to achieve “economic efficiency.”² As the concept of competition developed through the years, the “fairness” in “fair competition” has been understood more and more to pertain to the competitive process and less to what fairness generally connotes.³ Eventually, competition law was perceived as an objective discipline that should be separated from social factors, which are vulnerable to subjective, complex, and ideological interpretations.⁴ This is why social and public interest considerations, such as the promotion of gender equality, are often overlooked in competition.⁵

Not for European Union (EU) Commissioner for Competition Margrethe Vestager, however.

Vestager has a reputation for putting fairness at the forefront of her policy agenda, espousing it as the “lodestar of enforcement”⁶ or the “guiding principle for the [functioning] or outcome of market processes.”⁷ The fairness she envisions and advocates for, however, goes beyond the “level playing

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1. European Commission, Competition: Making Markets Work Better, at 1, available at <https://op.europa.eu/en/publication-detail/-/publication/9f857b2e-e25a-4fc3-9550-81a9de3b0429> (last accessed Jan. 31, 2023) [<https://perma.cc/VW6X-ZV97>].
 2. Niamh Dunne, *Fairness and the Challenge of Making Markets Better*, 84 MOD. L. REV. 230, 232 (2021).
 3. See Alfonso Lamadrid de Pablo, *Competition Law as Fairness*, 8 J. EUR. COMPET. L. & PRAC. 147, 147 (2017).
 4. *Id.*
 5. Lerisha Naidu & Sphesihle Nxumalo, Gender Inclusivity and Competition Law — Navigating Unchartered Waters, available at <http://competitionlawblog.kluwercompetitionlaw.com/2022/03/30/gender-inclusivity-and-competition-law-navigating-unchartered-waters> (last accessed Jan. 31, 2023) [<https://perma.cc/27LZ-UXVY>].
 6. Dunne, *supra* note 2, at 230.
 7. *Id.* at 238.

field”⁸ fairness that has long been established and acknowledged in the antitrust community.⁹ Vestager’s “fairness mantra”¹⁰ places competition law not only at the center of ensuring the efficient operation of markets to enhance consumer welfare,¹¹ but also attempts to “reconcile [competition law] with society”¹² by arguing that market fairness, attained through market efficiency, is not the end goal of competition law, but rather a means to the “real aspiration” of competition law, which is societal fairness. Vestager states that “if we value an open economy, and a liberal society, we have to show that those values benefit everyone ... if we want to show that our society treats everyone fairly, ... we need to prove it in the market.”¹³

The “fairness mantra” also imposes on antitrust enforcers the duty to make sure that everyone, not only consumers, is treated fairly —

The EU is about its people. It is about coming together to find answers to the problems we have in common In this Committee, you deal with the issues that affect people’s daily lives ... and you understand what needs to be done to help them. Your opinion on our Annual Competition Report for 2014 starts with a point that I think is fundamental: competition helps everyone. Not only consumers, but businesses and workers as well.¹⁴

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8. *Id.* at 236 (citing MASSIMO MOTTA, *COMPETITION POLICY: THEORY AND PRACTICE* 26 (2004)).
 9. Dunne, *supra* note 2, at 233-34.
 10. *Id.* at 230 (citing Lewis Crofts, Vestager’s ‘Fairness’ Mantra Rattles Through EU Competition Law, *available at* <https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/antitrust/vestagers-fairness-mantra-rattles-through-eu-competition-law> (last accessed Jan. 31, 2023) [<https://perma.cc/PY3G-ACLG>]).
 11. de Pablo, *supra* note 3, at 148.
 12. *Id.*
 13. Dunne, *supra* note 2, at 240 (citing Margrethe Vestager, Commissioner, European Commission, *Competition and the Digital Single Market*, Speech at the Forum for EU-US Legal-Economic Affairs (Sept. 15, 2016)).
 14. European Economic and Social Committee, “Competition Matters to Everyone” for a Fair Society and Strong Economy Commissioner Vestager Tells EESC Plenary, *available at* <https://www.eesc.europa.eu/ru/news-media/press-releases/competition-matters-everyone-fair-society-and-strong-economy-commissioner-vestager-tells-eesc-plenary#downloads> (last accessed Jan. 31, 2023) [<https://perma.cc/6WYZ-444W>] (citing Margrethe Vestager, Commissioner, European Commission, Speech at the European Economic and Social Committee Plenary (July 14, 2016) (emphasis omitted)).

The renaissance of this argument for the inclusion of social considerations in competition law, through Vestager’s “fairness mantra,” has drawn mixed reactions from international competition law experts.¹⁵ It nevertheless compelled them to reflect and probe further as to how competition law may be used to achieve not just fairer markets, but fairer societies.¹⁶ The Author coins this the “Vestager Effect.”

As an offshoot of the Vestager Effect, there is now an increasing recognition from international competition law experts on the correlation between gender and competition.¹⁷

This Article explores and discusses the findings of a supposed “bi-directional relationship” between competition and gender, which originated from a study by Estefania Santacreu-Vasut and Chris Pike.¹⁸ After that, this Article argues for the inclusion of a gender perspective in the Philippine Competition Commission’s (PCC) enforcement of the Philippine Competition Act (PCA),¹⁹ particularly in its enforcement activities, merger reviews, and the formulation of competition policies. Through a survey and analysis of literature on gender and competition laws, the Author argues that the absence of a gender perspective in the Philippine competition law may prevent it from addressing the impediments to achieving market efficiency, considering recent studies on the interplay between gender and competition.

15. de Pablo, *supra* note 3, at 147.

16. *See id.* at 148.

17. *See generally* Organisation for Economic Co-operation and Development, Gender Inclusive Competition Policy, *available at* <https://www.oecd.org/daf/competition/gender-inclusive-competition-policy.htm> (last accessed Jan. 31, 2023) [<https://perma.cc/JX2C-6LWU>] & Inês F. Neves, A Role for Competition Policy in Fighting Gender Inequality: Not a Matter of If, but How, *available at* <https://www.lexxion.eu/en/coreblogpost/a-role-for-competition-policy-in-fighting-gender-inequality-not-a-matter-of-if-but-how> (last accessed Jan. 31, 2023) [<https://perma.cc/A3W8-RSK5>].

18. Estefania Santacreu-Vasut & Chris Pike, Competition Policy and Gender, at 14, *available at* [https://one.oecd.org/document/DAF/COMP/GF\(2018\)4/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2018)4/en/pdf) (last accessed Jan. 31, 2023) [<https://perma.cc/JH2H-4VCP>].

19. An Act Providing for a National Competition Policy Prohibiting Anti-Competitive Agreements, Abuse of Dominant Position and Anti-Competitive Mergers and Acquisitions, Establishing the Philippine Competition Commission, and Appropriating Funds Therefor [Philippine Competition Act], Republic Act No. 10667 (2015).

The Article illustrates how competition policies can play a role in addressing social problems, particularly gender inequality. The Article, however, does not attempt to claim that all problems relating to gender inequality and all other social problems can be addressed by competition law. After all, even Vestager acknowledged that “[n]ot every case of unfairness is a matter for competition law.”²⁰

Consequently, the Author hopes the Article will add to the growing gender and competition literature, which international competition law experts have recently initiated.

To achieve this, the next Chapter, “Putting the ‘Competition’ in the Philippine Competition Law,” describes competition law and its development as a field of law through an illustration of the United States (U.S.) and the EU jurisdictions and how these jurisdictions have influenced the development of the current Philippine Competition Law framework. Chapter III, “Gender and the Law,” discusses gender and examines the interplay between gender and competition according to recent studies. Chapters IV and V, “Engendering Gender in Merger Reviews” and “Incorporating Gender in Competition Enforcement,” discuss how using a gender perspective may be incorporated into merger reviews and competition enforcement activities. The final Chapter provides the conclusion and the ways to move forward.

II. PUTTING THE “COMPETITION” IN THE PHILIPPINE COMPETITION LAW

The concept of “competition” has been recognized in Philippine laws since the Spanish period.²¹ It remains, however, a foreign concept to many Filipinos because: (1) the provisions on competition that are scattered across several laws are rarely enforced; and (2) the Philippines was only recently able to enact comprehensive competition legislation.²²

This Chapter illustrates the development of competition law in the U.S. and EU jurisdictions, which served as the primary inspiration for the design of

20. Margrethe Vestager, Commissioner, European Commission, *Setting Priorities in Antitrust*, Speech at the 11th Annual Conference of the Global Competition Law Centre (Feb. 1, 2016).

21. See generally Katharine Bjork, *The Link that Kept the Philippines Spanish: Mexican Merchant Interests and the Manila Trade, 1571-1815*, 9 J. WORLD HIST. 25, 27-28 (1998).

22. See Josiah Go, *Finally, Congress Passes Philippine Competition Act*, PHIL. DAILY INQ., July 10, 2015, available at <https://business.inquirer.net/195004/finally-congress-passes-philippine-competition-act> (last accessed Jan. 31, 2023) [<https://perma.cc/BTV5-FBB9>].

the Philippine Competition Law framework, before moving on to present PCA and its policies.

A. “*Competition*” in *Antitrust*, *Generally*

Competition law, generally, “consists of rules that are intended to protect the process of competition in order to maximiz[e] consumer welfare.”²³ It does so by “controlling the exercise of market power, either by single firms or by firms acting together, which leads to higher prices, less choice, [] lower quality[,] and less innovation in products and services.”²⁴ Succinctly, it is “premised upon the effective functioning of the market mechanism, free from abusive exercises of market power.”²⁵

Most people tend to view competition as a rivalry, where two or more parties, acting independently, compete for a third party’s business by giving the best terms possible.²⁶ Economists, meanwhile, in addition to rivalry, tend to regard competition as the opposite of monopoly: a perfectly competitive market where firms price their output at marginal cost, costs are minimized by internal efficiency, and everybody is a price taker.²⁷ Because “competition” is seen differently by lawyers and laypeople on the one hand, and economists on the other, this unique feature of competition law has proven to be a challenge in articulating what competition is.²⁸

There has been a widespread consensus that “competition” should be understood in how economists describe it.²⁹ The concept of competition in

23. RICHARD WHISH & DAVID BAILEY, *COMPETITION LAW* 1 (7th ed. 2012).

24. ALISON JONES & BRENDA SUFRIN, *EU COMPETITION LAW: TEXT, CASES, AND MATERIALS* 2 (6th ed. 2016).

25. Dunne, *supra* note 2, at 234.

26. See *Lipson v. Socony Vacuum Corp.*, 87 F.2d 265, 270 (Mass. 1st Cir. 1937) (U.S.) (citing Merriam-Webster Dictionary, Definition of Competition, available at <https://www.merriam-webster.com/dictionary/competition> (last accessed Jan. 31, 2023) [<https://perma.cc/7ENR-RRH7>]) (The Court defined competition as the “effort of two or more parties acting independently, to secure the custom of a third party by the offer of the most favorable terms.”)).

27. Maurice E. Stucke, *What Is Competition?*, in *THE GOALS OF COMPETITION LAW* 32–33 (Daniel Zimmer ed., 2012).

28. PHILLIP AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* 3 (3d ed. 2006). See also William Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSPECTIVES 43, 43–44 (2000).

29. AREEDA & HOVENKAMP, *supra* note 28, at 3.

the context of antitrust, however, has not been conclusively pinned down since economists have yet to agree on its definition.³⁰ Some economists tend to characterize competition in terms of the benefits it can bring to the market: lower prices, better quality of goods and services, more choices, and greater innovation.³¹ These are because, in a competitive market with open entry and exit, firms would aim to outdo each other by creating the highest quality items at the lowest cost and selling them at a market-determined price to avoid losing market share to their competitors.³² In this light, competition is conceived as an ideal end-state: a perfect competition.³³

Such characterization, however, was met with opposition³⁴ for at least two reasons: (1) a firm is likely to innovate to differentiate itself from the competition, forcing others to follow suit to avoid being outdone and maintain their portion of the market pie;³⁵ and (2) the various conditions essential to or impacting markets, such as “legal, social[,] and ethical norms, technology, production, and service norms,” among others, make the competition, not just a dynamic process but also a complex and unpredictable one.³⁶

But ultimately, it can be said that competition is a dynamic process aimed at bringing a market to an ideal end-state,³⁷ which coincidentally fosters flexibility and adaptability among firms, allowing the economy to better cope with a continuously changing environment.³⁸ Competition laws and regulations are enacted to guarantee the competitive market process and, as a

30. Stucke, *supra* note 27, at 33.

31. See Erlinda M. Medalla, Understanding the New Philippine Competition Act (Philippine Institute for Development Studies Discussion Paper Series No. 2017-14), at 3, available at <https://pidswebs.pids.gov.ph/CDN/PUBLICATIONS/pidsdps1714.pdf> (last accessed Jan. 31, 2023) [<https://perma.cc/6ZFE-NFBX>]. See also European Commission, Guidelines on the Assessment of Non-Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2008 O.J. (C 265) 7, ¶ 10.

32. Medalla, *supra* note 31, at 3.

33. Stucke, *supra* note 27, at 33.

34. *Id.* (citing FRIEDRICH AUGUST VON HAYEK, INDIVIDUALISM AND ECONOMIC ORDER (1948)).

35. Medalla, *supra* note 31, at 5.

36. Stucke, *supra* note 27, at 33.

37. *Id.*

38. Medalla, *supra* note 31, at 5.

result, ensure the preservation of the benefits of competition to the market and the consumers.³⁹

B. The U.S. Antitrust Law

Competition law traces its roots to *Lex Julia de Annona*, enacted during the Roman Republic to protect the corn trade from anyone who deliberately blocked the supply ships.⁴⁰ Modern competition law, however, began with the enactment of antitrust legislation in the U.S.

Competition law in the U.S. was born in response to the rise of trusts,⁴¹ which was the cause of the “alarming degree of conflict over the growth of business and disparities in wealth and economic opportunity”⁴² in the public’s mind. Thus, the U.S. competition law is called “antitrust.”⁴³ With trusts becoming increasingly synonymous with monopoly, the U.S. Congress enacted the Sherman Antitrust Act of 1890⁴⁴ to encourage a market-based economy that fosters economic growth and optimizes societal wealth to

39. *See id.*

40. Marko Sukačić, *Consumer Protection in Ancient Rome — Lex Iulia de Annona and Edictum de Pretiis Rerum Venalium as Prohibitions of Abuse of Dominant Position?*, in *ECONOMIC AND SOCIAL DEVELOPMENT: 22ND INTERNATIONAL SCIENTIFIC CONFERENCE ON ECONOMIC AND SOCIAL DEVELOPMENT — “LEGAL CHALLENGES OF MODERN WORLD”* 110-11 (Zeljko Radic, et al. eds., 2017).

41. NIAMH DUNNE, *COMPETITION LAW AND ECONOMIC REGULATION: MAKING AND MANAGING MARKETS* 19 (2015). Dunne explained that the “trust problem” that gave rise to the Sherman Act was “the phenomenon of large industries combining as trusts or looser arrangements to control pricing and output, and which were presumed to have the effects of squeezing suppliers in upstream markets and inflating prices in downstream markets.” *Id.* (citing HANS BIRGER THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* 63-85 (1954) & Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 *CORNELL L. REV.* 1140, 1146-55 (1981)).

42. CHRISTOPHER L. SAGERS, *ANTITRUST: EXAMPLES & EXPLANATIONS* 4 (2d ed. 2014).

43. Laura Phillips Sawyer, *US Antitrust Law and Policy in Historical Perspective* (Harvard Business School Working Paper No. 19-110), at 1, available at https://www.hbs.edu/ris/Publication%20Files/19-110_e21447ad-d98a-451f-8ef0-ba42209018e6.pdf (last accessed Jan. 31, 2023) [<https://perma.cc/GG74-4HJL>].

44. *An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies [Sherman Antitrust Act]*, 15 U.S.C. 1 (1890) (U.S.).

dismantle large American conglomerates that used trusts to conceal their business arrangements⁴⁵ —

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality[,] and the greatest material progress[.]⁴⁶

Instead of granting the U.S. government immense power to correct market failures by directly controlling firms' behavior, the Sherman Antitrust Act prohibited certain acts and proscribed severe penalties for its commission.⁴⁷ Hence, Section 1 of the Sherman Antitrust Act prohibited contracts, combinations in the form of trusts or otherwise, or conspiracies in restraint of trade —

*Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, at the discretion of the court.*⁴⁸

Subsequent case law clarified that Section 1 pertains to cartels and admits to anticompetitive agreements: the *per se* and the *non-per se* anticompetitive violations. The *per se* violations are always prohibited as such violations are “manifestly anticompetitive.”⁴⁹ Meanwhile, the *non-per se* violations are subject to a “rule of reason” analysis, where the court “weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”⁵⁰

45. See generally Sawyer, *supra* note 43, at 1 & Corporate Finance Institute, Sherman Antitrust Act, available at <https://corporatefinanceinstitute.com/resources/economics/sherman-antitrust-act> (last accessed Jan. 31, 2023) [<https://perma.cc/Z929-56KY>].

46. Northern Pacific Railway Co. et al. v. United States, 356 U.S. 1, 4 (1958).

47. Corporate Finance Institute, *supra* note 45.

48. Sherman Antitrust Act, § 1 (emphasis supplied).

49. Continental T.V. Inc., et al. v. GTE Sylvania Inc., 433 U.S. 36, 50 (1977).

50. *Id.* at 49–50 (citing Northern Pacific Railway Co. et al. v. United States, 356 U.S. 1, 5 (1958) & United States v. Topco Associates, Inc., 405 U.S. 596, 609–10 (1972)).

Meanwhile, Section 2 of the Sherman Antitrust Act also made it illegal for any person to: (1) monopolize; (2) attempt to monopolize; or (3) conspire with another person or persons to exclude competitors in the market —

*Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof; shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.*⁵¹

While Section 1 of the Sherman Antitrust Act punishes firms that conspire to commit an anticompetitive act, Section 2 penalizes monopoly firms that exercise anticompetitive unilateral conduct.⁵²

To complement the Sherman Antitrust Act, the U.S. Congress enacted the Federal Trade Commission Act (FTCA)⁵³ and the Clayton Antitrust Act⁵⁴ in 1914. The FTCA created the Federal Trade Commission (FTC)⁵⁵ and forbade “unfair methods of competition”⁵⁶ and “unfair or deceptive acts or practices.”⁵⁷ Meanwhile, the Clayton Antitrust Act outlaws certain practices discovered to be outside the purview of the Sherman Antitrust Act, including pricing discrimination, exclusive dealing agreements, and tying arrangements, among others.⁵⁸ The Clayton Antitrust Act’s most significant feature is the adoption of a “merger control framework,” which addresses the growing

51. Sherman Antitrust Act, § 2 (emphasis supplied).

52. See Sherman Antitrust Act, §§ 1-2.

53. An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies, and for Other Purposes [Federal Trade Commission Act], 15 U.S.C. 41 (1914) (U.S.) (as amended).

54. An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies, and for Other Purposes [Clayton Antitrust Act], 15 U.S.C. 12 (1914) (U.S.) (as amended).

55. Federal Trade Commission Act, § 41.

56. *Id.* § 45 (a) (1).

57. *Id.*

58. Corporate Finance Institute, Clayton Antitrust Act, available at <https://corporatefinanceinstitute.com/resources/wealth-management/clayton-antitrust-act> (last accessed Jan. 31, 2023) [<https://perma.cc/66JM-85WQ>]. Federal Trade Commission, The Antitrust Laws, available at <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws> (last accessed Jan. 31, 2023) [<https://perma.cc/9CJ7-J3T4>].

number of mergers that skirt antitrust restrictions.⁵⁹ Notably, the Clayton Act forbids interlocking directorates as well as mergers and acquisitions that have the effect of significantly reducing competition or tending to create a monopoly.⁶⁰

The U.S. Supreme Court has established certain guiding principles in dealing with antitrust challenges, which shows the design of antitrust for the protection of “competition on the merits” in the various cases it has resolved.⁶¹ For one, antitrust protects competition rather than competitors.⁶² For another, because the primary goal of antitrust is to promote efficiency, antitrust is only considered breached if the conduct results in a loss in output or a price increase.⁶³ While the goal for more productivity and lower pricing is intended to promote efficiency, it may also be aimed to maximize consumer welfare.⁶⁴ Hence, consumer protection must take precedence in a disagreement between these two goals.⁶⁵ Finally, social considerations are not valid antitrust defenses.⁶⁶

C. *The EU Competition Law*

The EU competition law traces its origin back to the European Coal and Steel Community (ECSC), which was formed to allow the free movement of coal and steel throughout Europe.⁶⁷ The ECSC included various competition

59. DUNNE, *supra* note 41, at 20.

60. See Clayton Act, § 18.

61. SAGERS, *supra* note 42, at 53 & See Jorge L. Contreras, Intellectual Property Licensing and Transactions: Theory and Practice, Forthcoming, University of Utah College of Law Research Paper No. 399, at 35, available at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3695630_code1335192.pdf?abstractid=3695630&type=2 (last accessed Jan. 31, 2023) [<https://perma.cc/JD6V-WEGT>].

62. See *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 320 (1962) (where the U.S. Supreme Court, through Chief Justice Warren, said “[t]aken as a whole, the legislative history illuminates congressional concern with the protection of competition, not competitors, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition.”) (emphasis supplied).

63. CYRUS B. GOCO & PATRICIA JASMINE C. ALCOPA, *COMPETITION LAW ANALYSIS: A COMPARATIVE APPROACH* 29 (2019).

64. *Id.*

65. *Id.*

66. SAGERS, *supra* note 42, at 53.

67. See WOLF SAUTER, *COHERENCE IN EU COMPETITION LAW* 27 (2016).

provisions, considered the predecessor to the Treaty of Rome,⁶⁸ which founded the European Community.⁶⁹ These competition provisions in the Treaty of Rome were deemed essential to achieve market integration that would enable Europe to compete with the U.S.⁷⁰

Despite declaring that the objective of competition law should be one of regulation,⁷¹ the EU, like the U.S., did not establish a mandate for direct market control.⁷² Instead, it merely prohibited specific anticompetitive behavior⁷³ enumerated under Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU),⁷⁴ which contain the core provisions of EU competition law.

Thus, Article 101 prohibits firms from entering into agreements or engaging in concerted practices with the intent or effect of preventing, restricting, or distorting competition within the internal market:

- (1) The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings[,] and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction[,] or distortion of competition within the internal market, and in particular those which:
 - (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
 - (b) limit or control production, markets, technical development, or investment;

68. *Id.* & Consolidated Version of the Treaty Establishing the European Community, signed Mar. 25, 1957, 1997 O.J. (C 340) 173 [hereinafter Treaty of Rome].

69. *Id.* art. 1 & See GOCO & ALCOBA, *supra* note 63, at 30.

70. Tony A. Freyer, Comparative Antitrust Enforcement and Business History (Article from the Antitrust Division of the U.S. Department of Justice), at 3, available at <https://www.justice.gov/atr/comparative-antitrust-enforcement-and-business-history> (last accessed Jan. 31, 2023) [<https://perma.cc/KRP4-NC8Z>].

71. See generally European Commission, *supra* note 1, at 7.

72. DUNNE, *supra* note 41, at 21.

73. *Id.*

74. Consolidated Version of the Treaty on the Functioning of the European Union, signed Mar. 25, 1957, 2012 O.J. (C 326) 47 [hereinafter TFEU].

- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; [and]
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.⁷⁵

Note that the enumeration in Article 101 is merely illustrative and not exhaustive.⁷⁶ Hence, any agreement that hinders or restricts competition is prohibited.⁷⁷ Moreover, unlike Section 1 of the Sherman Antitrust Act, Article 101 does not provide for a “rule of reason” analysis. Instead, it carved out an exception for *prima facie* prohibited agreements that can contribute to the enhancement of production or distribution of goods or the advancement of technology while allowing consumers a fair share of the benefits.⁷⁸

Meanwhile, Article 102 prohibits any firm from abusing its dominance within the internal market or a substantial portion of it —

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (1) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (2) limiting production, markets[,] or technical development to the prejudice of consumers;
- (3) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; [and]

75. *Id.* art. 101.

76. Petteri Metsä-Tokila, et al., Greening Competition Law — The European Commission’s Draft Horizontal Guidelines and Sustainability Agreements, available at <https://www.twobirds.com/en/insights/2022/finland/greening-competition-law> (last accessed Jan. 31, 2023) [<https://perma.cc/8TK4-HXNV>].

77. DUNNE, *supra* note 41, at 21–22.

78. TFEU, *supra* note 74, art. 101 (3) & See DUNNE, *supra* note 41, at 21–22 (citing TFEU, *supra* note 74, art. 101 (3) (a) & (b)).

- (4) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.⁷⁹

While Article 102 of the TFEU is essentially similar to Section 2 of the Sherman Antitrust Act as it both proscribes exclusionary, anticompetitive conduct committed by individual firms with significant market power,⁸⁰ the following nuances are worth highlighting: first, while the scope of Section 2 of the Sherman Antitrust Act applies to firms who exercise or attempt to exercise monopoly, Article 102 applies to dominant firms, or such firms which have significant market power but whose market power is significantly lower than a monopoly.⁸¹ In addition, while Section 2 of the Sherman Antitrust Act covers situations where firms are yet to acquire a monopoly over a market, Article 102 only applies to firms that already possess market dominance.⁸²

Notably, the language of “fairness” is very present within the TFEU’s textual framework: the Preamble includes an overarching reference to “fair competition,” Article 101 refers to “fair share” for consumers, and Article 102 refers to “unfair purchase or selling prices or other unfair trading conditions.”⁸³ It may therefore be construed that the very broad standard of fairness, including economic and non-economic welfare goals, has always been a part of the consideration in the EU’s competition framework.⁸⁴

The past two decades, however, saw the European Commission moving towards a similar direction taken by the U.S. through its explicit adoption of the more “economic approach,” where the pursuit of economic efficiency has become its primary objective in

79. TFEU, *supra* note 74, art. 102.

80. See generally Alden F. Abbott, *A Tale of Two Cities: Brussels, Washington, and the Assessment of Unilateral Conduct*, 56 ANTITRUST BULL. 103, 123 (2011).

81. See Sherman Antitrust Act, § 2 & TFEU, *supra* note 74, art. 102. See also *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946) (where the Supreme Court endorsed the previous position of the Circuit Court of Appeals that a market share of 90% is enough to constitute a monopoly).

82. See DUNNE, *supra* note 41, at 22.

83. TFEU, *supra* note 74, pmb., arts. 101 & 102.

84. Dunne, *supra* note 2, at 258-63.

enforcing competition law.⁸⁵ Seemingly inspired by Adam Smith⁸⁶ and Ordoliberalism,⁸⁷ the European Commission, in one of its issuances, expressly declared, as part of its policy, the protection of competition as a system and the provision of a “level playing field”⁸⁸ among competitors within the EU internal market —

The European Union’s competition policy has been an important part of EU’s work ever since it was set out in the Treaty of Rome in 1957. The treaty instituted ‘a system ensuring that competition in the common market is not distorted[.]’ The aim was to create a set of well-developed and effective competition rules, to help ensure that the European market functions properly and provide consumers with the benefits of a free market system.

Competition policy is about applying rules to make sure companies compete fairly with each other. This encourages enterprise and efficiency, creates a wider choice for consumers[,] and helps reduce prices and improve quality. These are the reasons why the EU fights anticompetitive [behavior], reviews mergers and state aid[,] and encourages liberali[z]ation.⁸⁹

Note that the policy declaration qualified the fair competition standard by economic outcomes such as efficiency, reduced prices, improved quality, and a greater variety of goods.⁹⁰ Such hinted at what former European Competition Commissioner Mario Monti described as a shift “from a legalistic[-]based approach to an interpretation of the rules based on sound economic judgement.”⁹¹ Although the shift to the “more economic approach” did not purport to override the plurality of objectives long-

85. Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and EU Antitrust Enforcement*, 81 FORDHAM L. REV. 2497, 2511-12 (2013).

86. See generally Herbert J. Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019 (1989) & John D. Bishop, *Adam Smith’s Invisible Hand Argument*, 14 J. BUS. ETHICS 165, 165 (1995) (where Adam Smith postulates that businesses are morally justified in pursuing profits and self-interest as it inures to the benefit of the public).

87. See generally ROGER VAN DEN BERGH, *COMPARATIVE COMPETITION LAW AND ECONOMICS* 108 (2017) & Ignacio Herrera Anchustegui, *Competition Law Through an Ordoliberal Lens*, 2 OSLO L. REV. 139, 139-40 (2015).

88. Freyer, *supra* note 70.

89. European Commission, *supra* note 1.

90. *Id.*

91. Mario Monti, Former Competition Commissioner, European Commission, *EU Competition Policy After May 2004*, Speech at the Fordham Annual Conference on International Antitrust Law and Policy in New York City (Oct. 24, 2003) (transcript on file with the European Commission).

recognized in the EU law, it nevertheless signaled that the primary focus of EU's rules on enforcement would be to ensure the efficient operation of the markets.⁹²

D. The Philippine Competition Law

A gamechanger⁹³ — that was how the PCA was touted when it was finally enacted on 8 August 2015, after languishing within the halls of the Philippine Congress for more than two decades.⁹⁴

Competition, although not clearly articulated in older Philippine legislation, has always existed within its penumbra if one looks closely. The Court confirmed this in *Tatad v. Secretary of the Department of Energy*⁹⁵ —

Section 19, Article XII of our Constitution is [antitrust] in history and in spirit. It espouses competition. The desirability of competition is the reason for the prohibition against restraint of trade, the reason for the interdiction of unfair competition, and the reason for regulation of unmitigated monopolies. Competition is thus the underlying principle of [S]ection 19, Article XII of our Constitution which cannot be violated by R.A. No. 8180.

...

Again, we underline in scarlet that the fundamental principle espoused by [S]ection 19, Article XII of the Constitution is competition for it alone can release the creative forces of the market. But the competition that can unleash these creative forces is competition that is fighting yet is fair.⁹⁶

The PCA was perceived as breakthrough legislation as it crystallized the national competition policy enshrined in the 1987 Philippine Constitution by

92. Dunne, *supra* note 2, at 245.

93. Arsenio M. Balisacan, *Competition a Gamechanger in PHL Economy*, BUSINESSMIRROR, Mar. 18, 2018, available at <https://businessmirror.com.ph/2018/03/18/competition-a-game-changer-in-phl-economy> (last accessed Jan. 31, 2023) [<https://perma.cc/7KZX-YVMA>].

94. Philippine Competition Commission, PCA at a Glance, at 4, available at https://phcc.gov.ph/wp-content/uploads/2017/08/Infokit-1-PCA-at-a-glance_oed_final.pdf (last accessed Jan. 31, 2023) [<https://perma.cc/D6WH-NTP2>] & Philippine Competition Commission, Philippine Competition Law, available at <https://www.phcc.gov.ph/republic-act-no-10667> (last accessed Jan. 31, 2023) [<https://perma.cc/FKJ7-2QXR>].

95. *Tatad v. Secretary Department of Energy*, G.R. No. 124360, 281 SCRA 330 (1997).

96. *Id.* at 358.

transforming a general policy declaration in the Philippine Constitution into a concrete national competition policy framework.⁹⁷

The PCA was passed for the Philippines to meet its commitment in the Association of Southeast Asian Nations (ASEAN) Economic Community Blueprint⁹⁸ to have a comprehensive competition law in place by 2015,⁹⁹ after being the only original ASEAN founding member without one,¹⁰⁰ and to consolidate the numerous, fragmented, and scattered¹⁰¹ competition policies in more than 30 different laws, which proved to be ineffective and remained unenforced.¹⁰² In designing the breakthrough legislation, the drafters of the PCA took the best practices of two of the leading competition law jurisdictions in the world — the U.S. and the EU — and came up with a hybrid competition law framework¹⁰³ in hopes of creating a “far more superior law.”¹⁰⁴ Hence, the Philippine Congress produced competition legislation that puts consumer welfare at the heart of its policy.¹⁰⁵

97. Amabelle C. Asuncion & Rebyanne Giselle C. Diaz, Dawn Raids: Investigating Violations of the Philippine Competition Act, at 4 (Jan. 2020) (unpublished paper, Philippine Competition Commission) (on file with Author).

98. Association of Southeast Asian Nations, ASEAN Economic Community Blueprint, available at <https://www.asean.org/wp-content/uploads/images/archive/5187-10.pdf> (last accessed Jan. 31, 2023) [<https://perma.cc/W2LQ-UPYZ>].

99. *Id.* at 2.

100. See H. REC., Vol. 2, No. 41, at 17, 16th Cong., 2d Reg. Sess. (Jan. 27, 2015) (where Rep. Enrique M. Cojuanco emphasized the need to pass a competition law as the Philippines is the only remaining ASEAN founding member without one) & Gerard Lim, *What Consumers Need to Know About the PH Competition Act*, RAPPLER, July 10, 2015, available at <https://www.rappler.com/business/economy/98287-philippine-competition-act-part-1> (last accessed Jan. 31, 2023) [<https://perma.cc/SW9P-VE9D>].

101. H. REC., Vol. 2, No. 41, at 17 (where Rep. Enrique M. Cojuanco expressed his frustrations on the poor enforcement of the laws involving competition).

102. Medalla, *supra* note 31, at 2.

103. H. REC., Vol. 2, No. 41, at 17–18.

104. Alizedney M. Ditucalan, *The Philippine Competition Act: A Mestiza?*, 9 KLRIJ. L. & LEGIS. 113, 134 (2019).

105. Arsenio M. Balisacan, *Consumers at the Heart of Competition Policy*, BUSINESSMIRROR, Jan. 2, 2019, available at <https://businessmirror.com.ph/2019/01/02/consumers-at-the-heart-of-competition-policy> (last accessed Jan. 31, 2023) [<https://perma.cc/M36S-VVTY>].

The PCA created the PCC, an independent quasi-judicial agency, to enforce the national competition policy through its investigative, prosecutorial, adjudicatory, and policymaking functions.¹⁰⁶ Five commissioners lead the PCC with backgrounds in either “economics, law, finance, commerce[,] or engineering.”¹⁰⁷

The PCA, which was heavily influenced by the U.S. Sherman Antitrust Act, FTCA, and the Clayton Antitrust Act, prohibited anticompetitive agreements,¹⁰⁸ abuse of dominant position,¹⁰⁹ and anticompetitive mergers and acquisitions¹¹⁰ committed by any entity within or outside the Philippines, if it directly and substantially impacts trade, industry, or commerce in the Philippines.¹¹¹ Dubbed as the “Pillars of the PCA,”¹¹² an anticompetitive agreement, abuse of dominance, or anticompetitive merger or acquisition is classified as so if it results in a “substantial lessening of competition (SLC),”¹¹³ which must be proven by substantial evidence,¹¹⁴ or that “amount of relevant evidence which a reasonable mind might accept as adequate to justify a conclusion.”¹¹⁵

An act or conduct results in SLC when it significantly affects the firm’s rivalry over time. It reduces the firm’s competitive incentive to lower prices, improve products or services, or innovate.¹¹⁶ Thus, to prove the existence of SLC, it must be shown that:

- (1) The agreement or conduct has the object (demonstrated by an examination of the whole legal and business framework in which the action is being pursued) or an effect (determined through an

106. Philippine Competition Act, § 12.

107. *Id.* § 6.

108. *See id.* § 14.

109. *See id.* § 15.

110. *See id.* § 20.

111. *Id.* § 3.

112. Asuncion & Diaz, *supra* note 97.

113. Philippine Competition Act, §§ 14, 15, & 20.

114. *Id.* § 12 (d).

115. Prangan v. NLRC, G.R. No. 126529, 289 SCRA 142, 146 (1998) (citing *Domasig v. National Labor Relations Commission*, G.R. No. 118101, 261 SCRA 779, 785 (1996); *Remo Foods, Inc. v. National Labor Relations Commission*, G.R. No. 116462, 249 SCRA 379, 385 (1995); & *Rase v. National Labor Relations Commission*, G.R. No. 110637, 237 SCRA 523, 532 (1994)).

116. WHISH & BAILEY, *supra* note 23, at 4.

economic analysis of the result on competition on consumer welfare);

- (2) The agreement or conduct prevents, restricts, or lessens competition among competitors; and
- (3) Such an effect is substantial.¹¹⁷

A perusal of the PCA's Sections 14, 15, and 20, which deal with the said Pillars of the PCA, reveals that the provisions were a patchwork of handpicked provisions or concepts from the U.S. and EU jurisdictions that were forcefully sewn together in the hope of creating a competition law framework superior to the U.S. and EU jurisdictions.¹¹⁸

Indeed, the Court declared in *Tatad* that the goal of competition is to ensure a competitive economy, which seems to allude to how economists view competition and how the U.S. and EU have decided to approach the enforcement of their competition laws —

We subscribe to the observation of Prof. Gellhorn that the objective of [antitrust] law is 'to assure a competitive economy, based upon the belief that *through competition producers will strive to satisfy consumer wants at the lowest price with the sacrifice of the fewest resources*. Competition among producers allows consumers to bid for goods and services, and thus matches their desires with society's opportunity costs.'¹¹⁹

Such pronouncement of the Court justified the Philippines to follow the U.S. and EU in pursuing a "more economic approach" to enforcing competition law devoid of any social consideration unless expressly provided by law.¹²⁰ The PCC, thus, in many of its issuances and publications, has consistently highlighted that it aims to foster a culture of competition among businesses across all industries by leveling the playing field for businesses and promoting consumer welfare.¹²¹

117. Asuncion & Diaz, *supra* note 97, at 18.

118. *See generally* Ditucalan, *supra* note 104, 148-50.

119. *Tatad*, 281 SCRA at 358 (citing ERNEST GELLHORN, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 45 (3d ed. 1986) (emphasis supplied)).

120. *See* Dunne, *supra* note 2, at 245.

121. *See generally* Asuncion & Diaz, *supra* note 97 & Philippine Competition Commission, *Consolidated Position Paper of the Philippine Competition Commission for the Consideration of the Sub-Committee on Economic Reforms of the Consultative Committee to Review the 1987 Constitution* (2018) (unpublished position paper, Philippine Competition Commission) (on file with the Philippine Competition Commission).

The motivation, however, of aspiring to establish a competition jurisdiction that will immediately stand on the same plane with U.S. and EU overlooks the fact that the Philippines, unlike the U.S. and EU, is a developing country whose context may differ entirely from such jurisdictions. Hence, simply supplanting their laws into the Philippine jurisdiction with an expectation of the same results, without regard for the nuances, lacks prudence.

For another, a reading of PCA's Section 2¹²² would readily show a myriad policy goals, which should be interpreted as a declaration that the competition policy regime in the Philippines should include both economic and non-economic welfare goals.¹²³ This interpretation is consistent with the legislature's intent, as stated by Representative Enrique M. Cojuangco, "competition promotes the welfare of consumers, regardless of class, but it does matter for the marginalized sectors."¹²⁴ Still, it is likewise consistent with the express mandate of the Constitution that directs the State to "regulate or prohibit monopolies when the public interest so requires."¹²⁵

III. THE GENDER AND COMPETITION NEXUS

Jonathan Baker and Steven Salop discovered in a study of the relationship between inequality and competition that market power contributes to growing inequality¹²⁶ while inequality can reduce economic growth.¹²⁷ Chris Pike and Estefania Santacreu-Vasut, in a later study, triggered by Commissioner Margrethe Vestager's call to promote fairness and address inequalities through competition enforcement, also found the same

122. Philippine Competition Act, § 2.

123. GOCO & ALCOBA, *supra* note 63, at 32. (The Authors explained that these non-economic welfare goals "range from nationalism to ASEAN integration and the protection of small businesses to the levelling of the playing field among business competitors. In addition, these multi-faceted approach takes into consideration the country's peculiar socio-economic and cultural dimensions, to ensure the promotion of social justice, as enshrined in the Philippine Constitution.")

Id.

124. H. REC., Vol. 2, No. 41, at 18.

125. PHIL. CONST. art. XII, § 19.

126. Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L. J. 1, 11 (2015).

127. *Id.* at 8.

bidirectional relationship to be true when applied to competition and a more specific type of inequality — gender inequality.¹²⁸

The Author addresses such preliminary findings on the alleged relationship between gender and competition law in this Chapter and then advocates for the inclusion of a gender viewpoint in the enforcement of Philippine Competition Law.

A. Gender and the Need for Gender Equality

Gender refers to “the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men.”¹²⁹ It determines the expectations and the things allowed and valued in a woman or a man in a given context.¹³⁰ As a result, in most societies, men and women have been assigned different obligations, activities, access to, and control over resources, and decision-making opportunities,¹³¹ often leaving women in an unequal and disadvantageous position compared to men.¹³²

The Universal Declaration of Human Rights of 1948 (UDHR)¹³³ sought to address this when it declared the promotion of equality as one of the primary aims of all nations.¹³⁴ Although the declaration is not legally binding, the incorporation of the principle of “[equality] before the law”¹³⁵ in later treaties such as the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹³⁶ and the International Covenant on Civil and Political

128. Santacreu-Vasut & Pike, *supra* note 18, at 33.

129. UN Women, Concepts and Definitions, available at <https://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm> (last accessed Jan. 31, 2023) [<https://perma.cc/FUM2-4FMK>].

130. *Id.*

131. *Id.*

132. See Naila Kabeer, *Gender, Poverty, and Inequality: A Brief History of Feminist Contributions in the Field of International Development*, 2 GENDER & DEV. 189, 192-93 (2015).

133. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 7, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948).

134. *Id.* pmbl.

135. *Id.* art 7.

136. International Covenant on Economic, Social and Cultural Rights art. 3, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3.

Rights (ICCPR)¹³⁷ obligates the signatory states to promote equality. The duty to especially encourage gender equality, however, was expressly recognized in the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW),¹³⁸ which the Philippines ratified on 5 August 1981.¹³⁹

Gender equality refers to the “equal rights, responsibilities[,] and opportunities of women and men and girls and boys[,]”¹⁴⁰ considering the different interests, needs, and priorities and “recognizing the diversity of different groups of women and men.”¹⁴¹ Contrary to popular misconceptions, it does not require men and women to be the same or be treated alike.¹⁴² Instead, it advocates that people’s “rights, responsibilities[,] and opportunities [should not be determined by] whether they are born male or female.”¹⁴³ Gender equality entails taking into account the interests, needs, and goals of both men and women, while also acknowledging the diversity of diverse groups of women and men.¹⁴⁴ It is based on the principle that all humans, regardless of gender, are free to develop their abilities, follow their professional careers, and make decisions without being constrained by stereotypes, traditional gender roles, and prejudices.¹⁴⁵

Despite numerous provisions on gender equality in different laws worldwide, discrimination and violence persist because of the deeply embedded patriarchal structures and gender imbalances that prevent them

137. International Covenant on Civil and Political Rights arts. 3 & 26, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171.

138. Convention on the Elimination of All Forms of Discrimination Against Women art 2, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13.

139. United Nations Treaty Collection, Status of Treaties: Convention on the Elimination of All Forms of Discrimination Against Women, *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&clang=_en (last accessed Jan. 31, 2023) [<https://perma.cc/7L7U-CVRV>].

140. UN Women, *supra* note 129.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 28 on the Core Obligations of States Parties Under Article 2 of the Convention on Elimination of All Forms of Discrimination Against Women*, ¶ 22, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010).

from equal and significant economic participation.¹⁴⁶ Probably contributing to this is the long-held idea that human rights have no place in business since “the social responsibility of business is to increase its profits,” American economist Milton Friedman argued.¹⁴⁷ Such an ideology has had such a tremendous impact on corporations and governments alike that it has become firmly buried in the rationale for doing business.¹⁴⁸ This viewpoint manifests in how competition law, a discipline that prides itself on objectivity¹⁴⁹ by making economic efficiency the primary, if not the sole, purpose of competition enforcement,¹⁵⁰ frequently ignores gender.¹⁵¹

The “rise in transnational economic activity,” however, heightened the awareness of the impact of businesses on human rights,¹⁵² which prompted attempts to improve the businesses’ recognition of human rights.¹⁵³ One of these attempts is integrating the gender perspective in implementing the United Nation’s Guiding Principles in Business and Human Rights (UNGP).¹⁵⁴

146. UN Human Rights Council, *Gender Dimensions of the Guiding Principles on Business and Human Rights*, ¶ 9, U.N. Doc. No. A/HRC/41/43 (May 23, 2019).

147. UN Global Compact Network Japan & EY Japan, *Business and Human Rights: Corporate Japan Rises to the Challenge*, at 7, available at https://www.ungcjin.org/common/frame/plugins/fileUD/download.php?type=contents_files&p=elements_file_2563.pdf&token=2012fc36fece514e13fc88a68e55493a05d3doc6&t=20230514215323 (last accessed Jan. 31, 2023) [<https://perma.cc/W27K-F5UR>] (citing Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, in *CORPORATE ETHICS AND CORPORATE GOVERNANCE* 178 (Walter C. Zimmerli, et al. eds., 2007)).

148. See Robert Bahlieda, *The Profit Problem*, in *THE ECONOMIC GULAG: PATRIARCHY, CAPITALISM, & INEQUALITY* 132 (2018).

149. See Dunne, *supra* note 2, at 232.

150. *Id.* at 231.

151. See Neves, *supra* note 17 & Naidu & Nxumalo, *supra* note 5.

152. Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, ¶ 1, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter *Guiding Principles*].

153. David Weissbrodt, *Human Rights Standards Concerning Transnational Corporations and Other Business Entities*, 23 *MINN. J. INT’L L.* 135, 136 (2014).

154. *Guiding Principles*, *supra* note 152, at 8.

Moreover, the antitrust community is gradually recognizing and accepting a possible connection between gender and competition law.¹⁵⁵ Such recognition has led to an initial finding of a bidirectional relationship between competition and gender competition policies can reduce gender inequality in a market, and gender equality in a market can improve competitive conditions.¹⁵⁶

B. Impact of Gender on Competition

Gender disparity, according to the OECD, leads to “smaller, less efficient[,] and less competitive markets where talent is misallocated and where competition works less efficiently to guarantee high consumer welfare.”¹⁵⁷ A market warped by gender inequality, as Sarah Long stated more bluntly, does not optimize consumer welfare.¹⁵⁸ Taking gender into account in implementing competition rules and policies is thus consistent with the consumer welfare approach of competition law, as it may eliminate market inefficiencies and enhance consumer welfare.¹⁵⁹

Gender can impact competition from the producers’ and consumers’ points of view.¹⁶⁰ From the sellers’ perspective, gender can influence market entry.¹⁶¹ Formal and informal barriers, ineffective incentives, and behavioral and cultural factors have all been shown in studies to restrict or reduce women’s involvement in markets.¹⁶² Formal obstacles can take the shape of legal and regulatory hurdles,¹⁶³ such as when women are not permitted to work in specific industries,¹⁶⁴ married women are not allowed to establish their

155. Santacreu-Vasut & Pike, *supra* note 18, at 4.

156. *Id.* at 14 & 33.

157. Naidu & Nxumalo, *supra* note 5.

158. Sarah Long, *Gender Inequality, Market Distortion and Consumer Welfare: A Call to Action for Competition Authorities*, 10 J. EUR. COMPETITION L. & PRAC. 267, 267 (2019).

159. Naidu & Nxumalo, *supra* note 5.

160. See Chris Pike, *What’s Gender Got to Do with Competition Policy?*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3487588 (last accessed Jan. 31, 2023) [<https://perma.cc/N8MM-3LTK>].

161. Santacreu-Vasut & Pike, *supra* note 18, at 14.

162. *Id.*

163. *Id.* at 15.

164. See, e.g., Santacreu-Vasut & Pike, *supra* note 18, at 15 (citing World Bank, *Women, Business and the Law 2018*, at 14, available at

businesses,¹⁶⁵ and husbands have the legal power to block their wives from working or opening a business.¹⁶⁶

Because of these formal and informal impediments, the playing field for women is not a level one.¹⁶⁷ Incumbent firms may “fill the gaps” left by the inability of more efficient enterprises run by female entrepreneurs to enter the market, resulting in less competitive restraints on incumbent firms that, even if efficient, can use market power to set higher prices.¹⁶⁸ And when women do get a chance to engage in the market, they face discrimination, more significant transaction costs, and other behavioral and organizational variables that may finally force them out.¹⁶⁹

To illustrate, research finds that women tend to incur higher market transaction costs, which are the costs associated with participating in the markets, including searching, bargaining, monitoring, and enforcing fees.¹⁷⁰ This is because women’s time investment in household tasks, on top of the discrimination that they face, makes them incur higher search costs.¹⁷¹ Furthermore, women engage in more detailed and comprehensive information processing.¹⁷²

Studies also show significant gender differences in discount values, attitude to risk, financial literacy, bargaining propensity, and confidence.¹⁷³ In addition

<https://thedocs.worldbank.org/en/doc/102741522965756861-0050022018/original/WBLKeyFindingsWebFINAL.pdf> (last accessed Jan. 31, 2023) [<https://perma.cc/KWN6-3LXA>].

165. See, e.g., Santacreu-Vasut & Pike, *supra* note 18, at 15 (citing World Bank, Women, *supra* note 164, at 10).

166. See, e.g., Santacreu-Vasut & Pike, *supra* note 18, at 15 (citing World Bank, Women, *supra* note 164, at 10 tbl. 1.2).

167. Santacreu-Vasut & Pike, *supra* note 18, at 15.

168. *Id.*

169. See *id.* at 16.

170. *Id.* at 19.

171. *Id.* & See Dan A. Black, *Discrimination in an Equilibrium Search Model*, 13 J. LABOR ECON. 309, 328 (1995).

172. See DeAnna S. Kempf, et al., *The Effects of Gender on Processing Advertising and Product Trial Information*, 17 MARKETING LETTERS 5, 14 (2006).

173. Estefania Santacreu-Vasut & Chris Pike, Competition Policy and Gender, at 2, 4, & 5, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3487726 (last accessed Jan. 31, 2023) [<https://perma.cc/T6HV-BGEN>] (citing Hannah

to the previously mentioned ones, these differences explain the significant wage gap between men and women and why women entrepreneurs, employees, and consumers do not compete on equal footing with male market players.¹⁷⁴

Meanwhile, from the consumers' perspective, gender can influence consumer prices, as seen when male and female consumers pay different prices for male and female versions of the same item.¹⁷⁵ Female consumers, in particular, frequently pay the "pink tax" since female gender products are priced higher than male counterparts¹⁷⁶ due to female consumers' greater willingness to pay for such products.¹⁷⁷ This information may be crucial for competition authorities since it suggests that there may be two distinct markets that must be considered when defining the relevant market.¹⁷⁸

Furthermore, while price discrimination, generally, is not entirely unfair because it often improves consumer welfare by allowing more consumers to purchase a product or service than would be the case if a single price had to be set,¹⁷⁹ it can be harmful to consumers as a whole when used to force a

Riley Bowles, et al., *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes It Does Hurt to Ask*, 103 *ORG. BEHAV. & HUM. DECISION PROCESSES* 84, 98–99 (2007)).

174. Santacreu-Vasut & Pike, *supra* note 18, at 4 & 7.

175. See, e.g., Bill de Blasio & Julie Menin, from *Cradle to Cane: The Cost of Being a Female Consumer: A Study of Gender Pricing in New York City* (New York City Department of Consumer Affairs), at 40, available at <https://www1.nyc.gov/assets/dca/downloads/pdf/partners/Study-of-Gender-Pricing-in-NYC.pdf> (last accessed Jan. 31, 2023) [<https://perma.cc/29HL-U8G7>].

176. Santacreu-Vasut & Pike, *supra* note 18, at 4 (citing de Blasio & Menin, *supra* note 175, at 30).

177. de Blasio & Menin, *supra* note 175, at 30. See generally George A. Akerlof & Rachel E. Kranton, *Economics and Identity*, 115 *Q. J. ECON.* 715, 732 (2000).

178. See Pike, *supra* note 160.

179. See generally Organisation for Economic Co-operation and Development, *Public Interest Considerations in Merger Control* (Written Contribution from Canada Submitted for Item 3 of the 123rd meeting of the OECD Working Party No. 3 on Co-operation and Enforcement), at 12, available at [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2016\)2/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2016)2/en/pdf) (last accessed Jan. 31, 2023) [<https://perma.cc/P86L-G4ME>] (where it emphasizes competition authorities to exercise their mandate while considering the primacy of public interest objectives).

competitor out or raise prices.¹⁸⁰ In cases that it does not constitute anticompetitive conduct, it can indicate, when demonstrated to be persistent, that the market is not functioning efficiently for particular groups of customers.¹⁸¹

C. Impact of Competition on Gender

Gender inequality may be influenced by competition policy in the same way that gender influences competitiveness.¹⁸² When competition authorities seek policies that remove market distortions, markets become more competitive, and, as a result, gender disparity decreases.¹⁸³ According to Gary S. Becker, discriminating firms sacrifice earnings to fulfill their preferences.¹⁸⁴ Prejudiced enterprises, however, will be outcompeted by more efficient non-prejudiced ones in a competitive market unless consumers are ready to pay a premium for discriminatory services.¹⁸⁵

Promoting competition in markets that are more important to women can reduce gender inequality.¹⁸⁶ For example, women usually do the household chores and caring for the children, the elderly, and the sick, which consumes most of their time in a day and is unpaid and limits their opportunity to provide paid formal work.¹⁸⁷ An intervention by the competition authorities that would make available and affordable possible substitutes for these unpaid services provided by women may enable women to participate more in the labor markets.¹⁸⁸

For another, women often have less access to financing due to legal restrictions and hurdles imposed on them in some countries, as well as poor credit conditions or blatant prejudice when applying for loans.¹⁸⁹ Because financial access is critical to women's educational investment, labor force participation, and entrepreneurial potential, action, or advocacy by

180. Santacreu-Vasut & Pike, *supra* note 18, at 18 n. 25.

181. *See id.* at 32.

182. *See id.* at 6.

183. *Id.* at 33.

184. GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 6 (1957).

185. *Id.* & Santacreu-Vasut & Pike, *supra* note 18, at 7.

186. *See* Santacreu-Vasut & Pike, *supra* note 18, at 9-14.

187. *Id.* at 9-10.

188. *Id.* at 10.

189. *See* Andrea Moro, et al., *Does a Manager's Gender Matter When Accessing Credit? Evidence from European Data*, 80 J. BANKING & FIN. 119, 132-33 (2017).

competition authorities to remove such distortions in financial markets will allow women to build wealth sufficient to compete fairly with men in the labor force or business.¹⁹⁰

Indeed, through their competition policies, competition authorities can contribute to minimizing gender inequality by safeguarding and boosting the efficiency of markets that are crucial to a gender-inclusive economy.¹⁹¹ In doing so, they achieve a “double dividend.”¹⁹² By increasing competition in specific markets, they minimize market inefficiencies and contribute to reducing gender inequality.¹⁹³ All these while remaining focused on their primary goal of lowering anticompetitive rents and their effects on consumer welfare.¹⁹⁴

D. Fairness as Basis for Public Interest Consideration in Competition Law Enforcement

Technically, fairness is not the same as equality.¹⁹⁵ The subtle distinction between the two, however, has become confused due to how fairness is understood in competition law, which is always in the context of “fair play.”¹⁹⁶ Many competition authorities, like the PCC, have interpreted “fair competition” promotion as “leveling the playing field,” requiring participants to have equal access to enter and compete in the market,¹⁹⁷ promoting the idea of equality as strongly related and intertwined with fairness.

190. Santacreu-Vasut & Pike, *supra* note 18, at 11.

191. *Id.* at 4.

192. *Id.* at 3.

193. *See* Santacreu-Vasut & Pike, *supra* note 18, at 33.

194. *See id.* at 8.

195. According to the Oxford Dictionary, “fairness” is the “impartial [or] just treatment or behavior without favoritism or discrimination.” Meanwhile, “equality” is the state of being equal, especially in status, rights, or opportunities. Rigorous Digital, Our Values: Fair, *available at* <https://rigorous-digital.co.uk/about/values> (last accessed Jan. 31, 2023) [<https://perma.cc/4QJD-PJPD>] & United Way of the National Capital Area, What Is Equality? Definition, Examples, *available at* <https://unitedwaynca.org/blog/what-is-equality> (last accessed Jan. 31, 2023) [<https://perma.cc/674V-3B2A>].

196. Dunne, *supra* note 2, at 236.

197. Arsenio M. Balisacan, Chairman, Philippine Competition Commission, *Leveling the Playing Field Amid the COVID-19 Pandemic*, Speech at Management Association of the Philippines Online General Membership Meeting (May 20,

Due to its unpredictability, however, “fairness,” as a competition law standard, has proven to be a difficult assignment.¹⁹⁸ This is because its broadness and ambiguity of “fairness” places a competition authority in an unduly political role that may require it to make judgment calls that it is not always qualified or able to make.¹⁹⁹ Fairness, thus, was argued to be an inappropriate metric for market regulation.²⁰⁰

Given that the goal of competition law is to “protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such[,]”²⁰¹ the concept of fairness and equality in competition law has been limited to that which will “ensure the efficient operation of markets in the consumer’s interest.”²⁰² Efficiency, which assesses an industry’s performance of its economic mission in the interest of society, is regarded as a particularly appropriate antitrust metric insofar as well-functioning markets provide an efficient allocation of resources.²⁰³ This “more economic approach” was thought to be more in line with the widely held notion of competition law as a “consumer welfare prescription.”²⁰⁴ Furthermore, using efficiency as a criterion has further regulatory benefits: it is quantifiable, measurable, and delivers a direct public benefit of expanding the amount of the economic pie available to everybody.²⁰⁵

2020) (transcript *available at* https://phcc.gov.ph/wp-content/uploads/2020/05/MAP-Speech_Leveling-the-Playing-Field_20May2020.pdf (last accessed Jan. 31, 2023) [<https://perma.cc/4B7B-8ZHA>]).

198. *See Dunne, supra* note 2, at 231.

199. Frederic Jenny, *Populism, Fairness, and Competition: Should We Care and What Could We Do?*, at 6, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476227 (last accessed Jan. 31, 2023) [<https://perma.cc/MW7D-M4PG>]. *See also Dunne, supra* note 2, at 237.

200. *Dunne, supra* note 2, at 236, 248, & 257.

201. *GlaxoSmithKline Services Unlimited v. Commission of the European Communities*, Judgment, Case C-501/06 P, EU:C:2009:610, ¶ 63 (CJEU Oct. 6, 2009).

202. *Dunne, supra* note 2, at 245.

203. *See W. KIP VISCUSI, ET AL., ECONOMICS OF REGULATION AND ANTITRUST 79* (2005) & Antonio Arbelo, et al., *Profit Efficiency as a Measure of Performance and Frontier Models: A Resource-Based View*, 24 *BUS. RES. Q.* 143, 144 (2021).

204. *Dunne, supra* note 2, at 245 (citing *Reiter v. Sonotone Corp., et al.*, 442 U.S. 330, 343 (1979) (citing ROBERT H. BORK, *THE ANTITRUST PARADOX 66* (1978))).

205. *Dunne, supra* note 2, at 247-48.

Vestager's constant endeavor to keep "fairness" front and center in her competition policy agenda resulted in her deliberate attempt to make fairness the "lodestar of [competition] enforcement."²⁰⁶ Her definition of fairness is more fundamental and all-encompassing, as it goes beyond a "level playing field" and her predecessors' "more economic approach"²⁰⁷ —

[It is] not enough anymore for business and government to simply ask people to trust them[.] [...] We now need to show people that the system is fair. Competition enforcement can help to deal with the biggest concerns that Europeans face [...] because it helps to make sure the system works fairly.²⁰⁸

Vestager's "fairness mantra" established that fairness is a catch-all for socially acceptable goals that may fall within the regulatory purview of the competition system, whether as arguments for regulatory restraint or as drivers for aggressive intervention.²⁰⁹ Thus, when she advocated for the need for a gender-inclusive competition policy,²¹⁰ she did so within the larger context of her "fairness mantra," as encapsulated in this remark of hers —

The rule of law is there to preserve fair opportunities in our markets. When fairness is at risk, we need authorities to stand up for what is right. Authorities that can weigh the evidence and restore fair markets.

That also drives competition enforcers today. When we do a competition case, we may think first of our rules, documents[,] and economic data. *But with our work, we stand up for very basic ideas. Fairness, openness, [and] equal opportunities.*²¹¹

From this perspective, according to Dunne, "competition law serves not only the individualist goal of correcting discrete market failures; it also addresses overarching concerns that the social market economy as such has failed."²¹²

206. *Id.* at 230.

207. *Id.* at 233-34.

208. *Id.* at 242 (citing Vestager, *supra* note 14).

209. *Id.* at 237.

210. Margrethe Vestager, Commissioner for Competition, European Commission, Address at the 17th OECD Global Forum on Competition in Paris (Nov. 29, 2018) (transcript available at https://www.oecd.org/competition/globalforum/GFC2018-Keynote_Address_Vestager.pdf (last accessed Jan. 31, 2023) [<https://perma.cc/65AV-QQAT>]).

211. *Id.*

212. Dunne, *supra* note 2, at 242.

Vestager's "fairness mantra" clearly provided a basis for considering public interest concerns in competition law enforcement and revived the long-standing debate on the propriety of including the public interest in competition law enforcement.²¹³ Skeptics, however, claim that accommodating public interest factors undermines competition in law enforcement because its breadth makes it impossible for enforcers to interpret and implement it objectively, transparently, and consistently.²¹⁴ Furthermore, they are concerned that including public interest objectives may lead to problems such as politicizing an impartial, economic-based assessment of market behavior or using "public interest" to disguise protectionist measures.²¹⁵

Apart from the fact that these arguments against public interest inclusion are primarily speculative, they overlook the fact that competition law is part of a more extensive suite of economic development policies,²¹⁶ and thus should be allowed to pursue multiple objectives and fit the socio-economic characteristics of a country,²¹⁷ particularly in developing jurisdictions.²¹⁸ Furthermore, even if it is true that including public interest considerations will make it more difficult for competition enforcers to apply competition laws objectively and consistently, doing so is imperative if not to jeopardize much more important goals, such as the promotion and protection of human rights, which are primarily included in many of the public interest considerations. Indeed, the pursuit of fairness links directly to the social rationale for competition law.²¹⁹ As Sandra Marco Colino has forcefully put, "[i]t makes

213. See Organisation for Economic Co-operation and Development, *supra* note 179, at 6.

214. Ma. Joy V. Abrenica, *Balancing Consumer Welfare and Public Interest in Competition Law*, 13 *ASIAN J. WTO & INT'L. HEALTH L. & POL'Y* 433, 452-53 (2018).

215. *Id.* at 453.

216. See generally U.N. Conference on Trade and Development, *The Importance of Coherence Between Competition and Government Policies*, U.N. Doc. TD/B/C.I/CLP/9 (May 10, 2011).

217. Michal S. Gal & Eleanor M. Fox, *Drafting Competition Law for Developing Jurisdictions: Learning from Experience* (Law & Economics Research Paper Series Working Paper No. 14-11), at 5, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2425329 (last accessed Jan. 31, 2023) [<https://perma.cc/TXX6-59L5>].

218. *Id.*

219. Damien Gerard, *Fairness in EU Competition Policy: Significance and Implications*, 9 *J. EUR. COMPET. L. PRAC.* 211, 211 (2018).

little sense to defend a competition policy that develops with its back purposely turned to the attainment of moral and social justice.”²²⁰

The ability of competition policies to level the playing field and generate equal opportunities that promote efficiency while undermining existing power structures in society thus, emphasizes the importance of including public interest objectives in competition enforcement,²²¹ for indeed, “[e]conomic and social progress are intertwined” and mutually enforcing.²²² Conclusive competition policy, thus, should be intersectional, considering a variety of obstacles that hinder equal participation, including gender disparities.²²³

Furthermore, Vestager’s “fairness mantra” does not necessarily contradict the “more economic approach.”²²⁴ Taking gender into account in applying competition laws and regulations, as previously demonstrated, is thus consistent with the consumer welfare approach of competition law, as it may minimize market inefficiencies and improve consumer welfare.²²⁵ Indeed, Vestager’s revival of “fairness” is “not a revolution,” but an “evolution,” in competition law.²²⁶

220. Sandra Marco Colino, *The Antitrust F Word: Fairness Considerations in Competition Law*, 2019 J. BUS. L. 329, 346 (2019).

221. See Santacreu-Vasut & Pike, *supra* note 18, at 32.

222. European Commission, European Pillar of Social Rights, ¶ 11, available at <https://europe-solidarity.eu/documents/social-pillar-goteborg.pdf> (last accessed Jan. 31, 2023) [<https://perma.cc/MGQ4-XJYP>]. Recital 11 of the European Pillar of Social Rights states that —

To a large extent, the employment and social challenges facing Europe are a result of relatively modest growth, which is rooted in untapped potential in terms of participation in employment and productivity. Economic and social progress are intertwined, and the establishment of a European Pillar of Social Rights should be part of wider efforts to build a more inclusive and sustainable growth model by improving Europe’s competitiveness and making it a better place to invest, [and] create jobs and foster social cohesion.

Id.

223. Naidu & Nxumalo, *supra* note 5.

224. Dunne, *supra* note 2, at 241.

225. Naidu & Nxumalo, *supra* note 5.

226. Dunne, *supra* note 2, at 241.

E. Engendering Gender in the Enforcement of the PCA

The primary goal of competition law is “to protect consumers from anticompetitive conduct, agreements and acquisitions by firms that increase prices or reduce quality and hence lead to a deterioration in consumer welfare”²²⁷ or disincentivize innovation of goods and services available in markets, which result in “maximizing consumer welfare by reducing barriers to entry, and addressing other features of markets that prevent, restrict[,] or distort competition.”²²⁸

Although the intent of the PCA’s framers considers the public interest in competition, a brief survey of the PCC’s issuances and publications seems to indicate that the Commission has taken the Parsonian approach to enforce competition law from a more economical line.²²⁹

The PCC’s seeming apprehension to apply public interest considerations in enforcing the PCA may be related to the long-standing debate on the propriety of the inclusion of public interest in competition law enforcement.²³⁰ But even if the PCC is not yet ready to accommodate public interest in its enforcement of competition law, it should still include gender analysis in its investigations because, as previously discussed, gender has been found to correlate with market efficiency, and its promotion may lead to improved consumer welfare.²³¹

The PCC has recently issued an internal guideline on gender mainstreaming in the workplace.²³² A closer examination of the said guideline, however, reveals that it is a boilerplate guideline issued by Philippine administrative agencies under Section 36, Chapter VI of the Magna Carta of Women,²³³ which mandates all government agencies to “adopt gender mainstreaming as a strategy to promote women’s human rights and eliminate

227. Santacreu-Vasut & Pike, *supra* note 18, at 32.

228. *Id.*

229. See Philippine Competition Commission, *supra* note 122 & Asuncion & Diaz, *supra* note 97.

230. See generally Organisation for Economic Co-operation and Development, *supra* note 179.

231. Naidu & Nxumalo, *supra* note 5.

232. Philippine Competition Commission, Guidelines on Mainstreaming Gender and Development (GAD) in PCC, Office Circular No. 3, Series of 2022 [PCC Office Circ. No. 2022-003] (Feb. 18, 2022).

233. An Act Providing for the Magna Carta of Women [The Magna Carta of Women], Republic Act No. 9710 (2009).

gender discrimination in their systems, structures, policies, programs, processes, and procedures[.]”²³⁴ Although the guidelines provide that the PCC will identify gender issues related to their investigations and use gender views in their economic analyses when necessary or applicable,²³⁵ such language used in the provisions was too generic and non-committal to be taken seriously as a competition enforcement-specific policy.²³⁶ While this is a step in the right direction, the language used in the guidelines lacks the compulsion to drive the PCC’s investigations or competition law enforcement efforts to actively employ and apply the gender perspective.

Notably, the U.S., through Commissioner Rebecca Kelly Slaughter of the United States Federal Trade Commission, has recently encouraged the antitrust community to begin thinking strategically about using antitrust as a tool for promoting diversity, inclusion, and equity after rejecting the common position that “antitrust can and should be value-neutral, and therefore social problems like racism do not have a role in antitrust enforcement.”²³⁷ Because both the U.S. and the EU, the jurisdictions from which the PCA was modeled, have recognized and acknowledged the role that competition law can play in combating inequality, the PCC may take this as a cue to reassess and consider how it can contribute to addressing social inequities in the Philippines. This will not only make its policy consistent with the jurisdictions from which the PCA was adopted but also, more importantly, its inclusion of public interest considerations, particularly the gender perspective, in its competition policy is consistent with the goal of competition law, which is to enhance economic efficiency, as well as the mandate of the 1987 Philippine Constitution and the international instruments to which the Philippines is bound.

234. *Id.* § 36.

235. PCC Office Circ. No. 2022-003, at 4-5.

236. See E-mail from Christian delos Santos, Director of Competition Enforcement Office, Philippine Competition Commission, to Takahiro Kenjie C. Aman, LL.M. candidate, Kyushu University (June 21, 2022) (on file with Author). In the e-mail, Director delos Santos said, “internally, there is already a policy to promote gender equality in the workplace. However, I am not aware if there is a specific antitrust enforcement policy relating to gender equality.” *Id.*

237. Rebecca Kelly Slaughter, Commissioner, U.S. Federal Trade Commission, Antitrust at a Precipice, Remarks at the GCR Interactive: Women in Antitrust (Nov. 17, 2020) (transcript available at https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf (last accessed Jan. 31, 2023) [<https://perma.cc/LQP5-GP5X>]).

IV. ENGENDERING THE GENDER LENS IN MERGER REVIEWS

Following the emerging consensus on the potential role of competition policy in leveling the playing field between men and women,²³⁸ the following two Chapters explore and considers the possible ways to incorporate a gender perspective into the competitive analysis process.

In this Chapter, the Author demonstrates how using a gender lens can aid the PCC in arriving at a more accurate market definition, which can help them better address the inefficiencies and distortions existing in the market, including gender inequality. Although the market definition is a step in the competitive analysis that is not exclusive to merger review, market definition is discussed in this Chapter as it is more extensively used and much more associated with merger review in Philippine practice.

A. Using the Gender Lens for a Better-Defined Market

The PCC conducts a competitive analysis to determine whether an agreement, conduct, merger, or acquisition results in substantial lessening of competition.²³⁹ Such analysis rises and falls with the PCC's correct and proper definition of the relevant market.²⁴⁰ To conduct a competitive analysis, the PCC must first define the parameters of the relevant market in which it will assess the consequences of an agreement or conduct.²⁴¹ Otherwise stated, the PCC investigates each firm's competitive environment and market power, or the capacity to dictate price and outputs within a relevant market.

The PCA defines the relevant market as "a combination of the relevant product market and the relevant geographic market."²⁴² The relevant product market "comprises all those goods and/or services which are regarded as interchangeable or substitutable by the consumer or the customer, by reason of the goods and/or services' characteristics, their prices[,] and their intended use[.]"²⁴³ Meanwhile, the relevant geographic market is the territory where

238. Santacreu-Vasut & Pike, *supra* note 18, at 4.

239. Philippine Competition Commission, Rules and Regulations to Implement the Provisions of the Philippine Competition Act, Republic Act No. 10667, rule IV, § 1 (2016).

240. *Id.* rule IV, § 1 (a) (1).

241. *Id.* rule IV, § 1 (b) & (c).

242. Philippine Competition Act, § 4 (k).

243. *Id.* § 4 (k) (1).

the competitive conditions are sufficiently similar, in which the substitutable goods or services are supplied.²⁴⁴

Sometimes, using a gender perspective in market definition analysis can be especially useful in evaluating items or services more likely to be influenced by deeply-rooted gender preconceptions.²⁴⁵ Gender can influence preferences, price sensitivity, and propensity to switch between products similar to other consumer characteristics.²⁴⁶ This means that gender can control how much particular products can be considered complements or substitutes.²⁴⁷ Aside from preferences, gender can influence the prices of products that are not clearly differentiated or marketed to a specific group.²⁴⁸ If gender is a determinant of preferences and costs, these disparities may result in gender-segmented relevant markets.²⁴⁹

Despite the lack of a clear policy on the use of gender perspectives in competitive assessment, the European Commission has demonstrated the relevance of gender in market definition in at least two cases.

In the acquisition of Otto of Primondo's assets,²⁵⁰ the European Commission disagreed with the parties when it broadly defined the relevant market to comprise the non-food retail market, which includes home shopping and brick-and-mortar stores.²⁵¹ According to the Commission, the relevant market should be further segmented into: "(i) clothing and footwear[;] (ii) furniture and furnishing[;] (iii) electronics and appliance[s;] (iv) [DIY], home improvement[,], and garden centers[;] (v) health and beauty[;] (vi) toys and games[;] and (vii) sport goods and camping[;]"²⁵² which, in turn,

244. *Id.* § 4 (k) (2).

245. Lisa Pinheiro, et al., *Gender Considerations in the Analysis of Market Definition and Competitive Effects: A Practical Framework and Illustrative Example*, at 6, available at <https://www.oecd.org/daf/competition/gender-inclusive-competition-proj-2-analysis-market-definition-and-competitive-effects.pdf> (last accessed Jan. 31, 2023) [<https://perma.cc/5QCS-38CX>].

246. *Id.* at 4.

247. *Id.*

248. *Id.* at 5.

249. *Id.*

250. *Otto/Primondo Assets*, Eur. Comm'n Dec. Case No. COMP/M.5721 (2010).

251. *Id.* ¶ 16.

252. *Id.* ¶ 19.

should be further subclassified, such that clothes and footwear, for example, can be further subdivided into men's, women's, and children's apparel.²⁵³

In the merger case between Sara Lee and Unilever,²⁵⁴ the European Commission decided that male and non-male deodorants are separate relevant product markets considering that: (1) male deodorants have different features and are marketed differently from non-male deodorants;²⁵⁵ (2) unisex deodorants are also marketed differently from male deodorants;²⁵⁶ (3) there is a strong gender differentiation between male and non-male deodorants across EU's member states;²⁵⁷ (4) retailers separately present male and non-male deodorants in retail outlets;²⁵⁸ and (5) there is a price difference between male and female deodorants.²⁵⁹

Since its establishment in 2016, the PCC had not used the gender perspective in its market definition analysis in any of its cases, particularly in merger review,²⁶⁰ despite a potential opportunity to do so when it approved the acquisition of Avon Products, Inc., a direct-selling company in the beauty, household, and personal care categories, by Natura Holdings, S.A. in 2019.²⁶¹ This global personal care cosmetics group includes The Body Shop.²⁶² To be clear, no definitive claim is being made that the merger transaction would have been decided differently by the PCC if the gender lens had been used in the competitive analysis. This is because the publicly available details about the

253. *Id.*

254. Unilever/Sara Lee, Eur. Comm'n Dec. Case No. COMP/M.5658 (2010).

255. *Id.* ¶¶ 41-45.

256. *Id.* ¶¶ 52-54.

257. *Id.* ¶¶ 46-51.

258. *Id.* ¶¶ 67-69.

259. *Id.* ¶¶ 70-77.

260. E-mail from Krystal T. Uy, Director of Mergers and Acquisitions Office, Philippine Competition Commission, to Takahiro Kenjie C. Aman, LL.M. student, Kyushu University (June 21, 2022) (on file with Author).

261. In the Matter of the Proposed Acquisition by Natura Holdings, S.A. of Shares in Avon Products, Inc., MAO Case No. M-2019-021, Sept. 12, 2019, para. 3, available at https://www.phcc.gov.ph/wp-content/uploads/2019/09/Natura-BodyShop-Avon_CommDecisionNo.-29-M-021-2019_13Sept2019.pdf (last accessed Jan. 31, 2023) [<https://perma.cc/K2NS-3H2E>].

262. See Louella Desiderio, *PCC Approves Avon Buyout by the Body Shop Maker*, PHIL. STAR, Sept. 15, 2019, available at <https://www.philstar.com/business/2019/09/15/1951785/pcc-approves-avon-buyout-body-shop-maker> (last accessed Jan. 31, 2023) [<https://perma.cc/B77N-L5RX>].

transaction cannot sufficiently confirm if the gender lens is applicable in defining the relevant market of the transaction. Nevertheless, it is suggested that moving forward, the PCC's use of the gender lens in its market definition process may aid it in uncovering key market aspects that might have otherwise gone unnoticed.²⁶³

Both supply and demand factors can influence how much gender affects the results of competitive analysis according to economic theory and previous research on gender differences in preferences and purchasing habits.²⁶⁴ Thus, to be better informed in its examination of competitive effects, the PCC may consider including the following suggestions early in its market definition analysis.

When a product or its variants is found to be targeted to a specific gender, the PCC may investigate: (1) the product's attributes, which may include its color, size, or other specific features;²⁶⁵ (2) the product's marketing, which may be seen through the product's description or packaging, or in the placement of its advertisement;²⁶⁶ and (3) the product's sales and distribution channels, which include the geographic locations of the stores where it is sold, where it is positioned within the stores, and how it is sold.²⁶⁷ Meanwhile, on the demand side, the PCC can use the gender lens when decision-makers are of the same gender or when customers demonstrate differing purchase patterns along gender lines.²⁶⁸

Indeed, it cannot be overstated how important it is to ensure that all relevant aspects are included when defining the relevant market for the competitive assessment to be more objective and reflective of reality. This use of gender lens in market definition matters because “[t]he potential consequence of misdefining such markets is that mergers that reduce competition for gendered products might not be challenged, potentially leading to increased price differentials, or that exclusionary practices are permitted on the basis of illusionary competitive constraints from producers of ‘other-gender’ products.”²⁶⁹

263. See generally Pinheiro, et al., *supra* note 245, at 9.

264. Pinheiro, et al., *supra* note 245, at 7 & See Rachel Croson & Uri Gneezy, *Gender Differences in Preferences*, J. ECON. LIT., Volume No. 47, Issue No. 2, at 1.

265. Pinheiro, et al., *supra* note 245, at 9.

266. *Id.*

267. *Id.*

268. See Pike, *supra* note 160.

269. Santacreu-Vasut & Pike, *supra* note 18, at 5.

While the inclusion of the gender perspective does not promise a perfectly defined relevant market, it can, however, lead the PCC to a closer approximation of reality. Hence, a more reliable competitive assessment can be made.

B. Using Merger Review to Address Gender Inequalities

Meanwhile, to promote women's labor market mobility, it is crucial to ensure the efficient and competitive operation of markets critical to women's economic participation, particularly the financial and infrastructure markets.²⁷⁰ Otherwise, if women have less regional mobility, their work options, or even their ability to start a business, are constrained, resulting in more inelastic labor and employers wielding greater market power over them.²⁷¹

In analyzing merger repercussions thus, the PCC, through its Mergers and Acquisitions Office, can consider the impact of mergers and acquisitions on monopsony market dominance over female workers,²⁷² in addition to checking if the product market definition is along gender lines.²⁷³

The considerations mentioned have “distributional and efficiency consequences for market functioning.”²⁷⁴ Indeed, understanding these distinctions brought about by gender differences is necessary for competition authorities to make sound conclusions in their competitive evaluations or market investigations.

V. INCORPORATING THE GENDER PERSPECTIVE IN COMPETITION ENFORCEMENT

In this Chapter, the Author shows how using a gender perspective might help competition enforcers conduct more effective cartel investigations, notably through the more strategic use of the leniency program and compliance

270. *Id.* at 10. See generally Emilia Del Bono and Daniela Vuri, *Job Mobility and the Gender Wage Gap in Italy*, 18 *LABOUR ECON.* 130, 140 (2011) & Pamela J. Loprest, *Gender Differences in Wage Growth and Job Mobility*, 82 *AM. ECON. REV.* 526, 527 (1992).

271. See Santacreu-Vasut & Pike, *supra* note 18, at 12.

272. See *id.* at 19. Having less job mobility results to a higher possibility of monopsony in market power by employers, which in turn, has an inverse relationship with wages, working conditions, and measures to address harassment in the workplace. *Id.*

273. *Id.* at 21.

274. Santacreu-Vasut & Pike, *supra* note 18, at 14.

monitoring. Following that, the Author shows how competition enforcement, through filing abuse of dominance charges to address unjustifiable gender-based pricing discrimination and competition advocacy, can be utilized to minimize gender inequality in markets.

A. Using the Gender Lens to Enhance Efficiency in Cartel Investigations

Since its establishment in 2016, the PCC has yet to prosecute and decide a case on a violation of Section 14 of the PCA, which involves cartels — and understandably so.²⁷⁵ Cartels are unique in that their operators work in secret, making it difficult to prove the existence of their anticompetitive agreement.²⁷⁶ In addition, competition enforcers have difficulty finding direct evidence to prove the agreement's existence as cartel members are usually uncooperative.²⁷⁷

Cartels are traditionally viewed as an economic phenomenon where cartels decide to engage in a collusive agreement based on rationality.²⁷⁸ However, cartels are formed through social interactions of people who meet to collaborate rather than compete with one another.²⁷⁹ These people who carry out cartel behavior, it should be noted, are human agents whose behavior is “intricate, multifaceted, and may precisely vary depending upon situational variables”²⁸⁰ and is heavily influenced by non-rational elements such as culture, social norms, personal interests, environment, and community, among others.²⁸¹ Indeed, it has been observed in practice that, more than “objective discussions on prices, clients[,] and other competitive variables,”²⁸² efficient collusion is achieved by relying on social norms such as “loyalty, trust, respect

275. See Philippine Competition Act, § 14.

276. Organisation for Economic Co-operation and Development, June 2007 Policy Brief, at 1, available at <https://www.oecd.org/competition/cartels/38704302.pdf> (last accessed Jan. 31, 2023) [<https://perma.cc/J3HU-UKPN>].

277. *Id.*

278. Carolina Abate & Alexis Brunelle, Cartel Behavior and Boys' Club Dynamics: French Cartel Practice Through a Gender Lens, at 4-5, available at <https://www.oecd.org/daf/competition/gender-inclusive-competition-proj-3-cartel-behaviour-and-boys-club-dynamics.pdf> (last accessed Jan. 31, 2023) [<https://perma.cc/LP7D-APE4>].

279. *Id.* at 2.

280. *Id.* at 5.

281. *Id.* at 4 (citing Emmanuel Combe & Constance Monnier-Schlumberger, *Fight Against Cartels and Behavior of Managers*, 4 CONCURRENTS 51, 59 (2016)).

282. Abate & Brunelle, *supra* note 278, at 5.

for precedent[,] and preservation of the respectability of the profession as a whole.”²⁸³ These social norms are critical to the formation and maintenance of cartel agreements.²⁸⁴

To improve the effectiveness of its investigations, the PCC must, through its Competition Enforcement Office, understand cartels through their social context, including their origin and development,²⁸⁵ and explore the extent to which these situational circumstances and informal dynamics contribute to illegal behavior to aid the PCC in better resolving its cartel investigations and in finding ways to make deterrence more effective.²⁸⁶

According to recent studies, gender preconceptions and biases are reproduced in human organizations²⁸⁷ and influence how people connect, share information, and make decisions.²⁸⁸ These gender differences become so entrenched in the inner workings of organizations that they take on the character of ideological hegemony.²⁸⁹ As a result, giant corporations are

283. *Id.*

284. *Id.* at 6.

285. *See id.*

286. *Id.* *See also* Sandy Haantz, Women and White Collar Crime, at 2, available at https://jpsimsconsulting.s3.amazonaws.com/cms_page_media/44/Women%20and%20White-Collar-Crime.pdf (last accessed Jan. 31, 2023) [<https://perma.cc/39GD-KCM5>].

287. *See generally* Paul Healy & George Serafeim, *Agency Costs and Enforcement of Management Controls: Analyzing Punishment for Perpetrators of Economic Crimes* (Mar. 20, 2018) (on file with the Harvard University Baker Library) (where analyses show that the degree of punishment vary depending on gender in firms that operate in countries with greater gender inequality, among others).

288. *See generally* Iain Clacher, et al., Not Just a Boys’ Club: Gender and Private Information Channels for Insider Trading, at 1, available at <https://scholarspace.manoa.hawaii.edu/server/api/core/bitstreams/44e6286a-4d68-4361-ae09-4c6734c2c339/content> (last accessed Jan. 31, 2023) [<https://perma.cc/NMQ7-GA54>] (where analyses show that a top executive’s gender affects the extent of information asymmetry within a firm).

289. Abate & Brunelle, *supra* note 278, at 9 (citing Karen D. Pyke, *Class-Based Masculinities: The Interdependence of Gender, Class, and Interpersonal Power*, 10 GENDER & SOC. 527, 529 (1996)).

functionally “gendered organi[z]ations” that reproduce the gender biases in society.²⁹⁰

These observations on organizations may likewise be applied to cartels.²⁹¹

A recent study found that a lack of gender diversity among organizations strongly predicts the creation and maintenance of cartels.²⁹² This is because the ability to join cartels is determined by social norms and the mechanics of networks that men heavily dominate.²⁹³ Indeed, when 68 cartel cases decided by the French Competition Authority from 2010 to March 2021 were reviewed and analyzed, it was found that 74% of sanctioned cartels were started, at least in part, on informal networks with a “core coalition” of people who exhibit numerous distinct features of a “boys’ club.”²⁹⁴ These “boys’ clubs” are powerful, male-dominated networks whose members wield significant resources and influence inside the economic sectors in which they operate.²⁹⁵ These robust, informal networks build interpersonal links that span enterprises, allowing their participants to coordinate their actions and limit cartel detection.²⁹⁶

It was further found that women are frequently perceived as “outsiders”²⁹⁷ or “potentially disruptive mavericks”²⁹⁸ and are often excluded from safeguarding the cartel’s informal predictability, a characteristic of boys’ club critical for collusive crimes.²⁹⁹ And, even when women are “allowed into the club,” they are relegated to mere “secretarial duties,” even if they rank higher than their male counterparts.³⁰⁰ Furthermore, despite their prominent position

290. Abate & Brunelle, *supra* note 278, at 9 (citing Jeff Hearn & David L. Collinson, *Men, Masculinities, and Gendered Organizations*, in OXFORD RESEARCH ENCYCLOPEDIA OF BUSINESS AND MANAGEMENT 4-5 (Donald Bergh, ed., 2017)).

291. Abate & Brunelle, *supra* note 278, at 9.

292. *Id.* at 3.

293. *Id.* at 22.

294. *Id.* at 11.

295. *Id.* at 23.

296. *Id.*

297. Abate & Brunelle, *supra* note 278, at 13-14.

298. *Id.* at 22.

299. *Id.* at 21.

300. *Id.* at 16 fig. 3.

in the organization, women are typically limited to organizational functions and are excluded from general strategic discussions.³⁰¹

These data imply that the persistent gender imbalance is a significant risk factor for cartel behaviors and that it should be a key focus of competition authorities, including the PCC.³⁰²

Kristy Holtfreter found, after researching the role of gender in white-collar crime, that gender-informed white-collar crime research is not only theoretically essential but also critical for the development and progress of crime prevention initiatives.³⁰³ By analogy, it is proposed that a gender-informed competitive analysis could contribute to developing more effective competition law enforcement strategies.

The PCC should prioritize its investigations by considering firms' gender structure and other behavioral variables.³⁰⁴ Given that cartels are formed and maintained through informal networks, the Commission should also consider expanding its investigation and monitoring activities to "more informal networks such as alumni associations, local business groups, sports and cultural associations, or charities,"³⁰⁵ which can be very fertile ground for "boys' clubs."

B. Using the Gender Perspective to Encourage Whistleblowing and Use of Leniency

According to research, women are more likely than men to report corporate misconduct, financial fraud, or environmental misconduct to law enforcement.³⁰⁶ More research, however, is needed to back up this claim. For one thing, the rationale for this discovery is yet unknown. Some argue that

301. *Id.*

302. *Id.* at 24.

303. Kristy Holtfreter, *General Theory, Gender-Specific Theory, and White-Collar Crime*, 22 J. FIN. CRIME 422, 429 (2015).

304. Abate & Brunelle, *supra* note 278, at 24 (discussing competition authorities should take into account gender structure of firms and other behavioral considerations when conducting investigations).

305. *Id.* at 25.

306. Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1177 (2010) (citing Yuval Feldman & Orly Lobel, *Decentralized Enforcement in Organizations: An Experimental Approach*, 2 REG. & GOVERNANCE 165, 179 (2008)).

this is because women are purportedly more altruistic,³⁰⁷ inequity-averse,³⁰⁸ and risk-averse³⁰⁹ than men, and therefore they focus more on the potential consequences of wrongdoing.³¹⁰ Meanwhile, others suggest that the difference in attitude between men and women towards corporate fraud is attributable to their differences in negotiation styles³¹¹ and taste for competition.³¹² For another, some studies seem to suggest otherwise.³¹³ Abate and Brunelle's latest 2021 study, however, appears to support the prior hypothesis that women may be more likely to blow the whistle due to their inclination "to adhere to the structure and the values of more formal networks[.]" which often benefit women's professions.³¹⁴

Moreover, studies also show that women's "propensity to whistle-blow" is also affected by "the inclusion of anti-retaliation provisions and confidentiality assurances in whistleblowing policies, and the establishment of

307. See Croson & Gneezy, *supra* note 264, at 8–9 (where research studies are revisited to prove that social preferences strongly manifest themselves in men and in women in that female participants exhibit altruistic and risk-averse behaviors).

308. See Ernst Fehr, et al., *Inequality Aversion, Efficiency, and Maximin Preferences in Simple Distribution Experiments: Comment*, 96 AM. ECON. REV. 1912, 1912 (2006) (where results of E&S experiments show that gender has a nonnegligible effect on inequality aversion, indicating that women are more egalitarian than men).

309. See Croson & Gneezy, *supra* note 264, at 1.

310. Constantine Cannon, Are Women More Likely Than Men to Be a Whistleblower?, available at <https://constantinecannon.com/whistleblower/whistleblower-insider-blog/women-likely-men-whistleblower> (last accessed Jan. 31, 2023) [<https://perma.cc/4EE7-9KW5>].

311. See Bowles, et al., *supra* note 173, at 89 (where experiment conducted supports the finding that women who negotiate their compensation are more likely to be reluctant in doing so because evaluators penalize them).

312. See Muriel Niederle & Lise Vesterlund, *Do Women Shy Away from Competition? Do Men Compete Too Much?*, 122 Q. J. ECON. 1067, 1097 (2007) (where results of an experiment show that women are less likely to join a competitive tournament than men despite having equal skills and ability).

313. See, e.g., Klaus Ulrich Schmolke & Verna Utikal, *Whistleblowing: Incentives and Situational Determinants* (Sept. 2016) (on file with the University Library of Erlangen-Nuremberg) (where results of experiments show that men are more likely to whistleblow than women due to the level of sanctions, the "false consensus" effect being more prevalent in men).

314. Abate & Brunelle, *supra* note 278, at 22 (citing J. Yo-Jud Cheng, et al., *Directors' Perceptions of Their Board's Effectiveness and Internal Governance*, 67 MGMT. SCI. 6399, 6403 (2021)).

a duty to report” with a corresponding sanction for failure to report, which are found to elicit less response from men.³¹⁵ Financial incentives, however, successfully encourage both men and women to blow the whistle,³¹⁶ with the deterrent impact increasing as the amount increases.³¹⁷

Be that as it may, despite these studies and assertions having yet to attain conclusiveness, these findings on the differences in sensitivities of men and women to incentives should compel the PCC to consider focusing their efforts on women as potential whistleblowers in their cartel investigations. Hence, the Commission should begin reexamining the PCA and its rules and regulations, particularly its rules on leniency, if the gender perspective can be accommodated within the current framework. Otherwise, it should begin reconsidering and reassessing if the program needs redesigning.³¹⁸

The PCC’s current Rules on its Leniency Program (Leniency Program Rules)³¹⁹ provide a participant or former participant of an anticompetitive agreement under PCA Sections 14 (a) and (b) with immunity from suit or a reduction in administrative fines in exchange for disclosing information regarding the agreement.³²⁰

315. Santacreu-Vasut & Pike, *supra* note 18, at 26.

316. *Id.*

317. *Id.*

318. Neves, *supra* note 17.

319. Philippine Competition Commission, Rules on the Leniency Program of the Philippine Competition Commission, *available at* <https://www.phcc.gov.ph/wp-content/uploads/2018/12/Leniency-Rules-Clean-Version.pdf> (last accessed Jan. 31, 2023) [hereinafter Leniency Program Rules].

320. *Id.* § 1. Section 1 of the Rules of the Leniency Program of the PCC provides —
Section 1. *Leniency Program.* The Leniency Program of the PCC offers the benefit of leniency in the form of immunity from suit or reduction of administrative fines to an entity that was or is a participant in an anticompetitive agreement as defined in Section 14 (a) or 14 (b) of the Act in exchange for the entity’s voluntary disclosure of information regarding such agreement subject to the requirements provided herein. Immunity from suit includes immunity from administrative and criminal liability arising from Section 14 (a) or 14 (b) of the Act. Immunity from suit likewise includes immunity from civil actions initiated by the PCC on behalf of affected parties and third parties.

While a “financial incentive” in the form of a reduced administrative fine is offered to a potential whistleblower, this only becomes an “incentive” if the PCC can build a strong case against the cartel,³²¹ which, as previously explained, is usually made possible only if someone steps forward and cooperates with the competition enforcer considering the unique context of cartels. In short, a chicken and egg — as the financial incentive provided by PCC does not persuade a cartel member to come forward because there is no practical benefit to speaking up rather than remaining silent.

A quick perusal of the PCC’s rules reveals that no explicit provision requires anyone with information about any cartelistic behavior to notify the PCC. Also, while Section 10 of the Leniency Program Rules provides a general assurance of confidentiality of the whistleblower’s identity, such commitment is conditional on the PCC’s determination of the necessity of the whistleblower’s sworn testimony for the successful prosecution of the administrative, criminal, or civil cases filed about the anticompetitive agreement.³²²

Furthermore, while there is a guarantee that a whistleblower will not face administrative, criminal, or civil liability in connection with the agreement, this guarantee is only given to a whistleblower who may provide information to the PCC.³²³ At the same time, the PCC has yet to receive such information

The amount of reduction of administrative fines which the entity shall be eligible for shall be in accordance with the appropriate guidelines and other issuances of the PCC.

Id.

321. *Id.* § 4.

322. *Id.* § 10. Section 10 of the Rules of the Leniency Program of the PCC provides

Section 10. *Confidentiality.* The identity of an entity applying for leniency as well as those who have been granted leniency, conditional or otherwise, shall be confidential and shall not be disclosed by the PCC unless the PCC determines that such entity’s sworn testimony or sworn statement is necessary for the administrative or criminal case(s), or the civil case filed by the PCC before the appropriate courts, in relation to the reported violation.

Id. (emphasis supplied).

323. Leniency Program Rules, § 5. Section 5 of the Rules of the Leniency Program of the PCC which states that

...

from any other source.³²⁴ Moreover, such assurance is only offered to the first whistleblower who applies for leniency, which is not disclosed. Thus, immunity is not guaranteed to a whistleblower unless the PCC informs them that: (1) the given material is new and (2) the whistleblower is the first entity to come forward to the PCC to submit such information. Because the whistleblower has no method of validating the integrity of such PCC assertions, the risk of being charged despite freely disclosing information about cartel activities substantially surpasses the apparent benefits of such disclosure. According to recent studies, women will not be encouraged to blow the whistle³²⁵ in the current version of the PCC's Leniency Program Rules.

Finally, although Section 12 of the Leniency Program Rules states that any entity that commits any form of reprisal or discrimination against a whistleblower shall be penalized with a fine of not less than ₪50,000 up to

[t]he PCC shall issue a marker to the entity indicating the date and time the request for a marker was made and the description of the anti-competitive agreement reported. A marker is necessary to protect an entity's place in the queue for applicants under the Leniency Program and allows the entity an initial period of thirty (30) days within which to gather and submit information and evidence.

...

If the entity fails to submit the information and evidence within the allowed period, the succeeding entity in the marker queue that submits the information and evidence in a timely manner shall be considered for the benefit of immunity from suit or reduction of fines, as the case may be.

Id.

324. *Id.* § 3. Section 3 of the Rules of the Leniency Program of the PCC provides —

Section 3. *Immunity from suit.* An entity reporting an anti-competitive activity under Section 14 (a) or 14 (b) of the Act before a fact-finding or preliminary inquiry has begun shall be eligible for immunity from suit subject to the following conditions:

- (a) At the time the entity comes forward, the PCC has not received any information about the activity from any other source. For purposes of these Rules, 'any other source' shall mean an entity that has been granted conditional immunity from suit[.]

...

Id.

325. See generally Schmolke & Utikal, *supra* note 313.

₱2,000,000.00,³²⁶ which arguably is not a sufficient amount to deter cartel members from retaliating against whistleblowers, there is no explicit provision in the Leniency Program Rules regarding the Commission's protection of whistleblowers from such retaliation from cartel members.

In short, according to the findings of previous studies, the PCC's current version of the Leniency Program Rules does not appear to meet the incentives that would elicit a response from potential whistleblowers, particularly women. As Santacreu-Vasut and Pike pointed out, using a gender perspective implies that whistleblowing legislation should include provisions encouraging women to report cartel activities.³²⁷ The PCC, thus, can increase the effectiveness of its cartel investigations by putting these findings to the test by redesigning its leniency program to allow the use of a gender lens.

Informed of the findings about most cartels' "boys club" conduct and women's greater propensity to blow the whistle, the PCC can advocate for increased gender diversity on corporate board directors.³²⁸ Doing so may

326. Leniency Program Rules, § 12 (b). Section 12 (b) of the Rules of the Leniency Program of the PCC states that

[a]ny entity that commits any form of reprisal or discrimination against anyone cooperating or furnishing information, documents, or data to the PCC in connection with an investigation or proceeding being conducted, shall, after due notice and hearing, be subject to a penalty in accordance with Section 6.12 of the 2017 Rules of Procedure of the PCC.

Id.

Meanwhile, Section 6.12 of the 2017 Rules of Procedure of the PCC states that

[a]ny entity that commits any form of reprisal or discrimination against anyone cooperating or furnishing information, document, or data to the PCC in connection with an Investigation or proceeding being conducted, shall, after due notice and hearing, be penalized with a fine of not less than fifty thousand pesos (₱50,000.00) up to two million pesos (₱2,000,000.00).

Philippine Competition Commission, Rules of Procedure of the Philippine Competition Commission [2017 Rules of Procedure of the Philippine Competition Commission], rule VI, § 6.12 (Sept. 11, 2017).

327. Santacreu-Vasut & Pike, *supra* note 18, at 26.

328. See generally Joan-Ramon Borrell, et al., Gender Bias in Cartel Management: The Role of Gender in Management Boards and How to Take the Role of Gender into Account When Designing Competition Law Enforcement, *available at* <https://www.oecd.org/daf/competition/gender-inclusive-competition-proj-4->

modify the dynamics that shape persistent cartel behavior,³²⁹ reducing the chance of corporate fraud and misconduct³³⁰ while boosting the likelihood of compliance with competition law.³³¹

C. Prosecuting Gender-Based Price Discrimination Through Abuse of Dominance Suits

As previously discussed, women pay higher purchase prices than men for the same items.³³² Price discrimination, *per se*, is not viewed negatively in economics as it can be profitable in cases where the price elasticities of the demand for a product or service differ in two or more markets.³³³ Thus, traditionally gendered products such as personal care products and clothing, while used by both genders, “women’s” versions are often priced higher as women allegedly value these products more and are more willing to pay higher for them.³³⁴

Even when these pricing disparities are justified based on the above, they are typically enforced on women, despite not having any control over the ingredients used in the products marketed to them, resulting in a more

gender-bias-in-cartel-engagement.pdf (last accessed Jan. 31, 2023) [<https://perma.cc/B9U2-K74P>] (where it emphasizes the importance of gender diversity in top corporate decision-taking and management bodies of companies).

329. Abate and Brunelle, *supra* note 278, at 22.

330. See generally Aida S. Wahid, *The Effects and Mechanism of Board Gender Diversity: Evidence from Financial Manipulation* (Dec. 22, 2017) (on file with the University of Toronto Milt Harris Library) (where it is found that gender-diverse top corporate decision-making bodies are less prone to financial misconduct).

331. Justus Haucap, et al., *Gender and Collusion*, at 3, available at <https://www.oecd.org/daf/competition/gender-inclusive-competition-proj-5-gender-and-collusion.pdf> (last accessed Jan. 31, 2023) [<https://perma.cc/G4ZH-LMAP>].

332. Santacreu-Vasut & Pike, *supra* note 18, at 4.

333. See Eric T. Anderson & James D. Dana, *When Is Price Discrimination Profitable?* (Center for the Study of Industrial Organization Working Paper No. 0072), at 26-27, available at <https://www.econstor.eu/bitstream/10419/38645/1/50520701X.pdf> (last accessed Jan. 31, 2023) [<https://perma.cc/M45T-PFC3>] (This shows that price discrimination becomes profitable if the ratio of the marginal social value from an increase in quality to the total social value of the goods is equivalent to an increase in consumers’ willingness to pay).

334. de Blasio & Menin, *supra* note 175, at 30.

significant financial burden.³³⁵ In another study undertaken by the New York City Department of Consumer Affairs on gender pricing of goods in New York City across multiple industries reveals that while men's and women's personal care products do not have comparable ingredients, this variation is not the primary cause of price differences.³³⁶ Instead, the research and development costs in manufacturing the product are not allocated evenly but are borne more heavily by women than men.³³⁷ The imposition of most of the financial burden on women was thus a choice made by the manufacturers and retailers, which women may rarely escape because their purchasing options are limited to what is only accessible in the marketplace.³³⁸

Taking its cue from this study, the PCC can also look at the price-discriminated products and services in the Philippines and investigate the causes of the persistence of price discrimination over these products and services: is the continuation of such price discrimination indeed due to segmented markets or is it due to the firms' exploitation of consumers' behavioral biases?³³⁹ In the latter instance, presuming that Filipino women consumers are confined to products available on the market, the PCC may consider bringing a case against such gender-based pricing discrimination under Section 15 (d) of the PCA.³⁴⁰ Moreover, the PCC, now informed of

335. *Id.* at 34.

336. *Id.*

337. *Id.*

338. *Id.* at 40.

339. See Santacreu-Vasut & Pike, *supra* note 18, at 4-5.

340. See Philippine Competition Act, § 15. Section 15 of the Philippine Competition Act provides —

SEC. 15. *Abuse of Dominant Position.* — It shall be prohibited for one or more entities to abuse their dominant position by engaging in conduct that would substantially prevent, restrict[,] or lessen competition:

[...]

- (d) Setting prices or other terms or conditions that discriminate unreasonably between customers or sellers of the same goods or services, where such customers or sellers are contemporaneously trading on similar terms and conditions, where the effect may be to lessen competition substantially: *Provided*, That the following shall be considered permissible price differentials:
 - (1) Socialized pricing for the less fortunate sector of the economy;

the role of gender in the gender pricing of goods and services, may apply potential demand-side remedies to promote competitive incentives and achieve improved market results.³⁴¹

D. Dovetailing Competition Advocacy with Promotion of Gender Equality

The persistence of gender disparities is a significant risk factor for cartel tactics and the prevalence of market distortions and inefficiencies.³⁴² As a result, competition authorities should carefully consider including a gender perspective in their advocacy and compliance efforts.³⁴³

The PCC should look at how the current system of measurement and limits used to assess potential anticompetitive consequences could be changed to account for gender or other aspects of people's identities that may influence market dynamics.³⁴⁴ When establishing or revising a regulation or policy, it should also perform both gender and more general competition audits to ensure that their impact is evaluated.³⁴⁵

As there is a growing interest in evaluating how competition might affect labor market inequalities,³⁴⁶ the PCC can also analyze further and promote competition in sectors that are particularly relevant for leveling the playing

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- (2) Price differential which reasonably or approximately reflect differences in the cost of manufacture, sale, or delivery resulting from differing methods, technical conditions, or quantities in which the goods or services are sold or delivered to the buyers or sellers;
 - (3) Price differential or terms of sale offered in response to the competitive price of payments, services[,] or changes in the facilities furnished by a competitor; and
 - (4) Price changes in response to changing market conditions, marketability of goods or services, or volume[.]

Id.

341. Santacreu-Vasut & Pike, *supra* note 18, at 20.

342. See Borrell, et al., *supra* note 331, at 3.

343. Pinheiro, et al., *supra* note 245, at 24.

344. See *id.*

345. See Pike, *supra* note 160.

346. Pinheiro, et al., *supra* note 245, at 23.

field across genders, particularly the informal, finance, and infrastructure markets.³⁴⁷

As it was said with other competition authorities, these minor adjustments to the PCC's enforcement and advocacy policies could significantly influence the promotion of gender equality and discourage anticompetitive behavior.³⁴⁸

VI. CONCLUSION

Gender is generally ignored in competition policy.³⁴⁹ The fact that gender disparities may have an impact on the market operation was disregarded by competition policy. A growing recognition among academic, corporate, and policy professionals of a possible link between gender and competition, however, has led to the discovery of a bidirectional relationship between competition and gender, such that competition policies may influence gender inequality while the existence of gender inequality and the use of a gender perspective in competition enforcement may impact competition enforcement. This finding implies two things: First, because gender influences competition, a competition authority's failure to consider gender in its competitive analysis or investigation may result in a misappreciation of the features of the markets, preventing it from implementing the appropriate action or remedies for each market; and second, because competition policies can influence gender, a competition policy that incorporates a gender perspective can contribute to the reduction of gender inequality.

Competition authorities, however, are generally hesitant to use the gender perspective in their enforcement of competition law. It has long been held that the pursuit of market efficiency, which is the generally accepted objective of competition law, should be exclusive of public interest considerations to maintain objectivity and protect it from several alleged risks such as "counterproductive outcomes, overt politici[z]ation, or even corruption."³⁵⁰ As might be concluded from its actions and issuances, the PCC appears to have this perspective.

But as demonstrated in this Article, such a stance disregards the mandate of various international responsibilities to which the Philippines has committed itself as a state party, as well as the constitutional mandate that the

347. See Santacreu-Vasut & Pike, *supra* note 18, at 4.

348. See Pinheiro, et al., *supra* note 245, at 24.

349. Naidu & Nxumalo, *supra* note 5.

350. Dunne, *supra* note 2, at 264 (citing de Pablo, *supra* note 3, at 148).

Philippine competitiveness policy is based on achieving many public interests.³⁵¹

Furthermore, even if it poses significant risks, the quest for fairness should not be overlooked, especially because, as de Pablo stated, fairness is at the heart of competition law —

Most, if not all, competition experts converge on the main values underpinning competition law. We cherish economic freedom and we agree that ensuring equality in the competitive process (equality of opportunities or competition on the merits) is an indispensable precondition for such freedom to exist; hence, the focus is on the protection of the competitive process and on the removal of barriers to entry. There is also the consensus that a non-rigged competitive process — ‘a system of undistorted competition’ in the words of the TFEU — yields the best economic outcomes.

In this sense, competition law should not — and does not need to — be diverted to pursue fairness because it is already about fairness. The very notion of merit-based competition carries implicit in it a sense of fairness, understood as equality of opportunity, for what is the sense of a competition if the game is rigged, if some enjoy advantages over others, if not all have a chance?

Fairness, in other words, is not an abstract standalone goal liable to divert or distort a correct enforcement of the law, but rather its natural outcome.

Protecting the competitive process will naturally benefit all participants in the process, consumers, counterparties, employees, and society overall. *The sound application of competition law will often result in a more efficient economy, but this is not the point of the discipline; what ultimately matters is that the application of competition law has a good chance of resulting in a fairer society.*³⁵²

Nevertheless, even if the PCC does not accommodate public interest in its competition policy, the PCC should still incorporate the gender viewpoint in its PCA implementation because doing so would not deviate from its goal of promoting economic efficiency. On the contrary, using a gender lens could increase the PCC’s efficiency in implementing the PCA by allowing the PCC to discover market distortions and inefficiencies that can only be exposed through gender-related social and behavioral studies. As a result, it is ensured that a more correct and accurate market definition will be adopted, that more proper and appropriate remedies will be structured, and that a more effective enforcement investigation and compliance process will be implemented.

351. See Philippine Competition Act, § 2.

352. de Pablo, *supra* note 3, at 148 (emphases supplied).

Consequently, a double dividend is obtained in which market distortions and inefficiencies are decreased while gender inequality is also addressed.

The difficulties in incorporating gender-related concerns into an already complex set of criteria that the PCC and other competition authorities today are encouraged to account for while carrying out their mandates are not unrecognized.³⁵³ In this age of tremendous interconnectedness, however, rules and policies can no longer be treated *in silos*. Competition authorities, including the PCC, should place competition law in a broader economic, political, and social context, and derive policies from a more holistic set of policies and aims.³⁵⁴ Indeed, competition laws are designed to protect consumers — who are also employees, entrepreneurs, citizens, and human beings.

The Vestager Effect has already swept the EU and it has now made its way into the United States. The Author can only hope that it reaches Philippine shores soon.

353. See generally William E. Kovacic, Incorporating Gender as a Prioritization Principle and Project Selection Criterion in Competition Agencies, at 8, available at <https://www.oecd.org/daf/competition/gender-inclusive-competition-project-7-incorporating-gender-as-a-prioritization-principle.pdf> (last accessed Jan. 31, 2023) [<https://perma.cc/2HYY-9A4U>] (This recognizes the various factors that could affect enforcement that is encouraged to be considered by competition authorities, such as historical awareness, among others.).

354. *Id.* at 2.