

Can Antitrust Enforcement Be A Tool For Racial Equity?

By **Rosa Morales** (March 30, 2021, 6:03 PM EDT)

A growing chorus of proponents for more aggressive enforcement wants antitrust to be used as a tool to combat racial inequality — which they claim is consistent with the U.S. antitrust laws' origins.[1]

Rising corporate power has increased wealth inequality, they contend, which has tended to affect communities of color disproportionately and exacerbate systemic racism.[2] Among the most prominent voices is then-Federal Trade Commissioner Rebecca Slaughter, who last September sparked a conversation about whether and how antitrust enforcement can and should be anti-racist.[3]



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While Slaughter's tweets have provoked some backlash,[4] President Joe Biden's recent appointment of her as acting Federal Trade Commission chairwoman —which could become permanent — and recent legislative and executive developments may portend a policy shift in antitrust enforcement in a political environment with rare bipartisan support for reining in market power in and beyond Big Tech.[5]

What is the antitrust and racial equality nexus?

The Sherman Act of 1890, the nation's oldest federal antitrust law, was passed to curb increasing concentrations of economic and social power held by trusts — famously, American Tobacco Co. and Standard Oil Co.[6]

As some have argued, these distributive and progressive goals were fundamentally about promoting economic justice, equal opportunity and democratic ideals by preventing excessive centralized economic power and facilitating equal access to markets.[7]

But the more noble egalitarian origins of antitrust law have largely eluded communities of color, some argue, because America's economic structure is highly racialized, with predominantly white, and male, corporate ownership and control that persists nearly intact today.[8] Lack of access to capital for minority entrepreneurs compounds this phenomenon and can act as an entry barrier to the market economy.[9]

For example, a recent Silicon Valley Bank study showed that Black entrepreneurs received only 1% of the \$130 billion spent in 2019 by venture capitalists in the U.S. — effectively stunting the ability of

communities of color to build wealth and exacerbating racial inequality.[10]

Critics cite conservative interpretations and applications of facially neutral antitrust laws and policies dating back to the 1960s and 1970s that have tended to preserve, perpetuate and exacerbate wealth inequality, which may disproportionately impact the poorest communities, particularly communities of color.[11]

Can and should antitrust enforcement be anti-racist?

On the heels of the protests over George Floyd's killing and the pandemic's devastating impact on communities of color, then-Commissioner Slaughter committed to making antitrust enforcement anti-racist. On Feb. 10, she renewed that commitment in her first speech as the new acting FTC chairwoman.

Slaughter named two reasons for embracing anti-racist enforcement of the antitrust laws. First, she noted that no other area of the law is value-neutral, so there is no reason for antitrust to be a "value-free zone." [12] According to Slaughter, when prosecutors target white collar, as opposed to violent crime, these decisions necessarily reflect specific values.

And so does the FTC's choice to focus on predatory lending or discrimination in auto financing, areas known to disproportionately affect African American communities.

Second, she noted that truly race-blind enforcement is an impossibility. In her view, because economic and market structures are "historically and presently inequitable," antitrust enforcement — or the lack thereof — inevitably affects structural equity or inequity and, thus, can reinforce unequal systems.[13]

Slaughter advocates for an "open-eyed" approach that considers the skewed ways that minorities have been affected by race-neutral approaches to antitrust enforcement.[14]

But Slaughter does not suggest reinventing antitrust to fight systemic racism. Rather, she claims, existing antitrust tools can be used creatively to eradicate or mitigate structural inequality.[15]

One such tool is data gathering. Demographic data can inform merger review and conduct challenges to assess the impact, such as price hikes, on communities of color.

Another is reprioritizing enforcement to target conduct and transactions with lopsided effects on consumers and businesses in communities of color. For example, in health care, people of color suffer poorer health outcomes, lower quality of care, higher costs and fewer options than their white counterparts. Reprioritized enforcement could mitigate racial inequities in health.

Finally, Slaughter urges creative use of the FTC's rulemaking authority to end problematic practices, like noncompete clauses in employee contracts in industries "disproportionately populated by workers of color." [16] On March 18, Slaughter lauded use of the FTC's rulemaking authority to address anti-competitive practices that, in light of the challenging jurisprudence, would be difficult to litigate.[17]

South Africa offers lessons.

Slaughter's "all-tools-available," anti-racist enforcement prescription is not unprecedented.

Post-apartheid, South Africa committed itself to equality as an imperative value consideration in all law,

including its competition laws.[18]

To combat structural racism, South Africa's Competition Act of 1998 mandates that: (1) small and medium-sized businesses of the type typically owned by Black South Africans have a fair shot at participating in the market, and (2) ownership is spread to include them in the formal economy.[19]

According to professor Eleanor Fox, this statute "made clear that it always valued inclusiveness," which "translated into antitrust[] mean[t] vigilant concern for lowering barriers, opening markets, and trusting in the not-yet-imagined contributions of outsiders to increase innovation. In this space, efficiency and equity meet." [20]

In 2017, then-President Jacob Zuma found the transformation goals under this legislation to have been unmet and thus reinforced its equality and inclusion mandate by empowering competition authorities to conduct market inquiries into whether the policy had resulted in new players entering in the economy, Black South African participation opportunities, and more dynamic, competitive and inclusive markets.[21]

Enforcers were also armed with remedies targeting structural obstacles to market entry and ownership by Black South Africans and other historically disadvantaged persons.[22]

As a result, South African competition authorities must consider equality and inclusion goals in clearing mergers and taking other enforcement action. Even a competitive merger may only be approved on the condition that the parties agree to offer shares in the deal or partnerships in a joint venture, or significant worker retraining and entrepreneurial capacity-building, to historically disadvantaged persons.[23]

A prime example is the 2011 Walmart Inc./Massmart Holdings Ltd. case. There, the large supermarket merger threatened the survival of small South African suppliers, which feared displacement by Walmart's global supply chain.

A South African court ordered that Walmart invest 200 million rands (\$13 million) on top of Massmart's 40 million rands (\$2.6 million) on capacity training for small suppliers so that they, too, could enter the global supply market. The program generated jobs and local procurement for Black South Africans and other historically disadvantaged groups.[24]

South Africa may serve as an example of what anti-racist, pro-equity competition enforcement might look like in other developed countries, like the U.S.[25]

Is anti-racism the future of antitrust enforcement?

Despite strong opposition, recent executive and legislative developments suggest that Slaughter's anti-racism prescription may indeed influence antitrust enforcement at the FTC and beyond.

Indeed, Biden has made eradicating systemic racism one of the pillars of his administration. On his first day in office, Biden signed an executive order, which, among other things, begins with the recognition that "[e]ntrenched disparities in our laws and public policies," have exacerbated inequities, including systemic racism.[26]

In his executive order, Biden directed a "whole-of-government equity" approach that would require

"embedding fairness" in the policies and programs across all federal agencies.[27]

Biden's appointment of Slaughter as acting FTC chairwoman may suggest that his administration intends to activate a racial equity agenda at the structural level. Indeed, in her first speech as acting chairwoman, Slaughter confirmed her penchant for an "aggressive" approach to enforcement, "including bold and innovative use of FTC's existing authority" to address all types of anti-competitive harm.[28]

Slaughter's vision for the agency may be bolstered by Biden's nomination of Columbia Law School professor Lina Khan to become FTC commissioner.[29] Indeed, a strong critic of the conservative antitrust jurisprudence of the past 40 years, Khan has similarly argued for reinvigorating antitrust enforcement to mitigate economic inequality.[30]

Moreover, Sen. Amy Klobuchar, D-Minn. — who chairs the U.S. Senate's Subcommittee on Competition Policy, Antitrust and Consumer Rights — recently commented that increasing market power and concentration, and decades of court rulings and lax regulation by agency enforcers, have been key contributors to the monopoly problem, particularly in Big Tech.[31]

In February, Klobuchar unveiled sweeping new legislation that was premised on the assumptions that the "presence of market power [] in the United States [is growing and is resulting in] increase[d] economic inequality, with particularly damaging effects on historically-disadvantaged communities." [32]

Her bill aims to undo some of the decades of antitrust jurisprudence that many argue has led to a monopolization crisis in the U.S. economy, which, in turn, has exacerbated racial inequality.

This alignment may signal a significant shift in antitrust enforcement away from a pure efficiencies model. But, given the current state of the law and the configuration of the federal judiciary, there is an open question of whether efforts to achieve racial equity will be limited absent significant legislative reforms.

In any event, companies whose proposed transactions and business practices will be reviewed by the antitrust agencies during the next four years should expect to face questions and information requests that seek to determine how diverse communities — particularly communities of color — have been or will be impacted.

They should also expect that issues that once were seen as pro-competitive efficiencies — i.e., lower production costs through lower labor costs — may be scrutinized more carefully and viewed with greater skepticism, if not deemed potentially harmful.

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[1] Hal Singer, Antitrust Can Address Racial Inequities - The American Prospect, Feb. 10, 2021; Brendan Kennedy, Yes America, Antitrust Laws Do Perpetuate Structural Racism But They Don't Have To - New York State Bar Association (nysba.org), Jan. 27, 2021; Sandeep Vaheesan, The Appeal - How Antitrust

Perpetuates Structural Racism — Open Markets Institute, Sept. 16, 2020.

[2] Id.

[3] Rebecca Kelly Slaughter on Twitter: "But I don't think there has been nearly enough discussion about whether our #antitrust laws can play a role in racial equity. I think the answer is YES! #Antitrust can and should be #antiracist. 5/14" / Twitter.

[4] Kirk Victor, Slaughter's tweets on antitrust and race spark backlash - FTCWatch (mlexwatch.com), Sept. 21, 2020. Some critics argued that the FTC's jurisdiction cannot be invoked unless "the challenged conduct harms competition and the competitive process" and that it would not suffice for the FTC to articulate a "goal of making markets fairer or less discriminatory." Others claim that antitrust enforcers are not equipped to achieve anti-racist objectives, and that other programs and statutes are specifically designed to address discrimination.

[5] Karl Herchenroeder, Slaughter Pushes Progressive FTC Agenda, Hints at Bipartisanship (communicationsdaily.com), Feb. 17, 2021.

[6] See, e.g., Lina Khan & Sandeep Vaheesan, Market Power and Inequality: The Antitrust Counterrevolution and its Discontents by Lina Khan, Sandeep Vaheesan :: SSRN, 11 Harvard Law & Policy Review 235 (2017).

[7] Id.

[8] Sandeep Vaheesan, How Antitrust Perpetuates Structural Racism - The Appeal, Sept. 16, 2020.

[9] Reed Albergotti, Black tech entrepreneurs lack legal protections against discrimination in venture capital - The Washington Post, July 22, 2020.

[10] Id.

[11] Sandeep Vaheesan, How Antitrust Perpetuates Structural Racism - The Appeal, Sept. 16, 2020.

[12] Antitrust at a Precipice: Remarks of Commissioner Rebecca Kelly Slaughter at the GCR Interactive: Women in Antitrust (ftc.gov), Nov. 17, 2020.

[13] Id.

[14] Lauren Feiner, FTC Commissioner Slaughter on making antitrust enforcement antiracist (cnbc.com), Sept. 26, 2020.

[15] Id.

[16] Max Fillion, US FTC's Slaughter seeks to examine impact of antitrust enforcement on systemic racism | MLex News Hub (mlexmarketinsight.com), Sept. 15, 2020.

[17] Prepared Statement of FTC Acting Chairwoman Slaughter, March 18, 2021.

[18] Eleanor Fox, South Africa, Competition Law and Equality: Restoring Equity by Antitrust in a Land

where Markets were Brutally Skewed (competitionpolicyinternational.com), December 9, 2019.

[19] Id.

[20] Id.

[21] Id.

[22] Id.

[23] Id.

[24] Id.

[25] South Africa is not alone. At least in principle, the European Union similarly embeds equity goals into its competition policy. Article 8 of the Treaty on the Functioning of the European Union ("TFEU") provides: "In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women."^[25] And Article 10 of the TFEU requires that, "[i]n defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." Consolidated Version of the Treaty on the Functioning of the European Union, resource.html (europa.eu). All EU institutions, including the European Commission, must consider these overarching principles when making policy in all areas, including in competition policy.

[26] Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government | The White House.

[27] Id.

[28] Prepared Statement of FTC Acting Chairwoman Slaughter, March 18, 2021.

[29] Asher Schechter, What Does Lina Khan's FTC Nomination Mean For the Future of Antitrust? (promarket.org), March 10, 2021.

[30] Lina Khan & Sandeep Vaheesan, Market Power and Inequality: The Antitrust Counterrevolution and its Discontents by Lina Khan, Sandeep Vaheesan :: SSRN, 11 Harvard Law & Policy Review 235 (2017).

[31] Kelly Anne Smith and Benjamin Curry, Sen. Klobuchar's Antitrust Reform Targets Big Tech – Forbes Advisor, Mar. 15, 2021.

[32] Press Release, Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement - News Releases - U.S. Senator Amy Klobuchar (senate.gov), Feb. 4, 2021. This bill was co-sponsored by Judiciary Subcommittee on Antitrust and Commerce Committee members Richard Blumenthal (D-CT), Cory Booker (D-NJ), Ed Markey (D-MA), and Brian Schatz (D-HI).