

Unclassified

English - Or. English

27 November 2024

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Executive Summary 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 Executive Summary by the OECD Secretariat contains the key findings from 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

JT03556364

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

By the Secretariat¹

The OECD Competition Committee held a Roundtable on the Consumer Welfare Standard - Advantages and Disadvantages Compared to Alternative Standards in June 2023. Based on the background paper prepared by the Secretariat, written submissions from delegates, and the contributions by expert panellists and delegates to the discussion, the following key points emerged.

1. Standards in competition law provide the framework to assess whether conduct or mergers are permissible. Standards can be defined explicitly but are also sometimes implicit, and policy makers and competition authorities are likely to have approach them differently. When considering standards, it is important to note that other factors, such as the standard of proof, can also have a significant influence on outcomes.

Standards implement the objectives of competition law, such as promoting the welfare of consumers or others within society. They are sometimes established directly in legislation but can also develop over time through jurisprudence. There can be significant debate within a jurisdiction on what the prevailing standard is, let alone what it should be. For competition authorities, the main question is likely to be what the appropriate standard is and how that affects their work, whereas policy makers may consider what the optimal standard should be.

Standards provide the framework for defining desirable outcomes and can therefore affect enforcement decisions by identifying and weighing relevant harms and benefits. For example, a merger may give rise to expected benefits which are counted under some standards but ignored under others, changing whether it is considered permissible or not. Standards are not the only factor that will affect outcomes and delegates expressed a range of views on the importance of standards in affecting the outcomes of competition enforcement. However, it was widely acknowledged that enforcement outcomes will also be affected by the standard of proof required to establish infringements, and in many cases, this may be more determinative than the standard itself. Isolating the effect of a standard on outcomes compared to other factors can be challenging, making comparing their advantages and disadvantages less straightforward.

2. There was no agreement on what the optimal standard for competition policy is. All standards appear to have their own advantages and disadvantages, such as predictability, workability and ability to cater to a wider set of social issues. Different jurisdictions may place different weight on these factors, and since standards do not operate in a vacuum, there is unlikely to be a one size fits all standard. Nonetheless, different standards can lead to different enforcement outcomes and therefore be a source of divergence between authorities if different standards are chosen across jurisdictions.

¹ This executive summary does not necessarily represent the consensus view of the Competition Committee. It does however identify key points from the discussion at the Roundtable, including the views of the expert panellists and the participants' oral and written contributions.

There was no agreement between delegates on the most appropriate standard for competition law, with different standards in use across jurisdictions. Beyond the choice of any particular standard, there was broad agreement amongst delegates that the use of standards should be transparent and not overly dogmatic, as standards must have a degree of flexibility. In particular, standards need to take into account the wider societal context in which competition law operates. The discussion highlighted that competition will not always work to promote these wider societal factors in a linear manner, for example if there are concerns around sustainability or promoting the welfare of previously disadvantaged groups. Given this, and the different advantages and disadvantages that different standards offer, it is likely to be up to each jurisdiction how to value the different attributes of alternative standards. In this regard, authorities should be aware of the potential to create divergences with other jurisdictions if an alternative standard is chosen.

3. Alternative standards are available and used to different extents in some jurisdictions, including the protecting competition standard, the total welfare standard, the citizen welfare standard, as well as broader public interest considerations.

Several alternative standards to the consumer welfare standard were identified. These were the protecting competition standard, which focuses on preserving the level of competition rather than on understanding effects on different groups, and broader standards, such as the total welfare standard, which includes the surplus for firms as well as consumers, and the citizen welfare standard or wide public interest considerations, which take into account broader impacts of competition, for example on specific groups, the environment, or labour markets. The possibility of using more than one standard depending on the conduct or situation also exists, with some delegates sharing their experience of this model providing a safety net to consider broader factors when necessary.

Several advantages for alternative standards were proposed, although there were mixed views on how they compared to the consumer welfare standard in terms of predictability and administrability. A key point of discussion was the extent to which competition law should seek to achieve a range of public policy objectives or focus on narrower, and more economic, fields, as well as the ability, and legitimacy, for a competition authority to consider these broader factors. There were mixed views in the discussion, with some arguing that competition law does not take place in a vacuum and should consider the broader policy context, while others considered that these were matters for other policy areas and central government. Further, some of the advantages and disadvantages of different standards can in fact reflect differences in standards of proof, rather than differences in the standard itself, and this appears particularly the case when comparing the protecting competition standard and the consumer welfare standard.

4. The consumer welfare standard appears to be the most commonly employed standard, although its meaning is not always clear and may vary across jurisdictions.

Many jurisdictions apply what could at least notionally be considered a consumer welfare standard, although there are differences in opinion on exactly what the consumer welfare standard is. Broadly speaking, the consumer welfare standard concerns maximising the benefits of competition for consumers. This has often focused on maximising consumer surplus, the area under a demand curve and market price, and is often considered related to consumer prices. However, the discussion revealed a broad agreement that a consumer welfare standard need not narrowly focus on short-term consumer prices but can instead take a longer-term perspective on potential benefits and harms to consumers and of preserving competition for their benefit. The consumer welfare standard has many merits due to its long traditions and relatively simple focus on the important aspect of consumer well-being. Some of the disadvantages raised regarding the consumer welfare standard

were that it can imply the need to show direct harm to consumers, risking a focus on static harms that may be easier to identify, and that it does not take into account broader societal effects of competition.

In the discussion, many delegates agreed that the consumer welfare standard was reasonably simple to administer compared to broader standards that consider a wider range of harms and benefits. As part of a flexible approach, such broader considerations may become relevant for competition authorities in deciding their priorities, even if they do not technically fall under the standard in operation.