

# Avoiding Ostrich Economics: Markets, equity and the social contract<sup>‡</sup>

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*We start from the notion introduced by Gal (2019)<sup>1</sup> that competition, regulation and consumer law can be interpreted as being part of the social contract. Equity considerations are part of that contract, but have been by and large ignored in the past by competition and consumer authorities. This paper analyses a number of case studies that shed more light on the relation between enforcement and equity. The case studies illustrate real opportunities for addressing equity through communication, prioritization and advocacy, but they also show some of the practical challenges of striking a balance between delivering on the core business (protecting competition and consumers) and taking broader considerations on board. At the very least, competition and consumer authorities need to invest in a better understanding of the equity effects of enforcement decisions, to increase public trust and strengthen the social contract.*

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## 1. Introduction

Competition and consumer authorities around the world often gear their mission towards addressing market failures such as market power and information asymmetry. Market power and information-asymmetry can lead to dead weight welfare losses and it makes a lot of sense to try to reduce these losses. As a consequence of intervening in markets, whether by breaking cartels, (dis)allowing mergers, fighting misleading or aggressive sales practices or reducing abuse of dominant positions, decisions by authorities can also have distributional impact.

There is a growing body of literature linking market power to inequality, suggesting that limiting market power and maximizing consumer welfare tends to generate more equal outcomes.<sup>2</sup> One possible explanation for this result is that the returns of market power seem to disproportionately favor the wealthy,

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<sup>1</sup> Gal, M.S. (2019) The social contract at the basis of competition law, should we recalibrate competition law to limit inequality? Chapter 4 in Lianos, I. and Gerard, D. (editors) *Competition Policy: between Equity and Efficiency*, Cambridge University Press, 2019, pp. 88-108.

<sup>2</sup> See for example Ennis, S. et al. (2017) Inequality: A hidden cost of market power [www.oecd.org/daf/competition/inequality-a-hidden-cost-of-market-power.htm](http://www.oecd.org/daf/competition/inequality-a-hidden-cost-of-market-power.htm); Khan, L. and Vaheesan, S. (2017) Market Power and Inequality: the Antitrust Counterrevolution and its Discontents. *Harvard Law and Policy Review*, 11, pp. 235-294; Baker, J.B. and Salop, S.C. (2015) , Antitrust, Competition Policy, and Inequality. *The Georgetown Law Journal*, 104(1), pp. 1-28.

who are more likely to own and provide capital, compared to the poor, who are more often laborers. Competition and consumer enforcement could help to correct that. Another explanation is that the consumption choices of people with low income may be more suboptimal in some markets and may be geared towards low elasticity products sold in markets that are perhaps less competitive.<sup>3</sup> Think of unfair business practices in retail energy markets and health insurance markets – markets characterized by relatively low income-elasticity, in which, in addition, due to information-asymmetry and heuristics, people with lower incomes and practical education tend to find it harder to compare and evaluate offers, and more often make suboptimal decisions.<sup>4</sup> However, critics of this literature argue that it is unknown if the net effect of enforcement actions is progressive or regressive<sup>5</sup>, or that enforcement harms firms and is therefore more unequal than we may think.<sup>6</sup>

Even if we accept that competition and consumer enforcement by and large improve equity, this is not always achieved in a straightforward sense (consumers win, producers lose). The relation between competition and equity has many more subtle ramifications that justify a closer look and more explicit consideration. For example, when specific groups of (vulnerable) consumers are consistently worse off than others, this may be reason to prioritize intervention, even if overall consumer harm is limited.

This paper contains several case studies that not only illustrate the need for a better understanding of enforcement effects on equity, but that also show how equity issues can potentially be addressed within the legal framework of competition and consumer enforcement, i.e. in terms of communication, prioritization, and advocacy. Beyond that, some authors have suggested that equity effects may be addressed in remedies or possibly even as an explicit competition enforcement goal<sup>7</sup>, though this is certainly not without controversy. There are other public policies that are often better suited for redistribution purposes than competition and consumer enforcement.<sup>8</sup> Indeed, the case studies in this paper also lay bare some of the practical challenges of taking broader considerations such as equity into account. At the very least though, competition and consumer authorities need to invest in an increased understanding of the equity effects of enforcement.

A better understanding of the impact of enforcement decisions on equity has various advantages. First of all, if some unintended consequences are widely known, policy and lawmakers can act upon it, should those consequences prompt that. Secondly, if legally possible and appropriate, authorities themselves can take into account distributional concerns, e.g. when laid down in existing government policies, when designing their decisions. An example of this is that authorities may decide to drop a case if there are marginal efficiency gains but major equity implications that clash with existing distribution policies. Thirdly, better insights into equity effects of decisions can benefit the public debate on the merits and demerits of competition and consumer policy. The debate is further helped by transparency about equity effects (whether positive or negative) since it adds to the legitimacy of competition and consumer policy. In sum, there is much to be said for learning more and avoiding 'ostrich economics'.

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<sup>3</sup> European Commission, Consumer Vulnerability across Key Markets in the European Union, Brussels, 2016; Mullainathan, S. and Shafir, E. (2013) Scarcity – Why having too little means so much. Allen Lane, United Kingdom; Siciliani, P., Riefa, C. and Gamper, H. (2019) Consumer theories of harm – An economic approach to consumer law enforcement and policy making. Hart Publishing, Oxford, United Kingdom.

<sup>4</sup> B. Handel, J. Kolstad, T. Minten and J. Spinnewijn (2021) Slechte eigenrisicokeuzes maken de zorgverzekering duurder voor laagopgeleiden. *Economisch Statistische Berichten*, 10 februari 2021 (in Dutch). Note that in The Netherlands, basic health insurance is compulsory and therefore income-elasticity is low.

<sup>5</sup> Crane, D. (2016) Antitrust and wealth inequality. *Cornell Law Review*, 101, pp. 1171-1228.

<sup>6</sup> Ayal, A. (2014) *Fairness in antitrust – Protecting the strong from the weak*. Hart Publishing, Oxford and Portland, Oregon.

<sup>7</sup> Baker and Salop, see note 2.

<sup>8</sup> Shapiro, C. (2018) Antitrust in a time of populism. *International Journal of Industrial Organization*, 61, pp. 714-748.

The literature on the relation between competition and equity varies from empirical studies<sup>9</sup> to conceptual papers<sup>10</sup>, to more policy-oriented papers.<sup>11</sup> Our paper fits in the latter category. With our case studies, we build on the rather philosophical notion of competition (and consumer) law as part of the social contract as postulated by Gal (2019)<sup>12</sup>, showing how enforcement decisions can affect the implicit contract between society on the one hand and competition and consumer authorities on the other. We illustrate some realistic pathways for competition and consumer authorities to deal with issues of equity without overstepping the legal mandate of those authorities, and discuss some of the practical challenges that may come with that.

Whilst it is per se important to analyze the impact of decisions by authorities on equity, the corona pandemic provides an extra stimulus for such an analysis. Vulnerable groups (self-employed, employees at the lower end of the labor market, youth with vulnerable socio-economic background, elderly people, SMEs) suffer disproportionately from the pandemic and its economic consequences. Hence, in cases where those groups threaten to be adversely affected by decisions of competition and consumer authorities, close scrutiny is needed.

## 2. Analytical framework: competition and consumer law as part of the social contract

Our paper builds on Gal (2019). She starts with the important notion that many institutions including competition (and consumer) law are part of the social contract. Social contract theory has existed for centuries. Grounded in philosophy from the early Greeks to Rousseau, Hobbes and Locke in the years of enlightenment to modern interpretations by Rawls, Gauthier and Pettit.<sup>13</sup> Social contract theory is also firmly grounded in the legal literature.<sup>14</sup> In philosophy it concerns the legitimacy of the authority of the state over the individual. This legitimacy has a formal and an informal part. The formal part is in the law. The informal part is the social contract. The idea is that citizens voluntarily surrender part of their freedom and that the contract should make sure that they get something in return for that. David Gauthier argues that any system of moral constraints must be justified to those to whom it is meant to apply.<sup>15</sup> Another way of framing this comes from Baker (2010)<sup>16</sup> who sees competition policy as a political bargain between consumers and producers. Similar to the social contract, the political bargain is a non-specific informal contract; a compromise between stringent regulation and freedom.

In the context of competition and consumer authorities, we interpret this as follows. The citizens expect that protecting consumers and businesses against market failures contributes to welfare. The law and its practices (i.e. decisions, court cases) set the formal boundaries of that notion. The social contract sets its

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<sup>9</sup> De Loecker, J., Eeckhout, J. and Unger, G. (2020) The rise of market power and the macroeconomic implications. *The Quarterly Journal of Economics*, 135(2), pp. 561-644; Gans, J., Leigh, A., Schmalz, M. and Triggs, A. (2019) Inequality and market concentration, when shareholding is more skewed than consumption. *Oxford Review of Economic Policy*, 35(3), pp. 550-563; Ennis et al (2017), see note 2.

<sup>10</sup> Gal (2019), see note 1. Stiglitz, J. (2017), Inequality, stagnation, and market power – The need for a new progressive era. Roosevelt Institute Working Paper, November 2017; Gerbrandy, A. (2019) Rethinking competition law within the European Economic Constitution. *Journal of Common Market Studies*, 57(1), pp. 127-142.

<sup>11</sup> Baker and Salop (2015), see note 2; Lyons, B. (2017) Inequality and competition. Competition Policy International, *Antitrust Chronicle*, 1, October 2017, pp. 32-37.

<sup>12</sup> Gal (2019), see note 1.

<sup>13</sup> Scholz S.J. (2011) Social Contract. In: Chatterjee D.K. (ed.) *Encyclopedia of Global Justice*. Springer, Dordrecht. [https://doi.org/10.1007/978-1-4020-9160-5\\_86](https://doi.org/10.1007/978-1-4020-9160-5_86).

<sup>14</sup> Stanford Encyclopedia of Philosophy, Contemporary approaches to the social contract. <https://plato.stanford.edu/entries/contractarianism-contemporary/> (accessed 12 May 2021).

<sup>15</sup> Ibid.

<sup>16</sup> J. Baker (2010) Preserving a Political Bargain: The Political Economy of the Non-Interventionist Challenge to Monopolization Enforcement, *Antitrust Law Journal*, 76(3), pp. 605-652.

informal boundaries. In an ideal world, the social contract remains 'silent'. If citizens accept the role of competition and consumer authorities as an institution and let the legal procedures (including mistakes) run the system, there is no special role for the social contract. Or rather, there is no reason to doubt that the social contract is in jeopardy. However, recent events (the financial crisis, online platforms raising inequalities and winner takes all outcomes), have cast doubt by more people than before over whether market economies deliver on that social contract and have decreased public trust.<sup>17</sup> In that slipstream, the position of consumer and competition authorities can be scrutinized.<sup>18</sup> The authorities might then not be seen as the public institutions that effectively protect against market failures.

### *Trust and the social contract*

It goes without saying that in democracies trust and support from people in society is vital for the relation between citizens and governments, i.e. the social contract.<sup>19</sup> Importantly, however, this does *not* mean that competition and consumer authorities should let individual decisions be swayed by the support, or lack thereof, of any particular group in society. Putting your ear to the ground, being aware of what is going on in society, does not equate with following each fashion or being open to populism. Saying no or taking unpopular decisions will always be part of the social contract as well. In the long run, trust in public institutions, including competition and consumer authorities, is built by competence and values-driven decision-making.<sup>20</sup> Important dimensions of trust in public institutions are responsiveness, openness and fairness.<sup>21</sup> The most straightforward way for competition and consumer authorities to contribute to the social contract is by ensuring fair outcomes through protecting consumers and businesses against market failures.<sup>22</sup> In addition, (showing) an increased understanding of the equity effects of enforcement will likely contribute to greater public trust and strengthen the social contract.

Although awareness of equity effects is an important necessary condition, is it not sufficient to improve trust in public institutions. Which measures to take depends on whether the adverse equity effects of competition and consumer enforcement decisions are perceived or real. In the former case, improvements can be made by clearing up misperceptions and showing that citizens actually benefit rather than suffer. Good, clear and honest communication to explain enforcement decisions, with the social contract in mind, should go a long way. In the latter case, it may be necessary to consider equity effects more explicitly, i.e. in terms of prioritization or advocacy to suggest complementary policy measures.

In practice, there can be both perceived and real adverse equity effects. Consider, for example, the claim by some that online platforms create winner takes all economies and destroy markets. Trying to improve on the social contract is then not only a matter of better communication or more explanation. In this example, it involves a complicated mix of communication (both to add nuance and to agree that more competition and consumer enforcement is needed), recognizing the boundaries of the law and finding new means (e.g. codes of conduct) to improve outcomes for consumers. Since the social contract is implicit and dynamic it is not written in the stars exactly how to act. But being responsive, open and fair, in whatever way that materializes in different contexts, will likely build trust and strengthen the social contract.

<sup>17</sup> Gal (2019), see note 1. See also: OECD (2017), *Trust and Public Policy: How Better Governance Can Help Rebuild Public Trust*, OECD Public Governance Reviews, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264268920-en>.

<sup>18</sup> *Ibid.*

<sup>19</sup> OECD (2017), see note 17.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> Speech by European Commissioner Margrethe Vestager, *Fairness and competition*, GCLC Annual Conference, Brussels, 25 January 2018: "[...] when people feel cheated by the market, they very easily lose trust in their whole society." [https://wayback.archive-it.org/12090/20191129212136/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/fairness-and-competition\\_en](https://wayback.archive-it.org/12090/20191129212136/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/fairness-and-competition_en).

### *Equity in the social contract*

Equity plays different roles in the writings of social contract theorists. All modern philosophers assume that a normative (hypothetical) social contract is created when free and equal persons come together and agree to create a new collective body (the state), directed at the good of all.<sup>23</sup> As such, it should not serve the interests of one group over another. Otherwise, those suffering from such inequity would not have agreed to join the collective. As Rawls put it: impartiality is key. His famous 'veil of ignorance' ensures that each person is denied any particular knowledge of one's circumstances such that everyone can choose principles for a just society, on which the social contract can be based.<sup>24</sup>

Inequity can stem from differences in, for example, income, wealth, race or gender. In the context of competition and consumer enforcement, we focus on welfare shifts between firms and consumers and therefore on inequity of income and wealth. However, this is not to say that other forms of inequity cannot also be addressed.<sup>25</sup> It is further important to distinguish between inequity of opportunities and inequity of outcomes. Concerns about inequity often have to do with outcomes, such as wealth. But outcomes are only indirectly addressed by competition and consumer enforcement, which is primarily aimed at fostering equity in opportunities – the idea being that equity in opportunities will continue to generate beneficial outcomes indefinitely.

When everyone starts from the same position, equal opportunities will likely result in equal outcomes, unless people prefer otherwise (e.g. some choose to work harder or take greater risks to reap greater rewards). Indeed, it is often thought that improving competition (equity of opportunities) will also improve equity of outcomes. This notion is important and in fact evidence suggests it may hold true overall.<sup>26</sup> But the textbook functioning of markets - and its benevolent effects on equity - does not always play out that way, even in the absence of market failures. In reality, not everyone starts from the same position and not everyone has the same opportunities in markets, despite efforts by competition and consumer authorities. For example, not all market players have equal opportunity to enter the market. Lobby power or discrimination can create unequal entry chances, even in the absence of traditional entry barriers. On the demand side, sophisticated consumers may have better chances of getting a good deal than naïve and vulnerable consumers, even though they are offered the same product information. The validity and strength of the social contract relies on taking these things seriously.

According to Gal, while equity is certainly part of the social contract, it is not a crucial or dominant criteria for competition and consumer authorities to base their decisions on. There can e.g. be questions about what weight should be given to equity when it clashes with other values and when enforcement decisions may have adverse equity effects. In our view, there are (too) many caveats in trying to concretize the social contract to the extent that it can guide enforcement decisions by competition and consumer authorities in practice. Mainly, it requires balancing various potentially conflicting goals, as well as the democratic legitimization that comes with that (which competition and consumer authorities typically lack when it comes to welfare distribution). It also requires defining the boundaries of the social contract, i.e. to whom and

<sup>23</sup> <https://plato.stanford.edu/entries/contractarianism-contemporary/>

<sup>24</sup> Rawls, J. (1971) *A Theory of Justice*. Harvard University Press 1971, revised ed., 2000.

<sup>25</sup> See for example the Antitrust Chronicle 'Inclusive competition', Competition Policy International, Spring 2021, volume 1(2). Also: Remaly, B. (2021) 'Agencies should consider racial inequities, current and ex-enforcers say', *Global Competition Review*, 26 January 2021. <https://globalcompetitionreview.com/gcr-usa/departments-of-justice/agencies-should-consider-racial-inequities-current-and-ex-enforcers-say>.

<sup>26</sup> Ennis et al. (2017), see note 2.

where it applies (decisions in the interest of a national social contract can be quite different from decisions in the interest of an regional social contract, say, that of the European Union<sup>27</sup>). And if we accept that protecting competition and consumers generates greater consumer welfare and contributes to greater equality, then there is arguably no need for a new compass, in the form of a (concretized) social contract, even if it has added value as an abstract construct when thinking about the role of public trust or trust in markets and institutions.

That said, in aiming to improve our understanding of the equity effects of enforcement decisions by competition and consumer authorities, it is useful to at least define what can be considered 'adverse equity effects'. In our view, enforcement decisions can be said to have adverse equity effects if:

- (i) The competition (and consumer) authority fails to correct a market failure;
- (ii) the decision negatively affects vulnerable groups of consumers or possibly firms<sup>28</sup>; or
- (iii) the decision obviously goes against current distributional policies

Although there can still be discussion about the exact definition of 'vulnerable consumers' – though this is an established term in consumer law – or about the political choices underlying current distributional policies, we think this definition offers a relatively objective way to consider equity effects in the context of competition and consumer enforcement.

#### *How can equity effects be taken into account?*

One could argue that competition and consumer authorities – albeit imperfectly – already take account of distributional effects when using a consumer welfare standard rather than a total welfare standard, because a consumer welfare standard favors consumers (who are thought to be less wealthy) over producers (who are thought to be wealthier). Indeed, much of the debate about equity and competition policy focuses on which welfare standard to use.<sup>29</sup> However, Hovenkamp (2017) argues that in practice, the difference between the two standards actually has limited implications and using a consumer welfare standard is simply more practical.<sup>30</sup>

Beyond maintaining the consumer welfare standard<sup>31</sup>, several authors<sup>32</sup> have proposed ways in which competition and consumer authorities could address equity effects, if so inclined, without losing sight of their main goals: protecting competition and protecting consumers. For example, Pike (2021) suggests to make inequality a secondary objective, similar to the Bank of England.<sup>33</sup> We briefly discuss a number of these suggestions here, which we deem practically feasible.<sup>34</sup> The next section provides a number of case studies that illustrate how these suggestions can be (or could have been) applied in practice.

<sup>27</sup> Think for example of buyer cartels that jeopardize the existence of suppliers in one country, to the benefit of consumers downstream in another country.

<sup>28</sup> Though competition and consumer policy are not designed to protect individual firms, a social contract point of view may prompt competition and consumer authorities, in exceptional circumstances, to be more lenient – as is illustrated by the case study on Corona travel vouchers in section 3.

<sup>29</sup> See for example Kaplow, L. (2011) On the choice of welfare standards in competition law. Harvard John M. Olin Center for Law, Economics, and Business, Discussion Paper No. 693. Other references are listed in note 53 in Baker and Salop (2015), see note 2.

<sup>30</sup> Hovenkamp, H. (2017) Antitrust policy and inequality of wealth. Competition Policy International, *Antitrust Chronicle*, 1, October 2017, pp. 7-13. See also: Hovenkamp, H. (2013) Implementing antitrust's welfare goals, *Fordham Law Review*, 81(5), pp. 2471-2496. <https://ir.lawnet.fordham.edu/flr/vol81/iss5/11>.

<sup>31</sup> Baker and Salop (2015), see note 2.

<sup>32</sup> Baker and Salop (2015), see note 2; Gal (2019), see note 1; Lyons (2017), see note 11.

<sup>33</sup> <http://competitionpolicy.ac.uk/documents/8158338/34046344/CCP-21-04.pdf/6bac0747-b0c2-2616-51f3-1212eed634c>

<sup>34</sup> In addition to some of the suggestions listed here, Baker and Salop (2015, see note 2) also put forward some farther-reaching suggestions such as 'remedies to benefit less advantaged consumers', 'rebalancing towards more interventionist antitrust and regulatory standards', and 'adopting inequality as an explicit competition policy focus'. We refer to Lyons (2017, see note 11) who has good arguments to be critical of those suggestions.

(i) Communication

As said, the most straightforward way for competition and consumer authorities to contribute to the social contract is by better protecting competition and consumers against market failures. But in order to improve, maintain or not jeopardize public trust and strengthen the social contract, it is equally important to clearly communicate and to educate the public about the effects of these enforcement efforts on consumer welfare as well as equity, and to clear up any misperceptions in that regard.

(ii) Prioritization

If certain business practices result in limited overall consumer harm, but specific groups of (vulnerable) consumers are consistently worse off than others, this may be reason to prioritize enforcement.<sup>35</sup> In addition, competition and consumer authorities may choose to prioritize enforcement in markets characterized by low income elasticity, i.e. in which the consumption does not vary much with income, because these products take up a larger share of low incomes than of high incomes (think of staple goods and utilities). In other cases, if the enforcement decision is likely to have limited efficiency gains but significant adverse equity effects, authorities may choose not to prioritize that particular case and apply more leniency.

(iii) Advocacy

Competition and consumer authorities can also use advocacy<sup>36</sup>, to popularize competition and consumer enforcement so that people in society know the benefits from such enforcement and trust the enforcement agency to generate these benefits, but also to draw attention to the limitations of competition and consumer law to deal with practices with adverse equity effects, and to recommend legislative or policy changes. Advocacy may for instance result in policymakers designing measures complementary to competition and consumer enforcement, which help strengthen the social contract.

Generally speaking, market studies are natural tools to take on board wider societal considerations than the ones that belong to the strict domain of competition policy. This is so for two reasons. First of all, the inquiries do not (per se) have legal consequences for the sector, and remedies or recommendations can extend to governments and other parties. Second, the wider notions are often important contexts that allow authorities to really understand the nature of competition in a sector.

Before we move on to the case studies, a word of caution is in place. As many authors have stressed, for a variety of reasons competition and consumer authorities may not be the first actors one looks at when dealing with inequality.<sup>37</sup> Indeed, there can be more efficient tools, or policies with more democratic legitimacy to correct unequal outcomes or reduce unequal opportunities. It is clearly not our purpose to stretch the mandate of competition and consumer authorities beyond its legal limits. But having said that, simply not looking at equality at all could be considered ostrich economics. Ignoring the equity effects of

<sup>35</sup> This requires unpacking the aggregate group of consumers, as suggested by Gal (2019), see note 1.

<sup>36</sup> Advocacy in relation to competition law is defined as "those activities conducted by the competition agency related to the promotion of a competitive environment by means of non-enforcement mechanisms, mainly through [its] relationships with other governmental entities and by increasing public awareness of the benefits of competition". International Competition Network (2002), Advocacy and competition policy. Report prepared by the ICN Advocacy working group. [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG\\_AdvocacyReport2002.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_AdvocacyReport2002.pdf).

<sup>37</sup> Reconciling equity and efficiency, a Global Challenge for competition policy, Gerard and Lianos (eds.) Cambridge University Press 2019. See also Competition Policy International, Antitrust Chronicle, October 2017.

decisions has the concrete risk of jeopardizing the social contract and undermining trust in competition and consumer authorities.

### 3. Case studies

This section develops a number of competition and consumer cases, largely from the ACM practice, that underline the importance of a better understanding of the equity effects of enforcement decisions. The case studies illustrate how each of the above suggestions to address equity issues can be adopted in practice, as well as some of the practical challenges that competition and consumer authorities may face in doing so. The purpose of working with case studies is twofold. First, it opens up the rich variety of market settings in which distributional issues come in to play. Second, it makes the analysis concrete and hence conclusions potentially more useful for practitioners.

#### *Communication I: Explaining the benefits to the general public*

The need and potential for clear communication to help build public trust and strengthen the social contract is perhaps most apparent in the day-to-day efforts to protect competition and consumers, as evidence suggests that protecting competition contributes to greater equity.<sup>38</sup> Indeed, there is widespread recognition that effective communication strategies can educate and engage people in society, as well as increase compliance with competition and consumer law.<sup>39</sup> However, competition and consumer authorities typically do not directly address the additional equity benefits in their communication. Instead, they tend to focus on increased compliance by firms, the size of the fine, and the financial benefits to consumers – although the debate on the role of fairness in competition policy has brought the notion of fairness more to the forefront.<sup>40</sup>

For instance, annual impact assessment reports such as those published by the CMA<sup>41</sup> and the ACM<sup>42</sup>, among others, provide useful estimates about the total direct financial benefits of enforcement flowing to consumers. The estimated impact is based on the affected turnover, the price, quality or other negative effect removed or avoided due to the intervention and the length of time the detriment would have prevailed in absence of the intervention, using rules of thumb based on empirical research. Given that successful interventions by competition authorities often occur in situations in which consumers were harmed, one could say that these estimates are a reasonable approximation of (equity) gains under a consumer welfare standard. In fact, the actual effect is most likely larger, because the calculations usually focus on short-term effects and do not include deterrence effects (which can be sizeable but are hard to measure). Also, the deadweight loss is typically omitted from the calculations because its size is deemed small compared to the overall welfare effect of lowering prices. However, it may still be useful to mention this from a social contract point of view, as consumers who could not afford to buy a product before, now get that chance after intervention by the enforcement agency.<sup>43</sup>

<sup>38</sup> See note 2.

<sup>39</sup> United Nations Conference on Trade and Development (2014) Communication strategies of competition authorities as a tool for agency effectiveness. Note by the UNCTAD Secretariat, 28 April 2014. [https://unctad.org/system/files/official-document/ciclpd28\\_en.pdf](https://unctad.org/system/files/official-document/ciclpd28_en.pdf). See also: International Competition Network (2018) Explaining the benefits of competition to the general public. [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG\\_ExplainingBenefitsToPublic.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_ExplainingBenefitsToPublic.pdf).

<sup>40</sup> Gerard, D. (2018) Fairness in EU competition policy: Significance and implications. *Journal of European Competition Law & Practice*, 9(4), pp. 211-212.

<sup>41</sup> UK Competition and Markets Authority. See for example the impact assessment report of 2019-2020. [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/901049/CMA\\_impact\\_assessment\\_2019-20.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901049/CMA_impact_assessment_2019-20.pdf).

<sup>42</sup> ACM (2021a), Opbrengst van het werk van de ACM in 2020 (in Dutch). <https://www.acm.nl/sites/default/files/documents/outcome-acm-2020.pdf>

<sup>43</sup> More accurately, reducing the deadweight loss as a result of lowering prices allows consumers with a lower willingness to pay



In their current form, these impact assessments (and subsequent reporting in annual reports, press releases, and on social media) likely contribute to the social contract, as they make the total and average consumer benefits from enforcement more tangible. But they could potentially strengthen the social contract even more if they also mentioned that in general, reducing market power and protecting (vulnerable) consumers contributes to greater equity. More detailed reporting on the distribution of gains over groups of consumers would require additional data that will likely not be available in most cases. Instead, it may be more useful to pay more explicit attention to vulnerable consumers and which enforcement decisions have particularly helped them, in communications to the general public.

Finally, competition and consumer authorities may also choose to communicate more explicitly about the importance of trust and the importance of equity in opportunities for all. For example, in its annual report of 2020, the ACM explicitly reports, in reference to the digital economy, that several developments that reduce competition and influence consumer choice in fact undermine consumers' and businesses' trust in digital markets and therefore weaken the social contract.<sup>44</sup> It further says that only if there is sufficient trust, there will be room for further innovation and development, from which all people and businesses can benefit.

#### *Communication II: Sustainability agreements*

Specific examples in which the competition authority rightfully protected competition but still appeared to weaken the social contract, are two cases in which the ACM blocked proposed sustainability agreements.

The first case is The 'Chicken of Tomorrow', the name for sustainability arrangements made between producers and retailers about completely replacing from 2020 regularly-produced broiler chicken meat that is currently part of the standard product range of supermarkets.<sup>45</sup> The ACM analyzed in 2014 whether the sustainability arrangements qualified for a cartel exemption under article 6(3) Mw. To that end, the ACM analyzed the costs and benefits with regard to animal welfare, the environment, and public health. As part thereof, it looked into how much value consumers attach to the measures for the improvement of animal welfare of broiler chickens with a so-called willingness-to-pay analysis. The analysis revealed that the benefits of these sustainability arrangements did not offset the costs. Furthermore, ACM believed that less far-reaching measures were possible that would also lead to more sustainable chicken meat in supermarkets, such as improved consumer education about the options with regard to sustainable chicken meat. The ACM prohibited the agreements. In a later ex post analysis, it was inter alia revealed that, indeed, the market did in the end succeed to deliver (more) sustainable chicken without the arrangements. Yet at the time, the ACM's decision was not received well by many and was quickly branded as against animal welfare.

The second case concerns the ACM's decision to block the agreement to close five coal-fired power plants. This agreement was part of the broader energy plan agreed between 47 parties in society, including industry, government, labor unions and environmental organizations, with the aim of working towards a more sustainable energy market in The Netherlands. The ACM concluded that closing the plants would result in a reduction in capacity that would raise prices for Dutch consumers, which the claimed

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to purchase the product. A lower willingness to pay does not necessarily coincide with the ability to afford a product. But generally speaking, when consumers face stronger budget constraints, they will be able to consume less and a price reduction will enable them to consume more.

<sup>44</sup> ACM (2021) Annual Report 2020 (in Dutch), March 2021. <https://www.acm.nl/sites/default/files/documents/jaarverslag-acm-2020.pdf>.

<sup>45</sup> [https://www.acm.nl/sites/default/files/old\\_publication/publicaties/13789\\_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf](https://www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf)

environmental benefits did not offset. The ACM reached its conclusion partly because the emission rights could still be used elsewhere on the European market for CO<sub>2</sub>-rights and the agreement would therefore not limit, but only shift emissions. However, the decision was widely seen as torpedoing a broadly supported sustainability agreement.

Both these examples underscore the importance of clear and responsive communication, in which the benefits of the enforcement decision are well explained, but which also shows a better understanding of other interests and concerns at play, in order to at least not weaken public trust and the social contract.

At the same time, evaluating sustainability initiatives also lays bare some of the more practical difficulties of concretizing a social contract and considering multiple public interests in an enforcement context, e.g. well-functioning markets, sustainability, and equity. This is illustrated by an example in energy regulation, where the grid operator's proposal to reduce the gas connection removal fee for households and small business users by 50 percent – in order to boost more sustainable energy consumption – would result in higher gas tariffs and likely have adverse equity effects. The reason is that the removal fee reduction would be covered by higher tariffs for the consumers who did not switch to more sustainable – and often more expensive – energy sources, that require the purchase of solar panels, heat pumps and the like. This was likely to disproportionately hit consumers with lower incomes or wealth, as was publicly recognized by the ACM.<sup>46</sup> In the end, the ACM adapted the tariff regulation<sup>47</sup> to accompany the removal fee reduction, despite the potential adverse equity effects. The reason was that in the meantime, the Ministry of Economic Affairs and Climate had imposed a new policy rule that went even further than the original proposal and ordered that removal of a gas connection should be completely free of charge – while the costs are to be covered by higher tariffs for those who stay.

Schinkel and Treuren (2021)<sup>48</sup> have also pointed at the adverse equity effects of balancing competition and sustainability, arguing that allowing sustainability agreements at the expense of competition would essentially redistribute wealth from the poor – for whom sustainable products are relatively expensive – to the rich. They stress that that is essentially a political role, for which competition authorities lack the appropriate legitimacy.

#### *Prioritization I: Vulnerable consumers*

The European Directive on unfair business-to-consumer commercial practices in the internal market (the UPCD)<sup>49</sup> and the accompanying guidance document from the European Commission<sup>50</sup> stress the importance of protecting vulnerable consumers from unfair business practices. According to the latter document, vulnerable consumers “should be ensured a higher level of protection than ‘the average consumer’ referred to in Article 5(2) [of the UPCD]”. While the UPCD does not currently mention social-economic factors in its definition of vulnerability, research by the European Commission<sup>51</sup> and others<sup>52</sup> has

<sup>46</sup> Trouw (2020) “‘Nee’ zeggen tegen groene afspraken? Scheidend topman Henk Don deed het geregeld”. Interview with (at the time) ACM board member Henk Don (in Dutch), 6 February 2020.

<sup>47</sup> ACM (2021b) Afnemer krijgt geen kosten meer in rekening gebracht bij een verzoek om zijn gasaansluiting te verwijderen. Press release (in Dutch), 1 March 2021. <https://www.acm.nl/nl/publicaties/afnemer-krijgt-geen-kosten-meer-rekening-gebracht-bij-een-verzoek-om-zijn-gasaansluiting-te-verwijderen>.

<sup>48</sup> Schinkel, M.P. and Treuren, L. (2021) Green antitrust: Why would restricting competition induce sustainability efforts? *ProMarket*, 26 March 2021. <https://promarket.org/2021/03/26/green-antitrust-why-would-restricting-competition-induce-sustainability-efforts/>.

<sup>49</sup> European Commission, Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.

<sup>50</sup> European Commission, Commission staff working document, Guidance on the implementation/application of directive 2005/29/EC on unfair commercial practices. COM(2016) 320 final.

<sup>51</sup> European Commission, Consumer Vulnerability across Key Markets in the European Union, Brussels, 2016.

shown that such factors do play an important role in consumer detriment. To the extent that consumer vulnerability is correlated with socio-economic factors, then, competition authorities and particularly consumer authorities may choose to prioritize the protection of vulnerable consumers – or rather, consumers in vulnerable circumstances – if they want to reduce adverse equity effects from unfair business practices.

Siciliani et al (2019) argue that the legal concept of vulnerability closely resembles the economic concept of naivety, e.g. consumers' limited ability to understand complex information or their incorrect estimations of their future preferences and actions.<sup>53</sup> Consider, for example, price discrimination in utilities markets, where consumers who switch benefit from low introductory rates and those who do not switch end up paying higher prices. If consumers' propensity to switch is purely preference-based and consumers' preferences are rationally formed based on perfect information, such price discrimination can be economically efficient. Even if the resulting outcomes were to generate or increase differences between groups of consumers, this would merely be a reflection of everyone's consumption preferences. However, to the extent that consumers' switching behavior is actually correlated with their naivety, such price discrimination may in effect be naivety discrimination. More explicit examples of naivety discrimination include product designs or contract terms that exploit consumers who underestimate their own future demand or who overestimate their future self-discipline. Think for example of mobile phone plans with high rates beyond the plan limit<sup>54</sup> or credit cards with significant fines for late repayment.<sup>55</sup>

If, in addition, suboptimal consumer choices as a result of consumer naivety are correlated with consumers' social-economic status and education level – and there is some evidence that suggests that this may be the case in certain markets<sup>56</sup> – these business practices may exacerbate existing inequalities within society. Looking at this from a narrow economic perspective, however, we may see limited overall consumer detriment, as in competitive markets it can be the sophisticated consumers, rather than the suppliers, who benefit most from the rents extracted from naive consumers, in the form of cross-subsidized introductory rates or base rates, possibly even below marginal cost.<sup>57</sup> The reason is that, in contrast to naive consumers who end up paying more than they thought when they first bought the product, sophisticated consumers make sure to switch or to avoid overcharges or late repayments and benefit from the low introductory or base rates.

Naivety discrimination may have different welfare effects in different market settings.<sup>58</sup> When the net effect on consumer welfare is negative but limited, this may be reason for consumer authorities to allocate their scarce resources to other projects and investigations. (Of course, if the negative welfare effect is not limited, authorities can and should prioritize intervention in any case.) However, when business practices generate or increase inequalities between different groups of consumers, and particularly when they harm vulnerable consumers, there may still be reason for authorities to prioritize intervening in these cases. In the specific case of price discrimination, though, intervening may be easier said than done. Particularly, banning price discrimination altogether could raise prices for everyone, if it meant that rivals would have to make an

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<sup>52</sup> P. Heidhues and B. Köszegi (2017) Naïveté-based discrimination. *The Quarterly Journal of Economics*, 132(2), pp. 1019-1054; Handel et al (2021), see note 4.

<sup>53</sup> Siciliani et al (2019), see note 3.

<sup>54</sup> Grubb, Michael D. 2009. "Selling to Overconfident Consumers". *American Economic Review*, 99(5), pp. 1770–1807.

<sup>55</sup> P. Heidhues and B. Köszegi (2010) Exploiting naïvete about self-control in the credit market. *American Economic Review*, 100, pp. 2279-2303.

<sup>56</sup> Heidhues and Köszegi (2017), see note 51.

<sup>57</sup> X. Gabaix and D. Laibson (2006) Shrouded attributes, consumer myopia, and information suppression in competitive markets. *The Quarterly Journal of Economics*, May 2006, pp. 505-540.

<sup>58</sup> Heidhues and Köszegi (2017), see note 51.

expensive across-the-board price cut in order to attract marginal switchers.<sup>59</sup> Instead, demand-side remedies to empower (vulnerable) consumers may potentially be more effective.<sup>60</sup>

Another way of approaching this is by assigning different weights to the welfare of naïve and sophisticated consumers, in line with existing distributional policies. Assigning weights may first of all result in government policies that facilitate consumer choice. Secondly, the resulting larger consumer detriment justifies prioritization of intervention by regulators against discriminatory practices based on anything other than consumer preferences – even if sophisticated consumers are worse off because of it, as they can no longer benefit from low tariffs that could only be offered due to the exploitation of vulnerable consumers. Importantly, this is not to suggest that regulators should take on the role of policymakers or assign welfare weights as they see fit. However, Armstrong and Vickers (2012) note that “in many settings it may be reasonable to accord a higher welfare weight to naïve consumers” and call for more analysis of distributional issues in retail markets.<sup>61</sup>

#### *Prioritization II: Leniency for firms*

Competition and consumer authorities may choose, under exceptional circumstances, to deliberately *not* prioritize potential market failures. For example, when intervention is expected to generate limited efficiency benefits but significant adverse equity effects, this would on balance decrease public trust and weaken the social contract. Two examples in which the ACM showed such leniency to firms, are the offering of vouchers during the Covid-19 crisis and collective agreements between self-employed in the labor market.

The Covid-19 pandemic has created specific equity issues. As explained in the introduction, vulnerable people, self-employed and small firms suffer disproportionately. Whilst it is not the responsibility of competition authorities to compensate for those losses, there are potentially many instances in which the view of competition authorities is called for. And there could even be public or political pressure on authorities to be lenient – and hence to deliberately not prioritize certain cases. Think of collective agreements by a sector on debt collection, opening times, terms of payment, vouchers and payback schemes of cancellations. It makes sense to assume that cooperation between competitors for all sorts of reasons is likely to rise during this and other crises.<sup>62</sup> In terms of the social contract and public trust, it is important that competition and consumer authorities show flexibility and understanding for the circumstances of firms and consumers in a crisis like this, and not be seen as further damaging already vulnerable firms by strict enforcement. However, that is not to say that normal rules do not apply, that the interest of consumers takes second place or that any leniency shown is to last longer than necessary.<sup>63</sup> These situations require careful balancing. Our point is that from a social contract point of view, equity considerations should not be left out of the equation.

<sup>59</sup> Lyons (2017), see note 11; E.CA Economics (2020) Economic research on loyalty price discrimination. Report prepared for the UK Competition and Markets Authority, 7 October 2020. [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/938616/E\\_CA\\_Economic\\_Research\\_on\\_Loyalty\\_Price\\_Discrimination\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/938616/E_CA_Economic_Research_on_Loyalty_Price_Discrimination_.pdf).

<sup>60</sup> Ibid. See also: Tuinstra, A. and Van der Noll, R. (2020) Kwetsbare consumenten gebaat bij betere marktwerking [Vulnerable consumers benefit from better-working markets]. *Economisch Statistische Berichten*, blog (in Dutch), 12 februari 2020. <https://esb.nu/blog/20058094/kwetsbare-consumenten-gebaat-bij-betere-marktwerking>.

<sup>61</sup> Armstrong, M. en Vickers, J. (2012) Consumer protection and contingent charges. *Journal of Economic Literature*, 50(2), pp. 477-493. Tuinstra-Karel, A. (2014) Wanneer bewuste consumenten profiteren van naïeve consumenten. *Economisch Statistische Berichten*, ESB Dossier ‘Consumentenwelvaart als beleidsdoelstelling’, Jaargang 99 (4683S), pp. 28-34.

<sup>62</sup> OECD (2020a) OECD competition policy responses to Covid-19. [https://read.oecd-ilibrary.org/view/?ref=130\\_130807-eqxgniy07u&title=OECD-competition-policy-responses-to-COVID-19](https://read.oecd-ilibrary.org/view/?ref=130_130807-eqxgniy07u&title=OECD-competition-policy-responses-to-COVID-19).

<sup>63</sup> OECD (2020b) Exploitative pricing in the time of Covid-19. <https://www.oecd.org/competition/Exploitative-pricing-in-the-time-of-COVID-19.pdf>.

In the case of vouchers offered by travel companies and others to consumers who were entitled to refunds in the beginning of the Covid-19 crisis, the ACM initially drew up basic guiding principles for retailers offering voucher schemes<sup>64</sup> as well as guidance for consumers about what to be mindful of when offered vouchers.<sup>65</sup> In its accompanying press release<sup>66</sup>, the ACM recognized that the voucher schemes were there to prevent bankruptcies if consumers were to ask for refunds *en masse*, and that in this extraordinary situation, it may be more reasonable and wiser for consumers to accept vouchers instead of demanding refunds. This would, on the one hand, do justice to the consumers' right to refunds, but, on the other hand, also be considerate of the difficult situation that business owners suddenly found themselves in due to the coronavirus (COVID-19) crisis. This balanced approach was shared by the Dutch Ministry of Economic Affairs and Climate, the European Commission<sup>67</sup>, consumer organizations ("In this exceptional situation, exercising your legal rights is not necessarily the right thing to do")<sup>68</sup> and several other parties in the travel industry.<sup>69</sup> Such a shared vision and approach contributes to strengthening the social contract in a time of crisis.

The second example of not prioritizing intervention for equity reasons relates to collective agreements among the self-employed in the Dutch labor market. Self-employed workers are officially undertakings. They determine their products, prices, and service themselves. That is why the competition rules also apply to self-employed workers. However, the ACM has indicated, in the form of guidelines<sup>70</sup>, that it will not impose any fines for certain competition law infringement, e.g. if agreements aim to set a minimum rate for self-employed workers that is not higher than necessary for safeguarding the subsistence level.

Reasons for the guidelines were as follows. The number of self-employed workers in the Netherlands has soared over the past few years, and continues to rise in part because of the emergence of digital platforms. The flexibilization of the labor market, of which said growth is a manifestation, has positive effects on the economy and society. It boosts entrepreneurship, and it creates new forms of services. That benefits the economy as a whole, and, in many cases, self-employed workers can capitalize on the benefits of entrepreneurship to realize a respectable financial position. However, there are also concerns. First of all, there are concerns about the vulnerable position of certain groups of self-employed workers at the lower end of the labor market, where the bargaining power of individual self-employed workers is more limited than it is at the top end. Certain groups of self-employed workers experience uncertainty about income, legal position, and rights, and they bear the consequences of risky work themselves. There are self-employed workers who have to work more than 40 hours a week in order to earn a minimum income. A large group of self-employed workers have household incomes that are below the low-income threshold,<sup>71</sup> the number of self-employed workers living in poverty has grown since 2017, and, of all employed people, self-employed workers run the most risk of living in poverty.<sup>72</sup> Furthermore the growth of this group of self-

<sup>64</sup> ACM (2020a) ACM offers guidance to sectors that wish to set up voucher schemes. <https://www.acm.nl/en/publications/acm-offers-guidance-sectors-wish-set-voucher-schemes>.

<sup>65</sup> ACM Consuwijzer (2020), <https://www.consuwijzer.nl/coronacrisis/alles-over-vouchers-tegoedbonnen-en-compensaties>.

<sup>66</sup> See note 62.

<sup>67</sup> European Commission (2020), Commission recommendation of 13 May 2020 on vouchers offered to passengers and travellers as an alternative to reimbursement for canceled package travel and transport services in the context of the Covid-19 pandemic. [https://ec.europa.eu/info/sites/default/files/recommendation\\_vouchers\\_en.pdf](https://ec.europa.eu/info/sites/default/files/recommendation_vouchers_en.pdf).

<sup>68</sup> European Consumer Centre (2020), <https://www.ecnederland.nl/en/news/corona-voucher-what-you-should-know>.

<sup>69</sup> See for example this communication by the Dutch foundation for consumer complaints boards (De Geschillencommissie; in Dutch): <https://www.degeschillencommissie.nl/over-ons/commissies/reizen/klachten-over-corona-maatregelen/>.

<sup>70</sup> This part borrows from <https://www.acm.nl/sites/default/files/documents/2020-07/guidelines-on-price-arrangements-between-self-employed-workers.pdf>.

<sup>71</sup> Statistics Netherlands (CBS) – Publication Poverty and social exclusion 2018. When a household has an income below the low-income threshold, then CBS considers this a low-income household or a household with a chance of poverty. The Ministry of Social Affairs and Employment estimates that approximately 17% of self-employed workers charges a rate that, even with a forty-hour working week, leaves them below the social minimum.

<sup>72</sup> CBS, Statistical Trends – Risk of poverty increased, March 2019

employed workers can also undermine existing social achievements of employees such as those reflected in the statutory minimum wage and in collective-bargaining agreements. If employers are tempted to replace, to a considerable extent, people in employment with 'cheaper' self-employed workers, it might erode the function of the statutory minimum wage and the bargaining position of employees and trade unions in collective-bargaining negotiations.

Importantly, the ACM's guidelines were in line with existing equity policies, or at least the Dutch government's expressed wish to protect self-employed workers against poverty, and to prevent them from being hired at too low a rate, and to prevent clients at the lower end of the labor market from choosing to work with self-employed workers solely because of the lower costs.<sup>73</sup> From a social contract point of view, and looking at our definition of adverse equity effects, strict enforcement of competition rules without regard for these existing considerations would have had adverse equity effects and would have potentially harmed the social contract. Instead, the social contract appeared strengthened, exemplified by positive responses by the labor union and many other stakeholders. A practical difficulty with choices like this, is that the foregone consumer welfare against which the equity effects are implicitly weighed, can be difficult to quantify. In this situation, however, there was much to be said for practically equalizing the position of self-employed at the lower end of the labor market with wage earners who could collectively bargain under an existing exemption in the Competition Act.

#### *Advocacy: Beyond competition and consumer enforcement*

Competition and consumer authorities may engage in advocacy to promote a competitive environment and popularize competition and consumer enforcement. In that sense, advocacy can be seen as part of a broader communication strategy that aims to explain the benefits – in terms of consumer welfare and equity – of competition and consumer enforcement to the general public. In addition, enforcement agencies may engage in advocacy towards policymakers, to address market failures and (other) equity issues in markets that cannot be solved by competition and consumer law alone, or that go beyond the agency's mandate. In response, policymakers may, for example, introduce complementary policy measures that facilitate consumer choice, remove barriers to entry, or choose to remedy said issues.

Market studies are an important means by which enforcement agencies can address market power and (other) equity issues, and can make recommendations to others to limit these issues insofar as they stretch beyond the realm of competition and consumer enforcement. For example, a market study by the ACM and the Dutch health regulator showed that over 70 percent of consumers had a basic health insurance plan for which a cheaper, nearly identical alternative was offered in the market.<sup>74</sup> The study revealed several obstacles in the consumer choice process that could at least partly explain the suboptimal choices, which had to do with the product information and policy rules regarding the product design. The recommendations to policymakers and others to remedy these choice obstacles were discussed in parliament. A related research question is what the income and education level distribution is within this group of over 70 percent of consumers, compared to the other 30 percent. For example, if it were to be found that it was mostly people with low incomes and a practical rather than theoretical education that made these suboptimal choices, this would (a) be an unwanted equity effect in and of itself and (b) render existing distribution policies in that sector ineffective. Indeed, quantitative evidence on part of the choice process suggests that

<sup>73</sup> See Dutch House of Representatives, parliamentary year 2019 - 2020, 31311, 'Voortgangsbrief 'Werken als Zelfstandige' (in Dutch), 15 June 2020. <https://www.rijksoverheid.nl/documenten/kamerstukken/2020/06/15/voortgangsbrief-werken-als-zelfstandige>.

<sup>74</sup> ACM and NZa (2018) *Beter kiezen op de polismarkt*. Report (in Dutch), June 2018. <https://www.acm.nl/sites/default/files/documents/2018-07/acm-nza-rapport-beter-kiezen-op-de-polismarkt.pdf>.

in that sector, people with lower incomes and a more practical education tend to make more suboptimal choices.<sup>75</sup> Findings like these underscore the importance of said advocacy efforts by regulatory and enforcement agencies.

Another example of advocacy to address market power and (other) equity issues is the annual statement with recommendations to the Dutch legislature that accompanies the ACM annual report. In 2019, that statement read that independent contractors, i.e. the self-employed, in their role as buyers, are comparable to consumers and should therefore be able to enjoy the same protection under consumer law.<sup>76</sup> The idea behind this, in line with the guidelines discussed earlier in this paper, was to offer better protection to the self-employed, especially at the lower end of the labor market. In 2020, the statement called for stricter rules for certification labels for sustainable products, to facilitate consumer choice and improve competition.<sup>77</sup>

Finally, with regard to the digital economy, advocacy by various competition and consumer authorities, policymakers and other parties has resulted in complementary legislation in the European Union, i.e. the Digital Markets Act and the Digital Services Act, that enables enforcement agencies to more effectively curtail market power by digital platforms and other parties that are active in the digital economy. Advocacy can also mean engaging with stakeholders about changes to the current enforcement practice, such as in the case of the European Commission's evaluation of the merger control regime and the subsequent guidance on renewed use of the so-called Dutch clause<sup>78</sup> – an existing but until recently inactive rule for national authorities to refer acquisitions below the turnover threshold to the European Commission. This is a way to target 'killer acquisitions', i.e. when established market players take over innovative start-ups. Such killer acquisitions are common yet potentially harmful in the digital economy, but also for example in the pharma industry. These new (and renewed) tools enable competition and consumer authorities to be more effective in protecting competition and consumers and to correct power imbalances that contribute to inequity, thereby strengthening the social contract.

#### 4. Conclusions and policy implications

In many jurisdictions (and clearly in the European Union) competition and consumer authorities have been put at arm's length of politics. This is a good thing. Independent competition and consumer authorities are less likely to be influenced by political daily realities and lobbies. As a consequence, it enables a more 'objective' decision making process, which is important in general but also in the light of the fact that decisions are often challenged in court, where judges are typically unimpressed by politically motivated arguments.

Crucially, the benign isolation from politics does not imply isolation from society. In the words of Gal (2019), our economies share the assumption that welfare of the members of society stands at the basis of the social contract of which competition and consumer policy is part. It means inter alia that competition authorities not only need to deliver in their formal and legal duties but also in terms of delivering for the social contract. However, since the social contract is by its very nature informal, it is *a priori* not obvious

<sup>75</sup> Handel et al (2021), see note 4.

<sup>76</sup> ACM (2019) InSight 2019: Consumer protection in a changing society. 3 April 2019. <https://www.acm.nl/sites/default/files/documents/2019-05/insight-2019.pdf>.

<sup>77</sup> ACM (2020b) InSight 2020 – Better certification labels are necessary for making sustainable choices easier. <https://www.acm.nl/sites/default/files/documents/2020-07/acm-insight-2020.pdf>.

<sup>78</sup> European Commission (2021) Commission guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases. C(2021) 1959 final. Brussels, 26 March 2021.

what this delivery means. Delivering the social contract does not mean, for instance, that any vocal citizen group should be appeased. On the contrary, the strength of the competition and consumer authority is exactly that it is well positioned to ignore or bypass vested interests, lobbies or unmerited outcries by citizens. But not all passionate outcries are unmerited and not all lobbies are wrong.

Whilst delivering to the social contract may not always be clear or easy, a good start is already the simple acknowledgement that equity effects are important is needed in the first place. It is also recommendable that competition and consumer authorities invest in a better understanding of the equity effects of enforcement decisions, to increase public trust and strengthen the social contract. Acting in splendid isolation without acknowledgement of equity effects would be, in our view, ostrich economics. However, competition and consumer authorities should also be aware of the risk of thinking too far and taking what are essentially political decisions.

Indeed, since the social contract is implicit and there are many choices imaginable, there is a certain danger that authorities end up weighing various public interests without the political or legal mandate to do so. Pushing it too far is of course harmful and can interestingly enough *also* endanger the social contract, since pushing mandates can delegitimize authorities. To what extent this risk will materialize in practice and what can be done to limit this risk can be subject of further discussion. The contribution of this paper is to show the practical relevance of thinking about competition and consumer law as serving the social contract, and to illustrate how communication, prioritization and advocacy can contribute to address equity issues while staying focused on the protection of competition and consumers.

Having said that, four conclusions can be drawn. First, a good way to strengthen the social contract is simply to deliver on the correction of market failures. By improving welfare through protecting competition and consumers, authorities show citizens and firms what they achieve in return for giving up freedom. Second, ignoring equity effects can jeopardize the social contract, even if the decision to protect against market failures is perfectly legitimate. Complementary action is then warranted to salvage the social contract. The nature of further action is context specific, but typically involves good communication and streamlining with other policy fields, as many cases analyzed in this paper revealed. Third, some bold actions by competition authorities can enforce the social contract. Leniency towards anti-competitive agreements or firms that infringe consumer rights may be appropriate in exceptional circumstances, but the equity underpinning must be solid to consider any such decision. In cases where authorities do take equity into account, society is likely to respond favorably. Notice that this should not be the *motive* of authorities, but is a side effect that cannot be ignored, mirroring the previous case where the adversarial affect should not be ignored either. Fourth, thinking of competition and consumer authority as institutions that need to deliver on the social contract enriches the debate and adds to the quality of decisions. We have demonstrated with a large set of different cases that the frame of the social contract by Gal (2019) is one that not only enforces the position by competition and consumer authorities in society but importantly also adds to the quality of decisions. A decision with a marginal efficiency effect but with substantial negative effects on equity is arguably not a good decision, even if it survives in court.