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8. Pre-distribution versus re-distribution: why competition law is much more than a tool to alleviate poverty

Amit Zac

INTRODUCTION

After decades of prosperity in the post-World War II area, with economic growth and a decline in inequality,¹ something in the capitalist-democracy mechanism broke loose becoming unsustainable.² Economic inequality levels have been increasing in many parts of the world, following years of decline.³ The rich become wealthier, the middle-class declines in income, and the poor struggle to remain afloat. Despite political discussion and efforts to promote equality in some jurisdictions, social polarization increases, and the last health and economic crises tore apart the fabric of our societies.⁴

While legal commentators have recognized that the way in which competition law is structured and applied might also contribute to this trend,⁵ only a handful of studies tried to

¹ Jonathan Hopkin, *Anti-System Politics: The Crisis of Market Liberalism in Rich Democracies* (Oxford University Press 2020). The past four decades have been prosperous ones. Globally, economic growth has increased by 73% per capita (USD constant) since 1980, with growth even higher at 85% for the world's most industrialised countries. GDP per capita between 1990 and 2018 according to the world bank indicators.

² Most scholars support the notion that inequitable distribution of resources and wealth will provoke some form of instability. On the other hand, some scholars emphasize that the key factor affecting instability is the 'perceived' inequality. Alberro Alesina and Roberto Perotti, 'The Political Economy of Growth: A Critical Survey of the Recent Literature' (1994) 8 *The World Bank Economic Review* 351; Vladimir Gimpelson and Daniel Treisman, 'Misperceiving Inequality' (2018) 30 *Economics & Politics* 27.

³ The latest UN Human Development Report (UNHDR, 2019: 111, 132) records that income inequality based on the top 10 percent's income share has risen since the 1980s. In 2017 the global top 1% owned more than 33% of the total wealth while the bottom 50% owned less than 2%. See also Facundo Alvaredo and others, 'The Top 1 Percent in International and Historical Perspective' (2013) 27 *Journal of Economic perspectives* 3; Facundo Alvaredo and others, 'The World Wealth and Income Database' (2016) 2 Website: <http://www.wid.world> 11; Emmanuel Saez, 'Income and Wealth Inequality: Evidence and Policy Implications' (2017) 35 *Contemporary Economic Policy* 7.

⁴ Aaron van Dorn, Rebecca E Cooney and Miriam L Sabin, 'COVID-19 Exacerbating Inequalities in the US' (2020) 395 *Lancet* (London, England) 1243.

⁵ Joseph E Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (WW Norton & Company 2012); Jonathan B Baker and Steven C Salop, 'Antitrust, Competition Policy, and Inequality' (2015) 104 *Geo. LJ Online* 1; Jason Furman and Peter Orszag, 'A Firm-Level Perspective on the Role of Rents in the Rise in Inequality' (2015) 16 Presentation at 'A Just Society' Centennial Event in Honor of Joseph Stiglitz Columbia University; Simcha Barkai,

disentangle the complex interlinks between effective competition law, intense competition, and societal benefits, including the decline of poverty and economic inequality (i.e., fair prices and wages). In companion papers, we have reviewed the empirical literature on how competition law interacts with poverty and economic inequality and offered a cross-country-industry analysis of the effects of the law.⁶ We have also elaborated on the various ways competition law can be adjusted to consider the distributional effects of competition while studying the household effects of competition law decisions in the UK.⁷

In this paper we explore the unique characteristics of competition law as a *pre-distribution* tool. By emphasizing the theoretical and practical features of the law, we make the case that competition law should not become an instrument to alleviate poverty alone, as some previous studies have argued.⁸ We argue that effective competition law enforcement should aim to tackle extreme inequalities between the low and middle classes, and to top income groups, e.g., the top 1% income and wealth groups.

The paper is divided into five sections: In section I, we review the basic definitions of economic inequality and poverty which will allow us to make the relevant distinctions in later sections. Section II provides a quick overview of the effects of competition law on economic inequality studied in previous literature and in our companion work. In section III, we explain the terminology of pre-distribution vs re-distribution. Section IV supports the main argument of the paper: why competition law is a tool to address economic inequality and not just poverty. Section V concludes the discussion.

I. ECONOMIC INEQUALITY AND POVERTY: DEFINITIONS

What do we mean by economic inequality? Three broad concepts of economic inequality are in the basis of the chapter's argument: wealth inequality, income inequality, and consumption inequality.

Wealth inequality is the share of economic stock owned by individuals in the economy. Wealth measures the value of all the assets of worth accumulated by a person or company, for example, at a given point in time. Wealth is determined by taking the total market value of all physical and intangible assets owned, then subtracting all debts. Essentially, wealth is

'Declining Labor and Capital Shares' (2016) 2 Stigler Center for the Study of the Economy and the State New Working Paper Series; Ioannis Lianos, 'The Poverty of Competition Law. The Long Story' [2018] Center for Law, Economics and Society, UCL. Research Paper Series.

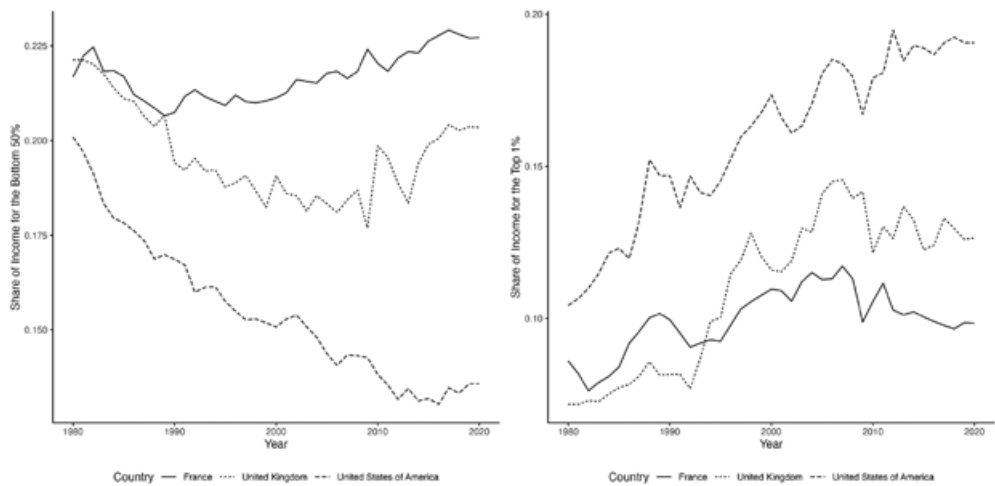
⁶ Amit Zac, Carola Casti, Christopher Decker and Ariel Ezrachi, 'Competition Policy and the Labor Share' (2023) *The Journal of Law, Economics, and Organization*: ewad008.

⁷ Ariel Ezrachi, Amit Zac and Christopher Decker, 'The Effects of Competition Law on Inequality—an Incidental By-Product or a Path for Societal Change?' [2022] *Journal of Antitrust Enforcement* jnac011; Christopher Decker and others, 'Competition Law Enforcement and Household Inequality in the United Kingdom' (2022) 18 *Journal of Competition Law & Economics* 905.

⁸ See for example, Thomas K Cheng, *Competition Law in Developing Countries* (Oxford University Press 2020).

the accumulation of scarce resources.⁹ Income inequality is a variable of flow (over time) and can be measured as the fraction of economic output that accrues to individual as compensation in exchange for their labour and return on capital investments. Such revenues can include wages from employment (and can be measured separately as ‘wage inequality’¹⁰), returns or dividends from investments in property or shares, or social security payments or benefits (i.e., ‘transfers’). Income inequality can also be measured in pre- or post-tax. Consumption inequality is the share of resources consumed by the measured unit. In other words, it often refers to differences in the expenditures that households make on nondurable or small semi-durable goods and services.¹¹

The rise in both income and wealth inequality is a common trend among developed countries, yet the factors contributing to the trend are idiosyncratic.¹² In Figure 8.1, we plot the share of *income* accumulated by the bottom 50% and top 1% shares in the United States, United



Source: WID database, authors' elaborations.

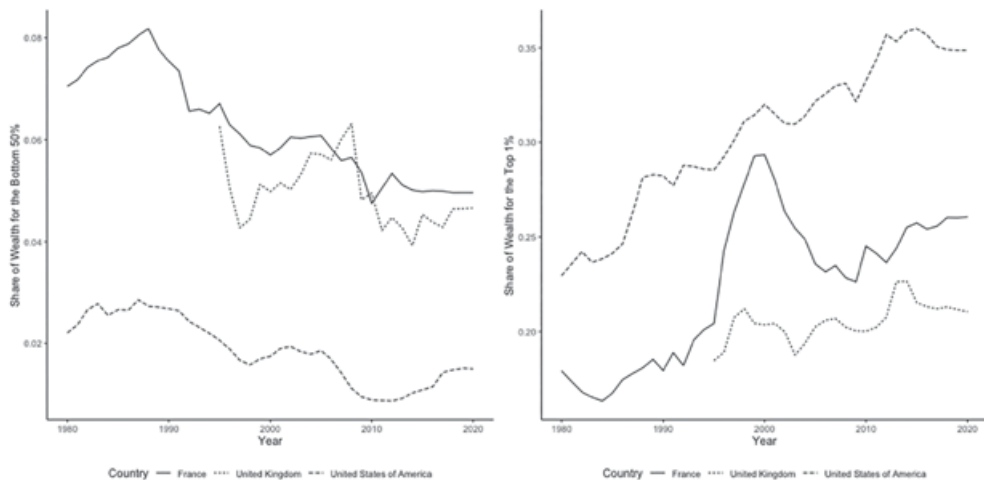
Figure 8.1 Bottom 50% and top 1% shares of income

⁹ Wealth inequalities may include financial and non-financial assets, including real-estate and consumer durables, fixed claim assets (cash, deposits), shares in listed companies, equity interests in unincorporated business (small traders, farms) and other assets.

¹⁰ The labour share is defined as the share of value added which is paid out to workers. It is therefore often also called the wage share. Generally, it is assumed that value added is produced with capital and labour as input factors so that $Y = F(K;L)$ where Y is value added or output, K the capital input, and L labour. Subtract labour share from GDP, and you get the share of GDP going to owners (to capital).

¹¹ Dirk Krueger and Fabrizio Perri, 'Does Income Inequality Lead to Consumption Inequality? Evidence and Theory' (2006) 73 *The Review of Economic Studies* 163.

¹² Peter Hoeller, Isabelle Joumard and Isabell Koske, *Income Inequality in OECD Countries: What Are the Drivers and Policy Options?* (World Scientific 2014).



Source: WID database, authors' elaborations.

Figure 8.2 *Bottom 50% and top 1% shares of wealth*

Kingdom and France between 1980–2020. Figure 8.2 does the same for the bottom 50% and top 1% shares of *wealth*. The trends of France, United States, and the United Kingdom are similar between 1980–2020, although their magnitude is dramatically different. The United States is ‘leading’ the way of inequality, in both income and wealth.

The figures show a common trends of inequality measures in the selected countries, yet note that the scale of Y-axis are (left and right) different, and the magnitude of overall change in each country as well. Yet, despite the differences the overall drift is clear.

Other inequality metrics are based on non-tangible measures such as opportunity inequality, social mobility, and human capital distribution. While such inequality measures are also potentially linked to competition and competition law, particularly in a dynamic context, it can be challenging to define such inequality concepts in a way that allows for the systematic collection and analysis of data.

Alongside these relative inequality metrics, various *absolute* economic standing measures such as poverty indicators focus on the resources available to the lowest wealth or income percentiles.¹³ Poverty can be defined in monetary terms or absolute terms as access to sufficient food, water, health care, basic sanitation, and housing. For example, the World Bank uses the benchmark of one US dollar and between 1–2 US dollars to measure extreme and moderate poverty. A person is said to be in extreme poverty if she or he earns 1 US dollar and moderate poverty if she or he earns between 1–2 US dollars every day. Of course, in developed countries this absolute measure is irrelevant as the price index (goods and products) of essential goods is much higher, meaning that even absolute poverty measures require adjustment. Definitions of the poverty line vary considerably among countries especially between the developed and developing parts of the world.

¹³ Jeffrey D Sachs, *The End of Poverty: Economic Possibilities for Our Time* (Penguin 2006).

The Organisation for Economic Co-operation and Development (OECD) offers a measure of the poverty line that is dependent on the median household income of the country studied. The poverty line is taken as half the median disposable (after-tax) household income. Using this definition, the OECD can estimate the percentage of people living under the poverty line. Such measures differ in terms of the relative income levels the poverty line represents even within the developed world. Country estimates are based on population-weighted subgroup estimates from household surveys. When referring to poverty or extreme poverty in this chapter, we are referring to measures that are closer to the general, intuitive form of poverty, meaning access to sufficient food, water, health care, basic sanitation, and housing. In one country this might mean over 12 dollars a day (the US for example) and in another, it might be much less. As we will explore in later sections of the chapter the line between the poor and low and middle classes is blurring in some parts of the developed world by the phenomenon of the ‘working poor’.¹⁴ The bottom and middle working classes are the ones with the greatest potential to gain from more effective competition and competition law, as argued in the rest of this chapter.

II. THE EFFECTS OF COMPETITION LAW ON ECONOMIC INEQUALITY: A SHORT REVIEW

The direct effects of lack of *competition* in product markets i.e., market power, are price and wage effects. When firms hold market power, e.g., through product differentiations, natural or artificial barriers to entry or network effects, the dominant firm may raise prices above marginal costs (i.e., increase markups).¹⁵ Higher prices affect consumers in a regressive way, as poorer consumers tend to spend larger portions of the income on consumptions.¹⁶ This is

¹⁴ Millions of full-time workers in the US rely on federal health care and food assistance programs (such as food stamps), according to a report from 2020 of the US Government Accountability Office. These full-time workers are employed in different sectors such as leisure and hospitality, wholesale and retail, and even manufacturing and business services. The report is available at www.gao.gov/assets/gao-21-45.pdf. See also Matt Day and Spencer Soper, ‘Amazon Has Turned a Middle-Class Warehouse Career into a McJob’, *Bloomberg*, 17 December 2020.

¹⁵ All firms, with or without market power, do their best to maximize their profit. The difference with market power is that the firm’s decision on the production volume affects the market clearing price (the firm is not a price taker but sets the price in the market). For clarity, let’s call a firm with market power as monopolist (even though there are duopolist and oligopolists with market power). A monopolist adjusts their production level by incorporating that decision’s effect on the market price – something a competitive market firms do not need to consider. It can be shown theoretically that a monopolist’s profit maximizing output is less than that of competitive market case – and because of downward sloping demand this inevitably results in higher price (and larger markup). An important distinction here is that monopolist is not just increasing up the price because they can do so; rather they are behaving just as any other firms do, i.e., maximizing its profit. Thus, to demand a monopolist to produce at a higher level (comparable to competitive market level, for example) is equivalent of asking them to sacrifice their profits.

¹⁶ John Creedy and Robert Dixon, ‘The Relative Burden of Monopoly on Households with Different Incomes’ (1998) 65 *Economica* 285; John Creedy and Robert Dixon, ‘Relative Welfare Losses and Imperfect Competition in New Zealand’ (2000) 34 *New Zealand Economic Papers* 269.

especially the case in basic goods like food and clothing. When prices rise, the overall demand for goods drops (consumption) compared to the competitive market and therefore also the demand for labour (especially in sectors competing in global markets). The end result is also a decrease in the equilibrium wage. This is true even if labour markets are competitive.¹⁷

When labour markets suffer from concentrations and market power (in this case monopoly power, i.e., the power of employers to suppress wages below the marginal productivity of the worker), further wage effects could lead to an increase in economic inequality.¹⁸ When firms' profits and remunerations for top corporate managers increase disproportionately to the increase of other workers' benefits (e.g., the median worker) to incentivize rising markups, that could increase inequality by encouraging firms to further suppress wages and raise prices.¹⁹

A high level of heterogeneity across countries is expected, although the rise of economic inequality seems to be relevant to most developed countries.²⁰ Such idiosyncratic explanations could be related to historical and institutional background, levels of employment protections and unionizations and social mobility levels facilitated by the local educational systems.

The dynamics of *competition* in product and labour markets described up until now impels intuitively that *competition law* enforcement might affect economic inequality via its effects on competition dynamics. The working assumption of most legal scholars, who argue for the use of competition law for promoting greater equality, seems to find some empirical support as summarized in our previous studies.²¹ However, it can be argued²² that too much competition, in a specific context (for example between employees), could also be detrimental to societal change. Moreover, competition policy is not always successful in protecting competitive markets. Like other rules and regulations, it can harm competition or cause unintended consequences, like chilling effects on innovation. In other words, more needs to be done to provide robust evidence to support the greater use of pro-competitive tools, such as competition law, to advance equality, especially if one argues for a change in the substantive analysis of competition law.²³

¹⁷ Jan De Loecker, Jan Eeckhout and Simon Mongey, 'Quantifying Market Power and Business Dynamism in the Macroeconomy' (National Bureau of Economic Research 2021) w28761 www.nber.org/papers/w28761.pdf accessed 27 February 2022.

¹⁸ Ioana Elena Marinescu and Eric A Posner, 'Why Has Antitrust Law Failed Workers?' [2019] SSRN Electronic Journal www.ssrn.com/abstract=3335174 accessed 12 January 2021.

¹⁹ Bao Renjie, Jan De Loecker and Jan Eeckhout, 'Are Managers Paid for Market Power?' <https://econ-papers.upf.edu/papers/1834.pdf>.

²⁰ Brian Nolan, Matteo Richiardi and Luis Valenzuela, 'The Drivers of Inequality in Rich Countries' (2018) available at https://mpira.ub.uni-muenchen.de/89806/1/MPRA_paper_89806.pdf (accessed 12 April 2024).

²¹ Amit Zac and others, 'Competition Policy and the Labor Share' (2023) *The Journal of Law, Economics, and Organization*: ewad008; A Ezrachi, A Zac and C Decker, 'The effects of competition law on inequality—an incidental by-product or a path for societal change?' (2023) 11:1 *Journal of Antitrust Enforcement*, 51–73; yet, using cross country data on competition laws, we find null effects on inequality. See Amit Zac, Carola Casti, Christopher Decker and Ariel Ezrachi, 'Competition Law and Income Inequality: A Panel Data Econometric Approach' (2021). Available at SSRN 3402436.

²² Maurice Stucke and Ariel Ezrachi, *Competition Overdose: How Free Market Mythology Transformed Us from Citizen Kings to Market Servants* (2020).

²³ Michal Gal, 'The Social Contract at the Basis of Competition Law', in *Reconciling Efficiency and Equity: A Global Challenge for Competition Policy* (Gerard and Ilanos eds., Cambridge

In addition to the direct market effects (product and labour) of the competition law, one needs to consider the role of competition law in shaping long-run dynamics of growth and innovation. The empirical evidence on the effects of growth on economic inequality are mixed. On one side growth and innovation could positively affect poverty reduction,²⁴ but on the other hand, their effects on economic inequality are ambiguous²⁵ and depend on other economic and institutional factors. In other words, the flow of rents from globalization, trade and technology, which are all associated with growth, depends on factors such as labour protection and unionization and capital distribution, taxation and historical endowments.

In the next section we will start to explore the unique characteristics of competition law as a distribution tool – an inefficient instrument for redistribution, but a powerful tool for pre-distribution.

III. PRE-DISTRIBUTION VERSUS RE-DISTRIBUTION

This section offers a new terminology that distinguishes between two main avenues for competition law to advance equality considerations. The first avenue concerns the effects competition law enforcement generates through the promotion of greater competitiveness. We will refer to this avenue as side effects or ‘ancillary’ effects of the main aim of the competition law to promote competition. This avenue, it will be argued, creates a pre-distribution effect only. The second avenue is a direct approach, which relies on provisions that address inequality as a parameter influencing the substantive assessment of competition law. These provisions can include general references to the law’s goals or unique mechanisms for transferring gains directly under the analysis of anti-competitive behaviour. In other words, under this avenue the distributional outcome becomes part of the competitive analysis. This avenue can be used as both a pre-distribution and a re-distribution tool, as we will show.

The use of this terminology helps emphasize the normative challenges each avenues faces. Much of the legal literature ignores this distinction, putting together ideas that rarely challenge the normative core of competition law, next to suggestions that can alter altogether the way anti-competitive acts are reviewed. In this section, we elaborate on the normative considerations for these two avenues.

A. First Avenue: Side-Effects of the Competition Law as a Tool for Pre-Distribution

As explored up until now, it has been argued that greater competition law enforcement would support market competitiveness and reduce economic inequality.²⁶ The empirical evidence supports this claim, but more is required before any conclusive policy argument can be made.

University Press, 2019).

²⁴ Augustin Kwasi Fosu, ‘Growth, Inequality, and Poverty Reduction in Developing Countries: Recent Global Evidence’ (2017) 71 *Research in Economics* 306.

²⁵ Philippe Aghion and others, ‘Innovation and Top Income Inequality’ (2019) 86 *The Review of Economic Studies* 1.

²⁶ Joseph E Stiglitz, ‘Towards a Broader View of Competition Policy’ [2017] *Competition Policy for the New Era: Insights from the BRIC Countries* 4.

For now, let us assume the principle claim that more competition will result in lower economic inequality. In that case, countries can effectively utilize the competition law toolbox – mostly merger control, enforcement against anti-competitive agreements, enforcement against abuse of market power and advocacy efforts – to reduce economic inequality. The role of competition law, under this view, is not conditioned on the normative scope of the law (the presence, or lack, of specific provisions aimed to promote fairness or equality). We can harness competition law to change distributional results without changing the main substantive analysis, but by promoting more competition on product markets and between employers.

Yet law and economics scholars argue that taxation policies are a superior legal tool to advance equity concerns. Specifically, the literature on optimal legal tools for redistribution have concluded a far-reaching consensus rejecting the use of competition law (or any other legal device) as distribution tools, favouring tax as the *exclusive* legal instrument fit for the purpose.

Before explaining the argument in favour of taxation, let us clarify the framework under which the argument stands. It is clear that any instrument for the transfer of income carries with it costs of use, a trade-off which is known as the ‘leaky bucket’ problem.²⁷ Any transfer of income has direct and indirect costs. A direct cost: resources are collected and distributed, imposing information and administration costs. Since this type of costs are a question of efficiency of administrative systems, they are less important to our normative debate. Yet any transfer also has an indirect cost, which results from inefficient incentives: the collection of income reduces incentives to earn it in the first place. This is referred to in the literature as the ‘*work-leisure distortion*’.²⁸ An increasing tax rate will continue to reduce the work effort to the point at which the total amount collected will decrease.²⁹

Although several arguments in the literature of law and economics support the exclusive use of tax law as an instrument for distribution, it appears that one specific argument in the law and economics literature has trumped them all: the tax substitution argument developed by Kaplow and Shavell.³⁰

²⁷ Arthur M Okun, *Equality and Efficiency: The Big Tradeoff* (Brookings Institution Press 1975); David A Weisbach, ‘Should Legal Rules Be Used to Redistribute Income?’ (2003) 70 *The University of Chicago Law Review* 439, 441.

²⁸ See James A Mirrlees and Stuart Adam, *Dimensions of Tax Design: The Mirrlees Review* (Oxford University Press, 2010) 204. In a basic microeconomic model, every individual chooses a unique combination of work effort versus free time (leisure). The total amount of work effort will shrink as we increase the tax burden on the individual. One of the major questions regarding this process is in what rate people will alter their choices (elasticity); this is one of the fundamental empirical questions in the optimal taxation literature.

²⁹ This is described in the work of Arthur Laffer (and is known as the ‘Laffer Curve’). Once a tax is raised, two distinguishable effects arise: more money is being collected per person, but more people stop the taxed activity. In one point the second effect offsets the first, making any increase in tax reduce the total of money collected. See Mathias Trabandt and Harald Uhlig, ‘How Far Are We from the Slippery Slope? The Laffer Curve Revisited’ (National Bureau of Economic Research 2009).

³⁰ Steven Shavell, ‘A Note of Efficiency vs. Distributional Equity in Legal Rulemaking: Should Distributional Equity Matter given Optimal Income Taxation?’ (1981) 71 *The American Economic Review* 414; Louis Kaplow and Steven Shavell, ‘Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income’ (1994) 23 *The Journal of Legal Studies* 667; Louis Kaplow

Intuitively, distribution comes at a price. If you transfer income via the tax system, you encounter the *work-leisure distortion* mentioned above, thus reducing the incentive to earn money. But what happens if we use a different legal system? If we transfer income via any other legal systems, we distort the incentives within that regulated activity (i.e., the '*legal distortion*'). Take for example, the case of tort law, used by Kaplow and Shavell; if we change damages in the tort system to consider relative income of the parties, the incentives for care measurements to prevent an accident are no longer optimal. When damages are shifted away from to the actual harmed caused (the definition of optimal damages under economic analysis of tort law), too much or too little care is taken, and the total costs are not minimized.³¹ The trade-off between the work-leisure and legal distortions, begs the question: which tool is more efficient?

According to Kaplow and Shavell, many law scholars fail to recognize that the work-leisure distortion resulting from a change in income tax would be identical in size to the effect caused by any legal transfer (e.g., tort transfer). Both transfers would create the same incentive cost to the work-leisure balance. However, and this is the key, the legal transfer not only creates the work-leisure distortion but additionally creates the legal distortion (such as the case of a tort transfer which will cause the care-level distortion), reducing the overall efficiency of the distribution tool. The legal distortion is a second cost relevant only to the regulated activity – in the tort example, the levels of care in society. Thus, they conclude that the use of any other legal system to redistribute would be more costly than redistribution via the tax system. This theoretical conclusion holds regardless of the transfer's size. In other words, a legal transfer would create a 'double distortion' of incentives while a tax transfer would create only one distortion.³²

Now, let us go back to competition law and its side-effects as a distribution tool under the first avenue. When debating the role competition law plays in income distribution we are no longer constrained by the 'double distortion' argument (work-leisure and legal distortions)³³ as we are at a pre-income-tax stage and are not adjusting (distorting) the substantive analysis under the law in reaction to individual incomes of the parties in the antitrust case. We can therefore refer to sides effects of competition law as *pre-distribution* as it is aimed at affecting the disposable income of individuals via prices and wages. The main advantage of competition policy is that it can change market results without the distorting influence of tax and transfer policies (work-leisure incentives). If market outcomes create a more equal society, the tax system will need to accommodate fewer transfers, overall creating fewer work-leisure distortions. When competition law works effectively, it operates in 'large numbers' untargeted to

and Steven Shavell, 'Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income' (2000) 29 *The Journal of Legal Studies* 821.

³¹ Kaplow and Shavell, 'Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income' (n 30).

³² It is not just a technical matter of counting distortions. As explained and demonstrated in Kaplow and Shavell's formal mathematical model, the two distortions in the income-dependent tort transfer are constructed from the same size distortion to work-leisure incentives, in addition to suboptimal incentives (care level distortion) in the tort system; thus, the two distortions are always larger. The conclusion is that whatever transfer society wishes to perform in the name of social goals, the best instrument for the task is the taxation of income or the tax system in general. This is the absolute advantage of the tax system, which has earned its exclusive law and economics status.

³³ Shavell (n 30).

specific individuals. It increases incentives for work (higher wages) and to consume (lower prices), generating more growth, innovation, and competition on quality.

When debating the use of competition law for advancing equality via its effects on competition, the main concern is the possible ‘chilling effect’ of competition enforcement. Competition laws can create a dead-weight loss by limiting competition and innovation (i.e., affecting firms’ incentives). This distortion effect is equivalent to the legal distortion (the care-level distortion in the Kaplow and Shavell model for the tort transfer).

Competition policy and law, under such view, might prevent ‘pie-expanding’ competition for market shares via the tendency of enforcers to punish innovative, cost-reducing efficient behaviour. The discussion is related to the sources of market power and the question of whether we can distinguish between ‘good’ and ‘bad’ concentrations? Competition law is tasked to determine to what extent dominant firms either hold a superior technology, operate in a sector with network effects and scale economies naturally leading to a monopoly, or benefit from hidden or artificial barriers to entry and market power. Such judgments are made on individual cases by competition agencies and courts. And the same is true for mergers or cartels.

In terms of efficiency of distortion, the relevant comparison under the first avenue is between the potential distortion of taxation (to provide optimal incentives to work) vs the distortion of competition law (to provide the optimal incentives to compete and innovate).

Considering the striking data on the rise of markups, it seems reasonable to assume that, if anything, competition law is in an under-deterrence status quo.³⁴ The empirical observations support the notion that competition law enforcement has, in many ways, failed consumers and workers. It failed its greatest role to encourage greater competition, constrain markups and wage markdowns. According to this proposition, anti-competitive activity goes on without being detected and challenged. Therefore, increasing the intensity of competition law enforcement will bring us closer to the optimal incentives to compete and innovate, creating sides effects for the distribution of income and wealth.

However, many would argue that using competition law sides effects is not enough – we need to consider a direct use of competition law to advance equality. This point leads to the second avenue which competition policy can take.

B. Second Avenue: Competition Law as a Tool to Target Inequality Directly

The second role competition law can play concerns the competition rulebook’s direct provisions to advance equality as part of the law’s enforcement; for example, when the legislator incorporates in the law specific references or goals related to equality, or more widely, to fairness. The direct use of competition law requires the policymaker to deviate from what would be otherwise considered pro- or anti-competitive. So, in other words, the second avenue may alter the substantive analysis adding another dimension of what is considered unlawful under

³⁴ Jan De Loecker and Jan Eeckhout, ‘Global Market Power’ (National Bureau of Economic Research 2018); Germán Gutiérrez and Thomas Philippon, ‘How EU Markets Became More Competitive than US Markets: A Study of Institutional Drift’ (National Bureau of Economic Research 2018) 0898–2937 https://fnce.wharton.upenn.edu/wp-content/uploads/2018/10/Phillippon_Europe_v2.5.pdf accessed 20 December 2021.

competition policy.³⁵ Such examples are most common in countries attempting to rise from colonial and discriminating regimes.³⁶

In some cases, general values could still be utilized to address rising inequality, like social contract or fairness theories. For example, the EU competition law reference the value of fairness,³⁷ via ‘unfair pricing’ can be applied and developed in light of wider policy concerns.³⁸ In South Korea, competition law promotes, among other goals, the balanced development of the national economy by encouraging fair and free competition.³⁹

The inclusion of parameters such as fairness and equality in the competition provisions or their interpretation is controversial, to say the least. The normative debate on the adequate scope and purposes of competition laws and the formulation of intervention benchmarks is as old as competition law itself. To what extent competition policy should seek to encourage distributional outcomes in practice? How should competition law enforcers balance the different goals of the law (hierarchy within the law values)? The second avenue raises normative questions. Efficiency and distribution can go hand in hand, but not always.

If one is only interested in the ideals or a narrow definition of their applications, incorporating economic inequality under the goals of competition laws could be simple, or simply empty talk. However, we can consider more experimental approaches such as providing specific procedural rules prioritizing claims that are more likely to affect economic inequality adversely. Another option would be to change the threshold for intervention according to such cases. As we go further away from the core use of competition law to promote competition, the risk of creating distortions to competition increases. Let us consider the meaning of walking down the more experimental path.

Maybe the most extreme example one can think of (similar examples are debated in the context of sustainability⁴⁰) is a ‘robin hood cartel’. In a short article, Schinkel argues that the use of competition law to advance social goals might backfire quickly in circumstances of a trade-off between the classic goals of the policy and equity concerns.⁴¹ For example, competition authorities may be convinced to allow a merger that protects low-skilled workers,

³⁵ One example is South Africa, where the Constitution requires affirmative action to empower historically disadvantaged groups (Constitution Sec. 9(2)). The Competition law in the country (Competition Act of 1998) directly includes inclusiveness as a relevant value and aims to encourage: ‘greater spread of ownership, particularly to increase the ownership stakes of historically disadvantaged persons’. The Competition Act 1998, South Africa. Available at: www.gov.za/documents/competition-act.

³⁶ Eleanor M Fox, ‘Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia’ (2000) 41 Harv. Int’l. LJ 579; Gal (n 23).

³⁷ Article 101(3) TFEU; Article 102 (a) TFEU.

³⁸ Article 9 TFEU refers to ‘the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health’. See also Article 12 TFEU; Article 38 Charter of Fundamental Rights of the European Union (2000/C 364/01).

³⁹ Meong-Cho Yang, ‘Competition Law and Policy of the Republic of Korea’ (2009) 54 The Antitrust Bulletin 621.

⁴⁰ See the latest OECD report on the topic, at www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf.

⁴¹ Maarten Pieter Schinkel, ‘On Distributive Justice by Antitrust: The Robin Hood Cartel’ [2021] SSRN Electronic Journal www.ssrn.com/abstract=3869561 accessed 25 June 2021.

even though it creates market power or allows horizontal cooperation between competitors if it benefits lower-income groups at the expense of wealthier individuals (via price discrimination, for example). Competition authorities, in such circumstances, may be inclined to allow the build-up of market power in return for a redistribution of wealth from the rich to the poor. A few scholars seem to support such use of competition law.⁴² More broadly, such use may also be consistent with suggestions made by prominent competition law scholars such as Professors Gal and Fox recent vision of competition law, in which they tie competition law enforcement to ideas of the social contract.⁴³ The notion is not purely theoretical and may even find a legal basis under the EU treaties.⁴⁴

Using a simplified model, Schinkel argues that using competition law in such instances, employing a Kaldor-Hicks criterion of total consumer welfare will be inefficient, helping the poor very little at a large cost to society as a whole. The basic insight from this model is that rent-seeking behaviour is inefficient even if a sub-group of consumers (in this case, the low-income) is made slightly better off. In this regard, the point is intuitive;⁴⁵ it is hard to escape the inefficiency of a Robin Hood cartel – because it is a cartel. Using more sophisticated models will not change that. Most of these models rely on similar assumptions concerning the utility function, demand curves etc.⁴⁶ Notice the difference between allowing a cartel (or a merger) despite its harm to competition in the product market in order to protect a group of low-skilled workers, and using competition policy to break a cartel (or a merger) which may result in increased monopsony power of the employers to suppress wages despite an efficiency claim.⁴⁷

C. Intermediate Summary

Now that we covered some of the key arguments relating to using competition law sides effects on inequality (3.A – first avenue) and competition law direct use to target inequality (3.B – second avenue) the key difference between the two suggestions becomes clear: the possible contradictions in following the law’s goals. Under the first avenue, any inefficiencies resulting from the application of competition law is accidental; cases of over deterrence and false-positive enforcement activities. Under the second avenue, the distortion is guaranteed

⁴² Ioannis Lianos, ‘Competition Law as a Form of Social Regulation’ (2020) 65 *The Antitrust Bulletin* 3; Dina I Waked, ‘Antitrust as Public Interest Law: Redistribution, Equity, and Social Justice’ (2020) 65 *The Antitrust Bulletin* 87.

⁴³ Gal (n 23).

⁴⁴ Schinkel (n 41) 3.

⁴⁵ The weighing of welfare essentially allows a redistribution agreement to discount its inefficiency losses on the rich, so that it can compensate the poor, despite wasting total welfare.

⁴⁶ Note that a Robin Hood cartel is a pre-tax mechanism, i.e., it will alter the companies’ revenue and markups in expense of its consumers and workers. It is a direct transfer between individuals before the tax system comes into action (as opposed to ex-post compensation for anti-competitive harm). So, this inefficiency could still be compared to the dead-weight loss of an alternative mechanism, i.e., taxation. Nevertheless, it is a direct tool for distribution by the terminology developed in this paper, as it alters what is considered anti-competitive by the law.

⁴⁷ Felix Montag, ‘Mergers, Foreign Entry, and Jobs: Evidence from the US Appliance Industry (Presentation, MaCCI, 2022).

by default, and as argued,⁴⁸ quickly becomes significant in size. Under both avenues, the inefficiencies of using competition law should be compared to the dead-weight loss of the work-leisure distortion (tax).⁴⁹ But under the second avenue, there is a potential for a ‘double’ distortion resulting from the use of competition law as a direct redistribution tool influencing both optimal incentives to compete and innovate, and the consumer’s incentives to seek income if his or her level of income is taken into account.⁵⁰

Practically, competition law is not designed to identify low- or middle-class individuals. Even if such information is easily attainable (using general averages and consumption patterns), competition authorities usually do not have the procedural tools to transfer back lost markups or markdowns to the consumer or employee – efficiently. This data can be however used to manage enforcement priorities.⁵¹ It will also be costly to enforce the boundaries of a robin hood cartel, for example, by making sure the agreement keeps to its original purpose.

To summarize the debate, the main advantage of competition law vis-à-vis taxation is its *pre-distribution* element and its potential to affect large groups of consumers by its general unspecified effects without altering individuals’ work-leisure preferences. When using competition law side effects as a tool, we are keeping the core goals of competition law and substantive analysis focused on enhancing the competitive environment. Under this approach, competition law should be used in addition to, instead of, the taxation and welfare system. Society should still aspire to create optimal tax regimes that redistribute income and wealth to the most needed individuals in modern societies, such as the elderly, the sick and the poor.

IV. WHY COMPETITION LAW IS MORE THAN A TOOL TO ALLEVIATE POVERTY

While the fight against poverty is of great social and economic significance, in this chapter, we argue against such a narrow approach for the use of competition law. Restricting economic inequality is an important policy goal that provides economic benefits in and of its own. More importantly, competition law is better suited to advance economic equality and specifically income and consumption equality. It is less efficient, as we argue, to target individuals living in extreme poverty in developed countries.

⁴⁸ Schinkel (n 41) 19.

⁴⁹ Just as a comparison, a well-known study suggests that the dead-weight loss of taxation can reach up to one-third of each marginal tax dollar Charles L Ballard, John B Shoven and John Whalley, ‘General Equilibrium Computations of the Marginal Welfare Costs of Taxes in the United States’ (1985) 75 *The American Economic Review* 128. Ballard et al. refer to the marginal, not the average, cost of funds, which is the relevant comparison, see Alan J Auerbach and James R Hines Jr, ‘Taxation and Economic Efficiency’, in *Handbook of public economics*, vol 3 (Elsevier, 2002).

⁵⁰ Theoretically speaking, a damage claim which is adjusted according to the victim’s or offenders’ income could be used to transfer income between producers to consumers. A practical example is the European system of Day Fines (see Elena Kantorowicz-Reznichenko, ‘Day-Fines: Should the Rich Pay More?’ (2015) 11 *Review of Law & Economics* 481). But using a firm or individual level of income puts us back in the double distortion model and theoretically in circumstances of an inefficient transfer.

⁵¹ Ezrachi, Zac and Decker (n 21).

First, under the classic economic analysis of law,⁵² the first argument favouring a just or equal distribution of wealth in society is the possible effects of skewed distribution on the *total* amount of utility. Put another way, inequality costs us all in utility. A commonly cited argument related to this cost is that individuals have a declining marginal utility of income. Each dollar is worth less – in terms of utility – as an individual gets wealthier.⁵³ So, if we shift resources from those who have lots to those who have little, we are increasing total utility. This has an effect far beyond reducing poverty. It is not only that other can buy and consume experiences and things that would make them happier in relative terms to a similar purchase by the extreme rich; people also care about what other, richer people, consume or possess, regardless of what they consume. In other words, people care about economic inequality as such, possibly even more than in the past. Empirical evidence shows that happiness and satisfaction from life are negatively associated with inequality.⁵⁴ Specifically, trust in the institutions seems to play an important role in shaping the relationship between income inequality and subjective well-being.⁵⁵

Second, there are also many negative consequences connected to economic inequality, such as deteriorating health measures and destabilizing crime levels.⁵⁶ Such second order consequences mean that the ‘pie’ of resources is shrinking, in a way which markets fail to take account for. A multinational empirical study by Pickett and Wilkinson⁵⁷ suggests a strong correlation between economic inequality and some of modern society’s most formidable challenges. The authors maintain that economic inequality is the most serious problem modern societies face, including the level of trust between individuals and the state, infant mortality, and imprisonment rates. Moreover, economic inequality has been connected to corruption and poor governance, creating more inequality and a vicious circle that is hard to get away from.⁵⁸ A straightforward way to understand these findings is that economic inequality is an essential component related to opportunity inequality:⁵⁹ money buys opportunities (for example, better education and health care even in most egalitarian countries). Therefore, economic inequality, not only poverty, might reduce overall economic growth by preventing or limiting the ability of some parts of society to contribute to the marketplace, incentivizing social undesirable activities. Overall, especially for developed countries, economic inequality costs us all in happiness, health, crime, opportunities, political stability and economic growth.

⁵² Richard A Posner, *Economic Analysis of Law* (Wolters Kluwer Law & Business, 2014) 638.

⁵³ Weisbach (n 27).

⁵⁴ Paolo Verme, ‘Life Satisfaction and Income Inequality’ (2011) 57 *Review of Income and Wealth* 111.

⁵⁵ Ada Ferrer-i-Carbonell and Xavier Ramos, ‘Inequality and Happiness: Inequality and Happiness’ (2014) 28 *Journal of Economic Surveys* 1016.

⁵⁶ A different economic way to support equality concerns is based on ‘interdependent utility functions’: people have utility gains from living in a more equal society even if it does not affect them directly Theodore C Bergstrom, ‘Systems of Benevolent Utility Functions’ (1999) 1 *Journal of Public Economic Theory* 71.

⁵⁷ Kate Pickett and Richard Wilkinson, *The Spirit Level: Why Equality Is Better for Everyone* (Penguin UK, 2010).

⁵⁸ You Jong-sung and Sanjeev Khagram, ‘A Comparative Study of Inequality and Corruption’ (2005) 70 *American Sociological Review* 136.

⁵⁹ Xavier Ramos and Dirk Van de Gaer, ‘Approaches to Inequality of Opportunity: Principles, Measures and Evidence’ (2016) 30 *Journal of Economic Surveys* 855.

Third, debating the difference between using competition law to eradicate poverty or reduce inequality makes sense mostly theoretically. Competition law is triggered using criminal, administrative and civil liability (such as tort law), making it hard or even impossible to target the benefits of intervention towards specific individuals in most current enforcement systems. Moreover, the lowest income groups usually benefit from direct cash transfers (using the welfare system and other redistribution policies) and less from market transactions, including wages. In simple words, competition law is not a policy that can *target* specific individuals efficiently.⁶⁰

The focus of competition law should be on its general effects on large groups of low and middle-class consumers, i.e., without targeting its effects. On average across OECD countries, the share of individuals in middle-income households⁶¹ fell from 64% to 61% between the mid-1980s and mid-2010s, while their aggregate income fell from four times the aggregate income of high-income households to less than three.⁶² Therefore, in many developed countries, the inequality crisis is originated from the decline of the middle classes, not from a rise in poverty. A recent study on the distributional effects of market power⁶³ found that ‘The groups of the population who are typically harmed by market power are the 0 to 80th percentiles, and interestingly the harm appears to be particularly accentuated on a middle class comprised somewhere between the 20th to 60th percentiles’. A similar conclusion is reached by Philippon,⁶⁴ who argues that the biggest losers of the rise of markups in the US are the middle classes.

In labour markets, the trend is similar. Middle incomes are stagnated, in both relative and absolute terms in developed countries. Over the past 30 years, median incomes grew at a third less than the average income of the wealthiest 10%. Meanwhile, the cost of essential parts of the middle-class lifestyle has increased (faster than inflation).⁶⁵ Market power in labour markets is also one of the potential causes of wage stagnation as we reviewed earlier.

Housing prices, a key financial burden on the middle classes, have increased three times faster than the median income household. More than one in five middle-income households spend more than they earn, and over-indebtedness is higher for the middle class than for low and high-income households. As a result, ‘today the middle class looks increasingly like a boat in rocky waters’.⁶⁶

The point we are trying to make here is that targeting competition law on low- and middle-class workers offers the greatest possible benefit for society from competition law enforcement. Both prices and wages are theoretical channels that do not require targeting and might affect the quality of life and satisfaction of squeezed middle classes as well as those

⁶⁰ Louis Kaplow, ‘On the Choice of Welfare Standards in Competition Law’ [2011] Harvard Law and Economics Discussion Paper.

⁶¹ Defined as households earning between 75% and 200% of the median national income.

⁶² OECD, ‘Under Pressure: The Squeezed Middle Class’ (OECD Publishing, 2019) <https://doi.org/10.1787/689afed1-en>.

⁶³ Sean F Ennis, Pedro Gonzaga and Chris Pike, ‘Inequality: A Hidden Cost of Market Power’ (2019) 35 Oxford Review of Economic Policy 518, 539.

⁶⁴ Thomas Philippon, *The Great Reversal: How America Gave up on Free Markets* (Harvard University Press, 2019).

⁶⁵ OECD, www.oecd.org/social/under-pressure-the-squeezed-middle-class-689afed1-en.htm.

⁶⁶ *ibid.*

living under the poverty line. The low- and middle-class households are more closely linked to markets, as they are more active than the poor as consumers and workers. Limiting the potential use of competition laws to poverty reduction via direct use of the law as a *redistribution* tool (for example by higher damages for the cases of anti-competitive behaviour in basic goods) is de facto a call to keep the current antitrust order in place.⁶⁷ It will not yield significant results in developed countries in the long run. Using competition law as a *pre-distribution* tool to reduce inequality means more intensive competition law enforcement overall.

In other contributions, we suggested a practical way to study the effects of competition law on consumption inequality.⁶⁸ We can aim benefits towards ‘groups of consumers’, based on consumption data, like housing and telecommunications. We all consume, and the rich consume even more. We need a systematic way to identify who receives the ‘transfer’ using consumption data and to locate pockets of markups which might be a result of artificial barriers to competition. Such data is attainable, and competition law can be used accordingly to focus on the middle-class. To be clear, the wider focus does not exclude the need to affect poverty. Rather it addresses it as part of a wider goal of sustainable growth.

V. CONCLUSION

The main conclusion of the chapter is that the primary use of competition law should be via its effects on competition dynamics, ensuring the benefits of competition and innovation. The task is putting competitive law enforcement back on a sustainable path, becoming part of the solution to the current inequality crisis.

Competition policy is an important policy for social change. Acknowledging the linkages between competition law enforcement, markups, labour share, and economic inequality is a strong argument favouring effective competition law enforcement. To put this simply, enforcement actions by well-resourced agencies that target anti-competitive activities support greater competition in the markets and are likely to generate a positive effect by helping to reduce the economic inequality gap. As long as an adequate level of intervention is observed, more effective enforcement will result in more competition and less inequality. At this level of generalization, the effects of competition enforcement on economic inequality are treated

⁶⁷ Such a narrow view of the role of competition laws may potentially keep enforcement levels low, creating distortions to the deterrence effects of competition law, giving a free pass to curb competition in many ‘luxury goods’ markets, ignoring the squeezed middle class.

⁶⁸ C Decker and others, ‘Competition Law Enforcement and Household Inequality in the United Kingdom’ (2022) 18:4 *Journal of Competition Law & Economics* 905–935. See also Bernhard Ganglmair, Alexander Kann and Ilona Tsanko, ‘Markups for Consumers’ (ZEW Discussion Papers 2020). They proposed a markup measure in which firm-level price markups are weighted according to consumption expenditures in the respective industries. They find that consumption-weighted price markups are higher and have increased faster than the conventionally reported revenue-weighted markups. They also show that consumption-weighted markups are highest for low-income households, highlighting the potential role of price markups as a contributing factor to changes in inequality in society, but also reenforce our suggestion above to use such measures to navigate competition policy in the right direction as a tool for pre-distribution. A similar approach can be used to target problems in labour markets.

almost as a by-product – a welcomed effect, which may support investment in enhancing the competition regime and its effectiveness. The literature concerning the needed reform in competition laws, specifically in digital platforms market power, is overwhelming. The main policy focus should be putting competition law back on track to constrain markups and market power in the age of ‘superstar’ firms.

Having acknowledged that, further actions can be used to focus the benefits of competition law enforcement to the low and middle classes. Rather than celebrate the potential effects as incidental by-products, we could utilize competition enforcement and form an additional path for societal change. Such strategic leveraging may take different forms, and we explore various possibilities in a companion paper,⁶⁹ drawing examples from other areas of policy where similar approaches are being adopted as part of a wider recognition that many tools are needed to address the extremes of inequality. Specifically, by setting priorities for competition enforcers to tackle market power in essential goods and labour markets, many low and middle-class workers can improve their quality of living and even get out of the vicious poverty cycle. In addition, further studies should focus on the possible ways to advance the substantive analysis of competition law, including a dynamic welfare standard that is sensitive to specific market circumstances and the potential error costs.

The economic analysis of the effects of competition and the distributional effect of market power are also widely recognized in the economic literature.⁷⁰ Nevertheless, most economists have generally eschewed making any further judgments about market power’s consequences, arguing that there is no objective way or conceptual apparatus to assess how the ‘gains’ should be distributed.⁷¹ There is also a view that assigning weights to different society members involves ‘political’ or ‘social welfare’ judgments on which economists have no expertise.⁷² Emmanuel Saez, whose work on inequality is recognized globally for its importance and merits, was quoted to say: ‘Economists belong to the happy class of the winners of these modern times. We are very well paid. We are part of the intellectual elite. For us, the world as it is works well, and I think it influences the way we think about the system. Our economic models make sense for people like us.’⁷³ While abstracting from distributional issues can aid analytical tractability, arguably, they should still be the focus of systematic economic and legal inquiry.

If inequality trends remain below the boiling point, many governments ‘manage’ the situation rather than act to resolve it – introducing patchwork policies to ease the pressure or promote elixirs such as trickle-down effects to justify feeble action. The last health, economic

⁶⁹ A Ezrachi, A Zac, C Decker, ‘The effects of competition law on inequality—an incidental by-product or a path for societal change?’ (2023) 11:1 *Journal of Antitrust Enforcement* 51–73.

⁷⁰ William S Comanor and Robert H Smiley, ‘Monopoly and the Distribution of Wealth’ [1975] *The Quarterly Journal of Economics* 177; Alan A Fisher and Robert H Lande, ‘Efficiency Considerations in Merger Enforcement’ (1983) 71 *Calif. L. Rev.* 1580.

⁷¹ Oliver E Williamson, ‘Economies as an Antitrust Defense: The Welfare Tradeoffs’ (1968) 58 *The American Economic Review* 18.

⁷² William J Baumol and Dietrich Fischer, *Superfairness: Applications and Theory* (MIT Press, 1986).

⁷³ <https://promarket.org/emmanuel-saez-saying-inequality-has-not-increased-in-the-us-the-equivalent-of-being-a-climate-change-denier/>.

and political crisis pushed many countries over the breaking point, opening the door for political and societal instability.

We emphasized the effects of market power on the low and middle classes, who witnessed their standard of living stagnate or decline. At the same time, higher-income groups have continued to accumulate income and wealth. The low and middle class play an enormous role in a healthy economy, sustaining consumption, investment in education, health and housing; they also play a key role in supporting social protection for low-income groups through their tax contributions. Societies with a strong middle class have lower crime rates, enjoy higher levels of trust and life satisfaction, and have greater political stability and good governance.

The main conclusion of the chapter is optimistic: much more can be done to tackle the effects of market power. Competition law could be utilized as a valuable complementary instrument, which can be applied to reduce economic inequality. It can do so without challenging values of self-interest and personal gain that often undermine direct policies aimed at targeting inequality. Furthermore, it can do so as part of its mandate to protect free-market rivalry.