Organisation for Economic Co-operation and Development

DAF/COMP/WD(2023)34

Unclassified

English - Or. English

24 May 2023

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Advantages and Disadvantages of Competition Welfare Standards – Note by Poland

15 June 2023

This document reproduces a written contribution from Poland 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

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JT03519589

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1. Introduction

1. In this contribution prepared by the Polish Office of Competition and Consumer Protection (UOKiK), we share our thoughts and observations with regard to the consumer welfare standard and its possible alternatives.

2. This contribution should be construed as a discursive text and is not intended to provide any definitive statement on what the prevailing standard in our jurisdiction is or what the prevailing standard should be. References to views of specific authors made in this contribution are not meant as endorsement of these views or support for any of the authors.

3. Since the Secretariat provided a comprehensive review of the main standards of assessment in the Background Note, in this contribution we focus on issues that we find to be of possible interest to the OECD, other delegates, and interested parties. Hence, we generally do not discuss issues that in our view would overlap in a significant manner with information already provided by the Secretariat.

4. The contribution is divided into five parts: (a) section 2 provides general background; (b) in section 3 we discuss the issue of antitrust standards and the standard applicable in our jurisdiction, including new developments in that regard; (c) section 4 concerns the attributes outlined by the Secretariat in the Background Note; (d) in section 5 we reflect on the utility of "ranking" standards based on their possible attributes; (e) section 6 concludes.

2. General background

5. Our institutional model and legal framework for antitrust enforcement generally resembles that used by the European Commission. We are an administrative antitrust agency and our task is to enforce: (a) Article 101-102 TFEU; (b) our national antitrust law, which generally follows the language and spirit of relevant provisions of TFEU and EUMR. Our decisions can be appealed to a specialised competition court (which, however, also deals with consumer and regulatory cases), and then further to the court of appeals, and the Supreme Court.

6. The fact that we enforce Article 101-102 TFEU (often in parallel with our own national provisions) and coordinate our actions in that regard with the European Commission and other NCAs means that to a large extent our enforcement practice converged with that of other relevant authorities. Also, taking into account that the European Court of Justice holds the ultimate authority on what is the standard of assessment under Article 101-102 TFEU, standards used in our jurisdictions are to a large extent the standards set by EU courts.

7. Nonetheless, in this contribution, we focus on how standards have been construed and defined by our national courts. Thus, even despite the fact that Article 101-102 TFEU can be seen as part of our enforcement activity, we do not focus on them in this contribution.

3. Standards of assessment

3.1. Goals, standards, and rules of evidence

8. Consumer welfare often dominates discussions over the goals of antitrust. A related term "consumer welfare standard" is also used. There appears to be no widely agreed framework that differentiates between "consumer welfare" and "consumer welfare standard". It seems that depending on author and context both terms are either used largely interchangeably or not. As it was also noted in the Call for Contributions: "*Many competition regimes apply what is **notionally** considered a consumer welfare standard*", i.e. there is no agreed and universal definition of the consumer welfare standard.

9. We generally believe that the division used by the Secretariat in the Background Note (section 2.1) is a useful one for theoretical purposes.

10. In particular, it seems that there is a difference between consumer welfare as a goal (or *the* goal) of antitrust enforcement and the consumer welfare standard. It is technically possible to hold consumer welfare as the goal, but to conclude that the best way to ensure that this goal is actually achieved is through a standard different than the consumer welfare standard. For instance, it is possible to conclude that consumer welfare will be best served by a simple standard such as e.g. the standard of protecting competition. Likewise, it can hypothetically be argued that for instance: (a) consumer welfare (seen as an antitrust goal) will be best served in the long term if the market operates in the most efficient way, which can be easier accommodated under the total welfare standard; or (b) that a more abstract goal than consumer welfare (e.g. individual freedom, democracy etc.) will be best served by the consumer welfare standard.[1]

11. The rules of evidence (or "burden of proof" as it was called by the Secretariat) should not be ignored as an important element of enforcement systems. Drastically different results can be achieved under the same standard, if simply different rules of assessing evidence are used. As noted by the Secretariat in the Background Note (para. 138 *in fine*), there is nothing that prevents e.g. the consumer welfare standard to use structural presumptions, per se or by object rules etc.[2] In fact, it seems possible for an advocate of the consumer welfare standard (with a strong risk-averse attitude towards restrictions of competition harming consumer welfare) to opt for rules of evidence that bring the consumer welfare standard close to what would otherwise be considered the standard of competition protection.

12. However, this also leads to a somewhat paradoxical situation (one can call it the "antitrust (standards) paradox"). On the one hand, it seems useful to make a distinction into goals, standards, and evidentiary rules, since conceptually they cover different issues – standards can be seen as a separate and independent category. On the other hand, the lines between these areas are blurry and all of them interact with each other, with the standard

[1] On all of these issues, see e.g. Jan Polański, *A Positive Program for Antitrust? Enforcement in Times of Political Tides*, World Competition 45, no 2. (2022), p. 243-244.

[2] See e.g. a discussion about the more probabilistic approach to enforcement in the EU by Nicolas Petit, *A Theory of Antitrust Limits*, George Mason Law Review, Vol. 28, No. 1939, 2021. See also: Jan Polański, *A Positive Program for Antitrust? Enforcement in Times of Political Tides*, World Competition 45, no 2. (2022), p. 255 ("*(...) it is not that the more economic approach would be always against blanket rules, as it should accept them, provided that having them brings more efficiency in terms of enforcement costs and legal certainty than prohibiting an efficient market conduct now and then*").

being significantly affected by goals and evidence rules.[3] In consequence, what is nominally considered to constitute the consumer welfare standard (e.g. under a definition similar to that used by the Secretariat in section 2.3 of the Background Note) may in practice look different after one also considers the goals and evidentiary rules that are used in a jurisdiction.

13. Nonetheless, we believe that for the purpose of a theoretical discussion such a division is still of use, with the caveat that one needs to bear in mind that all definitions of standards are in fact idealistic and represent the general thought (main subject of interest) behind a given standard rather than the final result of how enforcement works. Put shortly, one can imagine three jurisdictions: (a) one using the consumer welfare standard; (b) one using the citizen welfare standard; (c) one using the competition protection standard – yet, by just taking into account goals and evidentiary rules all these seemingly different standards may in practice become more similar than one would expect.

3.2. Assessment standards in Poland

14. As mentioned in section 2, the standard applicable in Poland is significantly influenced by developments at the EU level, in particular case law developments in EU courts. The standard has also evolved significantly since 1990 (when antitrust laws became effective in Poland) – this has consisted in the assessment standard becoming more effect-based. There are three main reasons for that. First, the economic context in which antitrust laws are applied changed significantly (in the early 1990s, the Polish economy was highly concentred and one of the main goals of Polish transformation was to de-monopolise and privatise it). Second, until 2004 (i.e. Poland's accession to the EU) Polish antitrust was developing more independently, while since 2004 Polish antitrust law has interacted more often with EU law. Third, over such a long period of time, the perception of antitrust standards has been changing globally (e.g. the move towards "more economic approach" in Europe started in the late 1990s to become more mature in the 2000s; in the late 2010s and 2020s the consumer welfare standard became more frequently questioned).

15. In 2008, some described the goals of Polish antitrust as: "*controlled chaos with consumer welfare as the winner*" (and while goals are not the same as standards, in this context they can be treated as synonyms).[4] This largely represents the main feature of Polish

[3] As noted by the Secretariat in para. 19 of the Background Note: "*The relationship between standards and the overarching objectives of competition law is worthy of brief discussion. They are intrinsically linked and the differences between them, to the extent that there are any, can be difficult to articulate. In many ways, they could be considered two sides of the same coin*". This relationship appears to extend further to evidentiary rules, e.g. structural presumptions will be more likely under the competition protection standard, and the competition protection standard itself (with its form-based rules) might follow from goals that are more deontological rather than utilitarian. On this last issue see for instance Oles Andriychuk, *Does Competition Matter? An Attempt of Analytical 'Unbundling' of Competition from Consumer Welfare*, Yearbook of Antitrust and Regulatory Studies, Vol. 2009, 2(2), saying e.g.: "*Theories which consider competition to be merely an instrument of achieving external goals (more important/the only valuable societal goals) can be classified as utilitarian antitrust theories. Concepts that consider competition to be more than merely a tool to increase productivity, generate welfare or maximise efficiency, are classified as deontological antitrust theorists. The latter views perceive competition as a distinctive feature of liberal democracy that should be protected* ***irrespective of the outcomes which it brings to society***".

[4] Dawid Miąsik, *Controlled Chaos with Consumer Welfare as the Winner: a Study of the Goals of Polish Antitrust Law*, Yearbook of Antitrust and Regulatory Studies, Vol. 2008, 1(1), p. 33-57.

antitrust, i.e. adaptability, which largely comes from changing priorities of the antitrust authority and from an evolution in the attitude of courts.

16. Goals (and standards) of Polish antitrust are not clearly stated in any legislative act. The Polish Competition Act itself mentions only briefly that it sets forth the rules according to which competition should be protected and the principles which should guide the protection of undertakings and consumers' interests, however with both groups being protected in the "public interest".

17. While ambiguous, based on the aforementioned provision, one could argue that the Polish Competition Act uses the total welfare standard (as it refers to both consumers and producers) mixed with some concern regarding the "public interest", which can both mean total welfare, as well as other public goals which are not necessarily subject to classic economic analysis. However, the Polish Competition Act itself is just part of a broader legal framework, with the Polish Constitution defining the economic model which should be followed as "social market economy", i.e. the model originally advocated by ordoliberals, who in turn had their influence on the perception of antitrust and competition in Europe.[5]

18. This brief overview of the goals of Polish antitrust also explains the reasons for which the standards of assessment have been subject to a "*controlled chaos*". This is also reflected in case law, with antitrust generally being expected to deliver low prices for consumers (this includes quality, innovation etc.), but occasionally giving room to other arguments.

19. The result of litigation in ***Sucha Beskidzka*** likely constitutes one of the most straightforward discussions of antitrust goals and standards in recent case law.[6] The case concerned an abuse of dominance by a local water and sewage undertaking, which consisted in excessive pricing. The court of appeals set aside an infringement decision in this case, and when doing so included references to the US *Trinko* case.[7] It concluded that an undertaking should be in a position to charge higher prices to recoup investments. Following an appeal, the Supreme Court directly commented on the references to *Trinko* and the axiology used by the court of appeals. It concluded that the goals and methods of assessment under Polish antitrust differ from those that had been followed by the US Supreme Court in *Trinko*. This was mostly based on references to the Polish Constitution and a more ordoliberal view on the economy than that held by the US justices in *Trinko*. The Supreme Court also commented on how the perception of the Chicago School and "*greed is good*" approach has changed over years (mostly in the context of 2008 financial crisis) – such broad and detailed theoretical discussions are not very common in the Supreme Court's case law, which makes the ruling unique.

20. Still, the result of *Sucha Beskidzka* also shows that the interaction between goals, standards, and evidentiary rules is often blurry. Neither of the courts rejected the consumer

[5] Since this contribution might be of interest to non-European readers, it seems useful to note that the ordoliberal concept of "social market economy" does not mean a "socialised" economy, but rather aims at emphasising that market economy is a social (organic) phenomenon, see e.g. Philip Mirowski and Dieter Plehwe (eds.), *The Road from Mont Pelerin: The Making of the Neoliberal Thought Collective*, Harvard University Press (2009), p. 107, outlining Friedrich Hayek's scepticism towards the term due to "social" serving as a "*weasel-word*" and Ludwig Erhard's explanation that what he means by it is that: "*the market economy as such is social, not that it needs to be made social*".

[6] Case III SK 5/17 (*Sucha Beskidzka*).

[7] *Verizon v. Trinko*, 540 U.S. 398 (2004).

welfare standard (i.e. the court of appeals did not subscribe to e.g. the total welfare standard; and the Supreme Court did not state that e.g. the standard of competition protection, which some would probably argue is close to ordoliberal ideals, should be followed). The case seemingly concerned the goals of antitrust, but in a way also standards (insofar the values defined by both courts could have affected their preference for a specific way of ensuring consumer welfare under the consumer welfare standard itself, e.g. in a long term or short term; with more confidence in the market or with more scepticism).[8]

21. The result of litigation in ***Homeopathy*** is also of relevance when discussing the standard of assessment applicable in Poland.[9] The case concerned a decision of the Polish National Board of Medical Practitioners which dissuaded medical practitioners from using homeopathic treatments. The decision was found to be anticompetitive – the case used a simple theory of harm based on an assumption that competition between medical products should remain undistorted and that consumers should have an option to choose such a treatment. It could be argued that this reasoning followed the standard of competition protection (insofar it put emphasis on competition between products and barriers to entry), but in practical terms it could also be well-argued that the classic consumer welfare standard was the prevailing standard (insofar consumer choice was emphasised).

22. Still, the court of first instance overturned the decision, saying that competition should be protected "in the public interest", without entering the usual stage of assessing the agreement under the national equivalent of Article 101(1) TFEU. The court pointed out inter alia that: (a) competition protection itself is not an objective (which can be taken as an argument against the consumer protection standard, even if the court did not directly assess this issue and commented on it in passing); (b) competition is a means to "*achieve a certain positive outcome – an outcome which should be positive for the entire society, the entirety of consumers*"; (c) patients have "*a right*" to be treated with methods with documented medical effectiveness. The ruling was upheld by the court of appeals, however without reference to public goals.

23. Overall, it could be argued that the court of first instance did not divert from the consumer welfare standard, rather re-interpreted it in a significant way (one could potentially say that the agreement ensured the maximisation of consumer welfare, since when it comes to medical treatments, consumers lack relevant expertise and would be better-off if certain decisions were indeed taken by associations of medical practitioners, rather than individual practitioners, whose short-term incentives may vary from the long-term interests of the medical profession and consumers in general). However, given that the court did not discuss this issue under the national equivalent of Article 101 (1) and Article 101 (3), or any concepts known or discussed in EU antitrust law (e.g. "regulatory ancillarity"), it seems more accurate to treat this case as an example of public interest considerations.

24. In ***Gmina Miasta Olsztyn***, on the other hand, an abuse of dominance by city authorities of Olsztyn was found (under Polish antitrust, local authorities are sometimes considered to be undertakings). During litigation, a point of contention was whether

[8] This last issue can also be linked with a recent argument made in Eleanor Fox, *"Consumer Welfare" and the Real Battle for the Soul of Antitrust* <https://www.promarket.org/2023/04/19/consumer-welfare-and-the-real-battle-for-the-soul-of-antitrust>.

[9] Case XVII AmA 163/11 (*Homeopathy*). On this case, see also: Michał Raduła, *The interpretation of the notion of public interest in Polish public competition law according to the judgement of the Court of Competition and Consumer Protection of February 4, 2015 (XVII AmA 163/11)*, Central and Eastern European Journal of Management and Economics (CEEJME), 2017, No. 2, p. 131-145.

environmental factors could have justified under antitrust the conduct of the city. The issue was not deemed antitrust-relevant by the first instance court, but was addressed by the second instance court (which, however, concluded that the environmental defence was incorrect based on the facts of the case). The Supreme Court, on the other hand, refused to hear the case due to lack of a significant legal issue. However, while refusing to hear the case, it commented on the case subject and pointed out that issues other than narrowly understood competition might be relevant in antitrust analysis.[10]

25. Resale price maintenance is also an issue that often leads to standard-related litigation in our jurisdiction. However, it might be an overstatement to say that RPM cases in our jurisdiction provide a clear example of how different standards of assessments can be used. This is because of the ambiguity of the goals-standards-rules division, which was covered in section 3.1. It is of much controversy to what extent the consumer welfare standard relies on the assessment of actual effects (this issue is further commented on in section 5). For some, the consumer welfare standard appears to be synonymous with effect-based analysis, yet as was rightly pointed out in paragraph 138 of the Background Note, presumptions are an option under the consumer welfare standard.

26. When it comes to RPMs, a common point of discussion in our jurisdiction is whether RPM constitutes an infringement by object or by effect. Thus, it can be argued that it is not a problem of standards, rather evidentiary rules. Still, it can also be seen as an interaction between the consumer welfare standard (here seen as a standard that aims at measuring effects) and the standard of competition protection (intrabrand competition is seen as relevant), with the latter being less concerned with whether interbrand or intrabrand competition is restricted, and preferring a simple conclusion that all types of competition will be protected.

27. Similar to *Sucha Beskidzka*, RPMs led to exchange of views between lower instance courts (mostly, the court of appeals) and the Supreme Court, with the latter one confirming on several occasions that RPMs constitute an infringement by object, which nonetheless may use a defence under the national equivalent of Article 101 (3) TFEU, with the burden of proof being on the undertaking. Thus, for instance, in *Röben*, the Supreme Court commented at length on why RPMs are anticompetitive: first by providing historical context (RPMs seen as a restriction of freedom of distributors to set their own prices), and then by pointing out (para. 12 of the ruling) that "*even today*" RPMs need to be seen as by object restrictions because of: "*the scope of choice, consumers' economic interests, or efficiency*".[11] While all of these issues can be seen as related to the standard of assessment, ultimately what was relevant to the court were the evidentiary rules established under Polish antitrust (which in this case were similar to those under EU law), i.e. that *de minimis* rule did not apply, RPMs were not covered by any block exemption regulations, and they met the requirements of being "by object" restrictions.

28. To conclude, when it comes to the standards of assessment, there is no single clear-cut, standard that would be universally used by courts in our jurisdiction. In consequence, if for instance there is competition and public health at stake (see *Homeopathy* case) or competition and environment at stake (see *Gmina Miasta Olsztyn*), it is rather for the authority, defendant, or court to make a compelling argument. So far, such assessments rather took place to exonerate undertakings (i.e. they were used as defences) than as an additional ground to e.g.: (a) find an infringement; (b) impose a higher fine (since e.g. the value at stake justified harsher punishment).

[10] Case III SK 21/14 (*Gmina Miasta Olsztyn*).

[11] Case III SK 21/11 (*Röben*); more recently, see also: case I NSK 10/18 (*Anyro*).

3.3. Current issues in Poland

29. The question of goals and standards is still present in Poland.

30. As in other EU member states, a subject of interest is how sustainability issues should be taken into account (this is thus mostly the question of "standards"). Yet, sustainability has so far remained more of a theoretical concern, as no large-scale initiatives of this kind have been discussed or analysed (as opposed to those that grabbed attention in e.g. the Netherlands).

31. Labour cases were investigated following agreements concluded by the Polish Basketball League and the Polish speedway association in the context of the COVID pandemic, however (so far) those cases have not caused much controversy in terms of applicable standards.[12]

32. Apart from sustainability and labour, we also see a development which is less common in Europe, but which has been present in e.g. the United States. The issue is whether (and if so, how) values such as free speech and media pluralism are of relevance under antitrust.[13]

33. Arguments concerning free speech and media pluralism appeared in 2020 in our merger proceedings concerning *Orlen/Polska Press*.[14] A number of arguments against the merger based on free speech were put forward by NGOs and the Polish ombudsman. Following our clearance of the merger, the merger decision was appealed by the ombudsman based on free speech grounds. In 2022, the court confirmed that there was no obligation to analyse the case solely on free speech grounds.[15] Following this ruling, the ombudsman confirmed that we were right to clear the merger, but suggested that merger laws should be amended to better take into account such factors as media pluralism.

34. Over the last few years, we also received complaints alleging abuse of dominance consisting in "private censorship", i.e. exploitation and/or discrimination when it comes to actions taken by social media with regard to information shared on their platforms. This generally follows similar topics that attracted attention mostly in the United States.[16] A

[12] Case DOK-1.410.2.2021 (*Polska Liga Koszykówki*), case DOK.1.410.1.2021 (*Polski Związek Motorowy*).

[13] Media plurality is also covered in para. 49 and 62 of the Secretariat's Background Note. See also: Maurice Stucke and Allen Grunes, *Antitrust and the Marketplace of Ideas*, Antitrust Law Journal, Vol. 69, No. 1 (2001), pp. 249-302; Jan Polański, *The Marketplace of Ideas and EU Competition Law: Can Antitrust Be Used to Protect the Freedom of Speech?*, YSEC Yearbook of Socio-Economic Constitutions 2021, p. 199–230; Gregory Day, *Monopolizing Free Speech*, Fordham Law Review, Vol. 88, 2020, p. 1315-1364; Neil Chilson and Casey Mattox, *[The] Breakup Speech: Can Antitrust Fix the Relationship Between Platforms and Free Speech Values?* <https://knightcolumbia.org/content/the-breakup-speech-can-antitrust-fix-the-relationship-between-platforms-and-free-speech-values>; Daniel Crane, *Collaboration and Competition in Information and News During Antitrust's Formative Era* <https://knightcolumbia.org/content/collaboration-and-competition-in-information-and-news-during-antitrusts-formative-era>.

[14] Cezary Banasiński and Marcin Rojszczak, *The role of competition authorities in protecting freedom of speech: the PKN Orlen/Polska Press case*, European Competition Journal, Vol. 18, Issue 2, 2022.

[15] Case XVII Ama 43/21 (*Orlen/Polska Press*).

[16] See references provided earlier.

related concern is whether Big Tech undertakings may have incentives to coordinate their content moderation policies in an anticompetitive way.[17]

4. Attributes

35. We generally agree with the list of attributes of an ideal assessment standard which was included by the Secretariat in the Background Note.

36. Still, taking into account the Secretariat's references to media plurality (para. 49 and 62 of the Background Note) and given the developments in our jurisdiction and elsewhere (see section 3.3), we believe it could be of use to add further sub-elements to social welfare enhancing so that "democratic values" (free speech, media plurality) are more clearly indicated. However, it can also be argued that such issues are part of the problem of "*Inequality in economic and political power*" (section 3.2.3 of the Background Note).

37. An additional attribute that could be added to the list as a standalone factor is: **flexibility** (adaptability). By flexibility of a standard we mean that a standard should be valued more if it allows policy and case law adjustments: (a) over a long period of time (the standard applied in practice does not need to be completely changed following e.g. legislative amendments or shifting consensus with regard to the role of antitrust); (b) in reaction to short-term rapid economic and political changes (e.g. a pandemic, geopolitical developments). Generally, broader standards can be expected to be more flexible. Yet, this is not to say that e.g. the consumer welfare standard is not flexible (we comment further on this issue in section 5.1). Flexibility can be either seen as part of political sustainability (section 3.4 of the Background Note) or positively correlated with it.

38. We also believe that an issue that is often overlooked in the discussions over the standards of assessment is the impact of standards on the resources of enforcers. This issue has been to some extent covered by e.g. Jones and Kovacic (reference included the Background Note) and the Secretariat itself (para. 175 of the Background Note), however we would like to provide further comments in that regard.

39. We would attach more value to a standard which is simple, since easier standards allow both swifter and less costly enforcement. However, "simplicity" does not necessarily mean that a standard needs to be narrow (albeit, holding others things equal, a narrow standard would tend to be simpler). Simplicity of standards is achieved not only through their scope, but also evidentiary rules. As was mentioned earlier (section 3.1) there is some ambiguity in this regard, since the same standard can be made "more difficult" or "simpler" by using e.g. presumptions, which in turn may result in, for instance, the consumer welfare standard becoming very similar to a "light" competition protection standard. In practical terms, this makes the assessment of standards difficult: (a) to assess them by including evidentiary rules means that in fact a number of consumer welfare standards is assessed; (b) to assess them by not including evidentiary rules might result in treating a certain standard too harshly with regard to some parameters.

40. Leaving this issue aside, however, we believe that standards which use presumptions have much value, in particular when it is taken into account that antitrust laws are enforced in jurisdictions with highly varying levels of available resources; this

[17] Evelyn Douek, *The Rise of Content Cartels* <https://knightcolumbia.org/content/the-rise-of-content-cartels>; Jan Polański, *Antitrust shrugged? Boycotts, content moderation, and free speech cartels*, European Competition Journal (forthcoming, available online).

even includes the European Union, with its Article 101-102 TFEU being often enforced by national competition authorities, not the European Commission.

41. Furthermore, the varying levels of available resources are not only linked with financial aspects: the pool of qualified lawyers and economists available in non-English jurisdictions is generally lower and the barriers of switching to non-English jurisdictions are often prohibitive or highly prohibitive (especially, if a given jurisdiction excludes non-nationals from serving at public authorities, like antitrust agencies and courts).

42. An advantage of standards that envisage a range of presumptions is also that they: (a) lower the cost of compliance; (b) allow swifter resolution of cases. Furthermore, standards that allow quick resolution of cases can be expected to receive more popular support (antitrust authorities that "do not deliver" might be unable to gather support, and it is the support for antitrust authorities which largely affects the support for the widely understood competition protection system).

43. While this issue goes beyond public enforcement, and possibly also beyond the topic of standards themselves, we would also like to point out that if a wider standard is adopted, then it should be kept in mind that standards of assessments are also relevant from the point of view of private enforcement, over which antitrust authorities have less control.[18] However, it is possible to adopt different evidentiary rules for antitrust authorities and private plaintiffs. For instance, the Polish Competition Act speaks generally of protecting competition "in the public interest". We prove this requirement when we issue decisions, however the fact that there is a public interest if we initiate an investigation is typically self-explanatory. As of today, this criterion is mostly a remnant of past institutional and procedural design that was in place before 2007, when undertakings could initiate a formal investigation (in a somewhat similar manner as complainants can in the EU system).[19] However, they needed to prove the "public interest". This created a safeguard against over-enforcement. In case of broader standards of assessment (e.g. such as citizen welfare standard), one could think of similar failsafe mechanisms.

44. As regards such attributes as political sustainability (credibility), and in particular democratic accountability, broader standards may indeed require more analysis from the point of view of democratic values. Yet, it should be noted that this is mostly a question of institutional design. Democratic accountability and democratic mandate does not only follow from the mere fact of being an elected body – to some extent it can also follow from ensuring that procedures envisage an adequate margin for democratic deliberation. For instance, in some types of cases public consultations can be held or wider participation of civil society can be allowed. This is not to say that antitrust authorities should be bound by any of such opinions or that there should be more room for external lobbing, it is rather to

[18] This issue is touched upon by e.g. Nicolas Petit, *A Theory of Antitrust Limits*, George Mason Law Review, Vol. 28, No. 1939, 2021, p. 1459 ("*In Europe the law is still enforced very centrally, in spite of growing private enforcement. When antitrust uses legal processes that are centralized, expert, and discretionary, the law can be more probabilistic*") . See also Robert Bork, *The Antitrust Paradox: A Policy at War with Itself*, Bork Publishing (2021), p. 458, giving credit to the European system and its centralisation.

[19] However, see comments in section 3.2 which show that the requirement of "public interest" can also be seen as referring more broadly to various categories of "public interests" that may affect the outcome of cases.

signal that a vote at ballot box is not the only source of legitimacy.[20] This could be seen as an exercise similar to "market testing", yet in a broader, social context.

5. Should standards be ranked?

5.1. Standards in practice

45. With the courts in our jurisdiction not being fully committed to any standard, we tend to look at the issue of assessment standards in a somewhat different way than picking an option from among a set of "pure" standards.

46. First, as it was discussed in section 3.1, the interaction between goals, standards, and evidentiary rules may result in difficulties in distinguishing between practical implementations of different standards (e.g. consumer welfare standard which envisages a broad set of presumptions vs competition protection standard). In practice, decisions tend to be more dynamic, with less emphasis on whether something falls within the definition of "consumer welfare standard", "competition protection standard", or even "citizen welfare standard". In a way, this issue is connected to a different topic discussed by e.g. Nicolas Petit: the prevailing standard is often the result of decisions adopted in a more unconscious and highly context-specific way.[21] This is not to say that goals or policy choices are made in an unconscious way (e.g. whether to focus more on employment or sustainability cases, prioritise them etc.) – these choices and general policy directions are more intentional, yet the standard of assessment itself appears to often be more of an evolutionary development.

47. Second, the flexibility of the consumer welfare standard blurs the most relevant questions of modern antitrust. This flexibility was grasped by e.g. Assistant Attorney General Jonathan Kanter who observed that: "*To its defenders, the "consumer welfare standard" is a remarkably flexible term. (…) If you ask five antitrust experts what the consumer welfare standard means, you will often get six different answers*" (reference provided in the Background Note).

48. Earlier in this contribution, we noted that free speech and media pluralism have been recently receiving more attention in our jurisdiction. One could say that both of these values are as such of no interest to antitrust. Still, in e.g. AAG Delrahim's speech, which

[20] In fact, it could be argued that if such broader access to antitrust authorities would be allowed, independence should be strongly protected to prevent capture. An interesting account of these problems comes from more recent research on ordoliberalism, with some authors showing how independence was seen as a relevant feature of antitrust authorities, and at the same time pointing out that simple rules might prevent capture, see: Matthew Cole and Sören Hartmann, *Ordoliberalism: What We Know and What We Think We Know*, The Modern Law Review (forthcoming, available online). For brief observations on legitimacy in antitrust enforcement, see: Anna Gerbrandy and Jan Polański, *Addressing the Legitimacy Problem of Competition Authorities Taking into Account Non-competition Values*, 10 December 2013 <https://ssrn.com/abstract=2398956>.

[21] Nicolas Petit, *A Theory of Antitrust Limits*, George Mason Law Review, Vol. 28, No. 1939, 2021, arguing inter alia that: "*(...) the question of setting better limits is ultimately empirical and context dependent. The point is that besides ideology, practicality matters. The limits of antitrust stem from practical choices made more or less consciously by institutions tasked with applying statutes designed to curb monopoly power. An understanding of the practical limits of antitrust is necessary to avoid the creation of false expectations about what law reform can achieve, which in turn fuel distrust in majoritarian institutions*".

had been delivered just a few years earlier than AAG Kanter's speech, an argument had been made that free speech (insofar it constitutes a quality improvement) can be seen as part of consumer welfare (and thus seemingly an element to assess under the consumer welfare standard).[22] Would it then mean that free speech is part of a broader conception of antitrust or the classic consumer welfare standard? Others, like Pitofsky, argued over two decades ago that e.g. media plurality might justify a more cautious approach towards mergers (which for the purpose of this discussion can be treated as not changing the standard of assessment, but merely adjusting evidentiary rules).[23]

49. Being focused on "welfare", the consumer welfare standard may in practice give additional incentives to measure it. Hence, e.g. AAG Kanter argued in the speech referred to by the Secretariat that: "The second problem with the consumer welfare standard is the idea that, as a practical matter, antitrust cases should be reduced to econometric quantification of the price or output effects of the specific conduct at issue. I call this the "central planning standard." The idea of the "central planning standard" is that antitrust enforcers or defendants must model and compute the welfare impacts of a specific merger, or of particular conduct under the rule of reason".

50. Yet, for instance Robert Bork in his seminal The Antitrust Paradox argued that: "Antitrust must avoid any standards that require direct measurements and quantification of either restriction of output or efficiency. Such tasks are impossible". [24] And further that: "Economists, like other people, will measure what is susceptible of measurement and will tend to forget what is not, though what is forgotten may be far more important than what is measured".[25]

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[22] Makan Delrahim, "*...And Justice for All": Antitrust Enforcement and Digital Gatekeepers"* <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-antitrust-new-frontiers> ("*In addition, diminished quality is also a type of harm to competition. As an example, privacy can be an important dimension of quality. By protecting competition, we can have an impact on privacy and data protection. Moreover, two companies can compete to expand privacy protections for products or services, or for greater openness and free speech on platforms. Where competition pushes companies to develop quality elements that better satisfy consumer preferences, our enforcement can protect that sort of competition too*").

[23] "*Antitrust is more than economics, and I do believe if you have issues in the newspaper business, in book publishing, news generally, entertainment, I think you want to* ***be more careful*** *and thorough in your investigation than if the very same problems arose in cosmetics, or lumber, or coal mining*", quoted in: Alec Klein, *A Hard Look at Media Mergers*, The Washington Post <https://www.washingtonpost.com/archive/business/2000/11/29/a-hard-look-at-media-mergers/d8380c2d-92ee-4b1b-8ffd-f43893ab0055>. See also research published in a similar period: Maurice Stucke and Allen Grunes, *Antitrust and the Marketplace of Ideas*, Antitrust Law Journal, Vol. 69, No. 1 (2001), pp. 249-302.

[24] Robert Bork, *The Antitrust Paradox: A Policy at War with Itself,* Bork Publishing (2021), p. 118.

[25] Cf. Cristina Caffarra, "*"Consumer Welfare Is Dead": What Do We Do Instead? – A Perspective from Europe*" <https://www.promarket.org/2023/04/27/consumer-welfare-is-dead-what-do-we-do-instead-a-perspective-from-europe/>, who arguing that consumer welfare is "dead", points out that: "*Defenders of the status quo appear to argue that CW is a good objective because we can be sure that practices that expand output and reduce prices are generally good and, importantly, measurable. However, this claim overstates our ability to measure anything (can we really measure with any serious reliability in an actual case what the output-expanding or price-reducing effects of a practice are? (...) The reasoning is circular: "we care about these indicators because we can measure them."*". For Bork's quote, see: Robert Bork, *The Antitrust Paradox: A Policy at War with Itself,* Bork Publishing (2021), p. 129.

51. In practical terms, there is likely a plethora of consumer welfare standards and its proponents, including e.g. "broad-market long-term presumptions-oriented and dynamic-focused consumer-welferists" and "narrow-market short-term effects-oriented static-focused consumer-welfarists". This makes it difficult to pinpoint the advantages and disadvantages of the consumer welfare standard, even despite the fact that it is seemingly the most widely used and most broadly researched of all standards.

52. A possible disadvantage of all consumer welfare standards might be that they tend to open the door for direct measurement arguments, which – if brought too far and misconstrued – may deprive antitrust enforcement of its effectiveness. Still, it should be borne in mind that this risk flows not just from the standard itself but also from the focus on consumer welfare as the goal, or maybe even more broadly from narratives surrounding antitrust – it seems that e.g. ordoliberal interpretation of antitrust goals might be more resistant to the drive towards what Robert Bork called "*economic extravaganza*", since with less measurable goals, it requires a more probabilistic, and sometimes more form-oriented, approach. Taking into account that this issue is more connected with antitrust goals, we do not elaborate on this topic further in this contribution.

53. In any case, however, we believe that the assessment of standards (whose identification, as we pointed out in section 3.1, is as such not without utility) should be very cautious and made in full awareness of limitations which come from categorising them. Each of the standards can be easily attacked or discarded based on their general outlines.

5.2. Alternatives

54. There is indeed a trend to frame discussions about current antitrust challenges as "for or against the consumer welfare standard". This is perhaps understandable in the context of many of these discussions originating from the United States, where consumer welfare and the consumer welfare standard had a transformative role in relation to enforcement. In consequence, given that there are attempts to re-interpret the role of antitrust in the United States, doing so by focusing on the consumer welfare standard can be seen as a logical development.[26]

55. Yet, as pointed out in the Background Note (see e.g. examples in Box 1) and in this contribution itself, various jurisdictions adopt different standards (or no formal standards). From the European point of view, the consumer welfare standard inspired large changes in the enforcement of competition rules, yet they rather amounted to a "more economic approach". In consequence, some argue that from the European point of view, the discussion is rather about moving closer to an ideal of the "more economic approach" or "more political" one.[27] In any case, the debate about the standards is much different than in the 1970s, when antitrust was mostly discussed in the United States.

56. Still, all these jurisdictions typically deal with similar practical challenges and political/economic trends (e.g. sustainability, economic resilience, too much/too little enforcement). Part of the background in which most enforcers operate also appears to be a

[26] Although even in the United States some, like e.g. Eleanor Fox, argue that focusing on the consumer welfare standard by those who aim at changing the course of US antitrust is in fact focusing on a wrong question, see: in Eleanor Fox, *"Consumer Welfare" and the Real Battle for the Soul of Antitrust* <https://www.promarket.org/2023/04/19/consumer-welfare-and-the-real-battle-for-the-soul-of-antitrust/>.

[27] Jan Polański, *A Positive Program for Antitrust? Enforcement in Times of Political Tides*, World Competition 45, no 2. (2022).

changing attitude towards market competition and free trade generally; the prospects of free international trade are also influenced by geopolitical developments.[28]

57. Generally, however, the two major questions appear to be: (a) to what extent antitrust should use presumptions and form-based approach vs quantification and effect-based approach; (b) to what extent antitrust should be responsive to non-market interests.

58. In both areas, a major problem is developing workable ways of making assessments.[29] Yet, these workable ways of making assessments ("the standard") often develop organically (see para. 46 above) which requires an interaction between the antitrust agency, courts, and defendants. A disadvantage of the so far prevailing (in most jurisdiction) standard might be that it makes it too dissuasive to attempt enforcement. This might further lead to a lack of empirical learning from cases.[30] This is even more problematic when academic research is not in a position to replace formal investigations, e.g. due to scale or limited access to data.

59. In this context, we find it interesting to look for ways to "test standards" (this includes the consumer welfare standard) and their limits and limitations. Some agencies, for instance, appear to be attempting this kind of exercise through "regulatory sandboxes".[31] Other seem to be willing to follow cases and issue prohibition decisions without imposing fines, even despite the fact that large fines and other far-going measures, such as break-ups, often constitute the hallmarks of antitrust enforcement.[32]

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[28] When it comes to this first trend (i.e. changing attitude towards markets), it seems it was actually predicted by members of the Chicago School shortly after its success, see e.g.: Milton Friedman and Rose Friedman, *The Tide in the Affairs of Men* <https://fee.org/articles/the-tide-in-the-affairs-of-men>. Cf. Eleanor Fox, *"Consumer Welfare" and the Real Battle for the Soul of Antitrust* <https://www.promarket.org/2023/04/19/consumer-welfare-and-the-real-battle-for-the-soul-of-antitrust/>, and her points concerning changes with regard to the perception of markets. When it comes to the second trend (i.e. international free trade), see current developments regarding microchips and semiconductors, 5G technology, energy markets, and subsidies; this issue is also partly linked with economic resilience covered by the Secretariat in section 4.3.5 of the Background Note.

[29] Workability became one of major advantages of Chicago-inspired antitrust, with e.g. Judge Easterbrook arguing that it is one of its most relevant accomplishments, see: Frank Easterbrook, *Workable Antitrust Policy*, Michigan Law Review, 1984, Vol. 84 Issue 8. Under Easterbrook's interpretation preference towards no false positive errors (see section 4.6.2 of the Background Note) became an important factor ("*The costs of erroneous prohibitions (and the losses as people trim the vigor of their competition to avoid such prohibitions) are apt to be greater than the losses involved in waiting for better data and analysis before acting*").

[30] On this issue, see e.g. Nicolas Petit, *A Theory of Antitrust Limits*, George Mason Law Review, Vol. 28, No. 1939, 2021, p. 1460.

[31] This includes the Greek antitrust agency, with a regulatory sandbox for sustainability agreements, see: OECD, *Environmental Considerations in Competition Enforcement – Note by Greece* (DAF/COMP/WD(2021)48). Based on this development, arguments were made that such an approach might also be an option with regard to agreements between Big Techs to fight fake news and misinformation online, see: Jan Polański, *Antitrust shrugged? Boycotts, content moderation, and free speech cartels*, European Competition Journal, p. 22 (forthcoming, available online). See also a similar point being made in a broader context by Nicolas Petit and Thibault Schrepel, *Complexity-minded antitrust*, Journal of Evolutionary Economics (2023), p. 26.

[32] For instance, the German Facebook case did not lead to a fine imposition, for a discussion of the case see e.g. Wolfgang Kerber, *The German Facebook case: the law and economics of the relationship between competition and data protection law*, European Journal of Law and Economics, 2022, vol. 54, p. 217–250. In this context, some authors argue that during periods in which antitrust

60. Taking into account this background and going back to the description of the applicable standard in our jurisdiction as "*controlled chaos*", there is an unexpected advantage to it, i.e. room for experimentation. While it is now well-recognised that undertakings make market decision in highly uncertain circumstances, antitrust decision-making also depends on imperfect information.[33] Yet, ultimately, and as pointed out by the Secretariat in the Background Note (para. 123), antitrust enforcement in democratic societies also relies on popular support.[34] With the assessment and perception of risk being hard to measure, and with more social polarisation over these issues, the greatest test for antitrust standards might be their adaptability.

6. Conclusion

61. The exercise of characterising different antitrust assessment standards is useful, as it allows seeing more clearly what kinds of factors can be analysed under antitrust. It may also facilitate: (a) analysing how cases would be assessed under various (idealised and simplified) standards, which in turn may contribute to testing the limits of each standard; (b) understanding that standards of assessments are not the same as goals, and that the same goal can in fact be served by various standards (and conversely, various goals can be served by the same standard).

62. At the same time, however, the way a standard is chosen in practice is more complex. A standard is developed through an assessment of large number of cases in context-specific circumstances. In fact, some jurisdictions operate without a clearly defined standard and do not attach any formal name to it.

63. While discussions over antitrust standards often focus on whether a standard should allow analysing non-efficiency interests and serve broader social concerns, it is also hard to deny that antitrust itself relies on social support. Antitrust enforcement not serving those broader social concerns might create an "antitrust vacuum" which may increasingly be

enforcement adapts to new political and economic conditions, antitrust agencies could proceed cases without imposing fines, until more consensus is reached, see: Jan Polański, *A Positive Program for Antitrust? Enforcement in Times of Political Tides*, World Competition 45, no 2. (2022), p. 259-260.

[33] On the issue of uncertainty and risk in the context of enforcement, see e.g. Nicolas Petit, *A Theory of Antitrust Limits*, George Mason Law Review, Vol. 28, No. 1939, 2021, p. 1460; Jan Polański, *A Positive Program for Antitrust? Enforcement in Times of Political Tides*, World Competition 45, no 2. (2022), p. 261.

[34] Against this backdrop, we also welcome the contribution made by **Sweden** in relation to this roundtable, insofar it introduces the issue of communication and enforcement. Support-building and competition advocacy are important areas of antitrust agencies' work. It is crucial to effectively communicate to the public the benefits that come from competition. Still, in our experience it is also often easier to explain the relevance of antitrust enforcement in terms of e.g. fairness – on the deontological and utilitarian concepts of antitrust, see also Oles Andriychuk, *Does Competition Matter? An Attempt of Analytical 'Unbundling' of Competition from Consumer Welfare*, Yearbook of Antitrust and Regulatory Studies, Vol. 2009, 2(2). As noted in the contribution of **Lithuania** to this roundtable, references to "fairness" and competition on the merits are present in European antitrust enforcement. And while criticised by some (see e.g. Thibault Schrepel, *Antitrust Without Romance*, NYU Journal of Law & Liberty, 326, 2020), it should be remembered that the area of public communication and applicable legal standard are distinct ones (although, admittedly, vast differences between them may in some cases lead to public dissatisfaction e.g. when the public internalises "fairness" as an inherently "anti-market" attitude rather than simply a "pro-market" attitude that recognises that there are instances when markets deliver what is expected, but there are also instances in which markets suffer from anti-competitive conduct).

filled with more straightforward and harder forms of regulation. While this may preserve the "purity" of antitrust as a discipline, those other forms of regulation might be less receptive towards the complexity of market processes and might not include the rigour of assessment that developed within antitrust enforcement over decades. Taking into account this background, a discussion over the antitrust standards of assessment within the OECD is well-timed.

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