ANTITRUST AS ANTIDISCRIMINATION: LABOUR MARKETS AND THE GENDER WAGE GAP

Gender discrimination by the employer is prohibited in most countries under constitutional and/or employment laws, but nonetheless it persists and has even widened during the ongoing pandemic. Women often do not file lawsuits against their employers fearing retaliation and high costs of a long-drawn litigation, while those in the gig economy are excluded from the protective ambit of anti-discrimination laws. In this paper, we argue that antitrust can provide a better remedy to gender wage discrimination. We analyze the issue from an economic lens, and locate the causes of gender discrimination at work in the capacity of monopsonistic employers to exploit the vulnerability of female employees. Drawing on the recent (and ongoing) debate on the goals of antitrust law and its role in society, we argue that antitrust policy committed to gender equality would prohibit discriminatory wages as an abuse of dominant position, and would reformulate the existing antitrust prohibition on collective action with a view to securing a level playing field for women. While antitrust is not a panacea to the broader sociopolitical reality that leads to workplace discrimination, we argue that antitrust enforcement in labour markets can reduce the extent and frequency of wage discrimination at work.

"We know that women have been and continue to be disproportionately affected by the economic consequences of COVID, especially in the job market. The effect is so profound that this economic downturn has been deemed a "she-cession." Women are leaving the workforce, both involuntarily and voluntarily, at shockingly high rates."

- Rebecca Slaughter, Federal Trade Commission (2020)[1]

The ongoing pandemic has drastically transformed the nature of work and industrial relations, and has affected the lives of almost all workers across the world. A large number of workers were laid off, put on furloughs or did not have their contracts renewed, while many of those who retained their jobs were faced with sharp cuts in salaries and benefits.[2] The impact of the pandemic, however, was not the same for all classes of workers – in particular, women were affected substantially worse than their male counterparts. In the US alone, 865,000 women dropped out of the workforce[3] while the gender pay gap worsened significantly in the UK, Germany and Australia.[4]

Gender-based discrimination at the workplace has been at the forefront of the legislative and policy agenda for the larger part of the last century, with one of the key demands of the feminist movement being that of 'Equal Pay for Equal Work'.[5] Gender equality in all matters is one of the foundational principles of most modern constitutions and has also been recognized in a number of international conventions, all of which

[1] Federal Trade Commission 'Antitrust at a Precipice: Remarks of Commissioner Rebecca Kelly Slaugter', GCR Interactive: Women in Antitrust, November 17, 2020.
[2] International Labour Organization, The Impact of the Covid-19 pandemic on jobs and incomes in the G20 economies (2020), available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_756331.pdf
[3] Federal Trade Commission (*Supra* note 1).
[4] Holly Corbett, 'Equal Pay Day 2021: Pandemic Impact and How to Close the Gender Wage Gap' Forbes, March 24, 2021.
[5] See Harold L. Smith, 'British Feminism and the equal pay issue in the 1930s' 5 Women's History Review 97 (1996); Mary Ann Becker, 'Patriarchy and Inequality: Towards a Substantive Feminism' 1999 University of Chicago Law Review 21 (1999).

specifically prohibit gender discrimination at the workplace.[6] Most states also have statutory laws governing issues of employment and/or anti-discrimination that prohibit any discrimination between men and women doing similar jobs.[7] The issues, however, still persist, and gender-based discrimination is rampant throughout the world. Numerous empirical studies show that even after adjusting for preferences, differences in working conditions, education, industry experience and other related factors, the average male earns more than a woman employed for doing the same job – on an average, women earn 95% of what their male colleagues earn in developed countries like the UK and the USA, and this gap widens substantially in developing countries.[8] This is often coupled with the imposition of onerous discriminatory terms on women such as a mandatory requirement that women wear heels to work.[9] While in most of these cases, women who have been discriminated against by their employers have a right to seek legal remedy under anti-discrimination laws, many fear retaliation from their employers on doing so, and are further discouraged by the high costs of litigation.[10] Moreover, the anti-discrimination statutes do not apply to workers in the gig economy, who are also not legally allowed to form unions, and are thus left entirely at the mercy of their employers.[11]

From an economic viewpoint, the difference between the wages of men and women can be explained, at least partially, by the theory of monopsonistic exploitation.[12] The labour market, is *'precisely as the name indicates: a market'*[13] where employees sell their talent to employers, and is therefore a *'mirror image of the product market'*.[14] Just like a concentration of the product market can lead to the emergence of large firms with substantial market power that can decide prices and discriminate between different sets of consumers, the concentration of labour markets can lead to the emergence of monopsonistic employers that can discriminate between different groups of employees. The economic harms of monopsony are similar to those arising out of a monopoly, and lead to inefficiency in the market – an employer in a monopsony can pay women less than their male counterparts for the same work, effectively transferring the value of the labour from the employee to itself and thus entrenching its monopsony power. Competition principles that apply to the product market should ideally apply to the labour market as well, but for a variety of reasons, competition authorities across the world have focused predominantly on the product market while labour markets have been ignored.[15] Accordingly, wage discrimination by employers is not usually treated as an antitrust offence, and is prosecuted only under anti-discrimination statutes.

In recent years, however, both academic commentators as well as policymakers have observed that antitrust policies should be applicable to the labour market, and have argued for the prosecution of non-compete agreements and buyer cartels on the labour market as well as the incorporation of labour concerns into merger assessment.[16] There has, however, been little literature on the abuse of dominant position in the

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[6] See for instance, Article 7 of the International Convention on Economic, Social and Cultural Rights; Article 4 of the European Social Charter; Article 15 of the African Charter on Human and People's Rights.

[7] See for instance, the US Equal Pay Act (1963), the UK Equal Pay Act (1973), the Indian Equal Remuneration Act(1976).

[8] Kathy Gurchiek, 'Study: Global Gender Pay Gap has narrowed but still exists', Society for Human Resource Management, April 2, 2019; Elise Gould, Jessica Scheider and Kathleen Geier, 'What is the Gender Pay Gap and is it real?', Economic Policy Institute, October 20, 2016.

[9] See British Broadcasting Corporation, 'High heels row: Petition for work dress code law rejected', 21 April 2017; Malcolm Foster, 'Japan Minister Responds to #KuToo Campaign by saying high heels 'appropriate', Reuters, June 6, 2019.

[10] Stephanie Bornstein, 'Disclosing Discrimination', 101 Boston University Law Review 287 (2021).

[11] Alysia Blackham, '"We are All Entrepreneurs Now:" Options and New Approaches for Adapting Equality Law for the Gig Economy' (2018) 34(4) International Journal of Comparative Labour Law and Industrial Relations 413-434.

[12] See Part I below.

[13] Orly Lobel, 'Gentlemen prefer bonds: How employers fix the talent market' 59 Santa Clara Law Review 663 (2020).

[14] Suresh Naidu, Eric Posner and Glen Weyl, 'Antitrust Remedies for Labor Market Power' 132 Harvard Law Review 536,538. (2018)

[15] *Id;* See also Eric Posner and Cristina Volpin, 'Labour monopsony and European Competition Law', Revue Concurrences (No. 4), 2020.

[16] C. Scott Hemphill & Nancy L. Rose, 'Mergers that Harm Sellers' 127 Yale Law Journal 2078 (2018); Ioana Marinescu & Eric Posner, 'Why has antitrust law failed workers?' 105 Cornell Law Review 1343 (2019-20); Marshall

labour market to discriminate between different classes of employees. This paper studies the economics of gender wage discrimination at the workplace and argues that it is similar to price discrimination by a monopoly and should be prosecuted under antitrust laws in a similar manner. It further argues that the prosecution of unionization in the gig economy as anticompetitive agreements reduces the bargaining power of workers and effectively entrenches the power of large employers to impose arbitrary terms on employees. Part I of the paper discusses the economic theory of labour monopsonies and part II explores why and how wage discrimination takes place in concentrated labour markets. Part III of the paper argues why this is an antitrust issue and suggests the use of existing antitrust tools to combat gender wage discrimination at work, and part IV comprises our concluding remarks.

I. THE ECONOMICS OF LABOUR MONOPSONIES

The term *'monopsony'* was first used by Joan Robinson in her pioneering work on the economics of imperfect competition.[17] Prior to her work, most of the economic literature on industrial organization focused on the product market and the effects of a monopoly. Robinson recognized that a large corporation can also exercise significant market power on the *'buy side'* – that is, in its purchase of inputs, including goods and services, and labour.[18] According to Robinson, a monopsony is analogous to a monopoly, and just like a monopoly can set prices in the product market, a monopsony can decide the prices it pays for the purchase of inputs. Although the term monopsony applies to any market situation involving a single buyer and multiple sellers, much of the subsequent research on monopsony has been centred around labour markets.[19]

Long before Robinson's theory, critics of capitalism like Marx and Engels had argued that powerful employers *'exploited'* their employees through underpayment and substandard working conditions.[20] According to Marx, as people were desperate for employment, employers could reduce wages far below the economic value of the labour put in by an employee and pay her the bare minimum needed to continue working. If an employee quit because of low wages or poor conditions, someone else from the *'reserve army of the unemployed'* who was willing to work for the wage being offered by the employer would take her place. The difference between the value of labour put in by the employee and the amount paid to her as wage (or *'the surplus'*) is extracted by the employer.[21] In her formulation, Robinson postulated that if the market for labour is competitive, an employee can quit her job if the wages are low, and can work for an employer who is willing to pay a higher wage, implying that the *'exploitation'* envisaged by Marx can take place only if the market is monopsonistic, and the employee has no alternative avenue of employment.[22]

Steinbaum, 'Antitrust, the Gig Economy and Labor Market Power', 82 Law and Contemporary Problems 45 (2019); Ioana Marinescu & Herbert Hovenkamp, 'Anticompetitive mergers in Labor Markets', 94 Indiana Law Journal 1031 (2019).

[17] Joan Robinson, *The Economics of Imperfect Competition* (1933) 215. Robinson, however, credited the classics scholar B.L. Hallward with coining the word. See Robert J. Thornton, 'Retrospectives: How Joan Robinson and B.L. Hallward named Monopsony' (2004) 18 Journal of Economic Perspectives 257.

[18] *Id,* Robinson at 292-304. See Suresh Naidu, Glen Weyl & Eric Posner, 'Antitrust Remedies to Labour Market power' (2018) 132 Harvard Law Review 537 (Hereinafter referred to as *Naidu et al)*

[19] Orley C. Ashenfelter, Henry Farber & Michael R. Ransom, 'Labour market monopsony', (2010) 28(2) Journal of Labour Economics 203-10.

[20] Karl Marx, *Capital*, vol. I (1848) (Ben Fowkes transl., Penguin books 1990) 320-29.

[21] See generally Karl Marx & Friedrich Engels, *The Communist Manifesto* (1848). See also Paul Samuelson, 'Understanding the Marxian notion of Exploitation: A Summary of the so-called Transformation Problem between Marxian Values and Competitive Prices', (1971) 9(2) Journal of Economic Literature 399-431.

[22] Robinson (*Supra* note 1) at 281-83.

Marx had argued that the continued exploitation of workers would spark a revolution that would take the economy on the path towards socialism, but in most countries the only visible effect was the formation of trade unions that focused on improving wages and social conditions for workers.[23] Throughout the world, trade unions were often able to pressure governments into recognizing various rights of labourers such as the protection from excessive work, low wages, discrimination and the like. Employment law gradually evolved throughout the world, and so did social security schemes aiming at the welfare of the workers.[24] However, by the end of the twentieth century, much was left to be desired, and employment laws, although successful to some extent, could not completely eliminate the evils of labour market power. In the late 2010s, almost all the evils of labour market power foreseen by Marx are still rampant - there is still large-scale unemployment, poor working conditions, low wages and discrimination.[25] The fissuring of the workplace and the emergence of the gig economy have made it easier for employers to exercise their power , as contractors are generally outside the purview of employment laws, and as such completely vulnerable to being exploited by large corporations.[26]

The market power of the employer in the labour markets arises from a variety of factors. *First*, similar to product markets, labour markets have become increasingly concentrated over the years leading to the emergence of a few large firms employing a large workforce instead of a number of smaller firms with relatively less employees. The increasing concentration has in the markets reduced the number of alternative employers that a disgruntled employee can choose from, leading to the inability of employees to leave their jobs. *The second factor* contributing to the power of the employer is 'search frictions', or the costs involved in searching for the ideal employer or employee.[27] In his pioneering model of a dynamic monopsony in the labour market, Alan Manning argued that since workers have to invest a substantial amount of time and effort in looking for alternative sources of employment, the employer can reduce the wages and/or benefits as they know that their employees can get another job only after incurring such high search costs.[28] The search costs are multiplied manifold on account of *the differentiation of both the workplace and the employee* - different facilities and amenities offered by different employers makes it extremely difficult for employees to compare different jobs, and employers face a similar difficulty in assessing the skill sets of various applicants for a job. A hire is made only when the preferences of the employer and the employee 'match'.[29] Although the internet has reduced the search costs involved in looking for a new job,[30] 'matching' remains difficult on account of

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[23] For a brief overview of the history of trade unions, see generally Rebecca Gumbrell-McCorcmick & Richard Hyman, 'Trade unions in Western Europe: Hard times, hard choices' (OUP 2013); See Jelle Visser, 'The rise and fall of industrial unionism' (2012) 18 Transfer 129-141.

[24] For instance, the US introduced the Fair Labour Standards Act in 1938, India introduced the Factories Act and the Minimum Wages Act in 1948. For an overview of the evolution of labour laws through the early half of the 20th century, see Simon Deakin & Wanjiru Njoya, 'The Legal Framework of Industrial Relations' in Paul Blyton, Nicolas Bacon, Jack Fiorito & Edmund Heery (eds.), *The Handbook of Industrial Relations* (Sage Publishers, 2008).

[25] Suresh Naidu, Eric Posner and Glen Weyl, 'Antitrust Remedies for Labor Market Power' 132 Harvard Law Review 536,538. (2018) .

[26] David Weyl, 'Enforcing Labour Standards in Fissured Workplaces: The US Experience', (2011) 22(2) The Economic and Labour Relations Review 33; Alysia Blackham, '"We are All Entrepreneurs Now:" Options and New Approaches for Adapting Equality Law for the Gig Economy' (2018) 34(4) International Journal of Comparative Labour Law and Industrial Relations 413-434.

[27] James Albrecht, 'Search Theory: The 2010 Nobel Memorial Prize in Economic Science', (2011) 113 Scandinavian Journal of Economics 237; Kenneth Burdett & Dale T. Mortensen, 'Wage differentials, Employer Size and Unemployment', (1998) 39 International Economic Review 257.

[28] Alan Manning, *Monopsony in Motion* (Princeton University Press, 2003); Alan Manning, 'Imperfect Competition in the Labour Market' in *4B Handbook on Labour Economics* (David Card & Orley Ashenfelter eds., 2011).

[29] V. Bhaskar and Ted To, 'Minimum Wages for Ronald McDonald Monopsonies: A Theory of Monopsonistic Competition', (1999) 109 Economic Journal 190; Suresh Naidu, Eric Posner and Glen Weyl, 'Antitrust Remedies for Labor Market Power' 132 Harvard Law Review 544, 545. (2018)

[30] Peter Kuhn & Hani Mansour, 'Is Internet job search still ineffective?' (2011) IZA DP No. 5955, Institute for the Study of Labour (Bonn, Germany).

personal preferences. For instance, Marinescu and Rathelot observed that employees typically tend to look for jobs closer to their place of residence, and that US job seekers are 35% less likely to apply for a job 10 miles away from their ZIP code than one within their ZIP code. *A third reason for* the inability of workers to move between firms arises from regulatory barriers that confine employees to certain geographical areas.[31] For licensed occupations like lawyers, mobility is often restricted to a stipulated region[32] – an attorney licensed to practice in a particular jurisdiction cannot work in another unless she qualifies the bar there. *A fourth reason* is the gradual decline of trade unionism across the world since the mid-1970s, which gave the employers unbridled power in setting wages and governing workplace policies.[33] Although employment laws prohibit most practices that seek to exploit workers, most are rendered ineffective due to the inability or unwillingness of workers to bring lawsuits against their employers on account of the sheer cost of litigation and the fear of retaliation by the employer.

The economic harms of a monopsony are analogous to those arising out of a monopoly – just like a monopolist can price-discriminate effectively between its consumers and can raise the prices without losing all of its consumers, a monopsony has the ability to pay different wages to different employees, and can bring down the general wage level for its employees. In a competitive labour market, the wage paid by the employer equals the marginal revenue product of the employee, that is, the amount of extra revenue that an additional worker can generate.[34] If the wage is below the marginal product, then the employee would take employment with another employer. However, when the employer has a monopsony, employees do not have other options of employment and may choose to stay with the firm even if it decreases the wages. Economists use the term *'labour supply elasticity'* to denote the responsiveness of employees to changes in the prevailing wage rate – for instance, if the wage rate in the economy goes down slightly and everyone quits their job, then the elasticity is high, but if people continue in their jobs despite a substantial decrease in wages, then the elasticity is closer to zero. Another related term, *'residual labour supply elasticity'* refers to the sensitivity of employees to changes in wages *at the particular firm.* If a small change in wages at the firm induces all the employees to move to a different firm, then the residual labour supply elasticity is approaching infinity, and conversely, if no one leaves, then the residual labour supply elasticity is closer to zero.[35]

Naidu et al note that *'the residual labour supply elasticity is a simple measure of a firm's labour market power'*.[36] If the employees of a firm do not quit even when the firm substantially reduces their wages or benefits, it indicates that the firm enjoys a monopsony in the labour market, and can effectively exploit the workers. However, often the residual labour supply elasticity varies across different classes of employees based on their skill, mobility or other factors. In particular, old people, people with disabilities or women may have a residual labour supply elasticity lower than the average employee because of the additional difficulties they would face in securing an alternate means of employment. As their search costs are higher, they tend to continue working with the firm despite significant decreases in their remuneration, and are therefore more vulnerable to being exploited by the employer. As the next part of this paper demonstrates, the lower residual

[31] Ioana Marinescu & Roland Rathelot, 'Mismatch Unemployment and the Geography of Job Search', (2016) NBER Working Paper No. 22672.
[32] Morris M. Kleiner, 'Border Battles: The Influence of Occupational Licensing on Interstate Migration' (2015) 22(4) Employment Research 4-6; Morris M. Kleiner & Alan B. Krueger, 'Analyzing the Extent and Influence of Occupational Licensing on the Labour Market' (2013) 31(2) Journal of Labour Economics 173-202.
[33] Rebecca Gumbrell-McCorcmick & Richard Hyman, 'Trade unions in Western Europe: Hard times, hard choices' (OUP 2013); Jelle Visser, 'The rise and fall of industrial unionism' (2012) 18 Transfer 129-141
[34] Suresh Naidu, Eric Posner and Glen Weyl, 'Antitrust Remedies for Labor Market Power' 132 Harvard Law Review 556-7 (2018).
[35] *Id,* 557.
[36] *Id.*

labour supply elasticity of women allows firms to pay less to women than to men working at the same post, which transfers the *surplus from the female employee to the firm and leads to inefficiencies in the market.*

II. DISCRIMINATION AGAINST WOMEN – THE WHY AND THE HOW

Numerous studies show that women tend to continue in jobs despite decreasing wages or benefits – that is, the supply of female labour is *relatively less elastic* when compared against men, which makes them vulnerable to exploitation by the employer. For instance, Webber notes that women earn 3.3 percent lower than men, all else equal, across industries in the US, demonstrating their lower labour supply elasticity.[37] Similarly, men's higher labour supply elasticity can be evidenced by industry studies.[38] For example, survey evidence from K-12 teachers in Missouri demonstrated that the gender wage gap persists in the education sector, notwithstanding rigid pay structures because of men's greater likelihood to sort into higher paying school districts.[39] Hirsch highlights evidence from Germany[40], US[41], Australia[42] and Italy[43] which supports the existence of monopsonistic gender wage discrimination in labour markets in these countries due to women being significantly less wage elastic than men in their supply of labour to the single employer.[44]

The ability of women to change jobs is constrained by a variety of social, political and cultural factors. Survey evidence in the UK demonstrates that women are less driven by monetary factors while deciding whether to quit or continue in a job, and that their decisions are likely to be significantly influenced by their domestic responsibilities, location of the workplace, working hours and commuting times, particularly if they are married and/or have child care responsibilities.[45] Kate Bahn and Mark Stelzner cite empirical research to demonstrate that inextricably linked race, gender and wealth disparities lead to a multiplicative intersectional wage gap which significantly amplifies the search costs for a new job for poor women of colour under monopsony. Apart from existing discrimination[46], these costs may also be greater for women due to their investment in domestic chores and responsibilities.[47]Their model highlights that *"the cumulative wage gap for non-white women is greater than the additive gaps of being non-male and non-white."*[48] Similarly, studies have shown that the wage gap suffered by black and Latina women is greater than the sum of individual,

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[37] DA Webber, 'Firm-level monopsony and the gender pay gap' , 55(2) Industrial Relations: A Journal of Economy and Society 323-345 (2016).
[38] *Id.*
[39] MR Ransom & VE Lambson, 'Monopsony, mobility, and sex differences in pay: Missouri school teachers', 101(3) American Economic Review 454-59 (2011).
[40] Hirsch, B., T. Schank, and C. Schnabel, "Differences in labor supply to monopsonistic firms and the gender pay gap: An empirical analysis using linked employer–employee data from Germany." 28:2 Journal of Labor Economics 291–330 (2010).
[41] Ransom, M. R., and R. L. Oaxaca. "New market power models and sex differences in pay." 28:2 Journal of Labor Economics 267–289 (2010).
[42] Booth, A. L., and P. Katic. "Estimating the wage elasticity of labour supply to a firm: What evidence is there for monopsony?" 87:278 Economic Record 359–369 (2011).
[43] Sulis, G. "What can monopsony explain of the gender wage differential in Italy?" 32:4 International Journal of Manpower 446–470 (2011).
[44] Boris Hirsch, "Gender wage discrimination: Does the extent of competition in labor markets explain why female workers are paid less than men?", 3 IZA World of Labor 1 (2016); Boris Hirsch, *Monopsonistic Labour Markets and the Gender Pay Gap* 151-200 (Springer 2010).
[45] Manning, A. *Monopsony in Motion. Imperfect Competition in Labor Markets*. (Cambridge, MA: Princeton University Press, 2003).
[46] Black, D. A. 'Discrimination in an Equilibrium Search Model.' 13 (2) *Journal of Labor Economics* 309–34 (1995).
[47] Estefania Santacreu-Vasut and Chris Pike, OECD paper, Competition Policy and Gender, pg 19. (2018)
[48] Mark Stelzner and Kate Bahn. "Discrimination and monopsony power." Washington Center for Equitable Growth (July 2020) at 1.

ethnic, racial and gender wage gaps.[49] This replicates discriminatory biases against women (and marginalised groups), and makes them less able to leave their existing jobs in the face of discriminatory wages, allowing the monopsonistic employer to maximise profit at the cost of the female employee.

Women'sability (or lack thereof) to change jobs and their financial status has a direct bearing on their position within the family and by extension, within society. The earner of income for the family, and their occupation is influenced by the power differential within the family, which also determines decisions regarding the expenditure from the income earned, thereby affecting distribution of other benefits such as basic security.[50] As per Goodin, acceptable relations of mutual vulnerability may be distinguished from unacceptably asymmetrical vulnerabilities by analyzing the capability of the subordinated party to exit from the relationship without severe cost so as to preclude the likelihood of exploitation by the superordinated party.[51] Albert O. Hirschman argues that voice of members within institutions and the feasibility of their exit from these institutions is inextricably linked.[52] This is because easy availability of an exit option can *"tend to atrophy the development of the art of voice"* whereas an unfeasible exit option obstructs the effectiveness of voice because the threat of exit is a crucial means to making one's voice count.[53] The absence of viable alternatives that provide financial security precludes the ability of women to *exit* unfavourable working conditions or abusive family relations, and renders them powerless against exploitation and abuse.

Hirschman further argues that institutions which deter exit and exact an inordinately high cost for it by rendering the explicit or implicit threat of exit implausible tend to stifle the use and potency of voice.[54] This renders the potential modes of countering deterioration, i.e., voice and exit, ineffective.[55] In the context of a monopsonistic employer, this could translate to outlawing unionization or collective bargaining by precluding workers from effectively raising their voice by denying them the protection of labour laws, as is the case in the gig economy. Legal instruments like Non-Disclosure Agreements (NDAs), mandatory arbitration clauses and secrecy policies also work towards reducing the ability of the employees to raise their voice against the employer. Together, these measures facilitate the exploitation of vulnerable categories of workers such as women by wage discriminating against them in the comfort of the knowledge that their options of exit are limited compared to men.

Susan Okin notes that discrimination against women in the workforce, including wage discrimination, can cause a woman to make a choice for *"full-time motherhood and domesticity that she would have been less likely to make had her work life been less dead-ended. They also give her less power in relation to her husband should she want to resist the traditional division of labor in her household and to insist on a more equal sharing of childcare and other domestic responsibilities."*[56] She argues that adhering to the *"male provider/female nurturer"* roles unobjectionably for reasons of efficiency or economic rationality for the family unit, glosses over the pernicious impact of gender discrimination, including wage discrimination in the

[49] Darity Jr, W., Hamilton, D., Paul, M., Aja, A., Price, A., Moore, A., & Chiopris, C. 'What we get wrong about closing the racial wealth gap' Samuel DuBois Cook Center on Social Equity and Insight Center for Community Economic Developmen (2018)*;* McGrew, A., & Bahn, K. (*2018),* 'The State of the US Labor Market for Black Women: Pre-July 2017 Jobs Release' Center for American Progress.
[50] Susan Okin, 'Vulnerability by Marriage' in *Justice, Gender and the Family* (New York: Basic Books 1989) 135.
[51] Robert E. Goodin*, Protecting the vulnerable: A re-analysis of our social responsibilities*, University of Chicago Press, 1986.
[52] Albert O. Hirschman*, Exit, voice, and loyalty: Responses to decline in firms, organizations, and states* (Vol. 25. Harvard University Press, 1970).
[53] Id.
[54] Id.
[55] Id.
[56] Susan Okin, 'Vulnerability by Marriage' in *Justice, Gender and the Family* (New York: Basic Books 1989) 148.

workplace, which exacerbates and reinforces gendered inequalities and the *"traditional division of labor within the household, even in the face of women's rising employment."*[57]

The gender pay gap therefore is caused by and in turn leads to an all-pervasive gender disparity between men and women that permeates all spheres of life. While gender disparity in its totality cannot be eradicated by any single measure, antitrust enforcement aimed at ensuring equality of pay between men and women can reduce women's financial precarity and provide them an opportunity to exit exploitative situations.

III. ANTITRUST REMEDIES TO GENDER DISCRIMINATION

A. Applicability of antitrust laws to labour markets

In order to determine whether gender discrimination in the labour market is an antitrust concern, the first question we have to ask is – what does antitrust law seek to achieve, or, in short, what are the goals of antitrust law? It is almost impossible to distinguish between the legal and the illegal unless we are certain about the purpose of the law.[58] Richard Steuer has argued that antitrust law is expected to safeguard the liberty of individuals from two innate human tendencies – bullying, and ganging up.[59] Antitrust law, therefore, should protect employees from being abused (or 'bullied') by their employer. However, it is quite rare to see antitrust cases aimed at defending the rights of employees in any jurisdiction, and much of the antitrust enforcement is focused on product markets with a view to protecting the 'consumer' from being abused by the 'seller'. The goal of antitrust law, as articulated by enforcement actions and legislatures across the world, therefore, predominantly concerns 'consumer welfare'. In the labour market, the employees are the sellers and not the consumers, and accordingly, their welfare is deemed to be outside the purview of antitrust law.[60] Further, improving working conditions and increasing wages of workers would lead to increased prices in the product market, which goes directly against the fundamental tenets of consumer welfare antitrust.[61]

The idea of consumer welfare as the goal of competition law emerged in the US in the 1970s with writings of Robert Bork,[62] who argued that the legislative intent behind the Sherman Act of 1890 was to ensure allocative efficiency in US markets, and was soon espoused by the Supreme Court and the Federal Trade Commission.[63] According to this formulation, the goal of antitrust law was to secure allocative efficiency in the market, irrespective of its consequences on the society or polity – antitrust was an objective regulation of markets governed solely by economic logic, and was therefore essentially apolitical and value-neutral. Under the influence of the neoclassical economic theories of the Chicago School, consumer welfare turned into a policy of antitrust non-intervention, eventually leading to the emergence of large corporations that reigned

[57] Id. at 148.
[58] Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* (1978) 50. (*"Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals? Everything else follows from the answer we give…Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules."*)
[59] Richard M. Steuer, 'The Simplicity of Antitrust Law', 14 Journal of Business Law 543 (2012).
[60] Herbert Hovenkamp, 'Competition Policy for Labour Markets', OECD Rountable on Competition Issues in Labour Markets (2019).
[61] Cristina Volpin & Chris Pike, 'Competition Concerns in Labour Markets', OECD Background Paper 2019.
[62] John B. Kirkwood & William H. Lande, 'The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency', 84 Notre Dame Law Review 191 (2008). The meaning of 'consumer welfare', however, is extremely debated. See Joseph F. Brodley, 'The Economic Goals of Antitrust: Efficiency, Consumer Welfare and Technological Progress', 62 NYU Law Review 1020(1987).
[63] Sandeep Vaheesan, 'The Profound Nonsense of Consumer Welfare Antitrust' 64 Antitrust Bulletin 479 (2019).

supreme in concentrated industries.[64] The standard of consumer welfare was soon transplanted in other jurisdictions, and features prominently in the antitrust statutes of a number of countries. [65]

Over the last few years, however, many commentators have registered their discontent with the empirical deficiencies of the economism which animates a limited understanding of consumer welfare as the sole objective of competition law, and have argued for the recognition of broader political and economic goals that the law must serve.[66] According to this new school, often described as neo-Brandeisian antirust, the economism of 'consumer welfare' is based on the myth of optimum allocative and productive efficiency in perfect markets for the benefit of a vaguely defined group characterised as consumers.[67] For instance, consumer welfare as an overall concept is agnostic to the pricing out of certain consumers who are less well-off from the market as long as it leads to greater wealth maximisation and efficiency forthe market of consumers that remains after such pricing out, deepening existing inequalities in wealth and power in society.[68] Glick and Lozada observe, *'all definitions of efficiency improvements in economics are biased in favor of wealthy individuals or firms'* and accordingly, antitrust law based on such flawed conceptual foundations tends to reinforce the existing power dynamics instead of standing up against it.[69]

As a result, it has been argued[70] that contemporary antitrust is failing not just consumers but also workers,[71] small businesses[72] and citizens.[73] Neo-Brandeisians argue that the imaginary standard of the consumers and their welfare, is rooted more in ideological belief than any sound justification[74] and that the emphasis on consumer welfare restricts the understanding of competition and its consequences to a market bubble, without accounting for its impact on the political economy and society at large. In particular, they

[64] Herbert Hovenkamp & Fiona Scott Morton, 'Framing the Chicago School of Antitrust Analysis', 168 University of Pennsylvania Law Review 1843 (2020); Daniel A. Crane, 'A Premature Postmortem on the Chicago School of Antitrust', 93 Business History Review 759 (2019).

[65] Dina I. Waked, 'Antitrust Goals in Developing Countries: Policy Alternatives and Normative Choices', 38 Seattle University Law Review 945 (2015).

[66] See, for example Lina Khan, Note, Amazon's Antitrust Paradox, 126 Yale Law School 710 (2016) Elizabeth Warren, Senator, Keynote Remarks at New America's Open Markets Program: Reigniting Competition in the American Economy (June 29, 2016), http://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf [http://perma.cc/8YKV-J5CS] ("Now the country needs more competition—and more competitors—to accelerate economic growth, more competition to promote innovation, and more competition to reduce the ability of giant corporations to use their money and power to bend government policy and regulation to benefit themselves.").

[67] Sandeep Vaheesan, 'The Profound Nonsense of Consumer Welfare Antitrust' 64 Antitrust Bulletin 479 (2019).

[68] AB Atkinson, *Inequality: What Can Be Done?* (Harvard University Press, London 2015) 124

[69] Mark Glick & Gabriel Lozada, 'The Erroneous Foundations of Law and Economics', Institute for New Economic Thinking Working Paper Series No. 149.

[70] For instance, see Sandeep Vaheesan, 'The Twilight of the Technocrats' Monopoly on Antitrust?' Yale Law Journal Forum, June 4, 2018.

[71] José Azar, Ioana Marinescu & Marshall I. Steinbaum, 'Labor Market Concentration' 17-18 (NBER Working Paper No. 24,147, 2017), http://ssrn.com/abstract_id=3088767 [http://perma.cc/95DU-B98U] (finding that local labor markets are highly concentrated in much of the countryand that high concentration is associated with lower wages); Simcha Barkai, *Declining Labor and Capital Shares* 26 (2016), http://home.uchicago.edu/~barkai/doc/BarkaiDecliningLaborCapital.pdf [http://perma.cc/7FA9-9LRJ]; Mike Konczal & Marshall Steinbaum, *DecliningEntrepreneurship, Labor Mobility, and Business Dynamism: A Demand-Side Approach*, Roosevelt Institute 27 (2016), http://rooseveltinstitute.org/wp-content/uploads/2016/07/Declining-Entrepreneurship-Labor-Mobility-and-Business-Dynamism-A-Demand-Side Approach.pdf [http://perma.cc/AAR3-YJE4].

[72] Ian Hathway & Robert E. Litan, 'What's driving the decline in the firm formation rate? A Partial Explanation' Brookings Institution (2014), https://www.brookings.edu/wpcontent/uploads/2016/06/driving_decline_firm_formation_rate_hathaway_litan.pdf

[73] Luigi Zingales, *Towards a Political Theory of the Firm*, 31 Journal of Economic Perspectives113, 122-25 (2017) (noting the significant political power of U.S. corporations).

[74] Sandeep Vaheesan, 'The Profound Nonsense of Consumer Welfare Antitrust' 64 Antitrust Bulletin 479 (2019).

denounce Bork's understanding of the legislative intent behind the Sherman Act as revisionist history, and hold that there is no legal basis for adopting consumer welfare as the goal of antitrust law. Rather, they argue that the Chicago School's understanding of *'efficiency'* as the goal of antitrust policy demonstrates a weak understanding of corporate power over competitors, workers and the society at large, controlling which is essential to safeguard the foundational principles of democracy.[75] In particular, they argue that the sellers in one market are the purchasers in another, so the consumer welfare standard that allows the exploitation of sellers to benefit the buyers is necessarily illogical. Sandeep Vaheesan and Mathew Buck, for instance, observe that the antitrust hesitation to enter the labour markets arises because many enforcers find it difficult to accept that workers (sellers in the labour market) are also consumers in other markets.[76]

On the other side of the Atlantic, the idea of consumer welfare, although predominant in EU law, has yielded ground to broader considerations of public policy. In numerous speeches, the Competition Commissioners have harped on the role of 'fairness' as a 'guiding principle' of antitrust policy.[77] Although the primary goal of EU Competition law is also to ensure the welfare of final consumers, courts in the EU have taken a broader view than their US counterparts. In *Aurubis/Metallo,*[78] the European Commission observed, "*the Merger Regulation and the Horizontal Merger Guidelines do not preclude the Commission from intervening in buyer power cases where direct harm to consumers cannot be demonstrated. The legal test of the Merger Regulation is whether the merger can significantly impede 'competition', which includes the protection of the competitive process, even if it cannot be demonstrated that such reduction of competition affects consumer welfare."* Broader policy goals such as 'fairness', 'equality' and 'economic development' also appear as the goals of antitrust policy in an increasing number of developing countries, although how far the competition agency prioritizes these non-efficiency goals over the goal of consumer welfare is debatable.[79]

Recently, however, antitrust authorities in a number of jurisdictions have been departing from the notion of consumer welfare and defending the rights of employees against large and powerful employers. Even in the US, the antitrust policy is slowly moving away from its obsession with consumer welfare, and expanding its scope to include broader social and policy issues. Particularly for the purposes of our paper, this includes a letter by the former US Senator Cory Booker to the US Federal Trade Commission and Justice Department, lamenting that *"despite having a clear mandate to promote competition across the economy and extensive enforcement tools"*, the antitrust agencies had not *"prioritized the responsibility to ensure that workers have meaningful choices that allow them to fairly bargain among potential employers*."[80] Wage-fixing by employers and no-poaching agreements are increasingly being recognized across the world as violations of antitrust law,[81] and it is becoming clear that the substantive provision of antitrust statutes apply not only against sellers but against buyers as well.

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[75] Lina M Khan & Sandeep Vaheesan, 'Market Power and Inequality: The Antitrust Counterrevolution and its Discontents', 11 Harvard Law and Policy Review 235 (2017).
[76] Sandeep Vaheesan & Mathew Buck 'Antitrust's Monopsony Problem', ProMarket , https://promarket.org/2020/02/03/antitrusts-monopsony-problem/ (last accessed on February 3, 2020).
[77] For an analysis of how the recognition of fairness as a goal distinguishes EU competition policy from that in the US, see Sandra Marco Colino, 'The Antitrust F Word: Fairness Considerations in Competition Law' CUHK Faculty of Law Research Paper No. 2018-09 (2018).
[78] European Commission, dec. Art. 8, §1 R. 139/2004 of 4 May 2020, *Aurubis/Metallo Group Holding*, case M.9409.
[79] Dina I Waked, 'Antitrust Goals in Developing Countries: Policy Alternatives and Normative Choices', 38 Seattle University Law Review 945 (2015).
[80] Matthew Yglesias, 'Booker Calls on Antitrust Regulators To Start Paying Attention to Workers', Vox (Nov. 1, 2017, 8:00 AM), http://www.vox.com/policy-and-politics/2017/11/1/16571992/booker-antitrust-letter [http://perma.cc/H73L-K3EZ]
[81] See Valentin Depenne, 'One Size does not fit all: A Comparative Approach to Antitrust Enforcement against No Poaching Agreements', 2 Sorbonne Student Law Review 239 (2019); Wilson, Sonsini, Goodrich and Rosati, 'DOJ brings first Criminal "No Poach" and "Wage Fixing" Antitrust Prosecutions" https://www.wsgr.com/en/insights/doj-brings-first-criminal-no-poach-and-wage-fixing-antitrust-prosecutions.html

B. Applying substantive antitrust provisions to remedy gender discrimination at workplace

Once it is established that the substantive principles of competition law may be applied the same way in labour markets to prevent the exploitation of employees by their employers, it becomes apparent that the existing toolbox of antitrust law in most jurisdictions is well-equipped to check anticompetitive conduct on the labour market. An emerging volume of literature over the past few years has been arguing for the assessment of labour issues into merger analysis,[82] and recognition of wage-fixing between employers as concerted action,[83] but there has been little attention paid to abuse of monopsony power by employers. This paper illustrates that gender discrimination at the workplace in terms of pay or amenities is economically no different from price-fixing by a monopolist, and is therefore an exploitative abuse of dominant power. Further, we argue that coordination and unionization among employees in the gig economy to engage in collective action should not be prosecuted as an anticompetitive agreement, but should be welcomed not only for its social benefits but also for its economic importance in countering the power of monopsonistic employers.

i. Gender discrimination as an exploitative abuse

Price discrimination by a monopoly, although often economically efficient, transfers the surplus from the consumer to the seller, and therefore benefits the seller at the cost of the consumer.[84] Antitrust laws aiming to protect consumer welfare recognize such price discrimination as a form of exploitative abuse of dominant power on the product market, and usually prohibit such discrimination. Wage discrimination by a monopsonistic employer in a labour market is a mirror image of price discrimination by a monopoly, and should accordingly be prosecuted under the same legal provisions that prohibit price discrimination.

In US law, secondary line price discrimination, or the charging of different prices to different consumers for a similar service, is prohibited under the Robinson-Patman Act, but price discrimination in business-to-business transactions is not considered illegal as it does not necessarily reduce consumer welfare. Although some commentators have argued that price discrimination falls under the scope of §2 of the Sherman Act as it entrenches and strengthens the monopoly, such an approach is yet to be espoused by courts.[85]

EU law, which is strongly committed to ensuring *'fairness'* in markets, takes a broader understanding of the law on price discrimination – all forms of discriminatory conduct by a monopoly, whether in terms of price or other conditions, amounts to an exploitative abuse under article 102 of the Treaty of the Functioning of the European Union (TFEU). Article 102(c) of the TFEU prohibits the application of *"dissimilar conditions to equivalent transactions with other trading partners, thereby placing them at a competitive disadvantage."* The court has interpreted this provision broadly and held that the application of similar conditions to dissimilar

[82] C. Scott Hemphill & Nancy L. Rose, 'Mergers that Harm Sellers' 127 Yale Law Journal 2078 (2018); Ioana Marinescu & Eric Posner, 'Why has antitrust law failed workers?' 105 Cornell Law Review 1343 (2019-20).
[83] See Tirza Angerhofer & Roger Blair, 'Collusion in the Labor Market: Intended and Unintended Consequences' Competition Policy International, June 12, 2020.
[84] There is a large volume of literature on the welfare effects of price discrimination. See Hal R. Varian, 'Price Discrimination and Social Welfare', 75 American Economic Review 870 (1985); Derek Ridyard, 'Exclusionary Pricing and Price Discrimination Abuses under Article 82 – An Economic Analysis' 6 European Competition Law Review 286 (2002).
[85] For an overview of the legal position in the US, see Einer Elhauge 'Tying, Bundled Profits and the Death of the Single Monopoly Profit Theory' 123 Harvard Law Review 397 (2009);

transactions also amounts to a violation of the provision.[86] The only evidence required to show that a monopolist engaged in price discrimination is a mere difference in the prices or conditions imposed on the sale of similar goods or services. The monopolist, however, has a defense – it can provide an *'objective justification'* to absolve itself of the charges. For instance, a firm accused of engaging in price discrimination between groups of consumers can show that it incurs different costs to provide the goods to the different groups of consumers, and the difference in prices reflects the difference in costs. It is difficult to provide an exhaustive list of objective justifications that explain differences in pricing, but generally a valid justification is one that shows that the firm was not engaged in exploitation and was merely responding to market forces.[87]

As discussed above, wage discrimination by a monopsonistic employer transfers the surplus from the employee to the employer, and is therefore similar to price discrimination in economic terms. Accordingly, an antitrust policy aimed at protecting employees from large powerful employers would recognize such discrimination as an exploitative abuse that runs contrary to the law. It is, however, not clear whether the Robinson-Patman Act can be applied to the labour markets as it applies specifically to secondary-line pricing. There is, however, no plausible argument as to why Art. 102 TFEU would not apply to gender wage discrimination between employees. Paying different amounts to men and women for the same kind of work clearly amounts to the application to dissimilar terms to similar transactions, and thus fulfills the criteria required to show price discrimination. Further, the imposition of any conditions that treat women differently from men, such as a requirement that women wear heels to work, would amount to a violation of the TFEU in so far as it places women at a competitive disadvantage with respect to their male colleagues.

Provisions similar to article 102 TFEU exist in the statutes of a number of jurisdictions,[88] which allows competition authorities to intervene against firms following a policy of paying men and women differently, or the imposition of discriminatory conditions on women. Recognizing discrimination at the workplace as an abuse of monopsony power in the labour market allows the competition authority to intervene suo motu, and as such can prove to be an effective remedy to gender wage discrimination, especially in situations where women tend not to approach the authorities with complaints because they fear retribution by their employers. Moreover, taking into the account the widespread dispute about whether individuals working in the gig economy are protected by employment laws, the prosecution of wage discrimination as an antitrust violation can effectively check attempts at wage discrimination by employers.

ii. *Antitrust and collective action: moving beyond default rules*

It is widely agreed in labour law literature that when the interests of an employee are infringed upon by the employer, she has two options – *exit* and *voice*.[89] She can either choose to leave the employer and secure alternative employment somewhere, or she can speak up against the employer and try to negotiate with the management for her rights. When there is only one employer in the market, there is no possibility of exit, and

[86] Case 13/63 J Italian Republic v EC Commission [1963] ECR 165, [1963] CMLR 289 in the context of ECSC Treaty and Commission Decision Van Den Bergh Foods Limited (Case Nos IV/34.073, IV/34.395 and IV/35.436) (1998/531/EC) [1998] OJ L246/1. See also Pinar Akman, 'To Abuse, or Not to Abuse: Discrimination between Consumers', 32 European Law Review 492 (2007).

[87] P Loewenthal 'The Defence of "Objective Justification" in the Application of Article 82 EC' (2005) 28 (4) World Competition 455, 456; D Gerard 'Price Discrimination under Article 82(c) EC: Clearing up the Ambiguities' in Global Competition Law Centre Research Papers on Article 82 EC – July 2005, 133.

[88] The fundamental principles of EU law have been transplanted widely, with a number of jurisdictions recognizing discriminatory pricing by a dominant firm as an exploitative abuse. See Anu Bradford, Adam Chilton, Katerina Linos & Alexander Weaver, 'The Global Dominance of EU Competition Law over American Antitrust Law', 16(4) Journal of Empirical Legal Studies 731-766.

[89] See generally Albert O. Hirschman, *Exit, voice, and loyalty: Responses to decline in firms, organizations, and states* (Vol. 25. Harvard University Press, 1970).

the only option available to the employee is to confront the employer and assert her rights. However, modern corporations employ a wide variety of instruments, both legal and otherwise, to silence their employees and coerce them into continuing in their jobs despite the subversion of their interests. In the 2020 Frankel Lecture, Orly Lobel observed,

"In Ovid's Metamorphoses*, Tereus, King of Thrace and son of Ares, rapes his sister-in-law Philomela. He then threatens to keep her quiet about the assault, but Philomela is defiant and wishes to speak up. The enraged king cuts out her tongue to permanently silence her. In more subtle ways, NDAs, noncompete, innovation assignment clauses, mandatory arbitration, and secrecy policies remove the tongues of employees, inventors, creators, and entrepreneurs, prohibiting them from speaking up against the institution and from using their potential to impact the path of an industry….such restrictions also limit the ability of employees to dissent, compete, and assert both their concerns and creativity in a wide range of contexts."*[90]

One of the key forms of protest in the workplace involves the formation of labour unions who present a collective front to the employer and seek concessions for all workers. The individual employee often lacks the bargaining power necessary to push the employer to make restraints, but a union comprising of a large number of workers can exert significant pressure on the employer by threatening to stop the production process through a strike, quitting *en masse* or otherwise organizing large scale protests that catch public attention.[91] Throughout the 20th century, collective action has been crucial in securing the rights of women at the workplace, and despite the decline in the strength of labour unions since 1970s, still remains a popular form of protest and a means of organizing and mobilizing support against workplace discrimination, harassment and exploitation.[92] The formation of a labour union at Google last year following allegations of sexual harassment faced by a number of female employees clearly brings out the importance of collective action in the attempt to preserve fundamental rights of workers against the vastly more powerful employers.[93] The quintessential role of collective action in protecting and preserving the rights of workers has been recognized in the ILO Conventions 87 and 98 with the latter explicitly covering *"The right to Organize and Collective Bargaining"*. Moreover, a 2012 ILO Survey noted that the right to collective action was enshrined in 66 constitutions across the world,[94] and is therefore a fundamental right that cannot be denied to workers unless absolutely necessary. Collective bargaining has the ability to protect individual workers from a monopsonistic employer that has the power to set wages or discriminate amongits employees, and can therefore reduce, to some extent, the anticompetitive effects of a labour monopsony.[95]

The relationship between competition law and collective action by workers is, however, extremely strained, with antitrust statutes often being used as grounds to ban trade unions. Viewed from an economic angle, a trade union involves the coming together of different individual economic agents with a view to

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[90] Orly Lobel, 'Exit, Voice & Innovation: How Human Capital Policy Impacts Equality (& How Inequality Hurts Growth)' 57 Houston Law Review 781 (2020).

[91] John S. Ahlquist, 'Labour Unions, Political Representation and Economic Inequality', 20(1) Annual Review of Political Science 409 (2017); Mathew Walters & Lawrence Mishel, 'How Unions help all workers' Economic Policy Institute, 2003; David Card, 'The effect of unions on the structure of wages: A longitudinal Analysis' 64 Econometrica 957 (1996).

[92] Allison Evans & Divya Nambiar, 'Collective Action and Women's Agency: A Background Paper', The World Bank Women's Voice, Agency and Participation Research Series (2013), No. 4; Roberta Kwok, 'Weaking Unions can lead to Gender Gap in Wages', Yale Insights, December 2, 2020; OECD, 'Can collective bargaining help close the gender gap for women in non-standard jobs?' OECD Policy Brief on Collective Bargaining and Gender, July 2020.

[93] 'Google Workers form Tech Giant's first labour union', BBC News, Jan 4, 2021 https://www.bbc.com/news/business-55535325 (last accessed on September 16, 2021).

[94] Report of the Committee of Experts on the Application of Conventions and Recommendations, 'General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008' (2012).

[95] Kate Bahn, 'Understanding the importance of monopsony power in the US labor market', Washington Center for Equitable Growth.

influencing the price level in the labour market (*"wages")* and is therefore similar to a cartel.[96] Competition authorities on both sides of the Atlantic treat collective bargaining by workers as inherently illegal, without any scope for justification. An agreement to fix prices is by default held illegal – it is *per se* violative of §1 of the Sherman Act in the US, and does not require any evidence of anticompetitive effects. Similarly, in the EU, an agreement to fix wages in the markets is illegal *"by object"* and is presumed to be anticompetitive and violative of art. 101 TFEU. However, in the face of growing demands for labour rights, courts both in the US and the EU fashioned a 'labour exemption' that excludes workers from the ambit of competition laws, while the prohibitions on collective action remain in place for independent contractors.[97] The reasoning behind the exemption, and accordingly, the distinction between 'employees' and independent contractors rests on shaky economic grounds, which is becoming increasingly questionable in the gig economy.

Both in the US and the EU, the initial decisions that carved out the labour exemption, clearly explained their rationale and the interplay between market competition and labour rights. In the US, the 1940 decision of the Supreme Court in *Apex Hosiery v Labour*[98] went into a detailed economic analysis, and observed that collective bargaining by the labour union, although within the purview of the Sherman Act would not lead to the kind of anticompetitive effects that are prohibited by the Act. However, 1 year later in *Hutcheson,*[99] the court changed its approach to issues of collective bargaining – it eschewed the rigorous economic analysis used in *Apex Hosiery,* and merely assessed whether the union activity in question fell within the scope of the exemption created by the Norris-La Guardia Act,[100] which became the standard approach in the years to come.[101] In the EU, the labour exemption was created by the CJEU in its 1999 decision of *Albany,*[102] wherein the court observed that it was *'beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers'* but conceded that *'the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to [EU competition rules] when seeking jointly to adopt measures to improve conditions of work and employment'.* Noting that the agreements in question were aimed at improving the remuneration and working condition of workers, the court held that they did not violate art. 101 TFEU. Over the years, however, the courts departed from the economic analysis or reasoning and developed a mechanical practice of decision-making involving only one question – whether the activity in question fell within the scope of the labour exemption or not. If it falls within the exemption, it is presumed to be legal and if it does not, it is presumed to be illegal, and there is no inquiry into the anticompetitive effects in either case. A narrow interpretation of the exemption on both sides of the Atlantic led to the consensus that labour exemption applies only to 'employees' and independent contractors (or the self-employed) are outside its purview.[103]

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[96] Giorgio Monti, 'Collective Labour Agreements and EU Competition Law: Five reconfigurations', European Law Review (2021).

[97] *Id;* Maria Jose Schmidt-Kessen, Christian Bergqvist, Catherine Jacqueson, Yvette Lind & Max Huffman, ' 'I'll call my union', said the driver – Collective Bargaining of Gig Workers under EU Competition Rules' Copenhagen Business School, CBS LAW Research Paper No. 20-43.

[98] 310 US 469 (1940).

[99] *United States v Hutcheson,* 312 US 219 (1941).

[100] Norris – La Guardia Act (1932), §2 reads: "*Whereas under prevailing economic conditions….the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment…..it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment…."*

[101] For a historical overview of the development of the case law, see Sanjukta M. Paul, 'The Enduring Ambiguities of Antitrust Liability for Worker Collective Action', 47 Loyola University Chicago Journal of Law 969 (2016).

[102] Case C-67/96, Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie [1999] ECR I-5751.

[103] Maria Jose Schmidt-Kessen, Christian Bergqvist, Catherine Jacqueson, Yvette Lind & Max Huffman, ' 'I'll call my union', said the driver – Collective Bargaining of Gig Workers under EU Competition Rules' Copenhagen Business School, CBS LAW Research Paper No. 20-43.

The emergence of the gig economy opened up a Pandora's box for the application of the usual concepts of employment law, including the distinction between employees and independent contractors. Platforms like Uber rely exclusively on independent contractors to run their business model, and the antitrust prohibition against collective action effectively renders impossible any voice of dissent against such an employer.[104] Moreover, since the employment laws against discrimination also do not apply to independent contractors, a worker in the gig economy who is discriminated against has no recourse at all.[105] Numerous studies have documented that the gender wage gap persists in the gig economy and may even have widened, while the legal remedies available to women are far lower than those available in the brick-and-mortar economy.[106] Apart from the discrimination in wages and the all pervasive gender bias by both employers and consumers, the gig economy places women in a particularly precarious position where they are also deprived of the option to engage in collective action to assert their rights as workers, and as individuals. The antitrust prohibition on collective action in the gig economy, in its pursuit of an elusive standard of efficiency, reinforces the power of the employer against the employee, furthering inequality and discrimination.

Over the last few years, there have been several suggestions by both academics and policymakers to remedy the situation and to legalize collective bargaining by workers in the gig economy.[107] A variety of solutions have been proposed, including extending the labour exemption to gig economy workers and recognizing all gig workers as employees, which would bring them within the purview of general employment laws. However, we suggest a rather unexplored approach – an economic analysis of the anticompetitive as well as the procompetitive effects of collective bargaining. Under the current approach, collective bargaining is held illegal by default, while an extension of the labour exemption would make all collective bargaining legal by default. A legal approach that seeks to retain market efficiency as well as the interests of workers would proceed by treating collective bargaining agreements under a *rule of reason* standard and assessing their *effects* on competition, investigating whether they actually impede the competitive process, and to what extent they are able to counter the wage-setting power held by a monopsonistic employer. In order to remain relevant, competition law and its rules must adapt themselves to the social reality, and operate in a manner that balances the goal of efficiency with larger social values – the antitrust prohibition against collective action must depart from its unreasonable default lines of legality and illegality, and make ground for a reasoned, logical approach that accommodates the social reality within its framework of efficient markets.

C. Limits of antitrust measures

While the antitrust remedies discussed above can substantially reduce the frequency and extent of gender discrimination by employers, a variety of practical considerations limit the ability of antitrust laws to effect social change in this regard. *First,* gender wage discrimination is a manifestation of a larger sociopolitical reality that makes it difficult for women to enter and to progress in the workforce. Antitrust law can only be used to achieve formal equality in terms of the wages paid to men and women for similar work. Concerns of equity and equality, which are beyond the scope of our paper and antitrust law, would still persist. Women's chances of success at the workplace are affected given the traditional division of labour within households, which makes them likely to expend substantial time on their children and homes, while having to

[104] Marshall Steinbaum, 'Antitrust, the Gig Economy and Labour Market Power', 82 Law and Contemporary Problems 45 (2019).
[105] Alysia Blackham, '"We are All Entrepreneurs Now:" Options and New Approaches for Adapting Equality Law for the Gig Economy' (2018) 34(4) International Journal of Comparative Labour Law and Industrial Relations 413-434.
[106] Neha Vyas, ''Gender inequality – now available on digital platform': an interplay between gender equality and the gig economy in the European Union', European Labour Law Journal (2020).
[107] For an overview of the different means proposed and their shortcomings, see Giorgio Monti, 'Collective Labour Agreements and EU Competition Law: Five reconfigurations', European Law Review (2021).

compete at work, *"not only with men from families like their own, who do significantly less family work than they do, but also with men whose wives are full-time housewives or work only part-time."*[108] It has been documented that even when the employer does not engage in discrimination, men tend to earn more than women because of their ability to work longer hours and their greater propensity to take risk.[109]

Second, in some cases, competitive markets alone may not be enough to reduce discrimination, even when both the labour market as well as the product market are competitive. It has been argued that increasing competition in product markets also reduces discrimination among employees by making it difficult to engage in taste-based discrimination. Becker had theorised as early as in 1957 that taste-based discrimination imposes a cost on the firm, and therefore encouraging competition in the market can mitigate gender discrimination by driving employers exhibiting taste-based discrimination out of the market.[110] This has been substantiated by empirical studies in a variety of industries.[111] However, when the consumers themselves are biased and prefer men over women, competition may not eliminate the disparity between the genders. For instance, consumers of art tend to value the work of male artists more than that of female counterparts, thus raising the value of the artwork done by men and accordingly leading to an increase in their remuneration.[112] Here, gender blind application of competition rules without anti-discrimination and consumer protection statutes may aggravate discrimination.

Lastly, we recognize the inherent difficulties of implementing antitrust laws on the labour market. There is no agreed upon method of deciding the relevant job market, assessing the power of the monopsony, measuring the ability of a trade union to counter the wage-setting power of the monopsony, and so on, and the initial years of such enforcement would require long-drawn debates and discussions between competition lawyers, economists and policymakers. Further, it would increase the workload of the antitrust authorities manifold and many enforcement authorities would hesitate to explore the uncharted territory of labour antitrust. However, it is the need of the hour, and antitrust law must adapt itself to labour markets if it is to remain relevant. Some authorities like the US Department of Justice and the Federal Trade Commission have already taken the lead in framing rules for labour market antitrust,[113] and multinational bodies like the OECD are encouraging discussion on the topic.[114] It is essential that antitrust continues to expand into labour markets to check the rising power of labour monopsonies, even if it is a slow start.

IV. CONCLUSION

The gender wage gap is frequently discussed across the world, but the legal and policy debates on reducing the gap are predominantly centered on constitutional law and anti-discrimination statutes. When viewed from an economic lens, the gender wage gap is simply an abuse of power by a monopsony in the labour

[108] Susan Okin, 'Vulnerability by Marriage' in *Justice, Gender and the Family* (New York: Basic Books 1989) 156.
[109] Cody Cook, Rebecca Diamond, Jonathan Hall, John A. List & Paul Oyer, 'The Gender Earnings Gap in the Gig Economy: Evidence from over a Million Rideshare Drivers', NBER Working Paper No. 24732.
[110] Becker, G. (1957), *The Economics of Discrimination*, Second Edition, The University of Chicago Press Economics.
[111] S. Baert, B. Cockx, N. Gheyle, N. Vandamme, 'Is there less discrimination in occupations where recruitment is difficult?' (2015) 68(3) Industrial and Labour Relations Review 467-500; B. Hirsch, M. Oberfinchter & C. Schnabel, 'The levelling effect of product market competition on gender wage discrimination', 3 IZA Journal of Labour Economics 1-14 (2014).
[112] Renee Adams, Roman Kraussl, Marco Navone, Patrick Verwijmeren, 'Is gender in the eye of the beholder? Identifying cultural attitudes with art auction prices', available on SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3083500 (last accessed on September 26, 2021).
[113] Department of Justice and Federal Trade Commission, 'Antitrust Guidance for Human Resource Professionals' October 2016 https://www.justice.gov/atr/file/903511/download
[114] OECD held a conference on 'Competition Concerns in Labour Markets' in 2020, see https://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm (Last accessed on September 26, 2021).

market, and falls within the ambit of antitrust law. An antitrust policy committed to gender equality would prohibit discriminatory wages as an abuse of dominant position, and would reformulate the existing antitrust prohibition on collective action with a view to securing a level playing field for women. Although the capacity of antitrust laws to effect meaningful social change is constrained by a variety of factors, attempts by antitrust regulators to push towards gender equality in the workplace can go a long way in protecting women from wage exploitation by their employers.

In the paper we have discussed the case of only women, but we believe that a similar approach can be followed to reduce discrimination against racial minorities, persons with disabilities or other communities that may be vulnerable to exploitation by their employers. It is high time that antitrust comes out of its narrow confines and isolationism to take a socially meaningful role, working with other areas of law to create a fair, equitable and just society.