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Summary of Discussion of the Roundtable on Consumer Welfare Standard - Advantages and Disadvantages Compared to Alternative Standards

Annex to the Summary Record of the 140th meeting of the Competition Committee

14-16 June 2023

This document prepared by the OECD Secretariat is a detailed summary of discussion of the roundtable on Consumer Welfare Standard - Advantages and Disadvantages Compared to Alternative Standards, held by the Competition Committee on 15 June 2023.

Please contact Mr Antonio CAPOBIANCO if you have questions about this document.
Email: Antonio.CAPOBIANCO@oecd.org

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Summary of Discussion of the Roundtable on Consumer Welfare Standard - Advantages and Disadvantages Compared to Alternative Standards

On 15 June 2023, the OECD Competition Committee held a roundtable on the advantages and disadvantages of competition welfare standards chaired by Professor Frédéric Jenny.

The **Chair** introduced the topic. He explained that recent debate on the consumer welfare standard and its potential limits for competition enforcement provide an opportunity to consider the origin of standards in competition, their relationship with other elements of competition law, why they are used and whether standards are in fact important for achieving positive competition outcomes. The roundtable did not aim to identify the most effective standard.

The Chair introduced the expert speakers: **Anna Gerbrandy**, Full Professor of Competition Law at the University of Utrecht; **Nicolas Petit**, Professor of Competition Law at the European University Institute in Florence; and **Carl Shapiro**, Professor of Economics at the University of California, Berkeley. The OECD also received 13 submissions on the topic and the Chair noted that interventions are welcome as part of the discussion.

The discussion was organised in three parts: a) the sources of standards, their interplay with the goals of competition law and how they can evolve overtime; b) case studies of standards in practice; and, c) alternate standards compared to the consumer welfare standard through the lens of effectiveness.

The Chair asked the **Secretariat** to present the OECD Background paper.

The **Secretariat** explained that the paper sets out a framework to help assess the advantages and disadvantages of standards. In the paper's introduction, the origin and definition of standards is described noting various historical interpretations and legal jurisprudence. The paper then suggests four loose groupings of standards (consumer welfare; total or modified welfare; citizen welfare; and protecting competition) and sets out five attributes for assessing their effectiveness:

1. Predictability;
2. Social welfare enhancing;
3. Ease of administrability;
4. Political credibility or sustainability;
5. Minimising the risk of errors.

The paper then assesses the various categories of standards against those attributes and concludes that there is no perfect standard. Rather, the effectiveness of standards depends on the weight and importance of each attribute within a particular jurisdiction measured against their competition policy goals and resources. Lastly, the Secretariat emphasised that while the framework is a useful tool to guide the discussion on the advantages and disadvantages of standards, the assessment of standards is limited to a certain point in time and limited by the rapidly changing real world context in which competition authorities operate.

The **Chair** thanked the Secretariat and called on the expert speakers to provide some background and to situate the topic within the recent debate on standards. He first gave the floor to **Nicolas Petit**.

Prof Nicolas Petit focused on deconstructing prevailing arguments that the consumer welfare standard, primarily within the context of US antitrust law, needs to be replaced by an alternative standard such as the protecting competition standard or a public interest standard. In his view, the current debate and efforts to abrogate the consumer welfare standard are based on four false assumptions related the consumer welfare standard in US antitrust law, which are that: a) it requires establishing that business conduct or transactions lead to an output reduction or a price increase; b) it requires extensive, lengthy and thorough factual and economic understanding, which is often impractical; c) it violates canons of statutory interpretation, in particular, it excludes consideration of non-economic harms from antitrust law; and d) it stems from ideas linked to the Chicago School which is seen as being favourable to industrial concentration and monopoly power.

Prof Petit argued that each of these assumptions was ultimately false. In his view the first proposition confuses means and ends, as antitrust law does not directly instill competition but rather deters specific behaviours that limit competition. The 1999 Microsoft case is an example where the District Court condemned practices unrelated to prices that threatened to raise barriers to entry, and reduce or delay innovation. Secondly, Pr. Petit stated that the consumer welfare standard can lead courts to require less economic evidence as it did in the 1999 US Kodak case. Thirdly, the relevance of non-economic harms in antitrust law has been discounted with the assertion that the Sherman Act addresses an economic question as confirmed by the Supreme Court in the 1903 Northern Securities. Finally, Pr. Petit argues that the consumer welfare standard has been shown to have existed prior to the emergence of the Chicago School. He concluded that his case analysis confirms in his mind that the critiques of the consumer welfare standard are overstated and suggests that competition authorities and courts stay the course.

The **Chair** thanked Nicolas Petit. He then asked **Carl Shapiro** to provide some initial thoughts and to respond to those of Nicolas Petit.

Prof Shapiro said that the notion that the law in the United States is solely focused on downstream consumers is incorrect, highlighting examples of cases that looked at innovation, suppliers and product improvement. However, the burden of proof and tightening of evidentiary standards are making it difficult for antitrust authorities to win cases and Shapiro suggests that adjusting those standards could improve competition without any changes to the substantive goals and principles of antitrust laws, namely protecting and promoting competition. Shapiro also cautioned against using competition policy as a means to achieve broader social goals such as protecting the environment or upholding democratic values. He noted that while these aims are laudable in themselves, there are many different laws in a jurisdiction and it is unrealistic to expect one law to be able to achieve all potential objectives.

The **Chair** thanked Carl Shapiro and gave the floor to **Anna Gerbrandy** for introductory remarks.

Prof Gerbrandy noted that she agreed with the previous speakers in relation to dismissing the notion that the consumer welfare standard is applied narrowly. However, she noted that when discussing standards and the goals of competition law, it is important to understand from which perspective one is having the conversation. Pr. Gerbrandy reflected that this was important as often the debate about standards takes place without a clear understanding of the level of discussion. She suggested that there are several different perspectives from which the discussion could occur (i.e. descriptive, normative, philosophical), and

highlighted that the discussion is very different from the perspective of a competition authority, which is likely to ask what the standard is, compared to an academic or policy making perspective, where there may be a reflection of what the standard should be. Not being clear on the relevant perspective can result in confusion about whether these discussions are about how it is now, what it might be, or how it ought to be.

The **Chair** thanked Prof Gerbrandy and suggested that perhaps standards and their interpretation change overtime in response to political evolution. He then invited **Poland** to present their submission on what they call the ‘antitrust standards paradox’.

Poland described the Sucha Beskidzka case to highlight divergences in viewpoints of different courts and the potential for the same standard to be applied in various ways. The case involved water and sewage services charging excessive prices. Although the initial judgement ruled against the company, the Court of Appeals surprisingly overturned it, citing US cases like Trinko and emphasising the need of significant infrastructure investment. The Supreme Court eventually reversed the decision however, again based on different interpretations of antitrust goals. For Poland, this situation highlights an "antitrust standards paradox" where different perspectives on the consumer welfare standard can exist based on varying goals and rules of evidence, leading to different outcomes while still being labelled as consumer welfare standards.

The **Chair** then raised the question over whether standards actually make a difference to antitrust outcomes and called on **Lithuania** to explain how there is room for interpretation despite Lithuania’s Constitution explicitly making reference to the Freedom of Fair Competition standard.

Lithuania explained that its Constitution was adopted in 1992 during the transition from a planned to a market economy. As mentioned by the Chair, it includes a specific requirement to protect the Freedom of Fair Competition. This constitutional principle guides various aspects of the state, including legislation, competition enforcement, the judiciary, and business activities. Lithuania explained that jurisprudence from the Lithuanian Constitutional Court confirms that the enforcement of competition rules is crucial for harmonising individual and public interests. The Supreme Administrative Court has also highlighted the importance of companies acting freely in the market and competing on equal terms. In this way, the broad interpretation of the Freedom of Fair Competition in Lithuania aims to ensure a fair competitive process, ultimately benefiting consumer welfare, but not being explicitly focus on it.

The **Chair** thanked Lithuania and noted that competition authorities, in principle, should be applying substantive standards as defined by their legislation. Turning to **Peru**, he asked why there appears to be a difference between the stated legislative objective (to enhance consumer welfare) and the practical application of competition law, noting a case study in Peru’s submission which indicated the objective is to protect the competitive process.

Peru explained that both the Competition Act and the Merger Review Act emphasise the promotion of economic efficiency for the well-being of consumers as their primary objective. While Peru's competition laws emphasise economic efficiency and consumer welfare, practical considerations sometimes lead to the incorporation of other standards, such as the protection of competition and citizen welfare standards. For example, in a recent case involving collusion in pharmacies, Indecopi imposed an additional fine of 20% to reflect public health concerns. So, at times, Indecopi may implicitly apply a citizen welfare standard, going beyond consumer welfare to protect broader public interests.

The **Chair** thanked Peru and commented that standards and their interpretation are known to evolve with political and societal changes over time. In his view, Argentina’s submission on the General Economic Interest (IEG) concept is an example of such a fluid standard.

The Chair then asked **Argentina** to elaborate on their experience with producing guidelines in this respect and how often they need to be updated.

Argentina explained that the concept of IEG has existed since its enactment into law in 1980 and it defines the objectives of competition policy in Argentina. The goal is not merely to promote more competitive markets but to enhance the overall welfare of society. Argentina said that the IEG standard is not subject to abrupt or politically influenced shifts in interpretation. Instead, it evolves based on jurisprudence, CNDC judgments, and court opinions related to cases handled by the competition authority. Over the years, the interpretation of IEG has shifted gradually from a total welfare standard to a closer association with the consumer welfare standard. More recently, it has broadened to encompass various factors, including labor markets, foreign trade, income distribution, and other societal welfare considerations. While the standard's flexibility can be seen as a desirable feature, Argentina emphasised that guidelines help provide predictability in understanding the scope and requirements of a standard regarding the analysis of transactions. The recent regulation for the notification of economic concentrations exemplifies these efforts by introducing a new section that assesses whether a transaction benefits or harms the IEG. Argentina said that the burden of proof to demonstrate that a merger benefits the IEG will be as high as that for demonstrating efficiency gains.

At this point the **Chair** welcomed reactions from the experts before moving to the next part of discussion on specific examples of standards in practice.

Referring to Poland's remarks on the paradox of antitrust standards, **Prof Petit** underlined that a legal standard can be implemented through hard or soft means. Hard means could require a demonstration of actual effects on prices/outputs, whereas soft could mean using it as a guiding principle in the prioritisation of enforcement efforts. In this regard, for example, the enforcement of competition in luxury goods markets may be seen as incompatible with overall aims to reduce economic inequality.

Prof Gerbrandy clarified that she is not arguing that politics influences competition law directly (or vice-versa) but that it is undeniable that competition authorities carry out their work in the face of normative discussions about societal priorities such as sustainability. In other words, competition authorities cannot and do not operate in a vacuum and often act on cases touching important issues, such as sustainability, before legislators catch up to create or modify existing laws or regulations.

Prof Shapiro highlighted that the discussion demonstrated that it was how competition authorities react to anti-competitive practices and decide cases that was more important than identifying and labelling the standard itself.

At this junction, the **Chair** opened the second part of the discussion on standards in practice and gave the floor to **Sweden**.

Sweden summarised their submission which, besides detailing how Swedish competition law relates to the consumer welfare standard, discussed the potential feasibility of extending competition law enforcement of to labour markets. Based on a theoretical analysis, Sweden believes that anticompetitive conduct on labour markets can be diagnosed with standard tools of economic analysis. However, Sweden explained that the implications of such conduct may differ between low- and high-skilled labour markets. In high-skilled labour markets, non-compete clauses or no-poaching agreements may cause downstream harm to consumers by restricting access to highly skilled labour which firms require to become innovative and produce better products or services for the consumer. In low-skilled labour markets, by contrast, downstream effects may be more cost-based, with the primary concern being market power distortion itself and potential abuse of dominance. In addition, anticompetitive conduct on labour markets may directly harm employees, but addressing

such harm would require an extension of intervention standards beyond consumer welfare. Despite these nuances, Sweden concluded that competition economists able to analyse firm conduct on labour markets using existing methods.

The **Chair** noted that Brazil's CADE also applied the consumer welfare standard to non-traditional areas such as data protection and quality and then gave the floor to **Brazil**.

In drafting their submission, **Brazil** identified instances of recent cases where CADE's analysis of anti-competitive effects in mergers, unilateral conduct and cartels incorporated a broader perspective beyond the traditional economic analysis of price, output, and efficiency. Specifically, the analysis of anti-competitive effects in these cases included factors such as service and product quality and privacy. That said, Brazil also cautioned that expanding to broader welfare standards may place additional burdens on antitrust agencies and could exceed their operational capacity.

At this point in the discussion, the **Chair** noted that several submissions asserted that the consumer welfare standard is sufficiently flexible for their purposes, although noted that not every submission agreed. He invited the **United States** to join the discussion and explain their dissatisfaction with the consumer welfare standard and which alternatives would be considered.

The **United States** explained that their interest in alternative standards stems from case experience where harm to competition is ascertained more readily than traditional implications for consumer welfare such as price effects. For example, a merger to monopoly with productive efficiencies requires a very complicated assessment of price effects or demonstration of exclusionary effects whereas the competitive implications are clear. The United States suggested that in these types of cases demonstrating competitive harm alone should be sufficient to prohibit anti-competitive conduct, noting a Supreme Court opinion in this favour. In that particular case, involving a professional engineers association, the court ruled that excluding price on offerings amounted to competitive harm and was a sufficient basis for prohibiting such conduct. Essentially, the Supreme Court asserted that harm to competition implies harm to consumer welfare. Nevertheless, the United States is routinely faced with litigation and defensive arguments that actual price and output effects are a necessary second element notwithstanding demonstrable harm to competition.

The **Chair** asked the United States to clarify on how it defines harm to competition (i.e. quantifying the number of competitors or otherwise). The United States responded that rivalry among competitors is one element. In their view, market definition through the lens of competitors more accurately assesses harm compared to identifying the number, strength and willingness of competitors to compete with one another, adding that this information is usually available in documents/evidence collected by competition authorities.

The **Chair** circled back to the question of whether the consumer welfare standard best defined the normative goals of competition law and called on **BIAC** who in its submission described it as a flexible and pragmatic tool irrespective of case complexity.

Acknowledging that alternative standards may have some merits and appeal, **BIAC** believes the consumer welfare standard best captures the normative goals antitrust is intended to address and is based on the premise that antitrust laws are designed to protect and promote competition, not competitors, and that low prices and high levels of outputs are a byproduct of that process. **BIAC** listed four advantages over alternative welfare standards: a) consistency with economic rationale and legal tradition of antitrust laws rooted in the protection of consumer interests and the promotion of economic efficiency; b) adaptability to changing markets and economies without sacrificing its core values; c) predictability and objectivity as it relies on verifiable and measurable indicators; and, d)

legal certainty as it provides consistent guidance to businesses, regulators, and courts, reducing the risk of arbitrary enforcement and political influence. That said, the consumer welfare standard can be recalibrated to support more aggressive antitrust enforcement and BIAC wondered if perhaps an appropriate starting point could be evidentiary standards noting earlier arguments made by Prof Shapiro and Prof Gerbrandy.

The **Chair** asked whether harm to competition can be analysed using the consumer welfare standard. **BIAC** pointed out that irrespective of case complexity, competition authorities have an obligation to show how competition is harmed which inevitably touches upon impact and harm to consumers, rather than relying solely on broad market assumptions based on the number of remaining competitors in the relevant market.

Prof Petit was invited back into the discussion and observed that the debate, up to this point, was largely contemplating whether an additional filter, the consumer welfare standard, should be applied on top of the existing elements of antitrust law. In his view, the consumer welfare filter serves two scenarios. The first is when observable harms to competition do not necessarily correlate with welfare costs. For example, in industries with network effects, capital-intensive sectors, or distribution agreements, reductions in rivalry may not lead to efficiency losses. The consumer welfare standard helps distinguish between efficient and inefficient exclusion. Secondly, when conduct or mergers do not produce immediate effects on competition. This is observed in cases like vertical and conglomerate mergers or some vertical restraint cases, where the immediate impact on competition is not evident. The consumer welfare filter aids in making more informed judgments, especially in cases of exploitative behaviour, discriminatory conduct, or unfair trading conditions, which display weak evidence of harm to competition. Petit emphasised that the discussion should be grounded in empirical facts about how the economy works in various contexts and industries, rather than relying on broad propositions about the efficiency of rivalry. The goal is to ensure that antitrust enforcement is well-informed and effective in addressing specific cases while considering both competition and consumer welfare.

Prof Shapiro intervened and conveyed appreciation for the United States' intervention in clarifying their concerns surrounding the consumer welfare standard. In his view, the concerns are primarily related to evidentiary requirements, particularly the challenge of demonstrating quantitative specific effects. Expressing his own disappointment, Shapiro spoke about the American Express case where the disruption of the competitive process was clear, but the Supreme Court was not satisfied with the quantification of the effect on consumers.

The **United States** clarified that while the goals of antitrust in the United States are also being debated, rulings in cases such as Northern Pacific confirm that competition supports allocative efficiency as the best method of organising the economy while also providing an environment conducive to the preservation of democratic political and social institutions. The United States believes there is no inherent inconsistency in recognising that both liberty and prosperity can be promoted by antitrust laws, and pointed out that the debate on this issue has persisted over time.

The **Chair** thanked the United States and turned to **New Zealand** to open the third part of the discussion which focussed on alternate standards to consumer welfare.

New Zealand focused on explaining how their mixed regime, which uses a consumer welfare standard and a modified total welfare standard, operates in practice. The purpose of the Commerce Act is to promote competition for the long term benefit of consumers which initially looks like a consumer welfare standard model. However, the regime has a safety valve called the authorisation regime which allows certain anti-competitive conduct if an overall societal benefit can be demonstrated. It works by applying different weights

of welfare considerations to different groups. For example, restricting the advertising of baby formula was offset by the promotion of breastfeeding or allowing a landfill merger that reduced transport emissions.

While New Zealand's experience with flexible approaches has been positive, the **Chair** called on **Ecuador** to share their perspective. Their submission sets out the challenges associated with having over eight standards, which could understandably create uncertainty in the business and legal community, and how they navigate this complex system.

Competition law in **Ecuador** is prescribed as a series of standards touching on fairness, rights of consumers and users, competitive process, public economic order and consumer welfare, among others. Ecuador explained that it does not give an express weight to a particular standard or attribute; rather the selection of one standard over another is made very simple by applying the prescribed standard in the article of the conduct being investigated. For example, with abuse of dominance or restrictive agreement offences, the most applied standard is the competitive process. As a benefit, in this scenario the legislation does not require an economic analysis of how consumers will be affected, saving scarce investigative resources. Ecuador also explained that although the 'general-well being of consumers and users' (considered the Ecuadorian consumer welfare standard) has yet to be applied operationally, the competition authority sees it as a broad guide or principle which encompasses elements additional to price such as quality, choice and innovation; and interprets consumers to include intermediate consumers. Despite the number of standards featured in their legislation, Ecuador achieves predictability and stability for businesses by consistent application of the relevant standard associated with the conduct.

The **Chair** thanked Ecuador and suggested that balanced flexibility is desirable because the discussion up to this point had shown that transparency and legal predictability are important attributes of standards to many jurisdictions and their courts.

He then invited **Prof Gerbrandy** to introduce the last part of the discussion on broader standards and the way forward.

Protecting societal values via trade offs with consumer welfare is seen by some as a call for action to competition authorities and **Prof Gerbrandy** believes that competition authorities should have mechanisms, like that of New Zealand's safety valve 'authorisation regime', to respond when faced with cases touching on issues such as media plurality, freedom of speech, democratic process, sustainability etc. Put simply, competition authorities need to respond when faced with cases whether or not specific legislation to address these issues exists.

Building on this introduction, the **Chair** invited South Africa to talk about how their public interest standard allows for certain economic efficiency trade-offs to attain other social economic outcomes despite arguments that this model is difficult to administer and lacks predictability.

South Africa first explained that South Africa's Competition Act is influenced by the nation's political and economic history, with considerations of equity, justice, and broad participation in the economy. There are three areas where the consumer welfare standard has limitations. The first relates to mergers, where South Africa introduced a separate public interest assessment based on four factors which runs in parallel to the competition-based evaluation, preventing the need to weigh competitive effects, using a consumer welfare standard, against public interest considerations. The second area of concern relates to abuse of dominance cases, particularly regarding anti-competitive effects on small to medium-sized enterprises. South Africa pointed out the difficulty of proving substantial lessening or prevention of competition in cases where negative effects on individual players

do not translate to broader market impacts. Recent amendments to the Competition Act have addressed this by scrutinising conduct affecting SMEs through different standards, like fairness and impediments to participation. The third area of concern the need to consider infringements of constitutional rights.

The **Chair** gave the floor to **Greece** to talk about the concept of polycentric competition law as a useful basis for different substantive tests.

Greece first acknowledged the potential for diverse perspectives on standards based on institutional contexts highlighting differences between the United States and Europe. In Greece, the focus is on policy standards rather than principles, as some standards are based on justice or fairness rather than economic effects. The concept of a “polycentric competition law standard”, detailed in their submission, was presented to challenge assumptions of the consumer welfare or total welfare standards. The proposal suggests that competition law should consider both market preferences and preferences expressed in the broader social and democratic context. This is because preferences exhibited by individuals in the marketplace might conflict with their preferences as citizens participating in other spheres of life. Greece also pointed out that the EU Constitutional Treaty illustrates the need to align competition law with broader goals such as sustainability and EU objectives. Overall, Greece encourages a more flexible and evidence-based approach to competition law that takes into account a broader set of preferences and goals beyond narrow economic considerations.

The **Chair** thanked Greece and gave the floor to **Canada**.

Canada intervened to make note of ongoing public consultations about the Competition Act’s effectiveness in protecting competition. Currently, Canada’s approach to standards varies depending on the section of the Act being applied (for example, cartels are treated as per se violations, while other enforcement activities such as analysing mergers use the substantially lessen or prevent competition (SLPC) test based on the merging or dominant firms’ ability to exercise market power). In particular, the efficiencies defence used in merger challenges, which assesses whether gains in efficiency from a merger outweigh the lessening or prevention of competition, has led to a focus on quantifying anti-competitive harm in tribunal hearings and decisions and the Competition Bureau recommends its repeal in favour of considering efficiencies as just one of several discretionary factors. The Bureau is awaiting the government response to over 540 submissions from stakeholders and the general public, all of which will shape the future direction of competition policy in Canada.

Chair called on the **European Consumer Organisation (BEUC)** to speak on behalf of consumers who may be worried about the potential of competition authorities moving away from enforcement for the benefit or welfare of consumers.

BEUC argued that the consumer welfare standard is sufficiently equipped to address emerging trends and dynamic competition considerations in the face of digital markets and expressed confidence in the flexibility of the EU standard asserting that it effectively addresses non-price issues like quality and innovation. To support this view, BEUC referenced the Google and Android antitrust case, where the court concluded that Google's practices limiting alternatives to its search engine were detrimental to consumer interests in having diverse sources of information on the internet. Finally, BEUC cautioned against attempts to politicise competition law enforcement for fears that it may result in prioritisation of firm competitiveness over competition.

The **Chair** observed that although there is a plethora of perspectives on the advantages or disadvantages of standards, no one is arguing for a dogmatic interpretation or preference of one standard over another. By considering their desirable qualities, the discussion has illustrated that a combination of those attributes largely determines the favourableness of a

particular standard. The Chair suggested that guidelines can offer predictability for stakeholders particularly in regimes where different standards are applied to different practices. He then opened the floor to the expert speakers for their final remarks.

Prof Shapiro underscored the need for careful consideration of flexibility and different standards, while also being mindful of the potential risks and unintended consequences that could arise. For example, he argued against protecting small businesses from competition by larger more efficient firms because, in his view, this type of flexibility goes against the principles of competition suggesting that a separate statute should be considered to address this goal. On the other hand, he supports the use of competition authority discretion in choosing cases where companies collaborate to achieve sustainability goals so long as political influence is not the driving force in such decision making.

Prof Petit echoed Shapiro's remarks with respect to undue political influence and urged competition authorities to be cautious with temptations to move towards enforcement methodologies that shy away from economic theory and empirical understanding. In his view, the current antitrust discourse often operates in an unrealistic realm where everything is subject to political edict. He would like to see a return to a more objective and evidence-based approach suggesting that issues like climate change should be addressed through appropriate legal reforms rather than competition policy.

Prof Gerbrandy pointed out that international agreements, about climate change for example, provide legitimacy for competition authorities to carry out their enforcement work in a manner that compliments such broader government commitments but cautioned against moving towards other areas such as the protection of democracy, media plurality etc until legislators have expanded the runway for competition authorities to do so.

The **Chair** thanked the participants noting the relevance of the discussion on standards to subsequent sessions on sustainability and the circular economy. Despite divergent views and multiple standards being applied, the Chair pointed out that the roundtable had in fact demonstrated common ground in the application of standards and what competition authorities view as important attributes of effective standards.