

# Gender-inclusive priority setting in EU competition law enforcement

Or Brook<sup>1</sup>, Katalin J. Cseres<sup>2,\*</sup>

<sup>1</sup>Centre for Business Law and Practice (CBLP), University of Leeds, Leeds, United Kingdom

<sup>2</sup>Amsterdam Centre for European Law & Governance (ACELG), Universiteit van Amsterdam Faculteit der Rechtsgeleerdheid, EU law, Amsterdam, The Netherlands

\*Corresponding author. Amsterdam Centre for European Law & Governance (ACELG), Universiteit van Amsterdam Faculteit der Rechtsgeleerdheid, EU law, Nieuwe Achtergracht 166 1018 WV Amsterdam, The Netherlands. E-mail: k.j.cseres@uva.nl

## Key Points

- The paper analyses how the substantive and procedural aspects of priority setting could implement considerations of gender equality and guarantee women's equal market participation.
- Despite the EU's robust constitutional framework and its horizontal clauses, gender equality remains an invisible issue in EU competition law.
- Notwithstanding the potential of priority setting rules and practices as a tool to combat inequality, currently they do not explicitly implement considerations of gender equality in the EU.
- Gender-sensitive indicators could be embedded across the priority setting rules and practice cycle.
- Four aspects of priority setting are particularly suitable for the consideration of gender equality: agenda setting, the substantive criteria guiding prioritization, conducting *ex-post* impact assessment of priority setting decisions, and the procedure in which prioritization decisions are being taken.
- The paper proposes to draft a new Recommendation on priority setting within the framework of the European Competition Network (ECN), nudging competition authorities to base their priority setting rules and practices on criteria based on sustainable, inclusive growth with a strong focus on gender equality.

## 1. Introduction

Women make major contributions to the economy, and their economic participation and unrestrained access to markets contribute vastly to inclusive growth and sustainable development.<sup>1</sup> However, modern economies are characterized by gender divisions of labour, gender inequalities in income and wealth, gender hierarchies in industrial enterprises, gender differences in rights of ownership, and conditions of employment.<sup>2</sup> While women represent remarkable spending power and economic influence, controlling the dominant share of global consumer expenditure, they are overrepresented among economically vulnerable groups of population with little to no economic independence.<sup>3</sup> Women are known to have less income, wealth, and capital on average than men.<sup>4</sup> Moreover, women are not only economically more vulnerable than men, but also have unequal access and unequal

opportunities to participate in the economy. This is due to the fact that gender and gender relations, in interaction with other structures of social hierarchy, such as class, ethnicity, race, and age, shape economic relationships, preferences, choices, and decisions by businesses and consumers.<sup>5</sup> Accordingly, gender differences influence the allocation of resources in the economy, and while the specific nature of gender relations varies among societies, the general pattern is that women have less economic autonomy, fewer resources at their disposal, and limited influence over decision-making processes.<sup>6</sup>

Women's lack of equal participation in the economy and gender inequalities in markets have many causes including discriminatory laws, policies, and social norms coupled with shifts in the global economy and demographics, technological advances, and protracted crises.<sup>7</sup> Part of this assemblage of barriers are the laws, policies, norms, and institutions that structure markets, which

<sup>1</sup> UN Women, Women's economic empowerment strategy (New York, January 2024) <https://www.unwomen.org/sites/default/files/2024-03/un-women-womens-economic-empowerment-strategy-en.pdf>.

<sup>2</sup> Rebecca Pearse and Raewyn Connell 'Gender Norms and the Economy: Insights from Social Research' (2016) 22 *Feminist Economics*, 1.

<sup>3</sup> Sandy Carter 'Who runs the world?' (2024) *Forbes*, <https://www.forbes.com/sites/digital-assets/2024/03/07/who-runs-the-world-women-control-85-of-purchases-29-of-stem-roles/>.

<sup>4</sup> Although women make up roughly one-half of the world's population, they only contribute to 37% of global GDP. World, Economic Forum 'Six

global trends that show how to support female entrepreneurs' (2024). Available: <https://www.weforum.org/stories/2024/01/six-global-trends-in-female-entrepreneurship/>. For statistics for the EU see [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Gender\\_statistics](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Gender_statistics).

<sup>5</sup> Diane Elson and Anuradha Seth (Eds.) *Gender Equality and Inclusive Growth: Economic Policies to Achieve Sustainable Development* (2019) New York: UN Women.

<sup>6</sup> Pearse and Connell (n 3).

<sup>7</sup> UN Women (n 2).

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operate with a gender divide mirroring the broader organization of society along gender lines.<sup>8</sup>

Competition law is a fundamental area of the law to safeguard open and competitive markets, and to ensure that competition functions as an effective accountability mechanism against arbitrary use of private economic power at national and supranational (EU) levels.<sup>9</sup> While debates on the optimal welfare standard guiding competition law enforcement have been long ongoing, and a large number of competition authorities adopt a consumer welfare standard globally, competition rules are generally aimed at protecting citizens from the negative impact of the undue acquisition and exercise of market power, whether private or public.<sup>10</sup>

Through preventing anticompetitive practices resulting from restrictive agreements between firms, abuses of dominant position, mergers which lead to excessive market power, and state aid that provides economic advantages to selected firms, EU competition law influences who has access and under what conditions to goods and services, and who can participate in markets. This raises the question of whether and how competition law and policy can address gender inequalities in markets and facilitate a more equal economy for women. Which tools and mechanisms EU competition law has to address the barriers to women's access and participation in markets as consumers of goods and services, or as entrepreneurs?

More concretely, this paper focuses on the question of how competition authorities in the EU can implement a gender lens in their priority setting rules and practices. Priority setting is the way competition authorities select which cases they pursue and which they disregard.<sup>11</sup> Setting priorities entails administrative discretion on the side of the competition authorities and provides them with the freedom to choose their course of action and to make choices that best fulfil the public interest that the law protects. At the same time, competition authorities' priority setting has vast socioeconomic consequences for economies and citizens' welfare, and impacts wealth distribution across various groups of society, including women.

The paper analyses how the substantive and procedural aspects of priority setting could implement considerations of gender equality, protect women as vulnerable citizens, and facilitate their equal market participation. It investigates this question against the EU's legal and constitutional order and its underlying integration mechanisms that support the integration

of gender equality as a constitutionally embedded fundamental right under EU law.

By relying on the authors' empirical research on priority setting rules and practices in the EU and its Member States, and the UK<sup>12</sup> as well as the theoretical framework they developed,<sup>13</sup> the paper offers a theoretical and a practical framework for embedding gender within competition law enforcement.

## 2. Gender equality and competition law in the EU

In the European Union's legal order, gender equality and competition law are both constitutional values.<sup>14</sup> First, undistorted competition is a fundamental constitutional value in the EU legal order.<sup>15</sup> EU competition rules are to control economic power, safeguard undertakings' freedom of economic activity and consumers' choice, and guarantee equal opportunities for all EU citizens to participate in the internal market. When competition is effective in markets, citizens benefit from lower prices, better products and services, and innovation.

While the central concern of EU competition law is to target firm behaviour that can harm the competitive process and ultimately the economic interests of consumers,<sup>16</sup> it is also a central pillar of the integration project and functioned as a fundamental building block of the EU's internal market.<sup>17</sup>

Second, equality is also a core value of the EU, on which the Union is founded and which, under Article 2 TEU, is common to the Member States and a fundamental right laid down in the Charter of Fundamental Rights. Gender equality refers to a state in which access to rights or opportunities is not affected by gender. Accordingly, it can be broadly understood as men and women having equal access and use of resources, equal participation in social, economic, and political spheres, and safety

<sup>12</sup> Brook and Cseres (n 12).

<sup>13</sup> Or Brook and Katalin Cseres, 'Priority Setting as the Blind Spot of Administrative Law Enforcement: A Theoretical, Conceptual, and Empirical Study of Competition Authorities in Europe' (2024) *The Modern Law Review*.

<sup>14</sup> Katalin Cseres, 'EU Competition Law and Democracy in the Shadow of Rule of Law Backsliding' In: C. Colombo, M. Eliantonio, K. Wright (eds), *The Evolving Governance of EU Competition Law in a Time of Disruptions*. Hart Publishing, 2024. Gender equality is a 'core value of the EU, a fundamental right and key principle of the European Pillar of Social Rights. It is also an essential condition for an innovative, competitive and thriving European economy[...] a potential which needs to be realised as we embrace the green and digital transitions and face up to our demographic challenges'. Eur. Comm'n, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions—A Union of Equality: Gender Equality Strategy 2020–2025*, COM (2020) 152 final (Mar. 5, 2020).

<sup>15</sup> The establishment of a system ensuring undistorted competition in the common market was one of the fundamental objectives of the Community outlined as early as 1957 in Article 3(f) of the Treaty of Rome. The Lisbon Treaty reform relegated it to Protocol 27 on the Internal Market and Competition, without thereby intending to diminish its rank and impact. As one of the goals of the EU (Art. 3(3) TFEU), the internal market is described in Protocol 27 as 'a system ensuring that competition is not distorted'. On the constitutional rank of what was Article 3(f) see Bastiaan van der Esch, 'The System of Undistorted Competition of Article 3(f) of the EEC Treaty and the Duty of Member States to Respect the Central Parameters Thereof', (1987) *Fordham Int'l L.J.* 11, 409–31, Annette Kur et al., '4: Undistorted Competition and Fundamental Freedoms' (2024) In Annette Kur et al., *Fairness in Intellectual Property Law*. Cheltenham, UK: Edward Elgar Publishing.

<sup>16</sup> Case C-377/20, *Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato and Others*, ECLI:EU:C:2022:379 paras. 41–46.

<sup>17</sup> Katalin Cseres, 'European Competition Law: An Overlooked Element of the EU's Rule of Law Toolbox' (2024) *Swedish Institute for European Policy*, November 2024:23para.

<sup>8</sup> The consequences of this divide affect particular markets to different degrees, reflecting the extent to which women are over- or under-represented as sellers or buyers, or both. Estefania Santacreu-Vasut and Chris Pike, 'Competition Policy and Gender' (November 29, 2019). OECD Competition Papers, Background paper for the Global Forum on Competition (2018). Available: [https://one.oecd.org/document/DAF/COMP/GF\(2018\)4/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2018)4/en/pdf).

<sup>9</sup> Katalin Cseres, 'Defending the Rule of Law Through EU Competition Law: The Case of Hungary' (2024) *Amsterdam Law School Legal Studies Research Paper No. 2024-29*, Amsterdam Centre for European Law and Governance Research Paper No. 2024-09. Available at SSRN: <https://ssrn.com/abstract=4878282> or <http://dx.doi.org/10.2139/ssrn.4878282>. Giuliano Amato, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (1997) Hart Publishing. Miguel Maduro, 'Ensuring Market and State Accountability: The Private–Public Distinction in the EU Internal Market'. In: Oles Andriychuk (ed), *Antitrust and the Bounds of Power—25 Years On* (2024) Oxford: Hart Publishing.

<sup>10</sup> Katalin Cseres, 'The Controversies of the Consumer Welfare Standard' (2005) 3 *Competition Law Review*, 2. Marcos Iacovides and Konstantinos Stylianou, 'The Goals of EU Competition Law: A Comprehensive Empirical Investigation' (2022) 42 *Legal Studies* (4):620–648. On the symmetrical aspects of EU competition law, see Pierre Pescatore, 'Public and Private Aspects of European Community Competition Law' (1986) 10 *Fordham Int'l L.J.* 373.

<sup>11</sup> Or Brook and Katalin J. Cseres, 'Policy Report: Priority Setting in EU and National Competition Law Enforcement' (2021). Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3930189](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3930189).

from violence.<sup>18</sup> The concept of gender equality engrains the concept of equal opportunities: eliminating obstacles to achieving substantive equality is often identical to creating opportunities where they are lacking.<sup>19</sup>

Gender equality was originally enacted in the EU as a tool of economic harmonization and framed by the logic of the (internal) market.<sup>20</sup> However, over the past decades, it developed into a fundamental value and principle of EU law, strengthened by the introduction of horizontal clauses, the European Pillar of Social Rights and the Charter of Fundamental Rights. Over the years, the EU legislation implemented various aspects of gender equality, and since the late 1990s, it followed a dual approach, consisting of mainstreaming a gender perspective in all EU policies, while also implementing specific measures to eliminate, prevent, or remedy gender inequalities.<sup>21</sup> Today, the EU is viewed as a global leader in gender equality, developing robust equal treatment legislation and jurisprudence, and mainstreaming the gender perspective into different policy areas, and laws to address particular inequalities.<sup>22</sup>

Competition law is typically not about taking positive action as gender equality policies would require; however, its broad prohibitions aim at controlling excessive economic power and, hence, it contributes to reducing inequalities.<sup>23</sup>

Still, the widely shared rationale for the existence and goal of competition laws has been the promotion of consumer welfare through the maximization of economic efficiency in the past 20 years.<sup>24</sup> An important feature of this standard is that it does not treat the welfare of all groups equally. It gives distinctive preference to consumers within the relevant market under investigation and their economic wellbeing, while ignoring specific subgroups and identity of consumers.<sup>25</sup> By focusing on the ultimate goal of consumer welfare, competition law and policy do not investigate the intersecting personal identities of consumers, such as gender, age, race, physical and social location, income,

or class. Hence, it overlooks the potential distributional effects of anticompetitive practices or the competition law intervention, despite evidence showing that vulnerable consumers and citizens are disproportionately affected by negative market outcomes.<sup>26</sup> These consumers pay higher prices than others (also known as the 'poverty premium') and are at a higher risk of negative impact on their wellbeing.<sup>27</sup> For these reasons, the consumer welfare standard has attracted much criticism due to its too narrow focus on outcomes, price, and output, while refusing to take account of broader social issues, such as sustainability,<sup>28</sup> social and economic inequality,<sup>29</sup> the rights of historically marginalized groups,<sup>30</sup> or the distribution of economic power within well-functioning democracies.<sup>31</sup>

A growing strand of literature argues that competition can and should contribute to more equal distribution of wealth and that competition on factors other than price, such as environmentally friendly or socially conscious products and services, can contribute to wellbeing, inclusion, and sustainability.<sup>32</sup> According to this view, competition law safeguards the competitive process and curbs overarching economic power that threatens the basic idea of a democratic society.<sup>33</sup>

### A. The 'woman question' of EU competition law

Despite numerous studies on gender-based discrimination and rising inequalities, little attention has been devoted to gender inequalities and their relation with market mechanisms and excessive market power.<sup>34</sup> While gender equality has been widely recognized as a key driver of economic growth and social development and women's economic independence and empowerment are seen as prerequisites for equitable and sustainable societies,<sup>35</sup> there has been little consideration of how economic law and policies could address gender-based economic inequality and implement gender considerations.

Likewise, EU competition law, policy, and scholarship have so far not fully addressed the question of how the enforcement of EU competition norms, institutions and decision-making impact women. This is surprising as EU competition law is embedded in a constitutional framework, where gender equality has been

<sup>18</sup> Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 *International Journal of Constitutional Law*, 3, 712–738. Formal equality imposes equal treatment, while substantive equality provides and allows for a redistribution of resources to counteract de facto inequalities. Both are necessary to achieve equality between individuals with different entities and living conditions. A social condition in which women and men share equal rights (formal equality) and a balance of power, status, opportunities, and rewards (substantive equality).

<sup>19</sup> Gianni Nanni, 'Gender Equality, Equity, and Equal Opportunities' In: Enrico di Bella, et al. (eds), *Measuring Gender Equality. Social Indicators Research Series* (2023), Cham: Springer.

<sup>20</sup> Anna Elomäki, 'The Economic Case for Gender Equality in the European Union: Selling Gender Equality to Decision-Makers and Neoliberalism to Women's Organizations' (2015). 22 *European Journal of Women's Studies*, 3, 288–302.

<sup>21</sup> European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions—A Union of Equality: Gender Equality Strategy 2020–2025, COM (2020) 152 final (Mar. 5, 2020).

<sup>22</sup> Fourteen of the top 20 countries worldwide on gender equality are EU Member States. 2019 EM2030 SDG Gender Index: <https://data.em2030.org/em2030-sdg-gender-index/>. The EU has adopted six Directives covering equality between women and men in the workplace, in self-employment, in access to goods and services, in social security, in pregnancy and maternity, and on family-related leave and flexible working arrangements for parents and carers.

<sup>23</sup> EU state aid law is an exception, which allows under certain circumstances for state subsidies. Jan Broulik and Katalin Cseres (eds), *Competition Law and Economic Inequality* (Hart Publishing 2022); Ariel Ezrachi et al., 'The Effects of Competition Law on Inequality—An Incidental By-product or a Path for Societal Change?' (2023) 11(1) *Journal of Antitrust Enforcement* 51.

<sup>24</sup> Anu Bradford et al., 'The Global Dominance of European Competition Law Over American Antitrust Law' (2019) 16 *Journal of Empirical Legal Studies*, 731.

<sup>25</sup> OECD 'Consumer Welfare Standards—Advantages and Disadvantages Compared to Alternative Standards' (2023) *OECD Roundtables on Competition Policy Papers*, No. 295, OECD Publishing, Paris. Available at: <https://doi.org/10.1787/3d174fdf-en>. 12.

<sup>26</sup> Eric Posner and Cass R. Sunstein, 'Antitrust and Inequality' (2022) *American Journal of Law and Equality* 2, 190–207, 195. Ivana Isailović, 'Gender in Political Economy and EU Law' (2024) *Transnational Legal Theory*, 15(4), 525–542.

<sup>27</sup> UK Consumer and Market Authority, Consumer Vulnerability: Challenges and Potential Solutions (Feb. 2019), available at: <https://www.gov.uk/government/publications/consumer-vulnerability-challenges-and-potential-solutions/consumer-vulnerability-challenges-and-potential-solutions>; Bokhari et al., (n 81).

<sup>28</sup> Anna Gerbrandy, 'Solving a Sustainability-Deficit in European Competition Law' (2017), 40, *World Competition*, 4, 539–562.

<sup>29</sup> Broulik and Cseres (n 24).

<sup>30</sup> Bennett Capers and Gregory Day, 'Race-ing Antitrust' (2022) *Mich. L. Rev.* 121, 523, 254.

<sup>31</sup> OECD (n 26).

<sup>32</sup> Robin Shaban and Colleen Kaiser, 'Leveraging Competition Law and Policy to Promote Inclusive Growth in Canada' (2023) Smart Prosperity Institute and Canadian Anti-Monopoly Project.

<sup>33</sup> Adi Ayal, 'The Market for Bigness: Economic Power and Competition Agencies' Duty to Curtail It' (2013) 1 *Journal of Antitrust Enforcement* 2, 231. Ioannis Lianos, 'The Poverty of Competition Law: The Short Story'. In: Damien Gerard and Ioannis Lianos (eds), *Reconciling Efficiency and Equity: A Global Challenge for Competition Policy* (Cambridge University Press, 2019).

<sup>34</sup> World Economic Forum 'Global Gender Gap Report 2024' (2024) [https://www3.weforum.org/docs/WEF\\_GGGR\\_2024.pdf](https://www3.weforum.org/docs/WEF_GGGR_2024.pdf). OECD, *Joining Forces for Gender Equality: What is Holding us Back?* (2023) OECD Publishing, Paris. <https://doi.org/10.1787/67d48024-en>. Gender equality, <https://www.oecd.org/en/topics/gender-equality.html>. Francesca Rhodes, *Women and the 1%, How Extreme Economic Inequality and Gender Inequality Must Be Tackled Together* (2016) Oxfam International. IMF, *Gender and income inequality*, [https://www.imf.org/external/pubs/ft/sdn/2015/sdn1520\\_info.pdf](https://www.imf.org/external/pubs/ft/sdn/2015/sdn1520_info.pdf).

<sup>35</sup> Can Bertay et al. 'Gender Inequality and Economic Growth: Evidence from Industry-Level Data' (2020) IMF Working Paper, No. 2020/119. International Monetary Fund.



a founding value of the EU legal order since 1957, when the principle of equal pay for work became part of the Treaty of Rome. Over the past seven decades, the EU has not only adopted a significant amount of legislation concerning equal treatment and non-discrimination, but has also developed a framework through its provisions for integrating gender into all of its policies, so-called gender mainstreaming.<sup>36</sup>

By making use of the distinctive methodology used by feminist social scientists to evaluate and approach social problems from the perspective of women's experiences, this paper follows an approach based on asking the 'woman question'<sup>37</sup> in EU competition law. The 'woman question' is a technique that helps to identify whether particular laws and enforcement tools consider women's experiences, and the gender implications of rules and practices that might otherwise appear neutral or objective.<sup>38</sup> It probes the gender implications of a legal rule or social practice: have women been left out of consideration, for example, assessing whether the competition rules with their goal of consumer welfare standard take account of women's experiences, in the form of gendered preferences, choices, and price sensitivity, when they define markets and assess market power and mergers, and effects on competition.

Such an exercise is importantly broad in its approach: it captures the diverse and varied experiences of women's lives of cultural differences, social division, and power relations. Women's experiences vary, sometimes fundamentally. Their social positions are shaped by multiple forms of injustices at the intersection of gender, race, social position, geographic location, and sexuality.<sup>39</sup> Accordingly, feminist theories can contribute to the understanding that gender, in complex intersection with other identifying characteristics, becomes an important element in assessing markets and market actors' behaviour.<sup>40</sup>

## B. The EU's constitutional framework

The protection of the competitive process is a core value of the EU's legal and economic order, and as such an implementation

of Article 2 of the Treaty on the European Union (TEU), which lists, among others, the EU values of democracy, equality, rule of law, and respect for human rights. When states join the EU, they commit to the EU's economic and legal order, which as a 'constitutional charter' explicitly includes the system of undistorted competition.<sup>41</sup> As such, by the 1990s, competition law became a 'common core' in most EU Member States, due to successful market integration, the process of EU constitutionalization, and strong supranational enforcement mechanisms of the European Commission.<sup>42</sup> Moreover, since 2004, the EU Commission is sharing the enforcement of the EU competition rules on anticompetitive agreements and abuse of dominance position with the Member States. National Competition authorities (NCA) apply the Treaty provisions based on their own, often diverse national procedural laws and act within their institutional and constitutional settings. In this decentralized system, the diversity of NCAs' administrative capacity, procedural, and institutional setting became crucial for the effective enforcement of the EU competition rules. As a fundamental part of the EU legal order, competition law was implemented and enforced by all Member States, and the protection of competitive markets is a *shared value* for all Member States.<sup>43</sup>

Equality is also a founding *principle* of the EU legal order, as evidenced by Article 4(2) TEU concerning equality between the Member States and Article 157 TFEU on equal pay.<sup>44</sup> Equality between women and men is also an *objective* of the EU as laid down in Article 3 (3) paragraph 1 TEU.<sup>45</sup> Furthermore, Article 2 TEU underlines that the EU is founded on *values* of non-discrimination and that equality between women and men must prevail.<sup>46</sup> Gender equality is also a *fundamental right*, which is laid down in Article 21 of the Charter of Fundamental Rights.<sup>47</sup>

Originally, the EU equality rules had an instrumental economic function, aiming to eliminate distortions of competition between companies established within the Community.<sup>48</sup>

Yet, since 1957, the EU's approach to equality law has fundamentally changed and the principle of gender equality 'deepened and widened'.<sup>49</sup> Over the past decades, the EU's gender equality

<sup>36</sup> The EU has adopted six Directives covering equality between women and men in the workplace, in self-employment, in access to goods and services, in social security, in pregnancy and maternity, and on family-related leave and flexible working arrangements for parents and carers. Together, they have progressively set a legal standard across Europe ensuring a broad protection from discrimination. Numerous cases brought to the European Court of Justice have further strengthened the principle of equality and delivered justice for victims of discrimination. Directive on equal pay for men and women (75/117/EEC), Directive on equal treatment for men and women in employment entered into force (Directive 76/207/EEC amended by Directive 2002/73/EC), Directive on equal treatment in statutory social security schemes (Directive 79/7/EEC amended by Directive 2002/73/EC). Both are now repealed and replaced by Recast Directive 2006/54/EC. In 1986, two directives entered into force, covering occupational social security schemes (Directive, 86/378) and one on self-employment (Directive, 86/613). Directive on equal treatment of men and women in occupational social security schemes (86/378/EEC, amended by Directive 96/97/EC and now repealed and replaced by Recast Directive 2006/54/EC), the Directive on equal treatment of men and women engaged in an activity, including agriculture, in a self-employed capacity (86/613/EEC, repealed and replaced by Directive 2010/41/EU), the Pregnant Workers' Directive (92/85/EEC). These directives, except Directive 79/7, have been amended and modernized since their adoption. In addition, directives on work-life balance issues and equal treatment of men and women in access and supply of goods and services have been adopted and amended the Directive on equal treatment of men and women in the access to and the supply of goods and services (2004/113/EC) and the aforementioned so-called Recast Directive on sex equality in employment and occupation (2006/54/EC). The latest addition is the Work-Life Balance Directive (2019/1158/EU), which will repeal Directive 2010/18/EU with effect from 2 August 2022.

<sup>37</sup> Yavuz Alkan, 'Feminist Legal Methods: Theoretical Assumptions, Advantages, and Potential Problems' (November 2013). 9 *Ankara Law Review* 2, 83–97.

<sup>38</sup> Nancy Levit et al., *Feminist Legal Theory (Second Edition): A Primer* (2016, New York, USA: New York University Press) 41.

<sup>39</sup> Kimberley Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' 8 (1989) *University of Chicago Legal Forum* 139.

<sup>40</sup> Crenshaw (n 40).

<sup>41</sup> In its *Sped-Pro* judgment, the General Court confirmed that compliance with the fundamental values of Article 2 TEU applies to the EU's competition law enforcement mechanisms under Articles 101 and 102 TFEU. Case T-791/19, *Sped-Pro v. Commission*, ECLI:EU:T:2022:67.

<sup>42</sup> Cseres (n 15).

<sup>43</sup> Cseres (n 15).

<sup>44</sup> Article 18 TFEU concerns equality between citizens of the Member States. Elise Muir et al., 'The Horizontal Equality Clauses (Arts 8 & 10 TFEU) and their Contribution to the Course of EU Equality Law: Still an Empty Vessel?' (2023) *European Papers* 1381.

<sup>45</sup> According to Article 3(3) TEU, one of the aims of the EU is to 'combat social exclusion and discrimination, and (...) promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child'. Consolidated Version of the Treaty on European Union, 2012 O.J. (C326) 13 (TEU).

<sup>46</sup> Consolidated Version of the Treaty on European Union, 2012 O.J. (C326) 13 (TEU).

<sup>47</sup> Article 21 prohibits any discrimination on grounds of sex, while Article 23 of the Charter requires equality between men and women to be ensured in all areas of the EU's activities. Charter of Fundamental Rights of the European Union, 2000 O.J. (C364) 1. The Charter is legally binding and generally emphasizes the importance of gender equality throughout all areas of EU law.

<sup>48</sup> Fearing competitive distortion and the movement of labour to countries in which women worked for lower salaries, the French government insisted that equal pay be a requirement that other Member States would also have to implement. The introduction into the Treaty of the principle of gender equality was not based on the idea of women's equal treatment across national boundaries, rather, it was drafted with an economic mind-set aimed at the creation of an economic community for economic purposes. Jule Mulder, 'General Principle of Equality between Men and Women' In: *Research Handbook on General Principles in EU Law* (2022, Cheltenham, UK: Edward Elgar Publishing).

<sup>49</sup> Eugenia Caracciolo di Torella, 'The Principle of Gender Mainstreaming, Possibilities and Challenges' In: Francesca Ippolito et al. (eds), *EU and the Proliferation of Integration Principles under the Lisbon Treaty* (Routledge, 2014) 48.

policies have developed into a solid policy field, moving from a measure preventing competitive disadvantages within the Community for companies with respect to the principle of equal pay, and to contributing to the improvement of living and working conditions, to a comprehensive legal and political framework dealing with multiple sources of discrimination.<sup>50</sup>

With the entry into force of the Treaty of Amsterdam in 1999, the EU constitutionally grounded the approach to achieve gender equality through gender mainstreaming all policy areas, and by making gender equality and non-discrimination guiding legal principles of the EU. Establishing the concept of substantive equality since the 2000s, new policies emerged targeting various forms of discrimination and including an intersectional perspective.<sup>51</sup>

By confirming a new emphasis on the social policy objectives of the European integration process,<sup>52</sup> the Lisbon Treaty's amendments to the constitutional framework of EU, including competition law and gender equality, created a framework where the economic and social underpinnings of the legal fields were brought closer together.

By introducing a 'highly competitive social market economy' as an objective of the EU, the amended Article 3(3) Treaty on European Union reinforced the idea that social and economic interests should be reconciled.<sup>53</sup> Accordingly, Article 3(3) TEU sought to balance a free market economy with social protection regimes by including both economic and social aims under the notion of 'social market economy'.<sup>54</sup>

The introduction of the so-called horizontal clauses was also a clear example of such balancing. Horizontal clauses have an overarching character, aiming to streamline the EU's actions to ensure consistency between different policies so as not to jeopardize the pursued objectives of one another.<sup>55</sup> They lay down transversal policy objectives and requirements, which must be taken into account in all fields of EU activities.<sup>56</sup> By safeguarding certain social values and objectives, such as the promotion of gender equality, they provide a constitutional basis to incorporate these values into all areas of EU law and policy.<sup>57</sup> While all clauses demand some form of integration,<sup>58</sup> the way integration has to take place remains unclear. Among the horizontal clauses, Article 8 explicitly affirms that the EU shall aim to eliminate gender inequalities and promote gender equality. Accordingly, the EU

has committed to eliminating inequalities and promoting gender equality 'in all its activities'<sup>59</sup> and has, accordingly, introduced legislation in its areas of competence.

Despite this robust constitutional framework, and while the Court has emphasized that the provisions of the Treaty should be treated as whole,<sup>60</sup> Article 8 and gender equality remains an invisible issue in the area of competition law. For example, in their systematic and comprehensive study on the (new) goals of EU competition law, Iacovides and Stylianou found no cases referring to gender equality in the decisional practice of the CJEU or the Commission.<sup>61</sup>

Lacking a clear and distinct, autonomous function in EU law,<sup>62</sup> the horizontal clauses have been used as interpretative tools by the CJEU, but their application has been more common in policy documents than in the case-law of the Court.<sup>63</sup> Accordingly, their function has been to show a political willingness to diversify the forms of protection and promotion of equality within the EU legal order.<sup>64</sup> The EU's 2020–2025 Gender Equality Strategy illustrates this, by highlighting that the 'Commission will enhance gender mainstreaming by systematically including a gender perspective in all stages of policy design in all EU policy areas, internal and external'.<sup>65</sup>

### C. The relationship between gender equality and competition law

Gender equality and competition law could be viewed as another example of conflicting social and economic policies. This also resonates with the primary economic nature of the European integration process, and the broadly discussed constitutional 'asymmetry' between economic and social policies at EU level.<sup>66</sup>

However, social mainstreaming has always existed in the EU's constitutional framework and a socially inclusive internal market where economic and social spheres are intertwined at the EU level is not a new development.<sup>67</sup> Historically, equality considerations were closely intertwined with the idea of a competitive market. Equality of opportunity and wealth have, for many centuries, played a central role in the liberal thought about competitive markets in competition law.<sup>68</sup> Deutscher showed that early political economists presumed that by dispersing economic power and

<sup>50</sup> Petra Debusscher, 'The EU Gender Equality Strategy 2020–2025: The Beginning of a New Season?' In: Bart Vanhercke et al. (eds), *Social Policy in the European Union: State of Play 2022: Policymaking in a Permacrisis* (2023, Brussels: ETUI, OSE) 91–110.

<sup>51</sup> Debusscher (n 51).

<sup>52</sup> Albertine Veldman and Sybe de Vries, 'Regulation and Enforcement of Economic Freedoms and Social Rights: A Thorny Distribution of Sovereignty' In: Ton van den Brink et al. (eds), *Sovereignty in the Shared Legal Order of the EU: Core Values of Regulation and Enforcement* (2015, Intersentia, Antwerpen).

<sup>53</sup> Sybe De Vries and Rik De Jager, 'Between Hope and Fear: The Creation of a More Inclusive EU Single Market Through Art. 9 TFEU' (2022) 7(3) *European Papers* 1406. The Lisbon Treaty amended Article 3(3) TEU by excluding the wording of a system of undistorted competition. It is to be read in conjunction with Protocol No 27 on the Internal Market and Competition attached to the Lisbon Treaty, which states that the internal market as set out in Article 3 TEU includes a system ensuring that competition is not distorted.

<sup>54</sup> Rutger Claassen et al., 'Rethinking the European Social Market Economy: Introduction to the Special Issue' (2019) 57(1) *Journal of Common Market Studies* 3. The concept of social market economy in Article 3 TEU refers to a normative system based on values unifying the principle of freedom with objectives of social equality and fairness. It is an economic system where both economic growth and social sustainability are compatible notions.

<sup>55</sup> Evangelina Psychogiopoulou, 'The Horizontal of Arts 8–13 TFEU through the Lens of the Court of Justice', (2022) 7 *European Papers*, 3. 1362–63.

<sup>56</sup> Psychogiopoulou (n 56) 1362–63.

<sup>57</sup> Psychogiopoulou (n 56) 1362.

<sup>58</sup> Julian Nowag, *Environmental Integration in Competition and Free-Movement Laws* (2016, Oxford University Press) 7.

<sup>59</sup> Article 19 TFEU provides the EU the competence to introduce legislation to combat gender-based discrimination; Article 157 TFEU establishing the principle of equal pay for work of equal value and giving the EU a legal basis for gender equality law in employment; and Article 157(4) TFEU and Article 23 of the Charter of fundamental Rights, which recognize positive action as a method of achieving gender equality. Consolidated Version of the Treaty on the Functioning of the European Union, 2007 OJ. (C326) 47 (TFEU).

<sup>60</sup> Case C-67/96 *Albany* ECLI:EU:C:1999:430, para 60.

<sup>61</sup> Marios Iacovides and Konstantinos Stylianou, 'The New Goals of EU Competition Law: Sustainability, Labour Rights, and Privacy' (2024) *European Law Open*.

<sup>62</sup> Muir et al., (n 47) 1385–1391.

<sup>63</sup> Bruno de Witte, 'Two Charters and a Pillar: The Slow Constitutionalization of Social Rights in European Law' In: Uladzislau Belavusau and Aleksandra Gliszczynska-Grabias (eds), *Constitutionalism under Stress* (2020). 182.

<sup>64</sup> Muir et al., (n 45) 1394.

<sup>65</sup> A Union of Equality: Gender Equality Strategy 2020–2025, COM (2020) 152 final (Brussels, 5.3.2020).

<sup>66</sup> Fritz W. Scharpf, 'The Asymmetry of European Integration, or Why the EU Cannot Be a 'Social Market Economy'' (2010) 8(2) *Socio-Economic Review* 211. Martijn van den Brink et al., 'Revisiting the Asymmetry Thesis: Negative and Positive Integration in the EU' (2023) *Journal of European Public Policy* 1.

<sup>67</sup> Sybe de Vries and Rik de Jager, 'Between Hope and Fear: The Creation of a More Inclusive EU Single Market Through Art. 9 TFEU' (2022) 3 *European Papers* 41.

<sup>68</sup> Elias Deutscher, 'Competition and Equality: A Republican Account, in Competition Law and Economic Inequality' in Broulik and Cseres (n 24) 154.

bringing about equality of opportunity, competition allowed individuals to become independent economic agents.<sup>69</sup> The preservation of equality of opportunity was also central to the Ordoliberal understanding of competition law, which influenced the drafting and early enforcement of EU competition law.<sup>70</sup> While the shift in EU competition law from the early 2000s towards a 'more economic approach' reflected Chicago School arguments opposing the pursuit of equality of opportunity through competition law (as excessive state interference with efficient business conduct),<sup>71</sup> the discussion on the relationship between the role of competition law and inequality has increased in the past decade.<sup>72</sup> The rise of industry concentration and accumulation of economic power in the hands of a few large corporations are increasingly perceived as a driver of growing economic and social inequalities.<sup>73</sup> Hence, market power has been identified as contributing to increased levels of inequality.<sup>74</sup>

Accordingly, both the constitutional framework and the intellectual history of competition law in Europe show that EU competition law was initially established with the core idea of competitive markets where economic power is dispersed and broadly defined economic opportunities are guaranteed.<sup>75</sup>

Similarly, the EU's constitutional framework is based on a 'highly competitive social market economy', as well as the constitutional mechanisms enshrined in the horizontal clauses, both demand an integrated approach to the intersection of gender equality and competition law. This resonates with the understanding of gender equality as substantive equality in terms of women's (as consumers and businesses) equal access to markets, goods, and services, and their equal opportunities to participate in markets; their link becomes one of a close relation.

The next sections turn to the question of which role EU competition law can play in addressing gender (in)equality and how to deliberate and analyse the integration of gender equality in competition law.

### 3. Integrating gender equality into EU competition law and policy

#### A. Embedding gender within the substantive competition law analysis

In the analytical framework of competition law and policy, gender can play a role at various stages of the analysis and enforcement. Its most direct implementation can take place by embedding the gender lens in the substantive analysis of the competition law prohibitions, that is, through investigating the identity of the consumer and its relationship with market power. Market power has been acknowledged as a source of inequalities, but it has not been investigated what relevance women's individual

preferences, interests, choices, and consumer behaviour fulfil in measuring (defining the relevant market) and investigating market power and analysing competitive effects in competition law.<sup>76</sup> Growing corporate power exploits and magnifies gender inequalities, for example, through privatization that commodifies and segregates access to essential services, like healthcare, childcare, or transport.<sup>77</sup> Accordingly, deprioritizing sectors that provide essential services for women can affect women disproportionately.

Including gender equality and values of equality in the interpretation of the competition law prohibitions is, however, not without controversy. First, it raises challenges concerning subjective value judgements, difficulties in quantification, and legal uncertainty. Importantly, it questions the desirability of delegating the power to determine redistribution of wealth in society to competition authorities, a task that is commonly left to elected officials.<sup>78</sup> Competition authorities, as independent, non-majoritarian institutions, may not have the mandate to make value judgements involving distributional effects. While they are expert decision-makers who have the capacity to effectively tackle complex technical issues, they lack the democratic legitimacy to balance economic and non-economic values.<sup>79</sup> Furthermore, broadening the scope of the substantive competition law analysis calls for balancing between incommensurable economic and non-economic benefits. This may result in legal uncertainty concerning the outcomes of a case or the remedies to be imposed, especially as competition law enforcement typically takes place *ex-post*. Often, this leads to the argument that competition law and policy are not the most adequate tools to advance inequality or other types of non-economic benefits.

Second, given the *ex-post*, self-assessment nature of the competition rules in the EU, the substantive application of the competition rules merit clearly defining the role of non-competition interests in advance to provide firms with legal certainty as to the type of benefits that may justify an exception from the competition rules.

As elaborated in the next subsection, many of those concerns can be addressed by embedding gender equality considerations in the competition authorities' case selection, as opposed to interpreting the substantive competition law provisions.

#### B. Gender-inclusive priority setting

While competition authorities' enforcement actions against anticompetitive practices can generate vast savings for society, competition authorities' resources are limited and can target only a limited number of infringements each year.<sup>80</sup> Therefore, the selection of which potential infringements they pursue and which they disregard is of fundamental relevance for all societies. Setting priorities influences markets' structure, shapes the boundaries of legitimate business conduct, and impacts wealth distribution across various groups of society. Furthermore,

<sup>69</sup> Deutscher (n 69).

<sup>70</sup> Ordoliberals understood competition primarily as 'open markets' and as an inclusive process that guarantees equal opportunities to carry out an economic activity. Elias Deutscher, 'The Competition-Democracy Nexus Unpacked—Competition Law, Republican Liberty, and Democracy' (2023) 41 *Yearbook of European Law*, 197, 215.

<sup>71</sup> Deutscher (n 71).

<sup>72</sup> OECD, 'Competition law and inequality' Background note Eleanor M. Fox, DAF/COMP/GF(2024)52024.

<sup>73</sup> Jason Furman and Péter Ország, 'A Firm-Level Perspective on the Role of Rents in the Rise in Inequality' In: M Guzman (ed), *Toward a Just Society: Joseph Stiglitz and Twenty-First Century Economics* (New York, Columbia University Press, 2018) 19; J Stiglitz, 'Inequality, Stagnation, and Market Power' (2017) [www.rooseveltinstitute.org/inequality-stagnation-market-power/](http://www.rooseveltinstitute.org/inequality-stagnation-market-power/); Sean F Ennis et al., 'Inequality: A Hidden Cost of Market Power' (2019) 35 *Oxford Review of Economic Policy* 518.

<sup>74</sup> Sean F Ennis et al., (n 74).

<sup>75</sup> Deutscher (n 71) 197, 215.

<sup>76</sup> Starting with market definition when consumer preferences play a key role in establishing demand substitutability, defining relevant markets, market investigations where gender or other factors affect prices and consumer purchasing decisions, implications for investigating market power and effects of competition, distortions, priority setting, and case selection.

<sup>77</sup> Oxfam International, 'Inequality Inc.' Oxfam International January 2024.

<sup>78</sup> Ezrachi et al., (n 24), Louis Kaplow, 'On the Choice of Welfare Standards in Competition Law' 693 *Harvard John M. Olin Discussion Paper Series*, (May 2011); Lianos (n 35).

<sup>79</sup> Anna Gerbrandy, 'Addressing the Legitimacy Problem for Competition Authorities Taking into Account Non-Economic Values: The Position of the Dutch Competition Authority' (2015) 5 *European Law Review* 769–781.

<sup>80</sup> It is estimated that the vast majority (>90%) of anticompetitive conduct is not detected, investigated, or brought to an end. Stephan Davies and Péter Ormosi, 'The Impact of Competition Policy- What are the Known Unknowns' (2013) *Centre for Competition Policy*.



competition authorities' priority setting has vast socioeconomic consequences for economies and citizens' welfare, including women.

Accordingly, the power to set the enforcement priorities provides an alternative route to embed gender concerns within competition policy, without reinterpreting the substantive competition law prohibitions. Competition authorities may, for example, focus on markets or practices that disproportionality affect women.

A gender-inclusive priority setting provides room for flexibility and public participation because priority setting policies are often adopted through soft law instruments, such as guidelines or policy rules. Such soft law tools enable the competition authorities to acknowledge the ongoing nature of social debates over cultural and political norms and entitlements,<sup>81</sup> which would not be available to them when interpreting the substantive provisions of the law. Competition authorities can consult interest groups and the general public on their priority setting policies and practices, allowing them to adjust.

Despite the potential of priority setting rules and practices as a tool to combat inequality, currently competition authorities do not explicitly implement considerations of gender equality in the EU. As a result, the allocation of enforcement efforts, and the direct and indirect savings they produce, are not equally shared among the members of society and may not serve those who need them most.<sup>82</sup> As markets have been assessed according to the logic of a uniform consumer without regard to their social position, economic status, or personal identity, vulnerable citizens, for example, women, can be disproportionately impacted by anticompetitive practices in markets such as food, health-care, housing, education, and energy.<sup>83</sup> Competition authorities do not systematically examine distributional justice concerns, or the impact of the case selection on people from different demographics, social backgrounds, gender, race, and income.<sup>84</sup> Moreover, they typically grant limited role for the involvement of organizations representing such vulnerable groups of society in their proceedings. As a result, these groups are left at a higher risk of experiencing anticompetitive harm.<sup>85</sup>

As priority setting gives enforcers the freedom and the power to choose which cases to pursue and which to disregard and preserve society's resources to tackle the most harmful infringements, such power affords authorities the autonomy to focus on matters of genuine economic and doctrinal importance (which can be defined by the legislator, the executive, or the competition authority as expert decision-maker) and, hence, can contribute to credible enforcement priorities.<sup>86</sup>

Despite the important effects of prioritization choices, our previous research demonstrated that there is a large diversity of priority setting powers, rules, and practices across national legal orders in the EU.<sup>87</sup> Also, the question of what types of competition law infringements the European Commission and the Member States' national competition authorities should prioritize and how such priority-setting decisions should take place have not been addressed in detail. The scope, substance, and procedure for setting enforcement priorities have not been fully harmonized by the EU legislator.

Article 4(5) of the ECN+ Directive<sup>88</sup> imposes an obligation on the Member States to empower their competition authorities to set their enforcement priorities, and to reject complaints that they do not consider to be an enforcement priority.<sup>89</sup> However, this legal obligation has not been complemented by hard or soft EU law to guide Member States or NCAs in setting the enforcement priorities.

Moreover, most competition authorities have informal and invisible priority setting practices. They are guided by no or very few rules on how and why they should set their enforcement priorities, and are not obliged to publish or reason their prioritization choices.<sup>90</sup>

In practice, many competition authorities mostly set their enforcement priorities in a reactive manner, namely, most of their enforcement efforts are dedicated to responding to complaints submitted by consumers or competitors, to leniency applications, and whistleblowing notifications rather than conducting their own *ex-officio* investigations.<sup>91</sup> Reactive prioritization policies are likely to focus the enforcement on a narrow type of anticompetitive behaviour and, in particular, serve the interests of competitors rather than those of consumers.<sup>92</sup> The EU's 2020 Courts of Auditor Report, for example, warned that while the European Commission should give priority to those cases which have the highest potential impact on the internal market and on consumers, 'no clear weighted criteria to be in place to ensure the selection of cases with the highest risk to competition or consumer welfare in the internal market and across all relevant economic sectors'.<sup>93</sup>

### C. Towards gender-inclusive priority setting

By relying on the authors' previous research, this section analyses how priority setting could implement considerations of gender equality and address practices that eliminate gender inequalities according to Article 8 TFEU.

First, gender equality concerns can be implemented in priority setting rules and practices by focusing on (i) the *outcome of markets*, namely, focusing on anticompetitive practices in markets that amount to gender inequalities, for example, creating significant

<sup>81</sup> Katherine Gelber 'Capabilities and the Law.' In: Enrica Chiappero-Martinetti et al. (eds), *The Cambridge Handbook of the Capability Approach* (Cambridge University Press; 2020) 649.

<sup>82</sup> The selection of specific enforcement targets create significant *direct effects* by putting an end to anticompetitive behaviour and benefiting the effected consumers or citizens. It also has important *indirect effect* through competition authorities' enforcement actions creating significant deterrent effects and costs savings in the sectors in which such interventions took place. CMA—deterrent effect of competition authorities work—literature review (2017), 3. CMA Deterrent Effect Report, 4.32–4.37, 7.7. Available at: <https://assets.publishing.service.gov.uk/media/5a82c57340f0b6230269c9d7/deterrent-effect-of-competition-authorities-work-lit-review.pdf>.

<sup>83</sup> Jonathan B. Baker and Steven C. Salop, 'Antitrust, Competition Policy, and Inequality' (2015) 104 *Geo. LJ Online* 1.; Ezrachi et al., (n 23) Capers and Day (n 31).

<sup>84</sup> Cengiz, F. (2021) The conflict between market competition and worker solidarity: Moving from consumer to citizen welfare standard in competition law. *Legal Studies* 41 (1) 73–90. Bennett and Day (n 32).

<sup>85</sup> Brook and Cseres (n 12); Cseres (n 15); Brook and Cseres (n 14).

<sup>86</sup> Brook and Cseres (n 12).

<sup>87</sup> Brook and Cseres (n 14).

<sup>88</sup> Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market OJ L11.

<sup>89</sup> Directive (EU) 2019/1 Recital 23.

<sup>90</sup> Brook and Cseres (n 12).

<sup>91</sup> Or Brook, 'Do EU and U.K. Antitrust "Bite"? A Hard Look at "Soft" Enforcement and Negotiated Penalty Settlements' (2023) 68 *The Antitrust Bulletin*, 3. 477–518. Brook and Cseres (n 1).

<sup>92</sup> Wouter Wils, 'Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement' (2011) 34 *World Competition* 3. 378–9.

<sup>93</sup> Court of Auditors Report—Special Report No 24-2020—The Commission's EU merger control and antitrust proceedings—a need to scale up market oversight (2020), paras 37–8.

spending of female consumers' budget, such as essential services, agriculture, health,<sup>94</sup> transport,<sup>95</sup> and fuel.<sup>96</sup> Similarly, priority could be given to labour markets and the analysis of monopsony.<sup>97</sup> In the EU, women are still overrepresented in certain low pay jobs such as education, healthcare, and childcare.<sup>98</sup>

Gender-inclusive priority setting could also focus on (ii) *access to markets*, namely, anticompetitive behaviour that limits market access of firms owned and operated by vulnerable groups such as women-led businesses that face difficulties in accessing finance,<sup>99</sup> access to digital platforms,<sup>100</sup> and on anticompetitive practices that limit future market access by women (unequal access to education and capital).<sup>101</sup>

Gender-sensitive indicators could be embedded across the priority setting rules and practice cycle. In our empirical work, we identified various aspects of the priority setting cycle, pointing to their role and effects in the pre-decision, decision, and post-decision stages.<sup>102</sup> Four aspects of priority setting are particularly suitable for the consideration of gender equality: agenda setting, the substantive criteria guiding prioritization, conducting *ex-post* impact assessment of priority setting decisions, and the procedure in which prioritization decisions are being taken.

## 1. Agenda setting

First, gender equality considerations could inform adopting a competition authority's *agenda*, that is, a list of *ex-ante* periodic enforcement agenda, publicly declaring that certain sectors or practices are a priority.<sup>103</sup> Adopting an agenda encourages proactive enforcement, rather than only reacting to complaints or leniency applications regardless of their impact on markets and society. It guides staff members in deciding whether to open an *ex-officio* investigation or to reject a complaint, and what enforcement tools to use in respective cases. Enforcement agenda could focus on sectors and practices where women encounter a higher likelihood of poverty throughout their life courses,<sup>104</sup> where they often are disadvantaged like in the informal economy, where they are overrepresented, for example, in social sectors and sectors with low pay, such as education, healthcare, caregiving, cashiery, and retail.<sup>105</sup> In 2021, in Europe, 76% of healthcare and

social care workers and 86% of personal care workers in health services are women.<sup>106</sup>

## 2. Substantive criteria

The substantive criteria for priority setting refer to external or internal criteria guiding competition authorities' decisions on whether to pursue or disregard a case. Unlike agenda setting, this aspect does not refer to a specific sector or practice, but to case-specific circumstances.

Setting substantive criteria structures the exercise of the competition authorities' discretion, promotes efficient use of resources, focuses enforcement efforts on deterrence, and clarifies the rules. It prevents both underenforcement (by encouraging enforcement in cases of legal, societal, or doctrinal importance) and overenforcement (discouraging enforcing practices having only a limited impact on consumers and markets). It also functions as an accountability mechanism. Publishing substantive criteria enhances accountability and transparency and addresses some of the concerns of opening up prioritization to include broader non-competition interests.<sup>107</sup>

While EU law does not offer substantive criteria for Member States, some NCAs adopted such criteria. Seven percent of the NCAs are guided by *external substantive criteria*, set by the national legislature, government, or judiciary as external control, 34% by only *internal substantive criteria*, adopted by NCAs as internal control (mostly published and publicly available), 35% by *both internal and external substantive criteria*, and 24% are *not guided* by any external or internal criteria at all.

Our previous research has demonstrated that even when legislators or the competition authorities themselves have adopted competition law prioritization principles, such principles have mostly focused on *practical concerns* (existing evidence; ease of proof; the need for legal precedent; the likelihood of establishing an infringement; the available resources of the competition authority), the *available legal remedies* (whether the competition authority is well placed to bring an infringement action; the potential effectiveness of the enforcement), and on *traditional economic growth indicators* (the gravity or seriousness of the infringement; the impact of the conduct on competition, the functioning of the economy or the market, or on consumer welfare).<sup>108</sup>

In our study, we found that prioritization decisions of the European Commission and the NCAs of the EU Member States are mostly driven by traditional economic growth indicators. They mostly rely on consumer welfare as the basis of their substantive prioritization criteria.<sup>109</sup>

Setting competition law enforcement priorities based on the consumer welfare standard or other traditional growth indicators does not take into account who the different beneficiaries of the intervention are and the impact the competition law enforcement will have on their respective well-being. Enforcement priorities informed by the consumer welfare standard do not distinguish between the products or services subject to an investigation, for example, between competitive harm taking place in essential products markets and those involving luxury products.<sup>110</sup>

<sup>94</sup> Posner and Sunstein (n 27). 200.

<sup>95</sup> Santacreu-Vasut and Pike (n 9).

<sup>96</sup> Farasat AS, Bokhari et al., 'Do the Poor Pay Disproportionately More for Increasing Market Concentration? A Study of Retail Petroleum Markets' A Study of Retail Petroleum Markets (June 30, 2021) (2021).

<sup>97</sup> Labour markets in which vulnerable groups of women participate, where pay gaps based on race or gender for example are large could be prioritized. Posner and Sunstein (n 27). 200.

<sup>98</sup> EIGE, Gender Equality Index 2024 available at: <https://eige.europa.eu/gender-equality-index/2024/country/NL>.

<sup>99</sup> OECD, Gender Inclusive Competition Toolkit (2023), available at: [<sup>100</sup> Santacreu-Vasut and Pike \(n 9\) 12.](https://www.oecd-ilibrary.org/docserver/0d789043-en.pdf?expires=1708347719&id=id&accname=ocid177514&checksum=6D77476BA6E7B50D747A0D02BD497CB3, 26; Betty Mkatshwa, et al., 'Prioritising gendered public interest considerations' (2021), available at: https://www.oecd.org/daf/competition/gender-inclusive-competition-proj-6-prioritising-gendered-public-interest-considerations.pdf, 6.</a></p>
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<sup>101</sup> Santacreu-Vasut and Pike (n 9) 4.

<sup>102</sup> The typology and definition of the different aspects of priority setting is based on Brook and Cseres (n 12).

<sup>103</sup> Agenda setting is also known as the authority's annual/action/work plan, or a strategy statement/plan.

<sup>104</sup> In the Netherlands, for example, women are less likely to be economically independent due to gender stereotyping and gender roles both at work and in the private sphere and as such have higher risk to poverty. Ministerie van Onderwijs, Cultuur en Wetenschap, 'Emancipatienota' 2022–2025 available at: <https://open.overheid.nl/documenten/ronl-9442234d31a1e83aaed7b1a7dece2205bb92e2fe/pdf>.

<sup>105</sup> European Union, 'Gender Equality Report 2023' (2023) available at: [https://commission.europa.eu/system/files/2023-04/annual\\_report\\_GE\\_2023\\_web\\_EN.pdf](https://commission.europa.eu/system/files/2023-04/annual_report_GE_2023_web_EN.pdf).

<sup>106</sup> European Parliament, COVID-19 and its economic impact on women and women's poverty: Insights from 5 European Countries, [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/693183/IPOL\\_STU\(2021\)693183\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/693183/IPOL_STU(2021)693183_EN.pdf).

<sup>107</sup> Brook and Cseres (n 12).

<sup>108</sup> Brook and Cseres (n 12).

<sup>109</sup> Brook and Cseres (n 12).

<sup>110</sup> Francisco Costa-Cabral and Julian Nowag, 'Greedflation, Competition Law, and the Cost-of-Living Crisis' (2023), 6. Available at: <https://www.socialistsanddemocrats.eu/sites/default/files/2023-06/greedflation-competition-law-and-the-cost-of-living-crisis-report-final.pdf>.



As an alternative, competition authorities could set their priorities with reference to broader growth standards. Indeed, since the early 1970s, concerns have emerged that macroeconomic statistics, such as GDP, do not provide a sufficiently detailed picture of the living conditions that ordinary people experience. Accordingly, there is a need for alternative development models for measuring not just material and economic growth but also societal progress about improvements in the wellbeing of people and households. Assessing such progress requires looking not only at the functioning of the economic system but also at the diverse experiences and living conditions of people.<sup>111</sup> Many variations of so-called beyond-GDP indexes and indicator dashboards have been developed, moving away from narrow economic growth to inclusive and sustainable growth, encompassing a wide-ranging quality-of-life and wellbeing parameters and aiming to distribute wealth fairly across society and create opportunities for all.<sup>112</sup>

In particular, several country-level composite measures of gender inequality and women's position have been developed. The Gender Development Index and the Gender Empowerment Measure, for example, are both developed and published annually in the United Nations Human Development Reports up to 2009.<sup>113</sup> The most salient beyond-GDP metrics include Gender Development Index, Gender Equality Index, Gender Inequality Index, and Human Development Index.<sup>114</sup>

In the EU, the Gender Equality Index is a tool to measure the progress of gender equality.

Developed by the European Institute for Gender Equality, since its introduction in 2013, it has tracked and reported progress by providing a comprehensive measure of gender equality, tailored to fit the EU's policy goals. It reveals both progress and setbacks and explores more effective ways to seize opportunities for change.<sup>115</sup>

The beyond-GDP measurements have been adopted and used in two countries over the past year in adopting detailed substantive prioritization criteria that align their competition law enforcement more closely with these new measurements of inclusive and sustainable growth. The UK's and Dutch<sup>116</sup> competition authorities have both recently adopted measures beyond GDP capturing dimensions outside the economic domain that influence wellbeing, inclusion, sustainability, and ultimately better living standards for all segments of society.<sup>117</sup>

<sup>111</sup> OECD WISE Centre on Well-Being, Inclusion, Sustainability and Equal Opportunity (WISE). Available at: <https://www.oecd.org/wise/measuring-well-being-and-progress.htm>.

<sup>112</sup> A seminal report was the so-called Brundtland Report (WCED, 1987) which stressed that economic development, social progress, and environmental sustainability are interdependent. It also provided a definition for sustainable development: 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.' The Brundtland report, however, also stressed the importance of overcoming global inequalities and poverty. Later, the so-called Stiglitz-Sen-Fitoussi report also stressed that progress can be seen as current and future wellbeing, with inequality also being a vital component. Anneke Jansen et al., 'A Synthesis of Beyond GDP Metrics for Wellbeing, Inclusion, and Sustainability Including a Deep-Dive into EU Metrics and their Role in Governance' (2023). Final version of WISE Horizons deliverable 1.1.

<sup>113</sup> Irene van Staveren, 'To Measure is to Know? A Comparable Analysis of Gender Indices', (2013) 3 *Review of Social Economy*, 71, 339–372.

<sup>114</sup> Anneke Jansen et al., 'Beyond GDP: A Review and Conceptual Framework for Measuring Sustainable and Inclusive Wellbeing' (2024) *The Lancet Planet Health*, 8(9).

<sup>115</sup> Gender Equality Index (n 83). It gives more visibility to areas that need improvement and ultimately supports policymakers to design more effective gender equality measures.

<sup>116</sup> Beleidsregel Prioritering van handhavingsonderzoeken door de Autoriteit Consument en Markt (2023) available at: <https://wetten.overheid.nl/BWBR0048190/2023-05-26>.

<sup>117</sup> World Bank and Organisation for Economic Co-operation and Development, 'A Step Ahead: Competition Policy for Shared Prosperity and Inclusive Growth' (2017). <https://doi.org/10.1596/978-1-4648-0945-3>.

The UK Consumer and Market Authority's 2023 Prioritisation Guidelines follow a more inclusive and sustainable growth approach, frequently referring to concepts of fairness.<sup>118</sup> This is apparent from the Guidelines placing emphasis on broader societal goals and redefining the addressees of competition policy, replacing the term 'consumers' with 'people'. The 2023 prioritization principles reflect the 2019 British Government's strategic steer to the CMA, which explicitly stated that '[c]onsumer harm can be substantial when markets do not work well, with people in vulnerable situations in particular at risk of losing out', and directed the CMA to 'make markets work well for vulnerable consumers'.<sup>119</sup>

Similarly, the Netherlands Authority for Consumer and Markets (ACM) revised its prioritization policy. The Prioritisation Policy Rules of 2023 revised the mission of the ACM 'to make markets work well for people and businesses, now and in the future'. For the authority, competition is an economic process that promotes the achievement of certain societal goals. It is a means to promote a healthy economy and prosperity in a broad sense and to contribute to trust in a government that protects people and businesses from the failure of markets. Finally, the assessment of harmfulness is not limited to 'average' or 'representative' participants in markets. The social interest in the actions of the authority, including not only market governance (well-functioning markets, optimal regulation of legal or natural monopolies, and consumer protection), but also wider public interests such as sustainability, economic resilience, quality of care, privacy, and safety. The ACM may also prioritize an enforcement investigation because of the relatively large impact its actions may have on a size-limited group, such as people and companies in vulnerable or dependent positions.<sup>120</sup>

### 3. Procedure to prioritize

Administrative procedures and institutional processes significantly impact prioritization choices, for example, by defining who can participate as third parties in the decision-making. Formal participation and complaints serve various functions in administrative procedures that provide the foundation of efficient and legitimate administrative decision-making in any modern democratic polity. They not only provide relevant information and assist administrative authorities in monitoring the good functioning of markets, but their participation fulfils an important aspect of transparency and accountability that enhances the legitimacy of the proceedings and the final decision-making. Formal participation of complainants is an essential oversight mechanism scrutinizing the administrative authority's use of discretionary powers and functions as a complement to judicial review: third parties are given the opportunity to contradict the possible decision of the competition authority, invoking errors, flaws, or mistakes that could ultimately lead to the illegality of the final decision.

<sup>118</sup> UK Consumer and Market Authority's 2023 Prioritisation Guidelines. [https://assets.publishing.service.gov.uk/media/653f71b780884d0013f71cf4/CMA\\_Prioritisation\\_Principles\\_.pdf](https://assets.publishing.service.gov.uk/media/653f71b780884d0013f71cf4/CMA_Prioritisation_Principles_.pdf); Katalin Cseres and Or Brook, 'The CMA's New Prioritisation Guidelines: Towards Inclusive and Sustainable Growth?' <https://competitionlawblog.kluwercompetitionlaw.com/2023/11/28/the-cmas-new-prioritisation-guidelines-towards-inclusive-and-sustainable-growth/>.

<sup>119</sup> UK Department for Business, Energy and Industrial Strategy, The Government's Strategic Steer to the Competition and Markets Authority (2019). <https://assets.publishing.service.gov.uk/media/5d2f3e3ce5274a14ed4871b8/cm-a-strategic-steer.pdf>.

<sup>120</sup> Beleidsregel Prioritering van handhavingverzoeken door de Autoriteit Consument en Markt 2023, 2023. ACM Prioritisation guidelines section 1.

However, such a participatory model is administratively burdensome, and, hence, restriction of third parties' participation rights and no obligation imposed on the competition authorities to address them by a formal decision keep enforcement swift and efficient.<sup>121</sup> Procedural efficiency is essential for addressing complex problems and for managing fast-paced technological changes in today's markets,<sup>122</sup> but is only one of the relevant considerations for modern public administration and a balance between procedural efficiency and transparency must be established. This could happen, for example, through differentiating between types of participation and by granting special status to certain relevant categories of third parties, who are sufficiently representative organizations acting in the public interest.<sup>123</sup>

Women organizations, as representative organizations acting in the public interest of gender equality, could be granted special status. A procedure similar to the UK's super-complaints could be adopted, which allows designated civil society organizations to file a 'super-complaint' about alleged anticompetitive conduct, which would direct the competition authority to prioritize the handling of the complaint by adopting a formal decision in a transparent, fast-track procedure.<sup>124</sup>

Such solutions highlight that administrative procedures are not only functional in nature. Their normative dimension must uphold the fairness and equality of decision-making.<sup>125</sup> This solution would allow women's organizations to participate in decision-making by being granted meaningful and structured access to justice by streamlining the participation rules in legal proceedings. It advances the basic premise of the rule of law that those adversely affected by the outcome of administrative decision-making should be guaranteed effective participation and protection of their legal interests.<sup>126</sup>

#### 4. Impact assessment

Finally, competition authorities can embed gender equality considerations within *impact assessments*, *ex-post* periodic assessment of prioritization choices.

*Ex-post* assessment of competition law interventions is limited in general and especially when it comes to prioritization choices.<sup>127</sup> There are no internationally recognized standards for measuring the performance of a competition authority in general and the allocation of enforcement priorities in particular.<sup>128</sup> Given the lack of such standards and the difficulties in measuring and evaluating the impact of the enforcement priorities, the limited *ex-post* assessments of competition law enforcement

tend to focus on basic quantitative measures (e.g. the number of interventions in a given year) or on traditional growth indicators such as consumers' savings (estimating the reduction in prices resulting from the competition policy enforcement in the market concerned multiplied by the estimated duration of the price reduction).<sup>129</sup> Competition authorities provide very little information on the impact of their selection of cases and enforcement actions. Consequently, there is little debate on the impact of the enforcement on the parameters of prices or the quality of products or services.<sup>130</sup> This was observed by the EU Court of Auditors, for example, criticizing the European Commission for focusing 'more on activities rather than on impact' when explaining and demonstrating the benefits of its enforcement actions for citizens.<sup>131</sup>

Embedding gender equality considerations within *impact assessments* would bring prioritization in line with the EU policy on gender impact assessment, where the European Commission deploys a variety of methods in its approach to gender mainstreaming.<sup>132</sup> These methods span the whole policy cycle, from policy definition, through implementation to monitoring and evaluation. While the Commission does not perform gender impact assessments as a separate, standalone exercise, it has integrated the consideration of gender issues within its general impact assessment system.<sup>133</sup>

#### D. Way forward

Gender equality is not just a matter of social justice but also a fundamental driver of sustainable and inclusive growth. By ensuring equal opportunities in markets, societies can facilitate women's potential as active contributors to economic, social, and cultural development. Following a gender-inclusive approach, competitive markets are seen to allocate resources, goods, and services in a societally beneficial manner, including the interests and needs of women.

While the core aim of EU competition law, as a key area of the EU legal and economic order, has been to protect competitive markets and deliver low-priced high-quality goods and services for people, it carries a broader constitutional value that facilitates a social order extending well beyond price and output of specific products. The historical roots and the constitutional home of EU competition law are deeply intertwined with the idea of safeguarding equal opportunities, which is a core element of gender equality as a constitutional value, principle, and fundamental right in EU law. Despite this strong constitutional underpinning of the relationship between competition law and gender equality, and despite important mechanisms of gender mainstreaming through the horizontal clauses, their relationship remained invisible both in the EU and largely in national competition law policies.

This paper offers a relatively simple but powerful enforcement tool to mainstream gender equality in the enforcement of

<sup>121</sup> On trade-offs between efficiency and transparency and accountability, see Brook and Cseres (n 9).

<sup>122</sup> Åse Gornitzka and Cathrine Holst, 'The Expert-Executive Nexus in the EU: An Introduction' (2015) 3 *Politics and Governance* 1, 2.

<sup>123</sup> Or Brook, Katalin J Cseres, Ben van Rompuy, 'Abolishing Formal Complaints? Balancing Technical Expertise and Efficiency with Democratic Accountability in the European Commission's Decision-Making' (2023), 14 *Journal of European Competition Law & Practice*, 8, 506–7.

<sup>124</sup> This would partly offset the disadvantages that a higher evidentiary threshold of admissibility for formal complaints would create for final consumers or other complainants that do not have the necessary resources and investigatory capacity to satisfactorily meet such a burden. Similar to the mechanism that exists in the UK and has been proposed by the government in Australia.

<sup>125</sup> Imelda Maher, 'Functional and Normative Delegation to Non-majoritarian Institutions: The Case of the European Competition Network' (2009) 7 *Comp Eur Polit* 7, 414–434.

<sup>126</sup> Hanns Peter Nehl, *Principles of Administrative Procedure in EC Law* (Bloomsbury Publishing 1999) 44. Joana Mendes, 'EU Administrative Action, Procedural Guarantees, and Participation', *Participation in EU Rule-Making: A Rights-Based Approach* (Oxford Studies in European Law, OUP, 2011).

<sup>127</sup> Brook and Cseres (n 12).

<sup>128</sup> Court of Auditors report—Special Report No 24-2020—The Commission's EU merger control and antitrust proceedings—a need to scale up market oversight (2020), para 80.

<sup>129</sup> European Commission: Directorate-General for Competition, Fabienne Ilzkovitz, and Adrienne Dierx, 'Ex-Post Economic Evaluation of Competition Policy Enforcement—A Review of the Literature' (Publications Office, 2015).

<sup>130</sup> Court of Auditors report—Special Report No 24-2020—The Commission's EU merger control and antitrust proceedings—a need to scale up market oversight (2020), para 88; Priority Setting Report [impact assessment].

<sup>131</sup> Court of Auditors report—Special Report No 24-2020—The Commission's EU merger control and antitrust proceedings—a need to scale up market oversight (2020), para 91.

<sup>132</sup> A Union of Equality: Gender Equality Strategy 2020–2025 (n 53).

<sup>133</sup> In the policy-definition phase, gender impact assessment is integrated within the Commission's impact assessment system. European Institute for Gender Equality (EIGE), 'Gender Impact Assessment, Gender mainstreaming toolkit' available at: [https://eige.europa.eu/sites/default/files/documents/eige\\_gender\\_impact\\_assessment\\_gender\\_mainstreaming\\_toolkit.pdf](https://eige.europa.eu/sites/default/files/documents/eige_gender_impact_assessment_gender_mainstreaming_toolkit.pdf).

competition law. It shows how gender equality considerations could be implemented in the priority setting rules and practices of competition authorities without having to substantiate how such values could be implemented in the substantive assessments of the competition law rules.

While being mindful of the administrative and constitutional diversity across the EU Member States, but also acknowledging the central and '*primus inter pares*' role the Commission plays in shaping EU competition law policy across the EU, the proposal this paper makes is a revival of the 2013 Recommendation on the power to set priorities made in the framework of the ECN.<sup>134</sup> As the obligation to set priorities already exists, the Commission could propose, within the framework of the ECN a similar

recommendation that would give detailed guidance on the way prioritization criteria are given shape, something the EU has already done concerning its growth model, which is based on the objective of fair and inclusive growth and competitive sustainability.<sup>135</sup> Taking the lead, the Commission could, on the basis of the values its legal and economic order stands for, call for a rethinking of the consumer welfare-driven policies and advocate for converging towards the Commission's model based on achieving sustainable, inclusive growth and also social inclusion.

Conflict of interest. The authors have no conflicts of interest to declare.

<sup>134</sup> European Competition Network, 'Recommendation on the Power to Set Priorities' (2013), available at: [https://competition-policy.ec.europa.eu/system/files/2021-07/recommendation\\_priority\\_09122013\\_en.pdf](https://competition-policy.ec.europa.eu/system/files/2021-07/recommendation_priority_09122013_en.pdf).

<sup>135</sup> European Competition Network, 'Recommendation on the Power to Set Priorities' (2013), available at: [https://competition-policy.ec.europa.eu/system/files/2021-07/recommendation\\_priority\\_09122013\\_en.pdf](https://competition-policy.ec.europa.eu/system/files/2021-07/recommendation_priority_09122013_en.pdf).

<sup>135</sup> European Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions—Towards a Green, Digital and Resilient Economy: Our European Growth Model* (Brussels, COM (2022) 83 final) (2022).