

Kluwer Competition Law Blog

Feminist Antitrust

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In 2021, an insightful interviewer asked Margrethe Vestager, EU Commissioner for competition law and policy, whether it was “*time for a feminist antitrust policy*”. The interviewer noted that “*feminist policy has been used to denote not just gender equality, but an approach that is more inclusive of all underrepresented people*”. In her answer, Vestager set out a number of important ways in which current (EU) competition law enforcement takes gender prominently into account. However, the gist of this question, namely what role feminism and its rich and multi-faceted scholarship could play in competition law and policy, remained unanswered.

In a recent paper, I aim to answer this question by showing what a feminist approach to competition law and policy is, and what its contribution can be to its body of knowledge.

Feminist social science approaches

By drawing on feminist legal theory, feminist economics and feminist political economy, I show how feminist approaches probe the alleged “*neutrality*” and “*objectivity*” of competition law and unpack the gendered nature (and impact) of its underlying concepts and enforcement practices. I investigate which gender-based consequences the application of these rules and concepts may have and how policymakers and enforcers could implement gender into the substantive analysis of specific cases as well as into the procedures and institutional arrangements in the enforcement of competition law.

I argue that by adopting a feminism-grounded analytical lens competition law could not only be more gender inclusive but also make an opening to other types of inclusion.

The power of feminist social science approaches lies in their objective to uncover the hidden, silenced and invisible experiences women and marginalized communities face in societies, and their theoretical sensitivity to voice, subjectivity, narratives and power relations. Feminists bring to “*audibility and visibility zones, the voices, experiences, and knowledge of women, which were marginalized by conventional social science.*”

Despite increasing attention from academics and policymakers concerning the intersection of gender equality and competition law, most debates and discussions merely add gender to the analytical framework of the substantive analysis, but they do not investigate how legal rules, formal and informal institutions and enforcement practices implant gender divisions that deeply

bifurcate the structure of modern society. Consequently, the impact of gendered social institutions, power differences and dynamics on people's preferences, choices and decisions in the marketplace remain outside of such discussions. In this way, the core of feminist social science research focusing on gendered social realities remains a blind spot in current debates and discussions in competition law.

Remarkably, a similar blind spot exists in the diverse strands of feminist social science research, notably feminist legal and economic scholarship that has already been applied to various legal fields including constitutional law, international law, family, contract and labour law, but has engaged less thoroughly with the legal frameworks structuring market processes. Therefore, competition law has been a blind spot in these investigations so far.

By going beyond gender equality issues, feminist social science researchers show how mainstream normative theories of social justice, well-being or inequality remain focused on male experiences and interests while ignoring the existence and relevance of gendered social institutions, gender roles, power differences and the (re)production of various forms of inequalities. Gender is a social construct, and is structurally embedded in society and intertwined with gendered policies, laws, institutions, and other social practices. Critiquing the role of law in constituting social meanings of gender and how gendered biases are embedded in seemingly "neutral" and "objective" legal norms, structures, processes and methods is a fundamental contribution feminist researchers have made over the course of the past decades.

Feminism is an interdisciplinary approach that analyses issues of equality and equity based on gender, and gender identity, as understood through social theories and political activism. Feminism is a multi-faceted project, with many schools focusing on different ideologies, identities, and experiences. By adopting different approaches they describe, analyse, and challenge the social, legal, and economic power dynamics that are constituted within and across societies, and how inequalities are produced. Nevertheless, they all converge in their goal of challenging gender inequalities in law and society and interrogating inequities along the intersectional lines of ability, class, gender, race, sex, and sexuality. Research grounded in feminist theories is an intellectual practice that raises new questions, gathers new data, and poses fundamental challenges to academic disciplines, including social sciences. It investigates and explains the complexity of human social, economic, and political organization, combining a search for universal themes with attention to the diversity and historical specificity of human outcomes.

Far from being a 'unitary project', the feminist research method is distinctive from other social science research methods by having its central focus on gender and by its objective to overcome the invisibility and distortion of the female experience. It questions the traditional social science research and a major part of the existing body of knowledge, that is produced from the male perspective while subjugating knowledge on women. Hence, it provides a critical analysis of law and assessment of its social impact by exploring diverse understandings of social reality about women's socio-economic position, raising consciousness for initiating social transformation that promotes gender justice and change in favour of women.

The complexity of the economy

Importantly, feminists take a contextualized lens and draw attention to the complexity of the

economy, economic activities and the embeddedness of markets in broader social, economic and political contexts. Their analysis is **multidimensional and pluralist**, with a strong focus on human diversity and intersectionality.

Feminist approaches go beyond adding gender to the analysis and investigate the deeper layers of legal rules, economic models and enforcement practices that entrench gendered power structures, dynamics, and institutional arrangements and (re)produce various forms of inequalities. By investigating **markets' embeddedness in social relations** and relations to other non-market sectors, feminist economists and feminist political scientists point out how markets are underpinned by gendered biases, for example, in the case of **pink taxes that involve gendered price discrimination**, or how concentrated economic power can be a **reflection of social dynamics and existing structural economic inequalities**. As Nancy Folbre compellingly argued “*[a] narrow definition of the economy leads to a narrow definition of exploitation*” something that directly speaks to concerns competition lawyers have with regard to analysing market power.

Feminists' analytical lens is, in fact, intimately related to the analytical lens of competition law. The focus of their analysis concerns power structures and dynamics, and they investigate how various social and economic actors are impacted by these power inequalities and strive to control excessive power and change existing social, economic, and political structures. However, the site and scope of their analysis differ. Competition law is concerned with market processes, economic structures, and activities and with economic power and its consequences on the competitive process. Feminists, however, repeatedly and forcefully called attention to those activities, processes and arrangements that lie **outside of the market and the economy**, and analysed how power and its allocation in and outside of markets impact women and vulnerable people. At its roots, feminism is **about equal rights** and at its core, it is about **redistributing power**.

As women's experiences (often fundamentally) vary, and their social positions are **shaped by multiple forms of injustice at the intersection** of gender, race, social position, and geographic location, feminist theories show how gender, in complex intersection with other identifying characteristics, has been a core element in distributing resources among individuals in society.

Feminist competition law

These perspectives provide an opportunity to broaden the legal and economic inquiry currently applied in competition law, and to rethink its role in markets and society and its relationship with the state and society. Feminist social science is one way to re-imagine how competition law and policy could become more inclusive in its analysis, and enforcement and ultimately, contribute to inclusive and sustainable growth in societies.

Feminist approaches help to unpack the wide diversity of roles and functionalities that markets and the process of competition may have in human society. By critiquing a universal concept of the market, and regulation of competition, they reveal the existence of multiple forms of “*market competition*” and, that (competition) law does not lie in a particular ‘**sovereignty**’ **but in pluralism** as a way to conceptualise and regulate market competition.

By taking a contextualised lens and by drawing attention to the complexity of the economy, economic activities and the embeddedness of markets in broader social, economic and political contexts, feminism provides a novel methodology to reassess allegedly “*neutral*” and objective

competition rules, economic models and enforcement practices. Through its multidimensional and pluralist analytical lens, with a strong focus on human diversity and agency, feminists challenged mainstream economic accounts of markets and market actors and emphasised the importance of social norms in affecting both the process and the outcome of economic processes. In contrast to neoclassical economists, feminist economists have underlined [the embeddedness of markets](#) in geographically- and historically-specific social relations and their relations to other non-market sectors. Arguing that a market economy is always “*embedded*” into “*the other economy*”, they contend that markets are based on power structures and the invisible labour of women and, hence form a system of exploitation that conceives labour as a source of wealth and accumulation.

From such feminist perspectives, market competition and the logic of the ideal market economy system, are assumptions based on economic rationality as gender-neutral, preferences as given and stable, and not as cultural constructions, and the trust in markets to solve gender inequalities.

By criticising these standard behavioural assumptions in mainstream economics, they reject the assumption that economic agency is fully driven by the [rational economic man](#). *Feminism “confronts” the homo economicus* as an independent, unembedded economic agent without unpaid care responsibilities. This is, at the same time, a critique of the sovereign consumer as a neo-liberal construct and ideological conceptualisation, which has been especially influential in competition laws over the past three decades. Portrayed as coherent, homogeneous and predictable mass, consumers have been [instrumental as a tool of narrow consumer welfare](#), understood in terms of economic efficiency and aggregate wealth.

Feminists’ critique of the gender-biased assumptions of neoclassical economic theory and its central principle of efficiency, which also permeate the consumer welfare standard, resulted in condemning many neoliberal policies, for example in the course of [EU integration](#) and the current developments in the [digital \(platform\) economy](#).

In the analytical framework of competition law and policy, gender can play a role at various stages of the competition law analysis and enforcement, as well as in institutional matters such as the composition of competition authorities. Its most direct implementation can take place through investigating the identity of consumers and what relevance the preferences, choices and behaviour of consumers fulfil in competition law. The consumer has different, but important functions at various phases of the competition law assessment and enforcement. Starting with market definition when consumer preferences play a key role in establishing demand substitutability and in defining relevant markets and analysing competitive effects, market investigations where gender or other factors affect prices and consumer purchasing decisions, implications for investigating market power and effects of competition, distortions, and lastly, priority setting and case selection.

In my paper, I set out how the consumer welfare standard as the first and most common notion that includes the consumer could be revisited and explain how new measurements of welfare and well-being explicitly implement gender as an indicator. By relying on the idea of human diversity, I explore how competition is likely to impact distinct individuals, who have multiple overlapping social, economic and political roles and identities, for example concerning mergers in health care or in the food sector. Finally, I suggest pathways to implement a gender lens in enforcement practices, such as case selection and (third party) participation in decision-making processes.

Feminist social practices within the competition law community

Feminism is, however, not just an academic endeavour, but also a social movement aimed at interrogating and changing the economic, civil, and ideological disparities between men, women, and those who identify outside of the gender binary.

As such, it also interrogates our own social practices within the competition law community. These social practices define the structure and nature of our community and have relevant implications for the body of knowledge, which is being produced. These social practices are today, still, profoundly gender-biased, producing knowledge largely from the male perspective and dominated by discourses and understandings of competition regulation as developed in the Global North over the course of the past century.

While feminism provides pathways for exploring diverse understandings of the social, economic, and political realities, that surround competition laws and their enforcement, and helps to generate new questions, theories, methods, and findings, a change in our social practices is needed to empower female competition practitioners, and scholars to regard themselves as authoritative constructors of knowledge. Such an approach makes women's (and other marginalized groups') actions, achievements, and concerns visible and validates the voices and experiences of all the members of the competition law community.

Empowering women means adding new voices and perspectives while enriching the field of competition law, policy, and scholarship. This requires a reflection on our own social practices in ways that contribute to women acquiring epistemic authority in competition law and policy. Such changes must start early and address social practices during the first encounters with the field, probably in higher education and continue along whichever career path one chooses in this community. It is a challenge that we need to take and address together in every corner of this community. The corner closest to my current position is the academic environment where we educate the next generations and form together an academic community producing a significant part of competition law scholarship. For those of us in this environment, the reflection should start with the learning and teaching environment we create for our student communities, and with the academic activities we participate in, or organize as well as what we read and write. We must reflect on the diversity and inclusiveness of all these activities, including our curriculum, courses, learning activities, lecturer teams and importantly the references and citations we use and the compulsory reading materials we prescribe. We must ask ourselves who are the role models (academics, enforcers, policymakers, practitioners) we show and introduce to our students. If these elements of our higher education and academic life lack inclusion and diversity, then we cannot expect our graduates to adopt other social practices later on in their professional careers. That the situation is alarming, should not come as a surprise.

For example, in the country I live and work in, in the Netherlands, another shocking report was published at the end of 2023, on how a [decrease is taking place in the growth of the share of female professors](#). While the proportion of female students and graduates (as well as PhDs) increases modestly and is still greater than the proportion of male students, there is still a strong decline in the percentage of women in each successive job category after the position of assistant professor. While there is a rise in the percentages of women professors, if career progression follows the same pace as of today, equal gender distribution among professors might be achieved between 2041 and 2045.

The “feminist imaginary” of competition law and its community

Competition law is one of the key legal areas that influence the construction and structuring of markets, by shaping power relationships between market actors and ensuring an economic order that contributes to the benefit of all societal groups. It also influences who has access and under what conditions to goods and services, and who can participate in markets. The “feminist imaginary” of competition law and its broader community may at the moment be an uneasy thought and pathway, but fortunately and thanks to many who have acted, written and spoken before me in this field, we have already departed on this path and there is no turning back.

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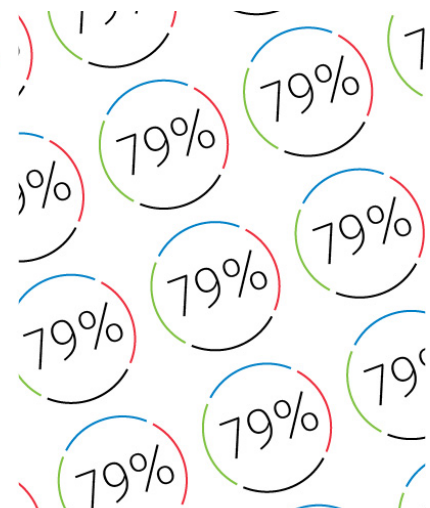
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Source: OECD“>[Consumer welfare](#), [Feminism](#)

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