

Unclassified

English - Or. English

7 June 2023

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

Advantages and Disadvantages of Competition Welfare Standards – Note by BEUC

15 June 2023

This document reproduces a written contribution from BEUC submitted for Item 6 of the 140th OECD Competition Committee meeting on 14-16 June 2023.

More documents related to this discussion can be found at
<https://www.oecd.org/competition/advantages-and-disadvantages-of-competition-welfare-standards-in-competition.htm>

Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08

JT03521043

BEUC

1. Introduction

1. BEUC welcomes the opportunity to contribute to the Roundtable on the consumer welfare standard - advantages and disadvantages to alternative standards. As a consumer organisation, this issue is of particular importance.
2. In its call for contributions, the OECD raises important questions on what the appropriate standard for competition policy is, including whether the consumer welfare standard is too permissive or narrow. It also indicates that a certain level of uncertainty exists as to what the consumer welfare standard exactly is.¹
3. This note focuses on the scope of European Union (EU) competition law and what the consumer welfare standard denotes in the EU, namely a standard capable of addressing different market failures and priorities and well equipped to cater also for non-price issues such as quality and innovation. The note also highlights that while the goals of EU competition law centre around, and are primarily consistent with consumer welfare, they are not limited to a narrow interpretation of this standard.

2. The scope and goal of EU competition law

4. While competition legislation in most jurisdictions will not directly set out the standard that should apply, it can indicate the objectives which can lead to the welfare standard in question.² Relevant case law notes that the goal of EU competition law is to protect the interests of consumers and competitors, as well as competition as a process.³

2.1. What do we mean by consumer welfare in the EU?

5. Even though the consumer welfare standard is not itself set out in the Treaty on the Functioning of the European Union (TFEU), the word “consumer” appears in the Treaty and in numerous other documents.⁴ The TFEU, under Article 101(3), makes reference to “[...] allowing consumers a fair share of the resulting benefit”. The European Commission’s (Commission) Guidelines on the application of Article 101(3) TFEU⁵ use

¹ OECD Background note, p. 7. Johannes Laitenberger, EU competition law: relevance anchored in empiricism, CRA Conference of 5 December 2018, https://ec.europa.eu/competition/speeches/text/sp2018_16_en.pdf: “In sum, the term “consumer welfare” is not as consensual as it seems.”

² OECD Background note, p. 9: “A standard must be consistent with the objective of competition law, but could also be more specific, in the sense that it provides more detail on what the objective means. In this sense, it could be considered the method of applying the objectives in practice.”

³ Case C-501/06 P *GlaxoSmithKline Services Unlimited v Commission and Others* [2009] ECR I-9291, para. 63; Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paras. 31, 36, 38-39.

⁴ For example, Commission guidelines and guidance papers note the importance of the consumer’s interest.

⁵ European Commission, ‘Guidelines on the Application of Article 81(3) of the Treaty’ [2004] OJ C101/97.

the expression “consumer welfare”, noting that the enhancement of consumer welfare and ensuring an efficient allocation of resources is at the core of EU competition law and policy.⁶ The consumer welfare standard in the EU has been developed through case law, including cases emphasizing that “*the ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase the well-being of consumers... Competition law and competition policy... have an undeniable impact on the specific economic interests of final customers who purchase goods or services.*”⁷

6. While the goals of EU competition law centre around and are primarily consistent with consumer welfare, they are not limited to a narrow interpretation of this standard as set out in Figure 1 below. In its application, EU competition law has been relevant to multiple objectives such as the protection of consumer well-being⁸, consumer welfare⁹, efficiency¹⁰, effective competition structure¹¹, the protection of input providers¹², fairness and distributional justice¹³, plurality¹⁴ and market integration.¹⁵ In essence, EU competition

⁶ European Commission, ‘Guidelines on the Application of Article 81(3) of the Treaty’ [2004] OJ C101/97, para. 13, 33; Svend Albæk, ‘Consumer Welfare in EU Competition Policy’ (2013), p. 70. BEUC’s response to the public consultation in relation to the evaluation of Regulation 1/2003, ref: BEUC-X-2022-102 – 06/10/2022, p. 4.

⁷ Joined Cases T-213/01 and T-214/01 *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v Commission* [2006] ECR II-1601, para. 115.

⁸ See footnote 9.

⁹ European Commission, ‘Guidelines on the Application of Article 81(3) of the Treaty’ [2004] OJ C101/97, para. 33.

¹⁰ See footnote 11, para.13; European Commission, ‘Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings’ [2009] OJ C 45/02, paras. 1, 5-7; European Commission, ‘Guidelines on Vertical Restraints’ [2022] OJ C 248, para. 10.

¹¹ Case C-322/81 *Nederlandsche Banden-Industrie Michelin NV v Commission* [1983] ECR 3461, para 57, holding that the dominant undertaking has a ‘special responsibility not to allow its conduct to impair genuine undistorted competition on the common market’; Case 6-72 *Europemballage Corporation and Continental Can Company Inc. v Commission* [1973] ECR-215, para. 26; Case C-95/04 *British Airways Plc v Commission Court of Justice*, [2007] ECR I-2331, para. 106; Case T-340/03 *France Telecom SA v Commission* [2007] ECR II-107, para 266; *TeliaSonera* (n 20) para. 24; Joined Cases C-468 to 478/06 *Sot. Lélos kai Sia and Others* [2008] ECR I7139, para. 68; and Case C-280/08 P *Deutsche Telekom v Commission* [2010] ECR I-9555, para. 176.

¹² *Raw Tobacco Italy* (Case COMP/C.38.238/B.2) Commission Decision of 20 October 2005. Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and others v Ichthyol-Gesellschaft Cordes and others* [2004] ECR I-2493.

¹³ Case 26/75 *General Motors Continental v Commission* [1975] ECR 1367; Case 27/76 *United Brands v Commission* [1978] ECR 207; Case C-177/16 *Autortiesību un komunikēšanās konsultāciju aģentūra (AKKA)/ Latvijas Autoru apvienība (LAA)* [2017] ECLI; *Deutsche Post AG* (Case COMP/C-1/36.915) Commission Decision 2001/892/EC [2001] OJ L331/40.

¹⁴ The General Court explicitly recognised the importance of consumer choice “to ensure plurality in a democratic society”, Case T-604/18 *Google Android*, point 1028.

¹⁵ BEUC, ‘The Role of Competition Policy in Protecting Consumers’ Well-being in the Digital Era’ (2019), p. 12. Margrethe Vestager, ‘Keynote of EVP Vestager at the European Competition Law Tuesdays: A Principles Based approach to Competition Policy’ (SPEECH/22/6393, Brussels, 25 October 2022): “EU competition policy is able to pursue multiple goals, such as fairness and level-playing field, market integration, preserving competitive processes, consumer welfare, efficiency and innovation, and ultimately plurality and democracy”.

law is also about protecting the competitive process¹⁶ in a way that can benefit consumers in terms of prices, choice quality and innovation. However, it is important to highlight that no law can be pursued in isolation and without also reference to the legal, economic, political and social context. EU competition law is no exception and is in constant evolution as a result of cases brought by the Commission over the last decades and the important case law developed by the EU courts.

7. Although competition law systems worldwide share the core mission to foster consumer welfare, they may differ in their scope of protection as well as their approach to distribution of wealth and fairness.¹⁷ In our view, the EU level framework which embodies the European consumer welfare standard that has been developed over time is flexible enough to address different market failures and priorities and is well equipped to cater also for non-price issues such as quality and innovation. Its scope is therefore well capable of adjusting and remaining relevant and effective for the economic realities it faces.

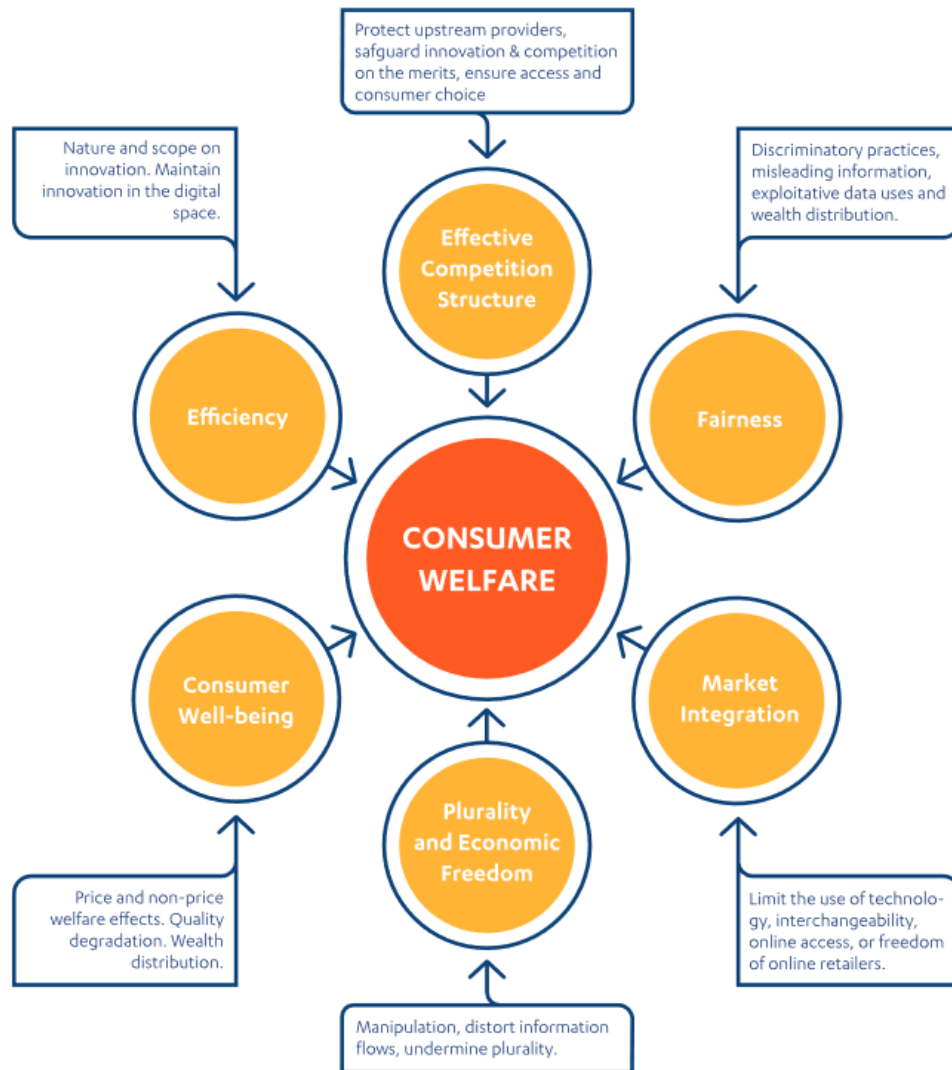
8. In contrast, we consider that a total welfare standard or other broader standards under consideration in academic literature, that would attempt to change or widen the scope of intervention of EU competition law to ostensibly accommodate current political priorities such as industrial policy or to serve vested interests, be they European or other, would be counterproductive. What should however be changed in certain respects is the way that competition law is enforced to strengthen its effectiveness which will ultimately offer better results also for consumers.¹⁸

¹⁶ European Commission, ‘Guidelines on the Application of Article 81(3) of the Treaty’ [2004] OJ C101/97, para. 105 “in other words, the ultimate aim of Article 101 is to protect the competitive process”.

¹⁷ BEUC, ‘The Role of Competition Policy in Protecting Consumers’ Well-being in the Digital Era’ (2019), p. 14.

¹⁸ See BEUC’s suggestions in the response to the public consultation in relation to the evaluation of Regulation 1/2003, ref: BEUC-X-2022-102 – 06/10/2022, p. 5 et seq.

Figure 1.



Source: BEUC, 2019, https://www.beuc.eu/sites/default/files/publications/beuc-x-2019-054_competition_policy_in_digital_markets.pdf

2.2. The EU consumer welfare standard is about more than prices

9. The consumer welfare standard is not concerned only with lower prices but instead allows factors other than prices to be taken into account in assessing competition cases. These include, choice, quality, innovation, which has been exemplified in a number of cases.¹⁹

10. That price is not the only or main parameter to be considered in all cases, especially in digital markets, has also been acknowledged in the Commission’s draft revised Market Definition Notice.²⁰ Greater emphasis has been given to the product’s or service’s non-price elements, such as the level of innovation or the quality in relation to, for example, “its

¹⁹ OECD Background note, footnote 13.

²⁰ See: https://competition-policy.ec.europa.eu/public-consultations/2022-market-definition-notice_en.

durability, sustainability, the value and variety of uses offered by the product, the image conveyed or the security and privacy protection afforded”.²¹ This was necessary in order to have an up-to-date Notice, not only because of the increasing practice of consumers accessing products and services by providing access to their personal data and being exposed to profiling and advertising rather than paying a monetary price, but also because in specific circumstances, parameters such as functionalities, quality (including privacy), data, attention or innovation play a more significant competitive role.²²

11. The economics-centred understanding of consumer welfare and efficiencies may be perceived by some as an obstacle in accommodating non-economic considerations and public policy objectives.²³ The centrality of economic analysis “provides a valuable prism which helps ensure that decision-making is compatible with the overall aims of competition law”, but it does not mean that economic theory should eradicate the wider goals of EU competition law or deprive it of its constitutional values.²⁴ While originally founded in economic interactions, EU primary law has naturally evolved over time and, by taking account of social interests and values, goes beyond purely economic considerations.²⁵ This naturally leads to the fact that certain price-based analytical tools reach their limits in understanding and assessing market behaviour when price no longer represents the basis of the analysis.²⁶ The societal role of competition law must therefore not be marginalised by means of economics.²⁷

²¹ Point 12 of the draft revised Market Definition Notice.

²² BEUC’s response to the public consultation on the draft revised Market Definition Notice (2023) ref: BEUC-X-2023-002. See also BEUC’s response to the public consultation, ‘Market definition in EU competition law enforcement: Need for an update’ (2020), ref: BEUC-X-2020-092 - 08/10/2020, p. 1.

²³ Majcher, Klaudia and Robertson, Viktoria H.S.E., ‘Doctrinal Challenges for a Privacy-Friendly and Green EU Competition Law’ (December 7, 2021), p. 5.

²⁴ BEUC, ‘The Role of Competition Policy in Protecting Consumers’ Well-being in the Digital Era’ (2019), p. 14.

²⁵ Article 3(3) TEU explicitly refers to various EU socio-economic goals (“a highly competitive social market economy”). Majcher, Klaudia and Robertson, Viktoria H.S.E., ‘Doctrinal Challenges for a Privacy-Friendly and Green EU Competition Law’ (December 7, 2021), p. 10: “Albeit a vague expression, the term ‘social’ suggests a substantive broadening of the Union’s purposes, going beyond purely economic considerations.” The relevant constitutional context also requires reflecting on Article 2 TEU which lists EU’s values, including democracy and the rule of law.

²⁶ Majcher, Klaudia and Robertson, Viktoria H.S.E., ‘The Twin Transition to a Green and Digital Economy: The Role for EU Competition Law’, Graz Law Working Paper Series, Working paper No 05-2022, p. 15. The limitation of, for example, the SSNIP (Small but Significant Non-transitory Increase in Price) test has been recognised in the draft Market Definition Notice. Explicit reference has now also been made to the Small but Significant Non-transitory Decrease in Quality (SSNDQ) test.

²⁷ BEUC, ‘The Role of Competition Policy in Protecting Consumers’ Well-being in the Digital Era’ (2019), p. 15.

3. Public policy goals in EU competition law

3.1. Considerations and risks

12. Promoting public interest objectives²⁸ in competition law and going beyond the generally accepted core competition policy objectives is increasingly present in the debate on the role of competition law. Competition law is not neutral when it comes to addressing problematic trends. This however does not mean that its primary role is to be the driver in achieving other public policy goals²⁹. Hence, caution is needed in terms of the idea of opening the consumer welfare concept up to public policy interests. Such a broadening may very well undermine the essence of competition law making its application subject to political considerations, which would not always be to the benefit of consumers. Furthermore, an overly broad standard for competition will pose significant challenges for enforcement authorities in order to identify the appropriate intervention benchmarks.

3.2. The EU consumer welfare standard in the twin digital and green transitions

13. The scope of the EU consumer welfare standard has been tested in relation to the challenges raised by digitalisation (particularly in relation to zero-price markets) and sustainability-led industry initiatives.

14. Recent cases against big tech companies in Europe has shown that a price-centric approach to consumer welfare is ill-suited to a digital economy in which ‘free’ has become the norm and users provide value through engagement and data. In the digital environment, where the monetary price is often set at zero, quality forms an important dimension of competition. For example, degradation of the quality of services or product characteristics can result in harm to consumer welfare, despite the absence of price effects. A price-centric approach in such a setting fails to identify consumer harm. Enforcers need to adjust their metrics in order to fully identify effects on competition. The digital landscape will increasingly require enforcers to consider a range of variables that impact on consumer welfare, even when these are not easily quantifiable. As noted by the former Director General of the European Commission’s Directorate General for Competition, Johannes Laitenberger: “*We must take an empirically driven view of consumer welfare and recognise that some consumer harm is not readily visible in price and output effects.*”³⁰ The recent judgement of the EU General Court in the Google Android case has confirmed this.³¹

²⁸ OECD Note by the Secretariat, ‘The Objectives of Competition Law and Policy’ (2003), p. 3, footnote 2, mentioning, among others, the promotion of employment, social progress or welfare, poverty alleviation. <https://www.oecd.org/daf/competition/2486329.pdf>.

²⁹ EVP Vestager’s view that: “Competition policy has to do its bit, of course. But it cannot replace the essential role of regulation. And in any case, as competition enforcers, we also have our own task to carry out – to protect consumers, by defending competition. It’s a task that’s been given to us by the Treaties – and one that’s essential to keep our economy working fairly for everyone, in the green future.” Renew Webinar, 22 September 2020; Johannes Laitenberger, EU competition law: relevance anchored in empiricism, CRA Conference, 5 December 2018, https://ec.europa.eu/competition/speeches/text/sp2018_16_en.pdf.

³⁰ https://ec.europa.eu/competition/speeches/text/sp2018_16_en.pdf.

³¹ Case T-604/18 *Google Android*, point 1028: “Furthermore, Google’s abusive practices had the effect, inter alia, of depriving competitors of the possibility of offering, without hindrance, alternatives to the general search service Google Search to those users wishing to use them (recitals 862 and 1213 of the contested decision). Thus, in general terms, those practices were detrimental to the interest of consumers in having more than one source for obtaining information on the internet.

15. In the context of competition and sustainability considerations, the revised Horizontal Guidelines on how to interpret EU competition rules applicable to sustainability agreements by and large strike the right balance between promoting beneficial sustainability agreements and not allowing such agreements to undermine competition and harm consumers.³² Article 101(3) provides considerable scope to enable sustainability related agreements between businesses to be exempted. In many cases it should be feasible to clarify their compatibility with competition law under traditional interpretations of this Article. The application of Article 101(3) TFEU exemption to sustainability agreements may however cause measurement challenges given the often non-economic nature of sustainability benefits.³³

16. Assuming that they can be clearly substantiated, sustainability benefits can readily lead to objective efficiency gains. Some view the standards focusing on protecting competition and consumer welfare as not well equipped to consider situations where there may be a lessening of competition that could result in substantial environmental benefits because of the *“significant potential conflict between the outcomes viewed as positive under those standards, greater output and lower prices, and effects on sustainability, which could imply lower output, as those standards are only equipped to consider one part of the equation”*.³⁴ It should be born in mind, however, that the Commission considers that efficiency gains generated by a sustainability agreement could include not only a reduction in production and distribution costs, but also improvements that concern a product’s quality and variety or more innovation.³⁵ Sustainability benefits can therefore take various forms, from cleaner technologies and less pollution to products of better quality to improved consumer choice by facilitating the comparison of products and not necessarily in the form of lower prices.³⁶

17. The 2021 car emissions cleaning “AdBlue” cartel³⁷, where vehicle manufacturers illegally colluded to restrict competition in the area of emission cleaning technology for diesel cars, agreeing not to use existing emissions reduction technology to go beyond what

Accordingly, in more concrete terms, those practices also restricted the development of search services directed at those segments of consumers that attached particular value to, inter alia, the protection of privacy or specific linguistic features within the EEA. Such interests were not only consistent with competition on the merits, in that they encouraged innovation for the benefit of consumers, but were also necessary in order to ensure plurality in a democratic society.”

³² Communication from the Commission - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, https://competition-policy.ec.europa.eu/system/files/2023-06/2023_revised_horizontal_guidelines_en_0.pdf.

³³ In particular when measuring efficiency gains and establishing the meaning of a fair share of benefits that must be passed on to consumers.

³⁴ OECD Background note, p. 33. See also Majcher, Klaudia and Robertson, Viktoria H.S.E., ‘The Twin Transition to a Green and Digital Economy: The Role for EU Competition Law’, Graz Law Working Paper Series, No 05-2022, p. 15, mentioning the question how competition law can consider certain trade-offs in terms of consumer welfare, e.g. between positive environmental externalities and higher monetary price caused by a respective sustainability initiative.

³⁵ Communication from the Commission - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, points 557 and 558.

³⁶ Majcher, Klaudia and Robertson, Viktoria H.S.E., ‘The Twin Transition to a Green and Digital Economy: The Role for EU Competition Law’, Graz Law Working Paper Series, Working paper No 05-2022, p. 16, 17.

³⁷ See: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_40178.

was required by law, exemplifies this very well. Car makers developed together a very good technology but decided not to compete on exploiting it to its full potential. While an academic study³⁸ has suggested that this cartel could actually have been beneficial to consumers as buyers of the more polluting vehicles had access to cheaper vehicles as a result of the technology not being used, such an approach ignores the fact that price is not the only parameter of the analysis. This cartel aimed at restricting competition on a key competition parameter – pollution reduction - and thereby deprived consumers of making environmental choices that would have improved air quality.

18. Improvements in production/distribution or technical and economic progress, do not therefore necessarily need to be reflected in prices but can consist in more choice and higher-quality products.³⁹ Quality considerations and innovation in the broad sense, including sustainability features, can be important factors insofar as consumers place a value on them.⁴⁰

19. Finally, as regards the second criterion of Article 101(3), that consumers receive a “fair share of the benefit”, the basic principle that users of the products that are the object of an agreement should be compensated for the harm caused to them by the restriction of competition is sound and should remain the rule. Nevertheless, one can legitimately apply a broader standard in some circumstances to take into account indirect benefits such as (1) benefits in other markets or in the future or (2) societal benefits – such as collective environmental benefits, and to factor in negative externalities.⁴¹

4. Conclusion

20. The consumer welfare standard as interpreted in EU competition law and as set out in this paper has served consumers well to date. Given its scope and flexibility, it should continue to do so in the future. While this standard may not suit all jurisdictions, there seems little need or justification to broadening this standard in the EU.

³⁸ Study ‘Colluding Against Environmental Regulation’ of 29 October 2021, <https://ceepr.mit.edu/wp-content/uploads/2022/01/2022-002.pdf>.

³⁹ The Court has held that physically identical products can be treated differently if their environmental quality differs (Case C-2/90 Commission v. Belgium 1993, para 33, ECLI:EU:C:1992:310).

⁴⁰ BEUC, ‘Sustainability and Competition – OECD Note by BEUC’ DAF/COMP/WD(2020)72, p. 8.

⁴¹ BEUC, ‘Sustainability and Competition – OECD Note by BEUC’ DAF/COMP/WD(2020)72, p. 10.