

EU COMPETITION POLICY REPORT

Greedflation, Competition Law, and the Cost-of-Living Crisis

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Executive Summary

This report sets out the case for the adoption of a vulnerable consumer standard for competition law. This would allow competition law to develop its full potential to address the cost-of-living crisis caused by what has been called 'greedflation'. The proposed standard is meant to complement rather than replace the consumer welfare standard in competition policy, providing added enforcement benefits for vulnerable consumers.

In the wake of the COVID-19 recovery, the inflation caused by the war in Ukraine triggered a debate over the role of competition policy in controlling price increases. The European Central Bank characterised those increases as 'greedflation': undertakings taking advantage of rising energy costs to bolster their profits. Being led by increases in essential goods such as food and energy, greedflation has created a cost-of-living crisis affecting vulnerable consumers with full force.

This report explores what competition policy can do to address this cost-of-living crisis, proposing that the European Commission adopts a vulnerable consumer standard as a matter of policy discretion alongside the established consumer welfare approach based on market power.

Although the current approach already provides some protection for consumers in general, its positive effects on vulnerable consumers are accidental rather than by design. These consumers typically represent a small fraction of total consumption and are usually attributed a corresponding importance in the enforcement of competition law. The report highlights three limitations of the consumer welfare and market power approach.

- *First, while theory suggests that vulnerable consumers would be most sensitive to price rises and therefore important in defining markets and assessing anti-competitive effects, in practice the behaviour of such consumers might be diluted by the majority of consumers.*
- *Second, the general consumer welfare standard ignores the kind of consumption at issue. For example, as such the consumer welfare standard cannot distinguish between price increases for Rolexes and price increases for bread. This blindness may also end up benefiting the 'consumption' by undertakings.*
- *Third, where the consumer welfare standard may lead to trade-offs between negative effects for vulnerable consumers and benefits for aggregated consumption, further marginalising vulnerable consumers, for whom price may ultimately be the most important factor.*

The report thus suggests the adoption of a vulnerable consumer standard. This would apply

to the low-income consumers affected by the cost-of-living crisis, but also to other kinds of vulnerability (as already been suggested for personal data). This standard would complement rather than substitute market power and consumer welfare, still requiring vulnerable consumers to be charged prices above the competitive level or that they suffer a decrease in choice and quality. It would nonetheless overcome the above-described limitations by showing when vulnerable consumers are particularly harmed regardless of constituting a separate market.

The report then sets out how this approach can be implemented in practice by means of the Commission's enforcement discretion and priority setting. Under the constitutional framework of the EU, this would be no different from the current prioritisation of consumer welfare by the Commission. Indeed, addressing the cost-of-living crisis is supported the Treaties' aim of an internal market working for balanced economic growth, price stability, and a social market economy.

The Commission could therefore strengthen its existing practice of showing effects on final consumers and conducting sector inquiries and studies on markets that affect them, namely by detailing effects on vulnerable consumers in infringement decisions, explicitly prioritising investigations on markets for basic necessities, and conducting sector inquiries in areas associated with greedflation. Previous sector inquiries and studies, such as those on food and energy, should be followed-up to examine how matters have developed and linked with further enforcement.

The Commission could also adopt a vulnerable consumer standard across its guidance, taking advantage of the methods already used for market definition to identify such consumers. The application of substantive rules would be easily adapted:

- 1. With regard to anti-competitive agreements, the Commission should use the standardised procedures for cartel enforcement to formalise the assessment of effects on vulnerable consumers, as well as sanctioning more heavily cartels that exploit vulnerable consumers.*
- 2. In the context of the abuse of dominance, effects on vulnerable consumers could also be measured and sanctioned. They could also lead to commitments by dominant undertakings protecting vulnerable consumers. Exploitative abuses such as excessive prices and unfair terms could be used to tackle greedflation directly, insofar as they already incorporate cost increases and consider profit margins. This would reverse the current prioritisation by the Commission of exclusionary abuses (in other words, abuses that concern competing undertakings and their access to markets).*
- 3. In the areas of mergers, the Commission might suggest the referral of mergers that do not fall under mandatory notification but are relevant for the cost-of-living. Merger control can further be used to develop the assessment of effects on vulnerable consumers and appropriate remedies, particularly when the transaction would otherwise not raise concerns due to positive effects on aggregated consumers. Greedflation may result from merger control failing to prevent price increases from added concentration, and should be used to develop ex post merger review of effects on vulnerable consumers.*

The European Parliament can express concerns over greedflation and the cost-of-living crisis in order to incentivise the Commission to follow-up these proposals.

1. Introduction

Inflation is surging in the European Union (EU) since the recovery from COVID-19 has been affected by the war in the Ukraine. Recent data from the European Central Bank (ECB) indicates that inflation was led by energy prices for much of 2022, but that this lead decreased to the point of energy prices no longer contributing significantly to inflation at the present.¹ In contrast, prices for industrial goods, services, and food have continued to increase and now account for the current inflationary pressure – in particular food, recognised as the key driver of inflation by the ECB.² At the same time as profits have gone substantially up,³ the accumulated weight of increases in energy, food, and services prices coupled with inflexible or precarious incomes has created a cost-of-living crisis.

Christine Lagarde, the President of the ECB, recently confirmed that ‘firms have been able to increase their profit margins on the back of mismatches between supply and demand, and the uncertainty created by high and volatile inflation’.⁴ ECB data shows inflation being driven by an increase in firm profits,⁵ indicating that the increase in energy costs from the war in Ukraine provided cover to prop up profit margins: what has been deemed as ‘greedflation’. Controlling inflation is a task of the ECB, but greedflation also raises questions for competition policy. The European Commission (Commission) is tasked with applying competition rules to anti-competitive behaviour and mergers that, if left unattended, increase profit margins by harming consumers. While the interaction between competition law and inflation is still under debate,⁶ it is imperative to ensure that generalised profit increases are in line with such rules.

This present report will show how competition policy could make a positive contribution in addressing the cost-of-living crisis triggered by greedflation. Price increases in essential products like energy and food have a disproportionate impact on consumers with limited budgets and other vulnerabilities. This report thus proposes tailoring the application of competition law to ‘vulnerable consumers’, as also suggested by the European Parliament.⁷ Importantly, the proposed vulnerable consumer standard would complement rather than radically change the Commission’s current approach of safeguarding consumer welfare by

¹ Isabel Schnabel, ‘Inflation in the euro area and the US – causes, persistence, outlook (Lecture at Stanford Graduate School of Business, 20 April 2023) <https://www.ecb.europa.eu/press/key/date/2023/html/ecb.sp230420-661bd5928c.en.pdf>.

² <https://www.reuters.com/markets/europe/euro-zone-food-inflation-still-intensifying-ecbs-lane-2023-04-05/>.

³ Christian Schnittker et al. - Goldman Sachs European Economics Analyst, ‘The Role of Profit Margins in Euro Area Inflation’ (April 2023) <https://www.gspublishing.com/content/research/en/reports/2023/04/19/e114a953-7a82-47dc-9178-dc7721f2d89c.html>.

⁴ Speech by Christine Lagarde, President of the ECB, at the Hearing of the Committee on Economic and Monetary Affairs of the European Parliament (June 2023) <https://www.ecb.europa.eu/press/key/date/2023/html/ecb.sp230605-0aadd43ce7.hr.html>.

⁵ Labour costs have also increased, but to a smaller degree.

⁶ Namely, whether the effects of competition law enforcement in preventing price increases would affect inflation or not, see OECD (2022), Competition and Inflation, OECD Competition Policy Roundtable Background Note (2022) DAF/COMP(2022)15 (OECD Competition and Inflation) www.oecd.org/daf/competition/competition-and-inflation-2022.pdf.

⁷ The European Parliament Report on Competition Policy for 2022 is currently under discussion (EP Draft Report on Competition), https://www.europarl.europa.eu/doceo/document/A-9-2023-0183_EN.html. It also ‘considers rising energy and food prices, leading to excessive corporate profits, to be the main drivers of the current hike in inflation’, and ‘calls for consumer vulnerability to be taken into consideration when assessing whether a dominant undertaking’s conduct is abusive’ (19).

controlling the market power of undertakings.⁸ This report will first sets out how the Commission's current approach is nonetheless insufficient to tackle the cost-of-living crisis (2.). Based on these findings, the report will discuss how a standard of vulnerable consumer could be adopted across competition policy (3.). It is then shown how enforcement discretion allows focusing on certain areas to the benefit of vulnerable consumers (4.). It is also shown how the application of existing competition rules could be adjusted to a vulnerable consumer standard (5.). The report will then conclude on some policy recommendations (6.).

2. Consumer welfare and cost-of-living

Competition policy has taken up consumer welfare as its main goal since more economic methods were introduced by the 'modernisation' of the Commission's enforcement in the early 2000s. Under that economic thinking, competition law exists to address the market failure of market power: the ability by undertakings, collectively or unilaterally, to raise prices above those that would prevail in a competitive market. This approach explicitly favours consumers over producers and, according to emerging evidence, marginally decreases economic inequality.⁹ Nevertheless, it has also prevented public interest from being considered by the Commission and coincided with increased concentration across the economy.¹⁰ The interconnection of all these factors is still a matter of intense discussion. Hence, the report will adopt a narrower inquiry of competition rules are applied by the Commission. This section briefly analyses how this practice has reflected the case law of the Court of Justice of the EU (Court) (a) and then considers in more detail the distributional limitations inherent in the concept of market power (b).

a) Case law and Commission practice

It is important to note that the Court has recognised consumer welfare as one among several goals of competition law and has not required harm to consumers in order to apply competition rules. The 'well-being of both intermediary and final consumers' is thus to be considered, together with the interests of undertakings and the public interest, in competition law's role of implementing the internal market.¹¹ It is settled case law that consumers are protected from both direct and indirect harm, so that competition rules only require harm to the competitive structure of the market – also understood as protecting the 'process of competition' in itself. Thus, it is unnecessary to prove that anti-competitive behaviour will result in a price increase

⁸ I.a. Guidelines on the application of [Article 101(3) TFEU] (Article 101(3) Guidelines) (2004) OJ C 101/97 25, Guidance on the Commission's enforcement priorities in applying [Article 102 TFEU] to abusive exclusionary conduct by dominant undertakings (Article 102 Enforcement Guidance) (2009) OJ C 45/7 10, and Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (Horizontal Merger Guidelines) (2004) OJ C 31/5 8.

⁹ Amit Zac 'Pre-Distribution vs Re-Distribution: Why competition is much more than a tool to alleviate poverty' in Julian Nowag, *Research Handbook on Sustainability and Competition Law* (Edward Elgar forthcoming 2023).

¹⁰ Or Brook, 'Struggling with Article 101(3) TFEU: Diverging approaches of the Commission, EU Courts, and five Competition Authorities' (2019) 56:1 *Common Market Law Review* 121-156 and, referring to data on concentration, OECD Inflation and Competition.

¹¹ Case C-377/20 *Servizio Elettrico Nazionale (SEN)* EU:C:2022:379 paras 41-46.

to consumers.¹²

To some extent, this case law frustrates the impetus of modernisation. The Commission's guidance states that protecting competition is 'a means of enhancing consumer welfare'¹³ and defines market power, in short, as an undertaking's ability to raise prices. Market power thus serves as a means to determine collusive effects (and, indirectly, object) under Article 101 TFEU, anti-competitive foreclosure (as well as dominance) under Article 102 TFEU, and a significant impediment to effective competition (SIEC) under merger control.¹⁴ The Commission guidance has also used market power to prevent anti-competitive practices and mergers from being individual or block-exempted under Article 101(3) TFEU.¹⁵

The Commission has adapted to the case law by framing market power as a structural position – the ability to raise prices coming from lack of competitive pressure – rather than a negative outcome for consumers. This allows the Commission to continue claiming that it pursues consumer welfare while basing its enforcement on harm to market structure. The key is the Commission practice of infringement decisions putting forward a 'theory of harm' from which effects on market structure may filter down to consumers. The Commission has insisted on this practice even when unnecessary under the case law to show the harmful nature of the action.¹⁶ For present purposes, such practice highlights how the role attributed to market power results from the Commission's discretionary application of competition rules. As will be developed further below in sections 4 and 5, the proposed standard of consumer vulnerability would act in a similar manner.

b) Insufficiencies of market power

A refinement of market power is necessary because this standard is by itself ineffective in addressing the cost-of-living crisis. The main issue is that market power only considers vulnerable consumers laterally, as part of protecting consumers as a whole. Whether such consumers benefit from enforcement thus becomes random. This can be observed in price-based tests when defining markets and examining effects (i), how enforcement does not consider the kind of consumption (ii), and market trade-offs and dynamic analysis (iii).

(i) Tests for market definition and anti-competitive effects are based on price increases for which vulnerable consumers might be decisive (as the most sensitive to price changes) but might also be diluted in a majority of other consumers.

In EU competition law, markets are mainly defined by substitutability of demand, which tracks whether consumers faced with a small price increase would switch in the short-term to (possibly competing) products.¹⁷ Substitutability is then re-examined in

¹² For restrictions by object under Article 101 TFEU, see Case C-883/19 P *HCBC* EU:C:2023:11 para 121; for Article 102 TFEU, *SEN* para 47.

¹³ Article 101(3) Guidelines para 13.

¹⁴ Article 101(3) Guidelines paras 21 and 24, Article 102 Enforcement Guidance para 19, and Horizontal Merger Guidelines para 22.

¹⁵ Article 101(3) Guidelines para 110 and various market thresholds for applying Block Exemption Regulations (https://competition-policy.ec.europa.eu/antitrust/legislation/block-exemption-regulations_en).

¹⁶ Much of the case law on Article 101 and 102 TFEU since modernisation has been dedicated to squaring this practice with the (legally binding) standards of anti-competitive harm.

¹⁷ Commission Notice on the Definition of Relevant Market for the Purposes of [Union] Competition Law (Market Definition Notice) (1997) OJ C 372/03, which is currently being updated.

the context of the effects of an anti-competitive practice or merger, this time focusing on consumers being able to switch between suppliers in the defined market – hence the term ‘market power’, the power to raise prices within that market. In both market definition and effects analysis, consumers are undifferentiated except for their reaction to the price increase: some will accept it, others will not. It is the sum of consumers that matters in determining whether market power is constrained by competition.

From a theoretical perspective, vulnerable low-income consumers have the most to lose from a price increase (relative to their budget) and are thus expected to be the first to switch. Competition matters for ‘marginal consumers’, the ones ready to change their purchasing decisions, and low-income consumers might therefore find themselves at the centre of defining markets and determining effects. Yet, reality may diverge substantially from theory. First, there is no guarantee that vulnerable consumers are able to switch: they may lack the information or means to do so when compared to other consumers.¹⁸ Second, even if low-income consumers do switch, this might turn out to be insignificant. For example, if substitutes are much worse (or if vulnerabilities make them so), most consumers may accept a price increase that low-income consumers cannot. In such a situation, vulnerable consumers are being forced to accept worse substitutes will seem negligible. Hence, when the majority reacts differently from vulnerable consumers, it is that reaction that determines competitive analysis.

(ii) *Committing enforcement to a general standard of harm to consumers ignores the kind of consumption at issue.*

If market power is the ability to increase prices, then this increase is the only relevant measure for consumer welfare – not which products are being priced. Nonetheless, products range from first-necessity to luxury. The Commission makes no such distinction, applying competition rules horizontally to all sectors of the economy. However, a profitable exercise of market power depends on some consumers bearing the price increase. High-income consumers can adjust their budget, and undertakings may pass-on the cost to their consumers. Low-income consumers may simply be discouraged from consuming. This could lead to a paradox: controlling market power benefits high-income consumers and undertakings since it is easier to raise prices to them. Arithmetically, bringing the price of a high-value product significantly down could offer a bigger welfare gain than a small decrease in a first-necessity good. Overall, this means for example that anti-competitive effects in the market for luxury watches are treated in the same way as in basic necessities, so that fighting price increases for Rolex watches might take precedence over increases in the price for bread.

A second related point is that competition rules are applied to protect not only consumers but also undertakings. To a large degree, the risk of enforcement catering to undertakings has already materialised. Competition rules protect both intermediary and final consumers, as the case law highlighted above shows. Final consumers are only

¹⁸ For example, there is evidence that low-income, low educational level, elderly and disabled consumers do not switch energy, telecom or banking suppliers even though they would benefit from it, see BEIS, Modernising Consumer Markets: Consumer Green Paper (2018) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/699937/modernising-consumer-markets-green-paper.pdf. More generally, the distribution channels catering to low-income consumers may offer them no alternatives.

one last step in a production and distribution chain involving countless undertakings. If nothing else but simple probability, enforcement will involve a product sold to an undertaking. Moreover, while negative effects on final consumers are extrapolated in the Commission decisions as referred above for theories of harm, such effects lack the importance and care given to the harm to market structure on which the successful application of the rules depend.¹⁹ When proving negative effects on consumers is indeed required by the case law – notably abusive exploitation under Article 102 TFEU – the Commission has refrained from enforcing such rules.²⁰ A standard of vulnerable consumers would therefore be a meaningful shift enforcement towards final consumers.

(iii) *Trade-offs between competitive parameters, including dynamic competition, consider aggregated consumers.*

Although abbreviated to the ability to increase prices, the exercise of market power can involve a negative effect on any competitive parameter. As such, a decrease in choice, quality, or innovation is equally considered an exercise of market power. This also means that if a price increase is compensated by improvements in other parameters, it will be overall neutral or beneficial for consumer welfare. That is the reasoning behind Article 101(3) TFEU and other balancing of effects, which require trade-offs to be aggregated across all consumers affected. However, vulnerable consumers may just prefer low prices, in particular low-income consumers, or experience greater harm from worse substitutes. The trade-off may therefore involve losses for vulnerable consumers against benefits for other consumers.

In addition, benefits to consumers in general become less clear in a dynamic context. Trade-offs can occur over time, such as price increases that subsidise improvements to future consumers. In such situations a (speculative) discount rate can be applied, but market power ceases to be an effective measure of consumer welfare. Moreover, discount rates are based on the assumption that current benefits are valued higher than future benefits, which again considers aggregated benefits and not impact on specific vulnerable consumers.²¹

In summary, market power's concern for high prices tends to benefit low-income consumers but does not differentiate between vulnerable consumers and other consumers, in particular the consumption by undertakings. Benefits to vulnerable consumers are thus as much by accident as by design. In practice, vulnerable consumers represent a small fraction of total consumption and are correspondingly represented in enforcement. Adopting a vulnerable consumer standard on top of the current practice based on market power would address these shortcomings.

¹⁹ Private enforcement has shown that even assessing damages to final consumers from cartels is not straightforward, needing a presumption of such damages in order to facilitate liability, see Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (Damages Directive) (2014) OJ L 349/1. Merger control does often involve complex models attempting to predict price effects but they are used to backup structural conclusions (since it is also common for different models to present opposing outcomes).

²⁰ The Commission instead focused on exclusionary, see abuses Article 102 Enforcement Guidance. Not even a handful of exploitative cases have been brought by the Commission since this guidance was issued in 2009.

²¹ Such assumption has been challenged in relation to climate change, and the disparate impact of crises on low-income consumers – notably the surge in prices of first-necessity goods – gives further reason to do so, see also fn. 27 below.

3. A ‘vulnerable consumer’ standard

It is worth highlighting that enforcing competition rules based on vulnerable consumers is not radically new. Vulnerability is a common consideration in consumer protection law,²² and has already been proposed for competition law regarding personal data.²³ The main thrust of that proposal is that certain consumers would, for reasons gathered or inferred from their personal data, be vulnerable to being charged prices or imposed conditions above the competitive level – a form of ‘personalised market power’. Thus, even where such vulnerable consumers would not constitute a separate market,²⁴ they could still be considered exploited. Finding those prices to be excessive would therefore involve considering vulnerable consumers within the market where the abuse takes place.²⁵

The standard advanced in this report expands the notion of vulnerability and applies it generally to all competition law. The inclusion of low-income consumers, in particular, fits naturally the economics of competition law. In a way, a low income is already implied in personal data vulnerability: contrary to normal exploitation (where price is compared to cost), prices are deemed excessive in relation to individual consumers’ demand – which is strongly tied to their budget. To put it more simply, personal data vulnerability may increase as income decreases.²⁶ In any event, the vulnerable consumer standard proposed is wider than personal data and low-income, potentially applying to other vulnerabilities affected by the competitive process such as low education, old age, and disability.²⁷

An important feature of this standard of vulnerable consumers would be not to substitute market power but to complement current enforcement: vulnerable consumers would still need to be charged prices above the competitive level or suffer a decrease in choice and quality.²⁸ The purpose of the standard would be to overcome the limitations of market power referred in the previous section, namely when vulnerable consumers are more harmed or their harm does not show in aggregated consumption. At the same time, a vulnerable consumer standard can be applied to other competitive harms, such as object restrictions in cartels and unfairness in abusive exploitation, under the same method of considering vulnerable consumers specifically once such harm is found (as developed in the section below on applying substantive rules).

²² See e.g. the briefing by the European Parliamentary Research Service - Nikolina Šajn, ‘Vulnerable Consumers’ (May 2021)

[https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690619/EPRS_BRI\(2021\)690619_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690619/EPRS_BRI(2021)690619_EN.pdf)

²³ Inge Graef, ‘Consumer sovereignty and competition law: From personalization to diversity’ (2021) 58:2 *Common Market Law Review* 471-504.

²⁴ In any market there are consumers willing to pay a higher margin but, for them to constitute a separate market, undertakings must have the ability to price-discriminate, see Market Definition Notice 43.

²⁵ See fn. 23 above. The case law has already established that the market of the abuse may be the same or different from the one where the undertaking is dominant, Case C-333/94 P *Tetra Pak v Commission* EU:C:1996:436 para 27.

²⁶ If there is a single price, it will extract more consumer surplus (the difference between price and willingness to pay) from low-income consumers; if there are individualised prices, exploitation is still more worrying for low-income consumers forgoing essential alternative consumption.

²⁷ The incorporation of public policy concerns in enforcement, such as access to medicines and medical products during the COVID-19 pandemic, can also be seen through the lens of vulnerability, see Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak (2020) OJ C 116/7.

²⁸ To the applicable legal standard for considering market power, such as restrictions by effect or a SIEC in mergers, see fn. 14 above.

A vulnerable consumer standard could therefore be easily adapted to the Commission’s enforcement tool-box. For example, it would not affect market definition since, as mentioned, vulnerability can operate based on specific consumers within a market. All that would be necessary would be to highlight products which are important for vulnerable consumers, such as first necessity goods for low-income consumers. Furthermore, benefits to vulnerable consumers can register as improvements to competitive parameters and therefore be prioritised in trade-offs such as Article 101(3) TFEU and other balancing of effects.²⁹

Most importantly, the benefits of a vulnerable consumer standard for the cost-of-living are evident. The essential goods that represent a significant expense for low-income consumers are also important for many other consumers, so that enforcement focusing on final consumers as described below would overlap with vulnerable consumers. The cost-of-living is also a dynamic standard, adapting to changes in relative incomes and price increases in crises.

4. The Commission’s enforcement discretion

A vulnerable consumer standard can be implemented in a ‘soft’ way, that is to say, through Commission discretion and without affecting the ‘hard’ substance of competition rules. In setting its competition policy, the Commission is tasked with implementing and providing guidance on the Treaties’ principles.³⁰ The Commission has enforcement discretion on how to go about this, and modernisation consisted in such an exercise: consumer welfare was elected from the goals recognised by the case law and guidance was provided on economic methods to assess consumer harm. This is a normative choice, not administrative or managerial.³¹ The Commission could therefore exercise exactly the same discretion to address the cost-of-living crisis by focusing on effects on vulnerable consumers. This would fall squarely within the Treaty goal of an internal market working ‘for the sustainable development of Europe based on balanced economic growth and price stability [and for] a highly competitive social market economy’.³²

The Commission can exercise enforcement discretion by two main avenues: issuing interpretative guidance and deciding which cases to prosecute. The main limiting factor is the interpretation of competition rules by the Court, so that guidance operates within the scope allowed by the case law. Similarly, the Commission cannot ignore an infringement of competition rules, only decide which cases to pursue first according to the interest of the Union.³³ The Commission’s competition policy is thus characterised as setting priorities in its guidance and for its enforcement.³⁴ As such, the modernisation of the Commission’s enforcement not only prioritised consumer welfare through guidance on market power, it also

²⁹ A vulnerable consumer standard would also ease dynamic competition concerns, since the immediate welfare of such consumers could be prioritised (generally without the same kind of conflicts as innovation).

³⁰ Joined Cases C-189, 202, 205, 208, and 213/02 P *Dansk Rørindustri* EU:C:2005:408 para 170.

³¹ For an approach that suggests using enforcement discretion to address inequality see also Ariel Ezrachi et al., ‘The effects of competition law on inequality—an incidental by-product or a path for societal change?’ (2023) 11:1 *Journal of Antitrust Enforcement* 51-73.

³² Article 3(3) of the Treaty on the EU. On the relevance of the social market economy for the application of competition law, see Anna Gerbrandy (2019) ‘Rethinking Competition Law within the European Economic Constitution’ 57 *Journal of Common Market Studies* 127-142.

³³ Case T-60/05 *UFEX* EU:T:2007:269 para 88.

³⁴ Competition policy can also include legislative action, which is not covered by this report.

concentrated enforcement on cartels – considered the most pernicious practice for consumers – by setting up a leniency system and encouraging follow-up private litigation.³⁵ Since then, most infringement decisions have indeed been about cartels.

Prioritising the cost-of-living can therefore also take two forms. On the one hand, establishing a vulnerable consumer standard in its guidance – as detailed in the next section regarding specific rules. On the other hand, prioritising action in areas of the economy associated with greedflation such as energy, food, and services – that is to say initiating investigations, following-up complaints, and advancing to infringement decisions – ahead of concerns in other areas. The same priority could be attributed to labour markets where practices contribute to worsening the cost-of-living by reducing wages that are already low.³⁶ This prioritisation would be made explicit by strengthening the existing practice of showing effects on final consumers in infringement decisions and extending it to vulnerable consumers. It could also go further by conducting sector inquiries into markets affecting the cost-of-living.³⁷

The Commission has hesitated to attribute such explicit market priorities, given that consumer welfare is supposed to be of general application. It nevertheless often touts enforcement against practices harming final consumers as a way to demonstrate the benefits of its competition policy.³⁸ It has also undertaken sector inquiries and competitiveness studies in markets important for final consumers like food, digital distribution, and energy,³⁹ in several instances after concerns being raised over high prices. Hence, there is already an implicit prioritisation of final consumers. Moreover, the Commission has elected to engage with collective negotiation in the ‘gig economy’,⁴⁰ which also shows prioritisation of an issue affecting low incomes.

What is lacking is explicit and coherent prioritisation of vulnerable consumers, particularly since previous sector inquiries and studies have not led to a perceived shift in enforcement.⁴¹

³⁵ Notice on Immunity from fines and reduction of fines in cartel cases (Leniency Notice) (2006) OJ C 298/17; Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to [Articles 7 and 23 of Regulation 1/2003] in cartel cases (Settlement Notice) (2008) OJ C167/1; Damages Directive; and Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser (2019) C 267/4.

³⁶ Although collective negotiations to protect workers fall outside the scope of competition law, see Case C-67/96 *Albany* EU:C:1999:430 para 60, this does not prevent investigating anti-competitive practices in labour markets, investigations which are also referred by the EP Draft Report on Competition (26).

³⁷ Article 17 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in [Articles 101 and 102 TFEU] (Regulation 1/2003) (2003) OJ L1/1. Sector inquiries could be triggered by an increase in prices or other conditions, as proposed by the EP Draft Report on Competition 2022 (20).

³⁸ See for example https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6101.

³⁹ See the Competitiveness studies commissioned by the European Commission which in 2016 also looked at ‘good practice in vertical relationships in the food supply chain’, available at https://single-market-economy.ec.europa.eu/sectors/food-and-drink-industry/competitiveness-european-food-industry/competitiveness-studies_en and DG Competition report on energy sector inquiry SEC(2006)1724 (10 January 2007) https://competition-policy.ec.europa.eu/sectors/energy-environment/sector-inquiry-energy-2005_en

⁴⁰ Moreover, the Commission has elected to engage with collective negotiation in the ‘gig economy’, which also shows prioritisation of an issue affecting low incomes. See e.g. Commission press release, ‘Commission proposals to improve the working conditions of people working through digital labour platforms’ (Dec 2021) https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6605.

⁴¹ There are no regulatory powers associated with sector inquiries under Regulation 1/2003, contrary to the powers contained in the Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022

This contrasts with the apparent prioritisation by the Commission of the digital economy, with prominent enforcement cases and even legislation.⁴² Sector inquiries into areas of the economy associated with greedflation could follow-up the sector inquiry into energy of 2005 and the study of the food sector in 2016.⁴³ Previous sector inquiries and studies provide a precious opportunity for *ex post* examination of effects on vulnerable consumers. The Commission could further use its discretion to link investigations with sector inquiries and studies.

5. Applying substantive competition rules

The cost-of-living crisis could be further addressed by adopting and implementing the vulnerable consumer standard through Commission guidance. The present focus on market power corresponds to concepts covered by different guidance instruments, from restrictions by object or effect under Article 101 TFEU to SIEC in merger control. These concepts also provide room for a shared vulnerable consumer standard. Guidance instruments are periodically reviewed⁴⁴ and policy changes are often tested in cases before being transposed to guidance. As already noted, existing guidance on market definition can be used to ascertain the overlap of vulnerable consumers with relevant markets by applying the methods and evidence for assessing the effects of a price increase. The application of Articles 101 and 102 TFEU and of merger control is summarily explained next.

a) Anti-competitive collusion

The main step for applying a standard of vulnerable consumers under Article 101 TFEU would be to specify the damage caused by cartels and other anti-competitive arrangements. As the current practice demonstrates, the law does not restrain the Commission from extrapolating effects on (any) final consumers as long as a restriction by object or effect is found. Being the most frequent and standardised kind of enforcement,⁴⁵ cartels provide the opportunity to formalise the assessment of effects on vulnerable consumers. This would provide a starting point for other types of restrictions and possible follow-up private litigation focused on vulnerable consumers.

The Commission could also implement a vulnerable consumer standard in its guidance on fines.⁴⁶ This is an area of wide Commission discretion,⁴⁷ which would accommodate sanctioning more heavily cartels and other arrangements that affect vulnerable consumers.

on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (2022) OJ L 265/1.

⁴² Ibid.

⁴³ See fn. 39.

⁴⁴ The Commission is currently undergoing an overall revision of its guidance in different areas, admittedly an updating of its overall policy, see fn. 38.

⁴⁵ See fn. 35.

⁴⁶ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (Fining guidelines) (2006) OJ C 210/2.

⁴⁷ See e.g. Case T-38/02 *Groupe Danone v Commission* EU:T:2005:367 para 134; Case T-150/89 *Martinelli v Commission* EU:T:1995:70 para 59; Case T-49/95 *Van Megen Sports v Commission* EU:T:2012:186 para 53; and Case T-229/94 *Deutsche Bahn v Commission* EU:T:1997:155 para 127.

b) Abuse of a dominant position

The same considerations for specifying and sanctioning harm to vulnerable consumers apply to both Articles 101 and 102 TFEU. Such harm could also be used for remedial discretion in accepting the commitments that have become central to investigations of abuse of dominance.⁴⁸ Under the case law, such commitments can go beyond the putative infringement and effectively reshape market conditions.⁴⁹ The Commission could therefore seek to specifically protect vulnerable consumers, including behavioural obligations regarding distribution channels and price-setting or other conditions.

As already mentioned, Article 102 TFEU would be particularly appropriate to pursue greedflation through its prohibition of excessive prices. The same would apply to abusive unfair terms, as undertakings have also lowered the value of products by reducing sizes or offering worse versions – so-called ‘shrinkflation’. The main obstacle to pursuing these exploitative abuses is the lack of guidance since the Commission has prioritised exclusionary abuses over exploitative.⁵⁰ However, even without such guidance, products that have increased price or had their conditions worsened could be easily investigated for such abuses. Although the legal test for excessive prices considers costs, and would therefore incorporate an increase in energy prices and other inputs, it also considers whether the margin to the final price is ‘unfair’.⁵¹ This approach not only allows capturing greedflation but also offers the most direct pathway for integrating vulnerable consumers within a substantive concept of unfairness that could be used for other types of harm.

c) Mergers

Implementing a vulnerable consumer standard seems more difficult for mergers, as the mandatory notification system offers limited opportunities for prioritisation. This system, based on turnover thresholds, may present another enforcement bias by favouring the more valuable purchases of high-income consumers and undertakings. Intermediary products are indeed the bulk of markets examined in merger control. However, in the context of referrals under Article 22 of the Merger Regulation and the recent notice,⁵² the Commission could exercise the option of suggesting Member States to refer below-threshold mergers that affect the cost-of-living.

The wide scope of merger control may also make it one of the most important tools to combat greedflation, particularly since as (post-concentration) price increases are already one of the main concerns. The Commission can therefore revise merger control to identify vulnerable consumers, analyse effects on them, and implement effective remedies. For that purpose, the Commission could exercise its discretion in three stages. First, it could ensure that effects on vulnerable consumers are not ignored in markets with no apparent concerns for other consumers. Second, it could develop specific analyses of the demand of vulnerable consumers regardless of whether they constitute a separate market. Lastly, if negative effects on vulnerable

⁴⁸ Article 9 of Regulation 1/2003.

⁴⁹ Case C-441/07 P *Commission v Alrosa* EU:C:2010:377 paras 47-48.

⁵⁰ See fn. 20.

⁵¹ Case 27/76 *United Brands* EU:C:1978:22 para 22.

⁵² Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases (2021) OJ C113/1.

consumers are not enough to block a merger (namely if they are compensated by benefits for other consumers), the Commission could commit to addressing such effects through remedies. For that purpose, it could introduce a soft rule of always initiating phase II proceedings if there are specific concerns for vulnerable consumers.⁵³

As mentioned at the outset, it is a matter of controversy whether greedflation signals a failure of merger control to prevent undue economic concentration. In any event, the Commission can and should conduct an *ex post* review of mergers in these markets important for the cost-of-living to learn lessons for the future.⁵⁴ These initiatives are already taking place in terms of the overall impact of competition policy by the Commission⁵⁵ but have not (yet) addressed vulnerable consumers.

6. Conclusion

The Commission's broad enforcement provides it with leeway to either adopt or reject the proposals of this report. The limited judicial review of economic assessments under that discretion is well known, and would also apply to what constitutes a vulnerable or low-income consumer as well as what essential goods are.⁵⁶ Furthermore, the Court has also effectively refused to review the Commission's prosecutorial discretion.⁵⁷ However, further constraints should be taken into account. The democratic deficit of the Commission is often remarked and political control by the European Parliament in the area of competition remains an open question.⁵⁸ One might ask whether the Commission's focus on the digital economy might have been influenced by the continued concerns expressed by the European Parliament. Similar manifestations of concern could guide the Commission's reaction to greedflation and the cost-of-living crisis.⁵⁹

The European Parliament could therefore strive to see the following proposals implemented by the Commission:

- Explicitly prioritising enforcement action in economic areas associated with greedflation and markets of first necessity products;
- Consideration vulnerable consumers in market definition and specifying effects on such consumers in infringement decisions;
- Heavier sanctioning of negative effects on vulnerable consumers (possibly adjusting sanctioning guidance);

⁵³ This would be similar to the presumption of a SIEC suggested by the EP Draft Report on Competition (22).

⁵⁴ Within the current system where approval conditions cannot be revisited. The introduction of review clauses has also been suggested by the EP Draft Report on Competition (ibid.).

⁵⁵ European Commission, Modelling the macroeconomic 2021 update and impact of competition policy: further development https://competition-policy.ec.europa.eu/system/files/2022-03/kdaq22001enn_macro-economic_impact_of_competition_policy_2021.pdf.

⁵⁶ Case T-201/04 *Microsoft v Commission* EU:T:2007:289 paras 87-89.

⁵⁷ Namely the condition of pursuing the interest of the Union, see Or Brook and Katalin J. Cseres, 'The "hole" in the (antitrust) "doughnut": governing the Commission's administrative discretion in antitrust procedures' (March 2023) <https://eulawlive.com/competition-corner/the-hole-in-the-antitrust-doughnut-governing-the-commissions-administrative-discretion-in-antitrust-procedures-by-or-brook-and-katalin-j>.

⁵⁸ Forthcoming Competition Policy Report by Francisco Costa-Cabral and Julian Nowag.

⁵⁹ See fn. 7 above on the position of the Draft Competition Report on Competition.

- Revising all guidance instruments to introduce a standard of vulnerable consumers on top of market power;
- Prioritising exploitative abuses in markets serving final consumers, in particular excessive prices and unfair conditions affecting vulnerable consumers;
- Following-up previous sector inquiries and studies, as well as engaging in new ones, based on the cost-of-living considerations;
- Considerations of the effects of mergers on vulnerable consumers as well as *ex post* merger reviews to assess consequences for vulnerable consumers;
- Strengthening private litigation options for vulnerable consumers.