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Advantages and Disadvantages of Competition Welfare Standards – Summaries of Contributions

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This document reproduces summaries of contributions 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

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Summaries of Contributions

This document contains summaries of the various written contributions received for the discussion on Advantages and Disadvantages of Competition Welfare Standards (140th OECD Competition Committee meeting on 14-16 June 2023). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an *.

Argentina

This contribution explores the concept of General Economic Interest (IEG, for its acronym in Spanish) in Argentine competition law and its scope concerning competition policy objectives. The IEG has been interpreted as a total welfare standard or, more narrowly, as a consumer welfare standard, and more recently, as a standard that includes attributes beyond market efficiency—such as labour markets, foreign trade, income distribution, among others.

The CNDC has initiated a process of revising the concept of IEG to incorporate new dimensions, such as productivity, technical level, geographical distribution of production and population, international trade, and employment levels, to improve its implementation as a complete standard, in harmony with other policies focused on improving the welfare of society.

The contribution also discusses the advantages and disadvantages of using IEG as a welfare standard for competition policy in Argentina. One of the benefits of using IEG is that it allows for a flexible standard that can adapt to objectives that are less direct in their univocal affection to the consumer and more focused on improving the general welfare of society. However, one of the potential disadvantages of using IEG is that its interpretation is not always clear and can be subject to debate, making it difficult to apply consistently.

Overall, the document provides a comprehensive overview of the concept of IEG and its evolution in Argentine competition law. It also highlights the ongoing efforts of the CNDC to refine the concept and incorporate new dimensions to improve the implementation of a criterion that comprises the IEG as a complete standard.

BEUC

This contribution considers that the consumer welfare standard as interpreted in EU competition law and as set out in this contribution has served consumers well to date. While this standard may not suit all jurisdictions, there seems little need or justification to broaden this standard in the EU.

Although 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. In essence, EU competition law is also about protecting the competitive process in a way that can benefit consumers in terms of prices, choice quality and innovation. Just as no law can be pursued in isolation and without also reference to the legal, economic, political and social context, EU competition law 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.

The European consumer welfare standard is flexible enough to address different market failures and priorities and is well equipped to cater also for non-price issues. Its scope is therefore capable of adjusting and remaining relevant and effective for the economic realities it faces.

On the other hand, 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 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.

Finally, we note that the scope of the EU consumer welfare standard has been tested in relation to the challenges raised by digitalisation and sustainability-led industry initiatives. In the digital environment, where the monetary price is often set at zero, quality forms an important dimension of competition (e.g., quality of services or product characteristics). That the scope of EU competition law covers also non-pricing issues has been confirmed by the EU General Court. Similarly, sustainability benefits such as cleaner technologies or less pollution can also be encompassed by the EU consumer welfare standard.

BIAC

Business at OECD (BIAC) appreciates the opportunity to comment on the advantages and disadvantages of the consumer welfare standard compared to alternative welfare standards. Antitrust welfare standards are the criteria used by courts and regulators to assess the effects of business conduct and mergers on social welfare, all of which reflect different normative goals and assumptions.

Though terminologies and points of emphasis may vary, commentators generally consider normative goals and welfare standards as falling within one or more of the following overarching standards: (i) total welfare; (ii) public interest; (iii) producer welfare; (iv) consumer welfare; and/or (v) competitive process. These welfare standards have different goals and attributes that are important to consider. In terms of goals, some standards focus on maximizing welfare whereas others focus on preventing discrete harms or preserving competitive structures. These goals then manifest themselves with different attributes, with some standards being more predictable or easier to apply, depending on the mix of normative goals.

Generally speaking, the consensus among courts, regulators, and scholars has been that the consumer welfare standard best defines the normative goals that antitrust laws are intended to address, including ensuring low consumer prices and high levels of producer output by fostering competition.¹ At the same time, the consumer welfare standard also functions as a flexible and pragmatic tool for antitrust analysis. Over time, the consumer welfare standard has demonstrated its ability to adapt to changing markets and economies and to incorporate new economic concepts without sacrificing its core values while being generally preferred for its simplicity, objectivity, and predictability. By contrast, subjective notions generally form the basis for the other proposed welfare standards. Consequentially, there is an increased risk of political influence, subjective enforcement and trade-offs between various constituencies. With numerous subjective variables, these alternative standards essentially require a rule of reason approach in nearly all cases with a constant balancing of multiple variables. This inevitably results in increased difficulties in administration and presents greater risks for regulators of an appeal of their decisions. For these reasons, BIAC views the consumer welfare standard as the antitrust welfare standard that best embodies the purpose, and ensures the effective application, of the antitrust laws.

This submission adds to BIAC's previous contributions on similar topics, including sustainability and competition² and purchasing power and buyers' cartels.³

¹ See Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* 1 (2005).

² OECD, *Sustainability and Competition – Note by BIAC*, DAF/COMP/WD(2020)71 (Nov. 13, 2020), [https://one.oecd.org/document/DAF/COMP/WD\(2020\)71/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)71/en/pdf).

³ OECD, *Purchasing Power and Buyer's Cartels – Note by BIAC*, DAF/COMP/WD(2022)20 (June 14, 2022), [https://one.oecd.org/document/DAF/COMP/WD\(2022\)20/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2022)20/en/pdf) [hereinafter BIAC Purchasing Power Note].

Brazil

Competition law has as its objectives free competition protection and the maximization of consumer welfare. Bork and other authors argue consumer welfare is equivalent to the sum of consumer surplus and producer surplus, which is maximized on the assumption of perfect competition. Today, according to Hovenkamp, antitrust guidelines reflect a concept of consumer welfare that is closer to reflect consumer surplus alone. Neo-Brandeisians, however, advocate for broadening the goals of antitrust to encompass concerns such as consumer privacy, environmental protection, and the stabilization of democracy.

The guidelines of CADE generally evaluate impacts on consumer welfare through a sequence of steps, such as defining the relevant market (from various perspectives) through quantitative and qualitative tests, rivalry analysis, entry barriers, consumer preferences, and others. The authority also proudly employs its innovative digital questionnaire platform, where companies and individuals can submit data requested by CADE when conducting market tests. Initiatives like this allow for faster processes and deeper market analyses.

According to its case law, the enforcer inquired into issues typically associated with alternative views of welfare at least four times. In the Microsoft-Activision Blizzard case, CADE looked into the popularity of a specific game to determine its importance to consumers. In the WhatsApp and Serasa-Claro cases, the issue at stake was consumer data privacy. In both, CADE limited itself to analyzing the classic aspects of merger review and left it to the data protection authority to enforce privacy laws. Finally, the Ser-Fael merger illustrates a debate on the quality of a service with positive externalities, namely education. It was possible that concentration in the higher education market would lead to a decline in service quality, incurring losses for all consumers.

In sum, although CADE has touched on issues associated with alternative welfare views in previous decisions, it did not carry out any in-depth analysis. Thus, the Brazilian legal system has sought to demarcate the competencies of different regulatory agencies, which has contributed to the implementation of a competition policy centered on the economic and competitive aspects of consumer welfare.

Ecuador

The Ecuadorian competition regime is a mix of standards, the Organic Law of Regulation and Control of Market Power prescribes at least eight different set of them. This regime got it all, from fairness through competitive process and the consumer welfare. Therefore, is complex for the Agency to deal with such a spectrum, whom sometimes collide with one another.

This contribution will make an approximation of the main different standards, their description, the alternatives that exists and which one is the most applied, concluding that, even though, the competition process standard is the most important in our jurisdiction we are ready for the application of the consumer welfare standard, as it is understood in Ecuador.

Greece

We start with a word of caution. It is important to acknowledge that the debate over the ‘competition policy standards’ is closely related, and thus, it is hard to disentangle it from the following two interrelated issues. First from that of the goal(s) of competition law, to the extent that setting the goal(s) of competition law, that is a default end-state position that the legal system should or is effectively pursuing preconditions the specific interpretive tool (standard) that will be selected by the adjudicator in order to attain this pre-determined desirable end-state. Second, from that of institutional choice, that is, the selection of the social decision-making process that would dispose the residual right of decision-making in a specific context. However, both these issues are not only interrelated but also form a precondition to the choice of the adequate ‘competition policy standard’ for the specific system of competition law enforcement . Furthermore, one may argue that constructing the analysis of ‘competition policy standards’ on external (to the specific legal system) and sometimes ambiguous (from a legal perspective) sources of authority, without proper discussion of the genesis of these concepts and evolution and an informed translation of their meaning in the legal context they are incorporated to, might lead to misinterpretation and to “lost in translation” phenomena .

One needs also to be aware that the participants in the current debate do not all talk about ‘standards’, i.e., they do not all suggest or support a particular ‘standard’, instead some of them place more emphasis on the reform of the ‘objectives’ of competition policy (which constitutes a more fundamental issue and (should) precede the discussion of ‘standards’), while others place more emphasis on the modification of the ‘standards of proof’/enforcement criteria.

The rest of this contribution is structured as follows. In section 2, we briefly present the dominant (so far) ‘consumer welfare standard’ and the main alternative ‘competition policy standards’ that have been proposed in the ongoing debate. In section 3, we review the use of competition policy standards in Greece. Finally, in section 4, we briefly conclude.

Lithuania

1. In the hierarchy of Lithuanian legal acts, the standard of the competition policy is laid out at the constitutional level. However, this standard is freedom of fair competition rather than consumer welfare. This Note overviews the legal framework of the constitutional principle of fair competition developed by the Lithuanian Constitutional Court. This Note also discusses the case law of administrative courts, which refers to the principle of freedom of fair competition while reviewing the decisions of the Lithuanian competition authority. The Note also highlights the change of direction at the EU level when it comes to the standard of competition policy. While the principle of fair competition was at the heart of competition policy in Lithuania ever since the declaration of independence, it seems that in recent years, fair competition as a principle of competition policy also grown in importance in the EU.

New Zealand

Under New Zealand's Commerce Act 1986, two main welfare standards are applicable to our competition law regime: consumer welfare and total welfare. The consumer welfare standard focusses on assessing changes in consumer welfare within the relevant market, through price and non-price factors such as quality, range, service, or innovation. A total welfare standard is adopted when the New Zealand Commerce Commission (NZCC) assesses ex ante public benefits and detriments in the authorisation context, but under this approach distributional factors are not considered.

In the authorisation context, the NZCC is also able to take a 'modified' total welfare approach, to assess and adjust the weight given to benefits and detriments to reflect their distribution within the wider community, beyond consumers and producers. Therefore, there is flexibility through the authorisation process to go beyond the consumer welfare standard and consider broader wider economic and social impacts of conduct, through a total and modified total welfare approach. New Zealand's 'mixed' regime is relatively uncommon.

This mixed regime provides the NZCC with flexibility to balance public benefits (such as sustainability, media plurality and fiscal matters) against competition to identify whether conduct restricting competition should be authorised.

New Zealand's authorisation regime recognises the fact that in some situations anticompetitive conduct or mergers may have sufficient public benefit to outweigh the competitive harm arising from the conduct or merger. Changes that lessen competition might nevertheless promote wider economic welfare, even if competition is lessened. Firms can apply for authorisation of a merger (section 67) or an arrangement (section 58) to allow firms to act in a way that would otherwise breach the Act.

The mixed regime reflects dynamism in New Zealand's competition regime, which is becoming increasingly important as consumers demand, and market participants look to achieve, broader welfare-based, long-term goals and social benefits. Our regime can respond to anticompetitive conduct in a principled and consistent manner, whilst having the flexibility to authorise conduct that may be anticompetitive but nonetheless produces a net public benefit for the people of New Zealand.

Peru

This contribution is aimed at providing a general overview on alternative standards that differ from the consumer welfare approach and point out to some potential advantages and disadvantages that the Directorate for Investigation and Promotion of Free Competition of Indecopi considers their application may introduce. Additionally, a review on the law and decisions taken by the Free Competition Commission and the Court Specialized in Competition of Indecopi is made to identify which standard had been used by Indecopi and which one is currently recognized by Peruvian Law. It is explained how the application of different standards has evolved over the years.

First, a summary of the purpose and key attributes is presented. Then, a description is made of the standards that have been proposed as candidates to replace the consumer-welfare standard. In this manner, the main characteristics of the total welfare standard, the total welfare modified standard, the citizen welfare standard and the protecting competition standard are analyzed. These standards, as seen, share similarities but also have considerable differences between them, which have been subject to discussion for decades. Some have not even been applied in practice yet, and still are just theoretical exercises. Some potential consequences of using these standards are pointed out.

In the last section, a closer look on how this topic has been present in Peruvian Competition Law and Enforcement is analyzed. The contribution evaluates the aim of the both the Old Competition Act (1991) and the New Competition act (2008). Also, the contribution analyzes several historical decisions by the administrative bodies of Indecopi and how, over several decades, different approaches towards the goals of competition policy have been considered by the authority. In the end, it is pointed out that in Peru, and at least for the last two decades, Indecopi has equate the purpose of Competition Policy with the consumer welfare standard.

Poland

There is much controversy surrounding the consumer welfare standard. Recently, some have even argued that consumer welfare (and seemingly along it also the consumer welfare standard) is “dead”. Others seem to believe that the rumours of the death of the consumer welfare standard are greatly exaggerated.

We welcome the proposal of highlighting more clearly a division into: goals, standards, and burden of proof issues. While the standard of assessment will often flow from the goals of antitrust picked in a given jurisdiction, it is possible to: (a) have a jurisdiction that aims at consumer welfare, but uses a different standard of assessment than the consumer welfare standard; (b) have a jurisdiction that aims at a goal (or goals) different than consumer welfare, but uses the consumer welfare standard as e.g. the best and most workable of all proxies that are available. At the same time, however, it should be noted that in practical terms, standards which are actually implemented in jurisdictions might be difficult to frame into categories, e.g. the consumer welfare standard appears to be so flexible that depending on e.g. the rules of evidence adopted in a given jurisdiction, it may lead to highly different results, even despite the fact that (nominally) the same standard is used.

Poland likely belongs to a group of jurisdictions with a more ambiguous standard of assessment than e.g. the United States. Over the last thirty years, courts have applied various standards of assessment, which typically give much weight to consumer welfare, but leave room for considerations that would generally be considered as not belonging to the consumer welfare standard.

Against this background, we believe that while the exercise of defining various standards of assessment is of use, much caution should be exercised when it comes to “ranking” standards based on their general outlines. We believe that flexibility would be an important feature of an ideal antitrust standard of assessment.

South Africa

The consumer welfare standard retains an important role in competition law more broadly, by focusing the assessment on competitive outcomes primarily. However, as the South African experience demonstrates, the consumer welfare standard is ill-equipped to cater for three specific situations, namely the protection of: (i) Public interest considerations in merger assessment; (ii) Dynamic competition effects; and (iii) Constitutional rights.

Public interest considerations in merger assessment

The first important innovation is in the construction of the Act which seeks to separate the assessment of a merger based on public interest from the assessment on competition grounds. In other words, a merger is assessed first on competition grounds and second on public interest grounds, with each assessment separate from each other. This has the benefit of avoiding the potential difficulty of weighing up the competitive effects against public interest parameters, such as determining whether to approve a merger by contrasting the price effects against employment effects. This means that the consumer welfare standard continues to be utilised for assessment of the competition effect.

Dynamic competition effects

The South African experience in abuse of dominance cases is that the consumer welfare standard has not necessarily served competition, as well as the public interest, particularly well. Under the consumer welfare standard adopted in abuse of dominance legislation from other jurisdictions, it has been difficult to establish anti-competitive effects where the complainants are SMEs. The problem is that the consumer welfare standard is not capable of determining accurately the effects given the difficulties courts have with determining longer term dynamic effects (where harm to SMEs and the greater economy is best captured) with any certainty.

One solution may be to adjust the legal standard to a more presumptive one, as advanced in the context of dynamic digital markets. Another solution is to adjust the liability standard away from the consumer welfare standard to one which considers the impact on the particular group of firms, namely SMEs and historically disadvantaged enterprises, much like in the merger control example. The recent amendments to the competition act have sought to adopt both solutions in respect of specific conduct that is most typically abusive to SMEs, namely the price discrimination and the abuse of buyer power.

Constitutional developments

The Constitutional Court (ConCourt) is the final court of appeal in South Africa, given the country is a constitutional democracy. In adjudicating a recently prohibited hospital merger, the ConCourt sought to set out clearly the constitutional standard to be applied in competition law. The ConCourt emphasised the need for a constitutional interpretation of competition law. In such instances, the infringement of those constitutional rights is itself substantial even if it implicates only a few consumers or businesses, rather than a broader consumer welfare standard. In the South African context, this applies equally to exclusion from the economy of SMEs and HDPs. If that exclusion is a consequence of conduct or a merger, then the right to equity is infringed and that is itself must be considered alongside any consumer welfare standard.

The legislation and jurisprudence in South Africa demonstrates how welfare standards can be developed for these three specific situations to still provide ease of assessment by the courts, but also the predictability and legal certainty to business.

Sweden

This contribution discusses challenges for competition agencies' communication and enforcement efforts in light of (i) recent international developments and (ii) recent discussions on intervention criteria and the proper scope of agencies' mandates. Special attention is paid to the role of the consumer welfare standard in Swedish competition law and enforcement, and we explore how the aforementioned challenges could be addressed within the currently prevailing institutional paradigm. One conclusion is that enforcement can be based on comprehensive assessments of competitive conditions along the entire value chain rather than narrowly defined short-run consumer welfare.