

# CONSUMER WELFARE STANDARD ADVANTAGES AND DISADVANTAGES COMPARED TO ALTERNATIVE STANDARDS

OECD Competition Policy Roundtable Background Note



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# Foreword

Standards in competition policy, such as the consumer welfare standard or the protecting competition standard, are the subject of considerable debate. This paper considers the relative advantages and disadvantages of alternative standards by first identifying their desirable attributes and then assessing several candidate standards against them.

This assessment is complex, often leading to significant uncertainty on how each standard ranks in relation to an attribute. Nonetheless, it provides a basis upon which to consider their relative merits. There is unlikely to be a “one-size fits all” solution across jurisdictions, which may choose to weigh attributes differently.

The paper also notes that while standards can affect outcomes in competition enforcement, many other factors can also have significant impacts, such as the standard of proof employed.

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# 1 Introduction

Debate around the appropriate standard, or welfare standard, in competition policy is multi-faceted.<sup>1</sup> On the one hand, until recently, many commentators would have likely agreed that there was a predominant standard applied in most jurisdictions, namely the consumer welfare standard.<sup>2</sup> On the other, there is much controversy regarding what standard should be applied, and this debate continues to this day. This can be illustrated, for example, with a cursory glance over the bibliography for this paper, which even though it can only hope to scratch the debate's surface, demonstrates its breadth.<sup>3</sup>

The standard for competition policy sets out how the relevant authority, be it an administrative body or the court, discerns positive outcomes from negative ones and hence determines preferences over different expected states of the world. It provides the underlying principle to how competition law is interpreted. Such a scheme provides the basis to permit or prohibit certain kinds of conduct, whether it be an agreement, conduct of a large firm, or a proposed transaction. Standards can affect the outcome of enforcement, but may also provide guiding principles for advocacy work as well as how authorities prioritise their activities. To loosely borrow an analogy from economics, the standard produces a function for an authority to maximise. Different value functions may produce different outcomes.

Given this potential to determine the outcome of competition enforcement, it is not surprising that the appropriate standard for competition policy is a much-debated topic. For a long time, at least from the 1960s until perhaps fairly recently, the main debate focussed on whether a consumer welfare or total welfare standard would be best. While this debate may still be open in some corners, the discussion appears to have again taken new life, with focus increasingly turning to whether the consumer welfare standard is too permissive or narrow, potentially ignoring competition's role in protecting workers or small businesses, as well as whether it ignores too many broader social issues, such as sustainability, inequality or the distribution of economic power within well-functioning democracies.

This recent discussion has taken place within the context of alleged decreases in aggregate competition across many parts of the developed world.<sup>4</sup> Within this context, some have argued that there has been a failure of competition policy, including linking the consumer welfare standard with underenforcement.<sup>5</sup> This discussion also takes place alongside increasing environmental concerns, and there has been discussion on the role of competition policy in promoting, or not impeding, progress towards a more sustainable economy (OECD, 2020<sub>[1]</sub>).

At the outset, it is worth noting that while the standard applied within competition policy can influence enforcement levels, it is not the only factor in determining them. For example, the standard of proof, including whether any presumptions of harm apply, is fundamental in determining the level and effectiveness of enforcement, as are the resources and vigour of action by the relevant authorities or agencies. To illustrate this point, consider that two competition regimes could apply the same standard but result in completely different outcomes if one requires a particularly high standard of proof to assert harm or breaches of the law.<sup>6</sup>

While there is no shortage of views on what standard should apply, there can at times be a lack of clarity on exactly what different standards mean, with the same standard often having a range of potential meanings. Further, debates around the goals of competition policy and associated standards are often tied to the underlying legislation and statutes of a particular jurisdiction, focussing on assessing the "true" standard given this relevant jurisprudence.

Jurisprudence and legislation undeniably hold vital positions in any debate on the objective or implementation of competition law. Nonetheless, this is less relevant to a broader international discussion, as each jurisdiction will have its own history and interpretations. As such, this paper seeks to move away from the question of what standard applies in any jurisdiction and also does not seek to identify the standard that should. Instead, it considers the relative advantages and disadvantages of alternative standards, with the purpose of identifying the trade-offs that different options present. The consumer welfare standard is loosely taken as the base for comparison.

The OECD Competition Committee has not directly discussed this topic before, but the theme of the objectives of competition law has cut-across many previous discussions. For example, discussions in *Purchasing Power and Buyers' Cartels* (OECD, 2022<sup>[2]</sup>) and *Sustainability and Competition* (OECD, 2020<sup>[1]</sup>) have touched on relevant points. Beyond the work of the Competition Committee, the goals of competition policy were discussed at the OECD Global Forum of Competition in December 2022.<sup>7</sup> Relevant issues were also considered at the Forum during sessions on “Competition Policy: Time for a Reset?” in 2020 and “Competition Under Fire in 2019”.<sup>8</sup>

This paper starts by considering alternative standards for competition policy, starting with the consumer welfare standard before introducing potential alternatives. There are many potential standards that could be discussed. This section focuses on standards that appear to have gathered the most attention or to offer something particularly unique.

Next, to provide a framework to assess standard's advantages and disadvantages, the paper considers the different attributes of performance for standards. The purpose is to identify the features that “ideal” standards could exhibit to better understand any trade-offs that might be required between them. While the attributes are unlikely to be of equal importance, no explicit weighting is given as they could be valued differently across jurisdictions.

The paper then assesses the alternative standards against the attributes. Some of the elements of the assessment are more straightforward than others, and one challenge for the paper and this wider discussion is the sheer volume of opinions on how different standards fare in practice.<sup>9</sup> As such, where there remains significant debate around how rival welfare standards would score on a particular attribute, the paper seeks to break down the areas of contention and identify the key questions that need to be answered in order to understand the relative advantages and disadvantages. Finally, the paper concludes.

## 2 Available standards

Despite countless debate and pages devoted to the subject (or perhaps because of it), there is still some uncertainty as to exactly what the consumer welfare standard is, let alone whether it is the “correct” standard. Defining it is clearly an important part of considering its advantages and disadvantages. This definitional issue is not limited to consumer welfare however, with it often being difficult to precisely determine the lines between one standard and another.

Part of the difficulty in pinning down their definition is that standards are rarely specified by legislation. Sometimes the purpose is spelt out within the legislation, perhaps in terms of protecting competition for the benefit of society or similar phrases, though this varies significantly by jurisdiction. Box 1 contains some examples of the objectives of competition law as set out in legislation, although as discussed further below, objectives and standards are not necessarily the same thing. It is not common for a statute to determine the use of the consumer welfare standard (or an alternative).

Standards for competition law are therefore often derived over time through decisional practice and jurisprudence. For most authorities, a standard will not be at the forefront of their minds as they go about their daily business, but instead it is used to describe practice after the fact or through controversial decisions at the courts. Further, jurisdictions may not apply a single standard, instead using a mix depending on the circumstances.

The first part of this section considers the interaction between the objectives of competition policy and the standard used, as well as how these interact with other factors, such as the standard of proof, to determine competition enforcement outcomes. Next, it provides a brief overview of welfare economics given its relevance to many of the standards discussed.

The rest of the section identifies relevant candidate standards, starting with the consumer welfare standard. To illustrate the potential differences between the standards, two hypothetical cases are presented at the end of the section, alongside a discussion of the treatment of each case under different standards.

While defining standards is not easy, this is the first step to compare them. To solve definition issues, this paper specifies simplified versions of alternative standards, seeking to capture the essence of the differences between alternatives. This risks at times bearing a weak resemblance to those applied in the real world, as these versions could be considered caricatures of their true complexity. Absent clear definitions however, comparing standards would be impossible. The purpose is to capture and define the key aspects of alternative standards, rather than seeking to provide the final word on any definitional questions.



### Box 1. Legislation and objectives of competition law

Competition legislation rarely sets out directly the standard that should apply explicitly. That said, it can often give reference to some objectives which can lead to the welfare standard in question.

In some jurisdictions, for example, the legislation explicitly mentions consumers, which can lead to argument in favour of the adoption of the consumer welfare standard. For example, in New Zealand, the primary competition legislation sets out that “The purpose of this Act is to promote competition in markets for the long-term benefit of consumers within New Zealand.”

Other jurisdictions have purposes that mention consumers, but also mention other goals, such as efficiency or preserving opportunities for particular classes of business, such as small and medium enterprises. For example:

- In Canada, the Competition Act sets out “the purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.”
- In Japan, the purpose is given as “The purpose of this Act is to promote fair and free competition, stimulate the creative initiative of enterprise, encourage business activity, heighten the level of employment and actual national income, and thereby promote the democratic and wholesome development of the national economy as well as secure the interests of general consumers by prohibiting private monopolization, unreasonable restraint of trade and unfair trade practices, preventing excessive concentration of economic power and eliminating unreasonable restraints on production, sale, price, technology, etc., and all other unjust restrictions on business activity through combinations, agreements, etc.”

Finally, another jurisdiction where the legislation spells out a wide-range of purposes is South Africa. The Competition Act states that the purpose of the law is:

“(1) The purpose of this Act is to promote and maintain competition in the Republic in order-

- (a) to promote the efficiency, adaptability and development of the economy;
- (b) to provide consumers with competitive prices and product choices;
- (c) to promote employment and advance the social and economic welfare of South Africans;
- (d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
- (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
- (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.”

Sources: New Zealand Commerce Act 1986, s1A; South Africa Competition Act, No 89, 1989; Canada Competition Act, 1985; Japan’s Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of April 14, 1947), English version.



## 2.1. Competition law objectives, enforcement standards and the standard of proof

The standard and objectives of competition law are important, as competition is typically not seen as a goal in and of itself, but instead part of the process for achieving other outcomes. Further, understanding the purpose of underlying aim of competition policy is an important part of its successful implementation (Kaplow, 2011<sup>[3]</sup>).

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.

The objectives of competition law set out its overall goal. The standard, which might otherwise be described as the welfare standard or enforcement standard, provides the framework or underlying principle to determine if outcomes are consistent with the objectives, and those that are not. If, given a standard, expected outcomes are better given an intervention or action, and this is sufficiently supported by evidence, then the case for intervention or action is met. Put another way, the standard is the way in which the goals, or objectives, of competition policy can be made operational (Shapiro, 2017<sup>[4]</sup>).

There can be overlaps between standards and objectives. For example, if the objective is to promote competition for the benefit of consumers, it suggests that consumers are at the heart of the objective and, arguably, that the consumer welfare standard should be used. 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.

Another important element in determining outcomes of competition enforcement is the standard, or burden, of proof required. The standard of proof sets out the evidential threshold that an authority or enforcer must reach against a particular enforcement standard, such as the consumer welfare standard. The standard of proof will be affected by a range of factors, including whether there are presumptions of harm in some circumstances. For example, hardcore cartels are generally considered illegal in most jurisdictions without the need to understand the expected effects. It is not necessary to demonstrate harm against a particular standard. By contrast, non-hardcore cartels may well involve an assessment of effects.

Such presumptions will clearly have a strong bearing on enforcement outcomes. While presumptions should be compatible with standards, for example consistent with general expectations of harm, the existence of presumptions could limit the impact of standards on individual enforcement cases, as with hardcore cartels for example. Different levels of presumption apply across different jurisdictions, for example using *per se* v *rule of reason*, or by *object* v *by effect* restrictions.

The interrelation between these different aspects of competition enforcement can cause controversies regarding their relative importance. For example, the importance of the choice of standard is controversial. On the one hand, some argue that the standard, or more specifically the consumer welfare standard, is fundamental to understanding how certain enforcement outcomes transpire, see for example (Khan, 2018<sup>[5]</sup>). For others though, perspective and assumptions are more important than the standard and these drive outcomes more than the goals, or standards, of antitrust (Fox, 2013<sup>[6]</sup>). Further, others have highlighted that different enforcement levels can occur through similar standards, for example (Salop, 2018<sup>[7]</sup>) and (Hovenkamp and Shapiro, 2018<sup>[8]</sup>), or noted that there is nothing about a standard, such as the consumer welfare standard, that prevents the incorporation of different presumptions (Melamed and Petit, 2018<sup>[9]</sup>).

It has been noted that, while relevant to outcomes in some cases, standards are unlikely to materially affect the outcome of many cases (Blair and Sokol, 2013<sup>[10]</sup>).

This paper focusses on standards rather than presumptions of harm or standards of proof.<sup>10</sup> As such, while it is necessary to consider the effect of different standards on enforcement outcomes, due to the range of other factors that determine them, it does not address the issues of over or under enforcement in detail.

## 2.2. Welfare economics and standards

As more than one standard explicitly references the welfare of particular groups, for example consumers, before defining standards, a brief overview of welfare economics is warranted. Competition law is, after all, grounded in economics (Baker, 2013<sup>[11]</sup>).

Welfare economics studies the measurement of societal welfare and underpins much of modern economics, including microeconomics and industrial organisation. Competition policy, whilst having the potential to make societies substantially better off, is generally not pareto improving. It usually involves making at least one party worse off, for example reducing profits to firms. To compare different states of the world, another sense of welfare enhancement is generally required which allows the aggregation of the welfare of different groups.<sup>11</sup>

Within the context of a specific market for a good or service, welfare can be characterised as the surplus derived by the relevant parties, namely consumers and producers. If consumers are assumed to have a fixed, and exogenously set, willingness to pay and producers face set costs of production, then surplus can be determined in a straightforward manner. Their surplus is the difference between their willingness to pay and the price. Producer surplus is profit.

While simplistic, the basic premise underscores much of the discussion of potential standards, including when considering its limitations. The model focuses on the demand of a product given its price, ignoring a range of other important factors that consumers value, such as quality, range or service. It is static and does not incorporate dynamic effects, a key potential benefit of competition. Further, surplus is given by preferences, which are assumed to accurately reflect the underlying best interests for individuals, which may not be the case.<sup>12</sup> Finally, it does not consider other actors beyond consumers and producers, including employees or suppliers, or those external to the market.

## Box 2. Marshallian surplus and critiques of economic welfare

The concept of economic surplus set out above is often referred to as Marshallian surplus, in honour of Alfred Marshall who brought the concepts to prominence in economics. In the discussion of antitrust, models of economic surplus have been employed to show how different trade-offs may occur between allocative, how surplus is distributed, and productive, how costs are determined, efficiencies.

A full history of such concepts is beyond the scope of this paper. Nonetheless, it is worth considering some of the critiques that can apply to the approach. One obvious criticism is the nature of the assumptions required to derive these models, as was described in the section above. Most crucially, preferences are assumed to be exogenous and independent of various framing effects, something which behavioural economics has suggested is not invariably the case. If the underlying preferences for a good are not fixed, it calls into question the ability to describe any outcome in relation to them as surplus.

Another criticism of these approaches to welfare is that they are only partial analyses. For example, Alan Meese argues that these approaches to welfare, either consumer or total, ignore potential externalities and follow-on effects that can spill into other markets, such as effects on production costs and output elsewhere due to the freeing up of resources. There is also a critique that such partial approaches miss second-best opportunities to improve overall welfare. One often cited example within this literature is the idea that a reduction in competition could improve overall welfare in situations where other markets are also uncompetitive, and thus increased price performs a desirable reallocation of resources from a general equilibrium perspective. However, permitting mergers that reduce competition on the grounds that competition is already low throughout the economy is unlikely to sound attractive to many within the competition or antitrust community, not least because such an argument runs counter to any effort to remedy the situation more generally.

Source: Meese, Alan (2013) Reframing the (False?) Choice Between Purchaser Welfare and Total Welfare; Glick, Mark (2018) The Unsound Theory Behind the Consumer (and Total) Welfare Goal in Antitrust; Williamson, Oliver (1968) Economies as an Antitrust Defense: The Welfare Tradeoffs; and Alfred Marshall (1890) Principles of Economics.

## 2.3. Consumer welfare standard

Few topics evoke as much discussion in competition policy as the consumer welfare standard. It has been vehemently defended and attacked, even being described as nonsense (Vaheesan, 2019<sup>[12]</sup>).

Beyond differing views on its merits, there is also disagreement on what it actually is (Hovenkamp, 2020<sup>[13]</sup>). To some extent, confusion regarding the consumer welfare standard is grounded in different interpretations of previous judicial decisions and statutory intent. The next part of this section provides some historical discussion on the use of consumer welfare standard, particularly as it has evolved through its use within the United States. As this paper is not focussed on any individual jurisdiction, it will not seek to form a view on the correct definition as defined by any jurisprudence. Nonetheless, a definition must be made.

For the purposes of this paper, simply put, the consumer welfare standard seeks to maximise consumer welfare, where consumers are end consumers affected by the markets in question. Strictly speaking, consumers may not be the same as customers, for example in the case of intermediate goods markets, where customers are typically businesses rather than consumers (Akman, 2010<sup>[14]</sup>). In practice however,

few regimes that utilise a notional consumer welfare standard differentiate between these different concepts (Solomon, Morrison and Bloomfield, 2021<sup>[15]</sup>), and this paper will not either.

Under such a standard, conduct that lessened competition but delivered sufficient efficiencies to offset this could, in some circumstances, be permissible if prices did not rise. At this point though, it is important to note that the consumer welfare standard is not concerned only with lower prices. Some have criticised the consumer welfare standard for being focused only on lower prices, at least in practice, such as (Steinbaum and Stucke, 2020<sup>[16]</sup>) and (Caves and Singer, 2018<sup>[17]</sup>). For this paper, the consumer welfare standard concerns itself with all aspects of consumer welfare, which necessarily includes factors such as quality, range or service. This also includes innovation. That factors other than price can be taken into account when considering competition cases within the context of a consumer welfare standard can be seen from numerous case examples (OECD, 2013<sup>[18]</sup>).<sup>13</sup>

A notable feature of the consumer welfare standard is that it does not treat the welfare of all groups equally, instead giving unique preference to consumers and their economic wellbeing.<sup>14</sup> Typically, it only considers consumers within the market, ignoring consumers of other products for example. The consumer welfare standard is also ambivalent to the identity of the consumers, not seeking to understand distributional effects for example.<sup>15</sup>

A range of alternative definitions have been suggested for the consumer welfare standard. For some scholars, the consumer welfare standard describes practices that disrupt the competitive process and harm trading parties on the other side of the market (Shapiro, 2017<sup>[4]</sup>). Such a definition, however, does not focus on consumers and, when it focuses on other sides of the market, such as farmers, it may be that the term “supplier welfare standard” is more accurate. Such use of the consumer welfare standard is not consistent with its definition for the purposes of this paper, where the welfare of consumers is considered alone, excluding interests of suppliers.

Further, many nuanced takes on the consumer welfare standard exist. Robert Lande, a long time contributor to the debate in the United States, has advocated for a consumer choice standard, which focuses on maintaining consumer choice, rather than their welfare (Lande, 2001<sup>[19]</sup>). Others, such as Herbert Hovenkamp, has argued that the consumer welfare standard can best be articulated as a focus on maximising sustainable output, rather than measurement of welfare itself (Hovenkamp, 2022<sup>[20]</sup>). For others, there is a strong emphasis that consumer welfare standard is less about showing direct harm to consumers, but instead provide criteria to identify types of conduct to consider anticompetitive, namely those which increase market power but are not efficiency-based competition on the merits (Melamed and Petit, 2018<sup>[9]</sup>).

As noted above, this paper does not seek to provide a definitive conclusion on what the phrase consumer welfare should mean, if indeed it should have a single definition at all. The key elements of the consumer welfare standard within this paper are the focus on consumers and how competition can serve their interests, such as through lower prices and higher quality, but also through higher levels of innovation over time.

### Box 3. History of the consumer welfare standard

To partly understand the diversity of thinking regarding the definition of the consumer welfare standard, consider that there are many competing accounts of the history of it. Such histories are usually broader than just the standard itself, and consider the evolution of antitrust practice, usually within the context of the United States. It is not the purpose of this paper to consider this history in detail, but it is worthwhile briefly considering some of the context and use of the term “consumer welfare standard”.

The term consumer welfare standard, or at least its rise to prominence within the antitrust community, is generally considered to have emerged in the United States in the 1970s. In particular, the work of Professor (and later Judge) Robert Bork and the Chicago School. Interestingly, many have noted that Bork’s use of the consumer welfare standard appears to take into account the welfare of consumers and producers, and as such may be better described as a total welfare standard (see below). Nonetheless, a form of understanding developed such that, in 1979 through *Reiter v Sonotone*, the United States Supreme Court noted that the Sherman Act is a consumer welfare prescription. Another milestone in the foundation of the consumer welfare standard, appears to be the ideas of Assistant Attorney General Baxter and the subsequent 1982 merger guidelines, which noted the importance of assuming that conduct was not anticompetitive unless it reduced consumer surplus. Thus, in this sense according to some authors, antitrust enforcement in the United States developed under the model of maximising consumer welfare from the early 1980s.

The events above all took place in the broader context of the development of antitrust legislation in the United States. To simplify, prior to the emergence of consumer welfare, it has been argued that the prevailing ideals in developing antitrust thinking was the promotion of economic and political equality, not least by tackling corporate power. This is perhaps best characterised through the ideas of Justice Brandeis around the 1930s, and it is these ideas that have acted as a catalyst for the recent movement for a review of the goals in United States antitrust.

Nonetheless, for at least a few decades, the consumer welfare standard has largely been seen as the predominant standard in many jurisdictions around the world, even though there remains disagreement as to its exact definition and whether this is in keeping with competition policy’s original goals.

Source: Hovenkamp, Herbert (2023) *The Antitrust Text*, Indiana Law Journal; Fox, Eleanor (2013) *Against Goals*, 81 *Fordham Law Review*; Kovacic, William E. (2020) *The Chicago Obsession in the Interpretation of US Antitrust History*, *University of Chicago Law Review*: Vol. 87: Iss. 2, Article 7; Khan, Lina (2018) *The Ideological Roots of America’s Market Power Problem*, *The Yale Law Journal Forum*.

## 2.4. Total welfare standard

Much like the consumer welfare standard, on first appearances, the total welfare standard is fairly self-explanatory. Rather than considering the welfare of just consumers, it considers the welfare of all. It, or close variants of it, have gone by a few different names, such as the societal welfare or total surplus standard. It could also be thought of as an overall efficiency standard.

However, two key definitional questions for the total welfare standard are the extent of the word “total” and how narrowly or broadly to interpret the word “welfare” (Heyer, 2006<sup>[21]</sup>). For example, in the relatively rare situations where a standard close to total welfare is employed, the impact of competition on labour markets is rarely considered, potentially due to assumptions that the underlying labour markets are well-functioning and therefore that any harm would be short-term. In principle, there would seem to be no reason not to include such considerations within a framework that considers the welfare of all (Heyer, 2006<sup>[21]</sup>). Similarly,

broader effects of competition on other aspects of society, such as on inequality, the environment or democracy, arguably fall within the remit of “total welfare”.

As noted above though, in practice this appears not to be the case. Instead, the total welfare standard generally considers effects of situations on both consumers and producers (Blair and Sokol, 2013<sup>[10]</sup>). Compared to the consumer welfare standard it therefore provides the potential for gains to producers to be given weight, even if they are not passed on to consumers.

For the purposes of this paper, consistent with the most commonly used definition the total welfare standard refers to the consideration of surplus from producers and consumers (Blair and Sokol, 2013<sup>[10]</sup>).

The total welfare standard, or standards that come close to this, has been applied most in developed economies that have placed an emphasis on the importance of achieving scale economies for the purposes of productivity. Canada is often cited as a jurisdiction that has applied a standard close to a total welfare standard, at least in the context of merger controls with its efficiency defence (Ross and Winter, 2005<sup>[22]</sup>). Box 4, and Box 5 further below, highlight some regimes that apply standards somewhat resembling a total, or in some cases even a citizen’s, welfare standard albeit usually only in specific circumstances.

#### Box 4. Authorisation regimes in Australia and New Zealand

The competition regimes of Australia and New Zealand both have a process that allow parties to apply for ex-ante authorisation for some forms of conduct. If authorisation is provided, then the conduct can occur, even if it otherwise may have fallen foul of competition laws. The conduct includes transactions, such as mergers, as well as other conduct that has the potential to infringe competition law, such as forms of collusion or misuse of market power.

The authorisation regimes allow the respective competition authority to authorise conduct on the basis that it may lead to broader benefits than otherwise, even if there may be detriment from a lessening of competition. In this sense, authorisations could be considered to employ a standard more closely resembling the total welfare, or perhaps even citizen’s welfare, standard than a consumer welfare standard.

In Australia, authorisation can be granted when the applicant provides sufficient evidence such that the Australian Competition and Consumer Commission (ACCC) is satisfied that the conduct in question may give rise to benefits to the public that outweigh any public detriment, such as a lessening of competition. Authorisation can be granted to mergers or other types of conduct, but is rarer for mergers. The case law in Australia has defined a public benefit broadly, noting that this could be anything of value to the community generally or any contribution to the aims pursued by society, but makes specific mention to the achievement of the economic goals of efficiency and progress. The regime in Australia tends to be broad by nature, considering a range of different potential benefits, and might be best considered analogous to a citizen’s welfare standard as described below.

As an example of the ACCC authorisation process, a recent authorisation enabled purchasers of electricity to pool their demand in order to conduct a joint purchasing process for renewable energy. The decision noted that it considered the risk of public detriment from the arrangement low due to the relatively low market shares of the purchasers. In any event, it considered that any detriment would be outweighed by the public benefits of the arrangement, which included environmental benefits due to facilitating an easier transition to renewable energy which would reduce greenhouse gas emissions.

Similar to Australia, the New Zealand Commerce Commission (NZCC) can grant authorisation for mergers or agreements that would otherwise be likely to lessen competition if they are satisfied that it is likely to result in such a benefit to the public that this will either outweigh the lessening in competition. As in Australia, benefits have been broadly defined by the courts to consider anything of value to the

community generally, while noting the principal element of the achievement of the economic goals of efficiency and progress.

The NZCC Authorisation Guidelines notes that benefits do not need to be passed onto consumers to be considered benefits. However, it notes that it is permitted to adjust the weight given to benefits to reflect their distribution, referencing this as the modified total welfare approach, which is discussed below. The Guidelines provide some examples of the circumstances that this might occur, including consideration of lower income consumers, but note that whether a potential adjustment is relevant to the authorisation will depend on the case. In contrast to the Australian approach, authorisations appear to be relatively rare in New Zealand and have tended to apply a more quantitative approach to the balancing of benefits and detriments. However, the authorisation regime cannot be seen as a pure total welfare application. For example, in a 2015 decision regarding the mergers between wool scouring companies, the NZCC considered that some additional increases in prices due to market power would be functionless monopoly rents, and therefore included as a detriment with no corresponding benefit. The case also highlighted the issue of whether producer surplus should be considered in the same way even if firms are foreign owned, and therefore any additional profits generated may be taken out of the country.

Note: The authorisation regimes do not provide for retrospective authorisation, being limited to forward-looking regimes.

Source: ACCC, Determination regarding Application for authorisation AA1000634 lodged by 1Circle Pty Ltd & the Business Renewables Buying Group members in respect of establishing a joint renewable energy purchasing group, 29 March 2023; ACCC, Guidelines for Authorisation of Conduct (non-merger), December 2022; NZCC, Authorisation Guidelines, December 2020.

#### **2.4.1. Modified total welfare standard**

It is debatable whether the modified total welfare standard can be thought distinct from the total welfare standard. It emerged as a response to criticisms that the total welfare standard ignored the distributional effects of competition too strongly.<sup>16</sup> It has elsewhere been described as the Balancing Weights Approach, for example in Canada (Clifford, Opashinov and Hollinger, 2003<sup>[23]</sup>). It is as described, a modification of the total welfare standard explained above. The modification is to give further consideration to the distribution of surplus, for example giving extra weight to surplus for low-income consumers.

The use of a modified total welfare has usually been discussed in the context of regimes that, at least notionally, employ a total welfare standard. The context is usually a decision, such as a merger, where there are substantial gains to firms that outweigh the losses to consumers, but the losses fall disproportionately on lower income, or vulnerable, consumers. The concept of modified total welfare has been most prominent in Canada, Australia and New Zealand, notably all Commonwealth common-law jurisdictions with modern economies that are comparatively sparsely populated.<sup>17</sup> Box 5 discusses the experience of Canada, with reference to the Superior Propane case.

#### **Box 5. The Efficiency Defence in Canada and the Superior Propane Case**

Section 96 of the 1986 Competition Act of Canada permits a merger even if it is likely to substantially lessen or prevent competition where the efficiency gains that result from the merger are greater than, and offset, the competitive effects. As a starting point, cases are decided on the basis of total surplus, being the surplus that was expected for consumers and producers. This includes efficiencies from the transaction, even if these are not passed through to customers (or, in the case of a buyer power matter, suppliers). For this reason, this approach was often described as a total surplus approach and could be considered synonymous with a total welfare standard.



An example of a case which provides an indication of such an approach, and how it might change into a modified total welfare standard, is from a controversial 2003 case in Canada. The case involved Superior Propane's proposed acquisition of ICG Propane, both distributors of propane. The Commissioner of Competition objected to the transaction on the basis that it was expected to result in significant price increases. The case was heard by the Competition Tribunal, which agreed with the Commissioner that the transaction would result in a substantial lessening of competition and higher prices, but dismissed the Commissioner's application, on the basis that it had weighed the expected anti-competitive effects and the efficiencies, and found that the efficiencies were greater. The Tribunal determined that the deadweight loss from the transaction amounted to approximately CAD 3 million per year, whereas identifiable efficiencies were determined to be approximately CAD 29.2 million a year, and so outweighed the deadweight loss.

The Commissioner filed an appeal to the Federal Court of Appeal, and it was remanded back to the Tribunal on the basis that it had not properly considered all of the effects of the merger. In this case, a relevant fact was that many of the consumers of propane were lower income consumers. In the redetermination, the Tribunal considered the distributional effects of the transaction, and an analysis was conducted to understand if giving extra weight to detriment to lower income consumers would affect the overall balance of surpluses. The Tribunal found that any reasonable weighting of the anticompetitive harm to lower income consumers would be offset by the efficiency gains. A subsequent appeal by the Commissioner was dismissed on the grounds that the Tribunal had considered all of the relevant considerations required.

Despite not changing the outcome, this provides an interesting example of how a total welfare approach that considers the surplus of consumers and producers equally, could be modified to give consideration to the distributive effects of changes in competition.

Source: Neher, D. V, Russo, D. M and Zona, J. D (2003) Lessons from the Superior-ICG Merger; <https://ca.vlex.com/vid/competition-commr-v-superior-680599701>.

## 2.5. Citizen's welfare standard

An extension of the standards above would be to extend the consideration beyond consumers or producers, and to consider the impact of competition on outcomes for all citizens. Such an approach broadens the analysed effects of competition issues beyond the relevant product and geographic market, to now considering a wide number of potential implications. For many competition regimes, this would be a substantial departure from the status quo. Further, while the previous standards have all received relatively thorough discussion in the academic literature, and varying degrees of application by authorities in practice, the citizen's welfare standard appears relatively less developed.

In a relevant paper in 2018, Ioannis Lianos proposed a move to a polycentric competition law, which appears largely to mirror a citizen's welfare standard. It would incorporate considerations of a range of effects on broader social welfare. This included privacy concerns, the effect of disruptive innovations on workers and skills, as well as the need to preserve issues such as societies values (Lianos, 2018<sup>[24]</sup>).

This paper defines the citizen's welfare standard to be one that seeks to maximise the welfare of citizens, defined broadly to include economic and non-economic concepts of welfare. Notably, such a standard gives weight to citizens as workers, whilst potentially also considering their role as small business owners or even shareholders. It should be noted in this regard that consumers are not just consumers, the majority are also workers and, perhaps with only a few exceptions in some sectors such as tourism, citizens (Beaton-Wells, 2020<sup>[25]</sup>). There are therefore some arguments that the consumer welfare standard could be broadened to include some of these considerations, although for the purposes of this paper it is not.

An interesting dynamic of the citizen's welfare standard is that a broad set of interests are now encompassed within competition policy. This could include citizen's interest in issues such as sustainability, democracy, media plurality, resilience, or indeed anything that is considered relevant to their well-being. As explained in the section on the total welfare standard, some broad interpretations of that standard would appear quite similar to that of a citizen's welfare standard.<sup>18</sup> Considering the welfare of all and that of citizen's appears difficult to differentiate, at least by name. However, as noted above, this paper distinguishes between the two by taking the narrower version of total welfare standard.

Box 4 above and Box 6 below provide some examples of regimes where it could be argued that there are some similarities to a citizen's welfare standard, albeit in generally more limited circumstances.

Another take on a citizen's welfare standard is the capability approach, which was suggested as potentially applicable to competition law by (Claassen and Gerbrandy, 2016<sup>[26]</sup>). The key idea behind this approach is that rather than focussing on how the welfare of certain groups is affected by a particular action, it considers how it affects their capability to do things. As such, it would not assess a price increase in terms of being a harmful outcome, but instead consider how the increase in price reduced the capability of consumers to purchase a wider set of goods. Such an approach could also be calibrated to ensure minimum capabilities for certain groups. For example, there may be a minimum capability for all consumers to be capable of consuming certain goods or services, and any action that threatened this minimal capability would be counter to the standard, regardless of overall effect on capabilities.

The capability approach is loosely similar to a citizen's welfare standard, where instead of overall balancing being given to different outcomes, the minimum capabilities for different parts of society are considered. There does not appear to have been any implementation of this standard to date, and it appears to be relatively complex. For the purposes of this paper, the focus will be on citizen's welfare standard focusing on welfare rather than capabilities.

## 2.6. Protecting competition standard

The previous standards have evaluated outcomes in relation to how they affect the welfare of specific groups, be it consumers, consumers and producers, or citizens.

Another type of standard has been proposed that instead of seeking to evaluate impacts on welfare, seeks to protect or preserve effective competition. A motivation for such a tool is that rather than focussing on outcomes and its complexities, competition policy should focus on protecting the process of competition. Many have argued that such an approach would bring practice back in line with the initial motivations for introducing competition laws in the first place, see for example (Khan, 2018<sup>[5]</sup>). As noted in Box 1, many jurisdictions have legalisation which specifically mentions protecting competition, suggesting that there is at least some merit in considering this as a standard. The protecting competition standard is often associated with the New Brandeisian school of thought, which considers that the consumer welfare standard is at least somewhat to blame for what proponents argue has been underenforcement of competition policy in some jurisdictions.<sup>19</sup>

As with the other standards set out above, precisely defining the protecting competition standard is not entirely straightforward. Several versions have been proposed. For example, Marshall Steinbaum and Maurice Stucke proposed an effective competition standard which seeks to protect individuals, purchasers, consumers and producers by preserving competitive market structures (Steinbaum and Stucke, 2020<sup>[16]</sup>). It also aims to preserve market opportunities for competitors, with the aim of the dispersal of private power. Similar ideas have been put forward by other scholars and practitioners, such as considering acting against conduct that may subvert the competitive process (Wu, 2018<sup>[27]</sup>).

This paper takes as the main principle for this standard to be the preservation of competitive market structures and protection of competition. The focus is on protecting the process of competition, rather than

seeking to understand the outcomes of competition. Within this standard, competition is the rivalry between firms, and can be to the benefit of consumers, for example in competing to offer lower prices, but also for inputs, such as competing for employees. The focus is on preserving competition for those that benefit from it, not just consumers. Under this standard, outcomes that result in more competition will be favoured, compared to the counterfactual of less competition.

Beyond explicit consideration of competition for groups other than consumers, such as small suppliers or workers, the extent to which the consumer welfare standard in practice differs in substance from a protecting competition standard is somewhat debatable. For example, as explained above, some authors have pointed out that the consumer welfare standard provides the means to understand which conduct is anticompetitive, but that in practice much of the results are to protect the competitive process (Melamed and Petit, 2018<sup>[9]</sup>).

There may be similarities between the protecting competition standard and another standard employing strong structural presumptions. In both cases, the effect would be to look unfavourably on changes in market structure that appear to lessen competition. However, any presumption of harm must also be consistent with the underlying standard. For example, whether competition that benefits workers should be protected, for example through no-poach agreements, may not be prohibited under some forms of consumer welfare even if strong structural presumptions were favoured.<sup>20</sup>

It could be fair to say that the application of the protecting competition standard is more straightforward in some areas of competition law than others. For example, it provides a strong presumption against mergers, and similarly in assessing agreements between competitors that threaten competition. One area that could be less clear-cut however, is the treatment of abuse of dominance. Protecting competition standards almost certainly imply higher levels of enforcement in such cases, either due to increased structural presumptions against the actions of firms that hold dominant positions, often termed no fault arguments, or through focussing on the conduct of firms rather than their dominant position (Melamed and Petit, 2018<sup>[9]</sup>). One way to think about these differences could be a change in the presumptions of harm, with any analysis focusing on the extent to which competition has been lessened compared to the counterfactual, for example absent the conduct in question.<sup>21</sup>

## 2.7. Public interest considerations

Like many of the standards discussed above, public interest considerations are fairly easy to understand from their name.<sup>22</sup> They relate to situations where issues of relevance to the broader public are brought into bearing when deciding upon competition matters. Public interest considerations are most commonly associated with merger control, although they could be applied more widely. They were discussed in detail during the OECD Working Party 3 Roundtable on public interest considerations in merger control.<sup>23</sup>

The interaction between public interest considerations and standards is difficult to pin down. On the one hand, public interest concerns can be considered exceptions with decisions taken outside, and on top of, competition law. In this sense they are distinct from standards. On the other hand, however, public interest considerations can capture a range of issues that affect competition enforcement in ways that mirror the choice of standard. In this respect, it seems difficult to discuss alternative standards while ignoring the existence of public interest considerations.

Public interest considerations can be narrow or broad (OECD, 2016<sup>[28]</sup>).<sup>24</sup> Jurisdictions within the OECD tend to apply narrow provisions, albeit in relation to a diverse set of situations (OECD, 2017<sup>[29]</sup>). One example of a narrow public interest consideration would be when a proposed transaction that threatens national security is challenged on this ground, but could also include preserving media plurality, security of energy supply or stability of the financial sector. Narrow considerations are of less interest to the

discussion of standards as they tend to be less frequently used, reserved for specific situations and applied on-top of competition law.

Broad public interest considerations, by contrast, can cover a wide range of issues, such as protecting workers or supporting the economy. Box 6 provides an example from South Africa to illustrate how such a broad public interest regime can work in practice.

### Box 6. South Africa case example

As explained in Box 1, the competition regime of South Africa contains several broad public interest considerations. In addition to the benefits of competition to consumers, it also includes explicit consideration of, amongst others, employment effects, effects on small and medium sized businesses and effects on historically disadvantaged persons. In some respects, these broad range of considerations could be considered similar to employing a citizen's welfare standard. However, it should be noted that while broad, there is an explicit focus on specific issues rather than citizen's welfare per se.

To illustrate how this regime works in practice, consider the example from a recent case involving the acquisition of NBL Investment Holdings and Distell Group Holdings by Sunside Acquisitions (Heineken). The South African Competition Tribunal cleared the transaction subject to a number of competition and public-interest conditions. One of these conditions was that due to the risk of a loss of competition in the cider and broader flavoured alcoholic beverages markets, Heineken would be required to divest its interests in the Strongbow brand in South Africa. Remedies such as this are common in many jurisdictions, regardless of the standard employed.

However, in addition to the divestment remedy, a range of other conditions were imposed. These included obligations to maintain levels of investment in production capacity, for example by building a new brewery and maltery. Further, Heineken is obliged to seek to develop suppliers in the local area, specifically smaller local businesses and there were several conditions relating to labour markets, including limits on the number of retrenchments that could be made and requirements for the paying of fair wages. These conditions, which go beyond the requirement to maintain levels of competition for the benefit of consumers, demonstrate broad public interest considerations in practice.

Source: <https://www.comptrib.co.za/info-library/case-press-releases/tribunal-approves-heineken-distell-merger-subject-to-competition-and-public-interest-related-conditions>.

How public interest considerations affect outcomes is clearly dependent on what those considerations are. Further, it is worth noting that adding broad public interest considerations to a standard could mimic the effect of another, to the point where almost all of the standards above could be created by adding public interest considerations. For example, adding a public interest consideration of efficiency could see the consumer welfare standard become the total welfare standard, adding consideration for distribution could then make it the modified total welfare standard, whereas adding numerous other issues of relevance to citizens would eventually see the creation of the citizen's welfare standard.

For this reason, the assessment of standards against attributes in this paper focuses on the standards listed above, rather than public interest considerations. Where considered, a broad set of public interest considerations will be assumed. Nonetheless, it should be remembered that there is potential for public interest considerations to operate on different parts of the spectrum between standards, with their main distinguishing feature being that they are limited to a defined list and this definition is clear upfront.

### 2.7.1. Mixed regimes

Up to now, the discussion has largely assumed that a jurisdiction operates one standard that applies equally in all contexts. One obvious exception is public interest considerations as described above. Another exception though could be regimes that apply a different standard depending upon the circumstances. Such “mixed regimes” could be in place for a number of reasons, such as wanting to apply a different set of considerations for some contexts, or to allow a broader, and more complex, procedure for circumstances where firms believe it relevant.

The authorisation regimes of Australia and New Zealand, as described above in Box 4, are potentially examples of such mixed regimes. They allow firms to apply for authorisation for conduct that might otherwise fall foul of the usual standard, likely closer to a consumer welfare standard. One difference between these regimes and public interest considerations is that, likely due to the voluntary merger regimes in place in Australia and New Zealand, parties can opt to use this process rather than the usual clearance process.

Mixed regimes appear generally uncommon and are not considered further in the paper. Nonetheless, it is worth acknowledging the potential for different standards to apply in different situations if required.

## 2.8. Hypothetical case illustrations

To help illustrate the various standards that are set out above, consider the two hypothetical cases described below. The hypothetical cases have been created to highlight the various ways in which the choice of standard could result in different outcomes.<sup>25</sup>

### 2.8.1. Hypothetical merger

Consider a proposed merger between two firms that produce good A, as well as numerous other goods that do not seem related.<sup>26</sup> The firms are judged to compete and the expectation is that they will acquire some additional pricing power as a result of the merger, although there are also some expected efficiencies. Given these efficiencies but additional pricing power, there is expected to be a price increase post-merger (between 3-5%). Good A is produced in dedicated factories within separate business divisions.

Some argue that good A, which is consumed by most citizens in the country, is an important part of modern life and that it is already at risk of becoming too expensive for citizens on lower incomes.

Of the expected cost efficiencies, half will result in reductions to labour costs, partly due to increased efficiency lowering overall headcount and partly due to a reduction in options for workers in the slightly specialised field of producing good A leading to lower wages.

In total, the two firms are not large in the context of the nation, but are large at a regional level, employing up to 40% of regional workers in total and accounting for 25% of regional GDP, which is currently split roughly evenly between them. Some regulations that govern how the two firms operate are set at the regional level.

The acquirer is publicly listed, and a high number of shares are owned by several large pension funds.

#### *Treatment of the merger under different standards*

Under the consumer welfare standard, the transaction would likely be considered problematic in relation to good A. As the other goods are not in the same market, and there is no explicit consideration for labour markets, the concerns would likely be remediable with a divestment of the relevant business division such that competition for good A is maintained.

If the total welfare standard were adopted, there is a greater chance that the entire transaction could be permitted. This would be the case if the efficiencies generated by the transaction were high enough, even though these are not expected to be passed onto consumers. If the savings from the transaction were sufficiently high, these could outweigh the increased prices and lower output. A modified total welfare standard would sit somewhere between the previous two, as now additional weight may be given to the fact that higher prices will be felt by low-income consumers.

With a citizen's welfare standard, or broad public interest considerations, the outcome is more complex. Several factors point to the potential of it being more likely that a concern would be found than under a total welfare standard. For example, the effects of the transaction on lowering wages are likely to enter the equation. Further, since the two firms are large employers at the regional level, the effects on wages could be broader than workers producing good A. Another potential issue could concern political power of the merged entity at the regional level. Acting in the opposite direction, some of the gains to the merged entity may be considered beneficial due to the large number of shares held by pensioners. Overall, there is potential that the transaction would be completely prohibited under a citizen's welfare standard and that even a full divestiture of assets in relation to good A may not be sufficient to allay the concerns.

In this case, a similar outcome would appear likely under a protecting competition standard, albeit for slightly different reasons. While the effects of the transaction itself would not be considered, the effect of the transaction on competition with respect to the supply of good A and in labour markets would increase the chance of concerns that cannot be allayed with a divestment related to good A. Compared to the citizen's welfare standard, it seems possible that there is a slightly higher chance that a divestment of good A could remedy concerns, depending upon analysis of the regional labour markets.

### **2.8.2. Hypothetical agreement**

Consider an industry that has four firms. The firms produce good B. Good B is differentiated, but it requires a common homogenous input, input X, which accounts for around half of Good B's production costs. Good B is largely consumed by higher-income individuals.

Through the production of input X, substantial greenhouse gas emissions are produced, as well as river pollution. Due to a specific production process, the emission of greenhouse gases is largely fixed at a factory level, regardless of output (i.e. the same emissions are produced with 10 units and 1000 units). Currently production is split between three suppliers of input X, which are located in different towns.

The four firms that produce Good B would like to coordinate the buying of input X, such that they maximise factory utilisation to reduce greenhouse gas emissions. It is also expected to reduce average per unit costs of input X, which is only used in the production of good B. It has been assessed that the benefits can only be achieved through jointly planning purchases between the four firms, and, as such, a large amount of information must be shared between them. It is expected that this information sharing will lead to a higher risk of coordination between the producers of Good B.

The labour markets in the relevant towns are considered to be relatively local, and the factories a substantial part of the local market, such that the closure of the plant will likely negatively impact those workers.

#### *Treatment of the agreement under different standards*

Under a consumer welfare standard, the key question will be what the end effect will be on consumers, namely through prices and, ultimately, output levels. Based on the circumstances, there appears to be a significant risk that the agreement could reduce competition between the competitors due to the shared costs. However, at the same time, there are likely to be substantial cost savings which could result in lower overall costs. As such, the overall assessment will likely hinge on whether the expected cost savings will be passed through to consumers such that overall prices do not rise.

Under a total welfare standard, there is likely greater potential for the agreement to be considered permissible even if it is assumed to raise prices. This would be the case if cost savings are high enough to offset any expected rise in prices. Another key question would likely be whether the cost savings could be achieved in a manner that minimised the risk of lessening competition. There would appear to be little reason for modified total welfare to produce a different result, as there appears to be no major distributional concerns to consider.<sup>27</sup>

An assessment under a citizen's welfare standard may be more likely to result in the agreement being permitted, if the environmental benefits from reduced greenhouse gas emissions were sufficiently large. However, this would need to be balanced against potential effects on workers in the towns where input X factories may close, as well as any expected costs to consumers. The outcome in relation to broad public interest considerations would be highly dependent on the considerations included. If, for example, environmental concerns were not listed as relevant, it would likely be prohibited.

Finally, under a protecting competition standard, it seems unlikely that the agreement would be allowed, as there is likely a risk to competition for the supply of good B, for the purchase of input X, and potentially in local labour markets.



# 3 Criteria for standards

This section considers the different attributes against which a candidate standard might be judged. The selection of a standard is first and foremost a policy decision, based on the standard's relative merits. The purpose of this section is to identify the potential dimensions affecting the relative performance of standards, and thereby provide a framework for considering their advantages and disadvantages.

All being equal, the attributes or factors identified are those that a standard should seek to deliver. Prospective standards, such as those identified in the previous section, can then be assessed against these attributes. Some attributes are clearer than others and therefore careful definition is required.

The attributes are not independent of each other.<sup>28</sup> Sometimes this correlation will be positive, with a high score in one attribute implying a higher score in another, but it could also be negative, with a higher score in one attribute being associated with a lower score in another. Thus, identifying the relationship between attributes can help understand the trade-offs required between different standards.

As discussed in the second section, almost all attributes discussed below could be affected by other aspects of a competition law regime, such as the standard of proof or agency effectiveness. Ultimately, enforcement decisions are based on law and while a standard can help in their implementation, it will not be determinative on its own. In some cases, these other aspects could have an even greater influence on the outcomes regarding that attribute. However, as the purpose of the paper is to consider the advantages and disadvantages of alternative standards, the attributes focus on how standards affect them, holding all else constant.<sup>29</sup>

This section introduces the main attributes relevant to standards, explaining what they mean and discussing the potential links between them and other attributes. The attributes are presented randomly and not in order of importance. This is not to say that all attributes are of equal importance, and different jurisdictions may choose to weigh them differently.<sup>30</sup>

## 3.1. Predictability

The predictability of a standard concerns the extent to which interested parties can foresee the outcome of an assessment under it. The OECD Council's Recommendation on Transparency and Procedural Fairness in Competition Law Enforcement sets out that adherents should, amongst other things, ensure that competition law is transparent and predictable.<sup>31</sup>

Predictability is undeniably an important part of a well-functioning competition law regime and is a key element of legal certainty. It allows economic actors to understand the implications of their conduct and to adjust accordingly, increasing compliance and reducing potential stymying effects of uncertainty on business confidence and investment. Some scholars have argued that the value of predictability of competition law is undervalued by the broader literature (Broulík, 2022<sub>[30]</sub>).<sup>32</sup>

How a standard affects the ability of actors to understand expected outcomes will be a function of how easy it is to understand, which will be partly influenced by its simplicity or complexity. There is therefore a link between complexity and predictability, with simpler standards being more predictable on average.<sup>33</sup>

Related to complexity is the ability for authorities to provide guidance on how outcomes will be determined. The easier it is to identify the factors that affect outcomes, the more clearly these can be articulated to relevant stakeholders to increase predictability. Further, the greater the extent that decisions are made with respect to a transparent set of predetermined and weighted criteria, as opposed to relying on the balanced judgement of decision makers, the more predictable it is likely to be.

While more predictability is generally a good thing, it is possible that under some circumstances there could be too much predictability, for example if it provided information to market participants that allowed them to game the system. Further, as with all attributes discussed in this section, predictability is clearly not the only factor that matters when comparing standards. To highlight with a simple example, a regime that prohibited all mergers irrespective of their size or effect would be almost perfectly predictable, but perhaps few would argue it would deliver better outcomes for society.

### 3.2. Social welfare enhancing

This attribute considers the extent to which a standard has the potential to make society better off. Put another way, to what extent does the standard allow the promotion of outcomes better consistent with better societies overall. This is perhaps most clearly articulated in reverse, by considering how different aspects relevant to society may be neglected by a standard.

While surely even the most devout competition advocate will accept that there are aspects of the overall welfare of society that do not hinge on competition, many will support the proposition that the benefits of competition can be felt more broadly than just direct consumers and producers. Indeed, this is part of the motivation for the introduction of competition law in the first place. A particularly relevant aspect of the discussion is whether those benefits happen indirectly through the promotion of competition, or through a direct consideration of how competition affects those issues.

For the purposes of this paper, the basis for this attribute is simple. A standard that factors in a higher proportion of outcomes that are more socially optimal than another is more social welfare enhancing. The reality, of course, is far less simple. As standards become broader to consider different types of social welfare, balancing overall welfare becomes increasingly difficult, and controversial, to determine. There are many competing perspectives on which outcomes are, or are not, socially optimal. In many cases it is not clear what it would mean to maximise social well-being or outcomes, even aside from the complexity involved in estimating these effects.

In response to this attribute, some may argue that the goal of competition law is not to promote social welfare, but to promote competition (Farrell and Katz, 2006<sup>[31]</sup>). Indeed, the suggestion that competition policy should seek to achieve broader social goals is highly controversial. This paper does not seek to promote this perspective. Instead, it notes that a prospective standard could be judged partly on its role on overall outcomes, balanced against other attributes.<sup>34</sup> After all, the promotion of competition is not for competition's sake, but for the beneficial effects that competition can have on broader societies. All else equal, anything that raises overall societal welfare is desirable.<sup>35</sup>

To provide some tractability for this attribute for the purpose of comparing different standards, the paper therefore considers the extent to which a standard provides a consideration of a range of different aspects of societal welfare.<sup>36</sup> The narrower a standard, the higher the likelihood that it will not consider some aspects which could lead to a general improvement in societal outcomes.

Another point to consider, is whether broader standards are genuinely able to balance these objectives effectively and thereby achieve them. While generally this falls under the domain of other attributes (such as predictability, risk of errors and ease of administrability) it is worth considering the extent to which such an assumption may not hold. A standard is only able to achieve better societal outcomes if this is the result in practice, not just because it seeks to.

Another relevant point is the availability of alternative policy tools to deal with issues beyond competition in markets to the benefit of consumers, and there are many that would argue that such considerations go beyond what competition policy can, and should, consider (Petit, 2021<sup>[32]</sup>).<sup>37</sup>

There are several potential elements that might be relevant to a broader assessment of social welfare or well-being, although this in itself is potentially controversial. It is impossible to fully capture all elements of societal welfare, but the main aspects relevant to the standard, and those that will be considered in detail in the next section are discussed below.<sup>38</sup>

### **3.2.1. Economic efficiency**

This considers aspects such as allocative and productive efficiency. This includes the extent to which there is deadweight loss in the economy, such that the allocation of resources is not optimal, as well as how efficiently firms are able to produce outputs given inputs, for example due to economies of scale.

Competition is an important driver of productivity and overall economic efficiency (OECD, 2014<sup>[33]</sup>). In this respect, all of the standards that seek to promote competition will to some extent promote economic efficiency. On the other hand, there will be times when the effect of a particular action, whether a merger or collaboration for example, may have potential negative effects on competition but significantly beneficial effects on productive efficiency. For example, efficiencies can also be derived from economies of scale, and this is most likely to come into potential conflict with competition if the efficiencies are unlikely to be passed through to consumers.

### **3.2.2. Labour markets**

Labour markets, and the workers within them, are vital parts of society. A consideration of the effects of a standard on overall societal welfare must therefore consider how that standard could affect outcomes within labour markets.

Competition issues in labour markets have attracted increased attention in recent times (OECD, 2020<sup>[34]</sup>). Numerous jurisdictions have launched cases involving competition in labour markets, with many also signalling that it will be an enforcement focus for them going forward.<sup>39</sup> Whether this implies that consumer welfare is not the current prevailing standard, or whether these concerns fit well within it, is subject to debate.

### **3.2.3. Inequality in economic and political power**

The distribution of wealth and economic power between different groups within society is another relevant consideration as part of broader societal well-being. This includes the extent to which inequality and competition can shift political power, affecting the functioning of democracy.

Increased competition can decrease income inequality, as profits from market power, which tend to benefit a relatively few number of shareholders, are redistributed to more numerous consumers (Ennis, Gonzaga and Pike, 2017<sup>[35]</sup>). How income is distributed across society can affect how society functions, with inequality posing both economic and political costs.

Beyond concerns on distribution of income, many authors have argued that competition is a key impediment to the acquisition of corporate power, and that corporate power is not benign (Meagher, 2020<sup>[36]</sup>). The concern is that concentration of economic power can overwhelm public government, and many have articulated that it was this fear that was a chief motivator of the development of antitrust practice in the United States (Khan, 2018<sup>[37]</sup>), resonating with the viewpoint of Louis Brandeis that beyond specific harms in markets, there is a threat from a curse of bigness that risks undermining democracy and causing harm to society (Wu, 2018<sup>[27]</sup>). In this view, it is not efficiency that should drive competition policy, but the

ideal of decentralising economic power. This effect transcends the idea of market power within distinct antitrust product markets, as economic power perhaps lends itself better to ideas of “bigness”.

Further, recent papers have suggested that there may be a link between mergers and lobbying, which could imply an increased political influence from market power. For example, (Cowgill et al., 2022<sup>[38]</sup>) studies the effects of mergers on lobbying in the United States and finds evidence of a relationship between concentration and increased spend on lobbying by firms. Beyond direct lobbying, it has been argued that corporate power can provide means to act independently from government and society (Meagher, 2020<sup>[36]</sup>).

Such issues are becoming increasingly topical in competition policy, and not just in the United States. For example, in its microeconomic strategy document, the UK’s Competition and Markets Authority (CMA) notes that links between market concentration and political lobbying are active areas of debate and that further research in this area could have significant implications for the types of cases that the CMA pursues.<sup>40</sup>

### **3.2.4. Environmental and sustainability issues**

This considers a broad range of environmental factors, including the fight against climate change and broader shift to a more sustainable economy. These factors clearly have the potential to materially affect overall societal welfare.

Putting aside debates around how one can determine the best outcomes for the environment, it is not difficult to promote positive environmental effects as beneficial if these are achievable and certain. The interface between competition policy and environmental policy or sustainability is an area that is continuing to receive increased attention. Two of the main aspects of the relationship concern competition’s role in promoting sustainability through encouraging innovation, as well as how competition law can manage the potential conflict between competition and sustainability (OECD, 2020<sup>[1]</sup>). Both of these factors have the potential to affect how a standard performs.

### **3.2.5. Economic resilience**

Another factor relevant to overall society is the resilience of markets and supply chains. Resilience concerns the ability of markets to continue supplying in the face of shocks. It is perhaps unsurprising that economic resilience has received increasing attention given the strain on supply chains in recent years.

The relationship between resilience and competition can be complex. On the one hand, more competitive markets should result in increased numbers of suppliers, suggesting fewer points of vulnerability and hence more resilience.<sup>41</sup> However, in some situations, some forms of resilience could be lessened by competition. For example, if competition resulted in increased supply coming from overseas, this might reduce domestic supply options, potentially decreasing resilience to disrupted supply from overseas. While it is unlikely that it would be beneficial for society to place too much weight on these considerations, it is possible that there may be a desire to retain some domestic resilience for some goods, or at least reduce exposure to some forms of disruption for certain goods.

## **3.3. Ease of administrability**

The administrability of a standard refers to the ease with which an authority can use it to determine outcomes. Administering a competition regime requires several tasks, collecting evidence, analysing it, then processing it and balancing it to form an argument or decision. There may also be the need to act through courts. Such steps require resources and, all else equal, the fewer resources required the better.

Different standards may require different inputs or levels of analysis. As such, the standard can affect the administrability of the regime. If two alternative standards offered equally attractive outcomes across all

other attributes but one was easier to administer, it would appear relatively uncontroversial that it should be preferred.

In general, complexity reduces the ease of administrability, with more resources required to determine outcomes. This could include needing to assess more factors or gather evidence on a broader set of outcomes but could also be attributed to needing more time to assess evidence or it being harder to make a decision or argue in court. Therefore, as there is likely a positive association between simplicity and predictability, this implies a positive correlation between the ease of administrability and predictability.

Further, the administrability of a standard may be affected by the level, and variety, of expertise it requires. Expertise is likely to be easier to obtain over narrower sets of subject matters, and so standards that require analysis of a broader set of circumstances may require more varied expertise. Such a need is likely to lower the ease of administrability.

### 3.4. Political sustainability / credibility

A standard that is stable, and unlikely to come under significant pressure for change, should, all things equal, be preferred to one that was under constant pressure to change. While the standards applied in competition enforcement are unlikely to be regularly party to detailed political discussion, this will not always be true.<sup>42</sup>

Public functions in democratic societies must ultimately benefit from a sufficient level of popular support, or lack of popular opposition, to be sustained. Popular support is not a straight-forward concept and need not mean a favourable outcome in public opinion at any one point in time. Rather, it refers to the underlying legitimacy of the regime within the broader democratic constitution of the state.

An increasing number of people have argued that the alleged lack of competition enforcement over the past 40 years in the US, of which the consumer welfare standard is at least partly to blame, is leading to an increasing public outcry at the lack of enforcement (Khan, 2018<sup>[5]</sup>). This has led to increased political consideration of antitrust and how to reform it. These developments demonstrate how a standard must preserve a sense of credibility within the wider public.

More broadly, the political sustainability and credibility of a standard is likely to be related to the ability of the public to understand it. This will likely be linked to its predictability, although it is not clear if being complex would in itself reduce political credibility.

Determining whether a standard is more, or less, politically sustainable is likely a subjective consideration. There may be links to the extent to which a standard benefits societal welfare, but this will depend on the other policy levers and mechanisms in place to achieve those aims.<sup>43</sup> In this sense, competition enforcement must be seen within a wider set of objectives and institutions. In other words, the appropriate borders of competition policy and the extent to which it should take into account wider social goals, should take into consideration other policy areas and the extent to which other institutions might be better placed to look after these goals. This is the other side of the coin as discussed above in the attribute on social welfare enhancing, and reflects the argument that such all-encompassing goals for competition policy may come at costs (Petit, 2021<sup>[32]</sup>). If there are too many overlapping areas of policy responsibility, this could cause issues of accountability and reduce political sustainability or credibility.

Relatedly, the scope of decisions may matter if they are made by non-democratically elected decision makers. For administrative regimes, these decisions may be made first by competition authorities, where officials may or may not be democratically accountable to some extent. Generally though, it is the courts that will ultimately uphold, or otherwise, any decisions made.<sup>44</sup>

Delegations of authority are normal and are an important part of a well-functioning society. However, the more complex a decision, and the more potentially subjective decision-making power on those not

democratically accountable, the higher the risk that it may not be sustainable within a democracy. As such, how the standard for competition law affects the nature of decision making can also affect its political credibility. An additional, and related, consideration could be the extent to which a standard increases the risk of corruption.

### 3.5. Minimising the risk of errors

Another relevant attribute when comparing standards is the risk of type I and type II errors. A type I error in the context of competition enforcement would be falsely finding an issue and preventing the conduct in question from occurring, even if it was beneficial to society.<sup>45</sup> A type II error would be allowing conduct that, in fact, was not overall beneficial.

A standard that minimises the risk of errors will, all else equal, be better than one that does not. However, reducing the risk of one type of error may increase the risk of the other. As discussed in an earlier section, how a competition regime manages the balance of proof and utilises presumptions of harm will be key determinants in outcomes and risks of over and under enforcement. Nonetheless, it is possible that a standard will affect the likelihood of type I and type II errors.

Unlike the relatively uncontroversial statement that reducing all errors should be considered good, it is feasible that some jurisdictions would place substantial weight on minimising one type of error over another. For example, some standards could be biased towards under or over enforcement. Unlike other attributes discussed above, it appears more controversial to argue here that one must necessarily be preferred to the other. As such, the effects of standards on different types of error will be discussed separately.

# 4 Assessment of standards

This section considers the advantages and disadvantages of the different standards in relation to the attributes discussed in section 3. It begins with a description of the overall approach to the assessment, before comparing the different standards, attribute by attribute.

## 4.1. Approach

Many of the attributes described above depend on factors other than the standard. Predictability, for example, is not only a function of the standard, but is affected by many aspects of the regime, including its transparency and consistency. More broadly, with the social welfare maximising attribute, it is clear that competition law is not the only tool by which societies achieve better outcomes.

To deal with these complex and multi-dimensional issues, the comparisons between alternative standards for each attribute are conducted holding not only the outside world constant, but also the other attributes. Such a simplification risks missing some of the dynamics at play. As discussed above many of the attributes are not just correlated, but the relationship between them is strong. For example, extra guidance could provide a way to make an otherwise complex standard more predictable but would require additional work and could therefore be less administrable.

Generally, assessments avoid classifying any particular standard as low or high scoring on an absolute scale. Rather, if a particular standard is considered lower scoring compared to alternative standards, it does not necessarily perform poorly against that attribute overall. For example, a standard could be less predictable than another, but this is not to say that it is inherently unpredictable.

## 4.2. Predictability

The fewer moving parts within a standard, the more likely it is to be predictable.

The protecting competition standard, which seeks to consider the effect of an action in relation to its effect on competition, rather than on welfare, appears simpler than alternative standards. Indeed, many have argued that such a standard would be inherently more predictable than the consumer welfare standard, for example (Steinbaum and Stucke, 2020<sup>[16]</sup>). However, as discussed above, this relies on it being clear to all relevant stakeholders how decisions will be made under this standard.

Many proponents of the consumer welfare standard laud its predictability (Dorsey et al., 2020<sup>[39]</sup>). In contrast, they point out that many alternative standards are inherently unpredictable, and that this unpredictability has substantial costs. However, many have also argued the opposite, and that the use of any “welfare” standard implies that cases should be decided on the basis of a clear understanding of their welfare effects, which are unavoidably complex. A requirement to assess, and prove, harm with respect to welfare, arguably increases the need for complex economic analysis that makes regimes harder to predict (Khan, 2018<sup>[5]</sup>). Such a criticism would appear to apply equally to consumer and total welfare standards.<sup>46</sup> Of course, even with consumer welfare regimes there is room for structural presumptions, or per object or per se offences.



As noted above, another aspect of predictability is the argument that many proponents of the consumer welfare standard make, that a standard that is not objective risks being arbitrary or vague, making it difficult to predict. For example, Melamed and Petit argue that while it may sometimes be difficult to apply the consumer welfare standard, it is coherent and well-defined, thus increasing accountability of decision makers (Melamed and Petit, 2018<sup>[9]</sup>).

Understanding the predictability of the total welfare standard is difficult. On the one hand, it could be considered simpler to implement because it hinges on the question of whether efficiencies outweigh the deadweight loss (Heyer, 2006<sup>[21]</sup>). In practice though, understanding how efficiencies will be counted by authorities does not appear straight-forward. Assessment of deadweight loss is also likely to be difficult, given the need to estimate elasticities. Overall, therefore, it appears likely it would be harder to predict the outcome of a total welfare standard than a consumer welfare standard, but it is difficult to say by how much.

The broader standards, such as citizen's welfare standards and broad public interest considerations, are likely more complex to assess and, as such, appear less predictable than others. In particular, as the number of subject areas increases, it will be difficult to understand the end result of an assessment (OECD, 2017<sup>[29]</sup>).

Finally, another element relevant to the predictability of a standard is user experience of it. To the extent that consumer welfare is the prevailing standard, there is therefore likely to be an incumbency advantage to it in terms of predictability. Having a history of case precedent to consider provides a significant aid for firms, through their advisors, to understand the law. Such an advantage would only be temporary and would reduce over time, as the new standard was implemented and applied in practice. It could also, no doubt, be at least slightly alleviated by the issuing of guidance and other materials.

### 4.3. Social welfare enhancing

A useful and simple starting point for assessing how social welfare enhancing each standard is, is to note that, by definition, certain standards take into consideration broader aspects of welfare. The consumer welfare standard does not seek to maximise social welfare, instead focussing on the welfare of consumers. Protecting competition standards do not focus on welfare at all, instead focussing on preserving and promoting competition. On the other hand, the citizen's welfare standard, as well as potentially public interest considerations, allow a more explicit incorporation of wider welfare factors.

It is worth noting that competition is, generally, likely to be a beneficial force for societal welfare. To this extent, all of the standards seek to promote competition, albeit to varying extents and sometimes balanced against other considerations. However, if competition can drive benefits to society wider than those envisaged by the standard, there is a risk of not achieving those societal benefits.<sup>47</sup> Thus, an important, if not the key, question is the extent to which focussing on a subset of welfare results in suboptimal outcomes more generally.

As an illustration, a criticism of the consumer welfare standard is that its focus on efficiency has blinded enforcers to a range of harms that low competition can bring to other actors in the economy, such as workers and suppliers, but also to innovators and entrepreneurs (Khan, 2018<sup>[37]</sup>). In this view, the focus on consumer welfare has left society worse off. There are many scholars who have argued that use of the consumer welfare standard is one of the reasons that competition is decreasing in certain jurisdictions. For example, (Steinbaum and Stucke, 2020<sup>[16]</sup>) argues that competition has diminished under the consumer welfare standard, and that under a protecting competition, or effective competition, standard, it would be easier to preserve competition as there would be no need for enforcers to demonstrate how there were harms to consumers.

As noted, there are many complexities to overall societal welfare, most of which have traditionally not been the concern of competition policy. There are a range of other issues that may wish to be considered. These

includes a number of broader ethical concerns and, in general, the broader the scope for these to be considered, the more likelihood these can be maximised. For example, animal rights are not typically considered within competition law, but could be considered as part of overall welfare (Claassen and Gerbrandy, 2016<sup>[26]</sup>). Such a consideration would not appear to fit well within any of the standards considered, although could be covered by a public interest consideration or if animal rights were of value to citizens more generally. Another consideration could be that of happiness (Stucke, 2013<sup>[40]</sup>). While difficult to reconcile with any of the standards directly, perhaps the citizen's welfare standard would be best placed to consider any direct effects on happiness.

The sections below consider the different aspects of social welfare as discussed in section 3 in relation to the different standards.

### **4.3.1. Economic efficiency**

As noted above, competition is likely to result in higher levels of economic efficiency, as this is pursued by all standards to some degree. However, to the extent that standards do not place weight on economic efficiencies unless they result in benefits to consumers or to changes in competition, such as with the consumer welfare standard and protecting competition standard, there is a possibility this results in suboptimal levels of efficiency.

A key argument in the United States surrounding potential reforms to antitrust, is the idea that previous practice has given too much prominence to competition as a means to serve efficiency goals (Khan, 2018<sup>[5]</sup>). This suggests that protecting competition standards would place less weight on efficiency. Further, it has been argued that moving to a protecting competition standard could result in a wide number of outcomes that would reduce efficiency substantially, incurring static welfare losses against society (Melamed and Petit, 2018<sup>[9]</sup>). For example, if abuse of dominance provisions were to be more aggressively applied against those with a dominant position, it could reduce the gains from legitimate acquisition of market power, imposing dynamic losses to competition, as well as incurring costs that raise static inefficiencies, for example through duplication of costs. However, some have disputed this, for example Fox, who notes that protecting process does not in itself protect inefficient competitors, noting that analysis can be used to differentiate the two (Fox, 2013<sup>[6]</sup>).

With a consumer welfare standard, efficiencies will be relevant only to the extent that they are passed through and do not result in lower output, which is likely to focus on savings to marginal costs. In contrast, under a total welfare standard, a broader range of cost savings can be considered (Heyer, 2006<sup>[21]</sup>). Total and modified total welfare standards therefore contribute to an overall balancing of broader economic efficiency (Blair and Sokol, 2013<sup>[10]</sup>), and this standard therefore appears to score best on overall economic efficiency.<sup>48</sup>

The citizen's welfare standard or public interest considerations are harder to assess in relation to economic efficiency. On the one hand, these standards could take into account overall benefits from substantial efficiencies if these are deemed to be of broader benefit to society. On the other, such effects will likely need to be traded off against all of the potential effects of a lessening of competition. It therefore appears difficult to judge these standards against the overall field of economic efficiency, although given the broad range of possible considerations, it may be reasonable to assume it would not fair better than the consumer welfare standard.

### **4.3.2. Labour markets**

Many have criticised the consumer welfare standard for ignoring effects on labour markets, and thus leading to overall worse societal outcomes. This includes attacks from a range of perspectives, including from Marxist perspectives, (Cengiz, 2021<sup>[41]</sup>), as well as from more market based perspectives (Steinbaum and Stucke, 2020<sup>[16]</sup>), (Stucke, 2013<sup>[42]</sup>). While the number of cases relating to labour markets has

historically been low, some have argued this is more of a practical consideration than due to the standard used, as these issues are harder to consider (Melamed and Petit, 2018<sup>[9]</sup>).

By focusing on harms to consumers, effects on labour markets are not considered directly under a consumer welfare standard. However, it is not necessarily the case that competition within labour markets are completely ignored within the consumer welfare standard. As noted above, there are examples of competition authorities that operate under a notional consumer welfare standard considering the effects of competition on labour markets, and in relation to purchasing power more generally (OECD, 2022<sup>[2]</sup>).

While this could mean they do not operate a consumer welfare standard as defined in this paper, another explanation is that competition in upstream markets can affect consumers. For example, the acquisition of either monopsony power or bargaining power by purchasers can lead to reductions in output or reductions in innovation, ultimately harming consumers (OECD, 2022<sup>[2]</sup>). As an example, the UK's CMA has been clear in stating its view that it will be looking closely at competition in labour markets and that this is fully compatible with the consumer welfare standard.<sup>49</sup>

Despite this, labour market issues may not be fully addressed within the consumer welfare standard if harm to workers affects society beyond the impact that it has on end consumers. In fact, weaker competition for workers could even be beneficial for consumers if reduced labour costs led to lower prices. To further illustrate this point, some authors have argued that competitive harm to workers requires an addition to the consumer welfare standard of “worker welfare” (Naidu, Posner and Weyl, 2018<sup>[43]</sup>).<sup>50</sup>

As the total welfare standard tends not to consider the effects of distribution or transfers, focussing only on deadweight loss versus efficiency, it could be argued that it would serve interests in labour markets even less than the consumer welfare standard. This is because it would treat any savings from reduced labour costs as a potential efficiency, even if they were not expected to lead to lower prices. In this paper, it is assumed that total welfare standards do not consider labour markets, but a modified total welfare approach may have the potential to place greater weight on the welfare of workers.

The protecting competition standard seeks to explicitly preserve competition, including competition for labour inputs. In this sense it is likely better placed to deliver better outcomes for workers and labour markets generally. Regarding the other standards, it is clear that a citizen's welfare standard has the potential to consider a range of effects in labour markets, as could public interest considerations that take into account labour markets, such as those seen in South Africa and discussed in Box 6. Between protecting competition and citizen's welfare, it is difficult to judge which would be best placed to promote labour market issues. As the citizen's welfare standard can directly consider effects on citizens as workers, this could lead to more consideration of workers. However, not all citizens are workers, and it is difficult to assess how competing demands will be balanced. The protecting competition standard is likely to protect competition for the benefit of workers more generally, albeit without considering whether outcomes are optimal for them.

### **4.3.3. Inequality in economic and political power**

As it does not treat transfers between consumers and firms as neutral, many suggest that consumer welfare will result in better distributional outcomes than total welfare (Pittman, 2007<sup>[44]</sup>). However, this is not accepted by all, with others arguing that not all consumers have a low income, and in some instances may be better off than suppliers (Heyer, 2006<sup>[21]</sup>).<sup>51</sup> Neither the protecting competition standard nor the consumer welfare standard explicitly take into account the effect of distribution, but both seek to preserve competition to the benefit of consumers. The total welfare standard appears worst placed in relation to economic inequality, as not only does it not consider distribution, but it also places more weight on producer efficiencies, which are generally unlikely to reduce income inequality. Modified total welfare is clearly a slight improvement in this regard.

The citizen's welfare standard and relevant public interest considerations may be best placed to deal with these issues as they can directly consider the effects of income distribution, either through its effects on the welfare of citizens or because it is explicitly considered.

#### *Political power*

Assessing how different standards fare in relation to the distribution of political power is especially hard.

As noted in section 2, one of the key motivations behind the protecting competition standard is a view that the consumer welfare standard has resulted in increased concentration as it led to underenforcement. As such, one of the goals of the protecting competition standard is to more effectively disperse the means of private power through preserving effective competition (Steinbaum and Stucke, 2020<sup>[16]</sup>). In a speech, Jonathan Kanter, Assistant District Attorney at the United States Department of Justice, outlines three problematic issues with consumer welfare. The first is that it does not provide for the protection of democracy from corporate power. Crucially, he argues that by ignoring these benefits of competitive markets, there is a bias towards underenforcement.<sup>52</sup>

However, in respect to the current exercise, the mechanism for this effect is through higher levels of enforcement, which is captured below through a lower risk of a type II error. The protecting competition standard does not explicitly consider political power in individual cases.

Specifically taking into account concerns that go beyond the direct effects of competition on markets, is only possible within the citizen's welfare standard or a broad public interest test focused on the prevention of accumulating economic or political power. As with economic inequality, total welfare appears particularly poorly suited to dealing with these concerns, due to the focus on deadweight loss balanced against efficiencies.

#### **4.3.4. Environment and sustainability**

Competition's role in promoting sustainability through encouraging innovation is unlikely to be materially affected by different standards. To the extent that competition will promote environmental goals, this is also likely to coincide with other outcomes consistent with competition.

In relation to managing any potential conflict between competition and sustainability, it is fairly straightforward to see that the protecting competition and consumer welfare standards are not well equipped to consider situations where there may be a lessening of competition that could result in substantial environmental benefits. This would also be true for a total, or even modified total, welfare standard. This is because there is a 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.

The citizen's welfare standard or public interest considerations in relation to the environment, by contrast, could directly consider these effects. For example, they could consider that despite a loss of competition, a particular arrangement will result in sufficiently substantial positive environmental effects to be permitted.

It is worth noting that, as with the discussion of labour markets above, the implementation of these considerations in practice may not be as black-and-white. For example, authorities in the European Union, United Kingdom and Japan have all produced dedicated documents, either draft guidance for consultation or updated guidance, on how they expect to deal with environmental issues that have a potential anti-competitive effect.<sup>53</sup> In general though, the guidelines note how it is important to design any arrangements such that any effect on competition is minimised.

### 4.3.5. Economic Resilience

To the extent that competition promotes resilience, as per other factors which are expected to be positively correlated with competition, resilience should receive similar treatment under most standards, according to the levels of enforcement.

There may be some differentiation between standards, however. For example, in their paper advocating for the effective competition standard, (Steinbaum and Stucke, 2020<sup>[16]</sup>) argue that it protects the resiliency of supply chains through preserving competition for individuals, consumers, workers and upstream suppliers. The increased focus on upstream markets with a protecting competition standard would appear to put it in a better position than consumer welfare with respect to economic resiliency. The same would appear to be true for total welfare compared to protecting competition, where it could be further argued that the increased focus on efficiency may not be consistent with resilience.

Direct consideration of economic resilience, including potentially allowing for reduced competition to promote it, would appear to only be possible with a citizen's welfare standard or relevant public interest consideration.<sup>54</sup> For example, weight could be placed on the desire to maintain domestic supply options, even if this could result in harm to consumer welfare or overall total welfare, through less competition.

## 4.4. Ease of administrability

The more complicated a standard, the more difficult it will be to administer. In this respect, the discussion above in relation to predictability is equally applicable here. As noted there, the protecting competition standard appears likely to be the simplest standard as there is no need to assess effects, followed by the consumer welfare standard. The broader standards, like the citizen's welfare standard, are inherently more complex, and therefore likely more difficult to administer.

For example, it has been argued by several scholars that while many of the goals of a citizen's welfare standard are laudable, competition policy is poorly placed to deal with them. For example, Carl Shapiro argues that using competition policy in this way may be counterproductive as agencies are ill-suited to handle these broader problems (Shapiro, 2017<sup>[4]</sup>). Further, decision making may be hard to implement as increasingly broader concerns are incorporated. As a decision maker must weigh increasingly large numbers of factors together, this could cause significant challenges (OECD, 2017<sup>[29]</sup>). This further explains why broader standards are likely to be more difficult to administer compared to simpler ones.

Another relevant aspect of administrability linked to simplicity, is the ability of firms, which are likely to be better resourced than public agencies, to engage in increasingly complex methodologies to their benefit. Indeed, some have argued that a significant advantage of a simpler standard such as the protecting competition standard is that it does not require detailed determinations on specific outcomes.<sup>55</sup> Instead, it focusses on protecting a process, something many have argued is necessarily simpler. Such arguments have been made against all standards that consider welfare effects, namely those that focus on outcomes rather than on defending processes. In this view, any standard that requires outcomes to be assessed with respect to welfare, is likely to make litigation highly protracted and costly (Khan, 2018<sup>[5]</sup>).

Some have argued that the costs of implementing a total welfare approach need not necessarily be substantially more than the costs of consumer welfare (Heyer, 2006<sup>[21]</sup>), contending that such an approach negates the need to differentiate between how cost savings will be passed through, instead allowing a "simpler" comparison between the likely efficiencies against the expected deadweight loss.

As described in section 3, there are other factors relevant to administrability than just simplicity. The human resourcing needs of the standard should also be considered, and while this can partly be explained by the complexity, there may also be overlaps with the levels of enforcement expected. In particular, standards that imply more enforcement will result in higher numbers of cases. It has been argued in the context of

potential changes in competition enforcement in the United States that significantly greater caseloads would require significantly more qualified staff able to bring the required cases to court (Jones and Kovacic, 2020<sup>[45]</sup>). To the extent then that the protecting competition standard may increase enforcement and lead to lower levels of type II error, it may therefore require more staff to conduct it, making it less administrable. As discussed above, and further below, though, this needs to be balanced against the complexity of enforcing.

Beyond staffing levels, the broader the range of considerations in a standard, the more challenging it will be for a competition authority to achieve expertise across all relevant areas. To understand how different events could affect outcomes across many dimensions, such as in labour markets, political spheres or with respect to the environment, greater levels of expertise are required, reducing administrability.

Overall, compared to the citizen's welfare standards, it appears that all of the other standards fair reasonably well in terms of administrability. The protecting competition standard may have an argument to be slightly easier to administer due to the reduced need to show welfare effects, but the overall result is uncertain given the potential for increased levels of enforcement.

#### 4.5. Political sustainability / credibility

Assessing standards with regard to political credibility is particularly difficult, not only because it is a fundamentally multifaceted question, but also because the political climate in each jurisdiction may vary. It is also strongly linked to issues covered more directly by other attributes.

For instance, many of the standards, apart from the citizen's welfare standard or public interest considerations, do not explicitly consider wider societal concerns.<sup>56</sup> To the extent that this is what the public value, then this could cause credibility issues. Further, if there is public support for increased competition, the levels of enforcement that result may be important to the public. However, assessing standards in this regard appears to be a double counting of the societal welfare attribute.

However, as noted in section 3, one important aspect of political sustainability is that, due to the complexity of how competition interacts with overall society, whether it is for lawmakers to decide how to trade-off between these different elements, rather than enforcers themselves.<sup>57</sup> There may also be other policy tools better suited to deal with them (Motta, 2015<sup>[46]</sup>). In this respect, standards that focus on the preservation of competition, or on minimising explicitly defined and narrow aspects of welfare, will require fewer careful judgements on the wider societal impact on their interventions. There is also likely to be less potentially problematic overlaps with other policy tools outside of competition enforcement.

As with other attributes, as the scope of welfare considerations increases, for example as it does with the citizen's welfare standard, the risks of important society shaping decisions being made with further removed degrees from elected lawmakers or governments increases. This creates substantial risk that decision making processes could become unsustainable from a democratic perspective, or risk losing their political independence. For example, Carl Shapiro has highlighted the potential dangers from politicising antitrust (Shapiro, 2017<sup>[4]</sup>). Such a criticism would also apply to any standard that does not have an objective criteria for implementation, an argument discussed above which some have levelled at the protecting competition standard (Melamed and Petit, 2018<sup>[9]</sup>).

#### 4.6. Minimising the risk of errors

Generally, the risk of error is determined by the standard of proof. Holding that constant, the question is therefore how the standards compare in terms of the risks of under or over enforcing levels of competition. As explained previously, presumptions could be employed under different standards and this would undeniably have a significant impact on the risk of type I and type II errors.

#### **4.6.1. Type II errors - underenforcement**

The role of the consumer welfare standard in affecting alleged lower levels of enforcement is an area of substantial debate. For many, it has been a large factor in leading to what they consider an overall lessening in the effectiveness of competition enforcement in the United States, see for example arguments from (Steinbaum and Stucke, 2020<sup>[16]</sup>) and (Khan, 2018<sup>[5]</sup>) (amongst others).

Some argue that this narrative is too simplistic, and ignores the complexity of how antitrust ideals have formed in the United States, which includes influence from the Chicago School more generally, as well as the Harvard School of thought (Kovacic, 2020<sup>[47]</sup>). Others have argued that high levels of enforcement are entirely compatible with the consumer welfare standard, and that vigorous, but principled antitrust regulation can be achieved with it (Shapiro, 2017<sup>[4]</sup>), (Hovenkamp and Shapiro, 2018<sup>[8]</sup>). Untangling the overall risk to underenforcement between a consumer welfare standard and protecting competition is therefore not straightforward.

Beyond these two standards, it is likely that a total welfare standard would further reduce the scope for competition enforcement (Fox, 2013<sup>[6]</sup>). As such, type II errors seem more likely, not least because firms will have clear informational advantages over consumers and regulators.

Further, the more complex a standard, the higher risk of type II errors, as firms are likely to have substantial advantages in terms of ability to argue on the merits (Jones and Kovacic, 2020<sup>[45]</sup>). Similarly, there is a general consensus that there will be a natural bias in economic research for theories that help those with incentives to benefit from it, namely firms who wish to defend against intervention (Hovenkamp and Scott Morton, 2020<sup>[48]</sup>), (Kovacic, 1992<sup>[49]</sup>). This implies that standards will become increasingly likely to bias towards under, rather than over, enforcement, the broader the scope to consider complex outcomes.

#### **4.6.2. Type I errors – overenforcement**

A potential disadvantage of the protecting competition standard is a relatively higher risk of type I error, where enforcement action is taken even though overall the effects of the action could be positive. While this is already taken into account to some extent in the discussion of economic efficiency, it is also perhaps an unavoidable consequence of shifting the dial towards increased enforcement. Determining the magnitude of this issue is, however, likely to be highly contentious.

It appears even more difficult to rank the likelihood of overenforcement between other standards. As noted above, the risk of underenforcement appears slightly higher with regard to total welfare and the citizen's standard, which may imply a slightly lower risk of overenforcement, but the links between over and under enforcement are not necessarily straight-forward. On the other hand, some have argued that the consumer welfare standard provides an appropriate balance between risks to competition, and the efficiency of firms, thus reducing the relative risk of overenforcement (Dorsey et al., 2020<sup>[39]</sup>), (Melamed and Petit, 2018<sup>[9]</sup>).

#### **4.6.3. Balancing risks**

In deciding how to balance different risks of over and under enforcement, it is likely important to form a view on the relative harms from each. Inherent in such a consideration is the extent to which benefits that may be foregone from overenforcement can be achieved anyway, through other means, versus the extent to which the harms from underenforcement may dissipate anyway.

A crucial part of the latter is the extent to which one considers that market power will naturally dissipate over time, or put another way, whether markets naturally correct. The extent to which there are entry barriers across markets will likely be a determining factor in this assessment, and it has been argued that assuming markets are self-correcting ignores this important fact (Khan, 2018<sup>[5]</sup>).



# 5 Conclusion

There is no perfect standard for competition law. Instead, it is necessary to consider their relative advantages and disadvantages. There are several standards available, with the consumer welfare standard likely still the predominant standard worldwide. Nonetheless, a total welfare, citizen's welfare or protecting competition standard, offer what appear to be the most credible alternatives, although this list is far from exhaustive.

The relative advantages and disadvantages of each standard depends upon the attributes that a jurisdiction considers important and their relative weight. There is unlikely to be a “one-size fits all” solution, and different jurisdictions may choose to weigh attributes differently. For example, some jurisdictions may be better placed to administer more complex standards, such as the citizen's welfare standard, or have a different tolerance for under versus over enforcement. It is also possible that some jurisdictions could administer mixed regimes, using different standards according to the circumstances.

Despite the value in considering how standards perform against attributes, this is difficult to do with confidence. This difficulty means that identified differences between standards are usually limited to relative rankings, often tentative, and with significant uncertainty regarding their magnitude. This is partly due to the myriad of related factors that affect the attribute but can also simply be a function of how hard it is to predict outcomes with many other relevant factors held constant, such as authority resources or standards of proof. Such an exercise will therefore always be somewhat simplified compared to reality.

Further, even when differences between standards are identified, the impact of these differences should not be overstated. It is clear that, even between vastly different standards, many of the outcomes from competition enforcement would be the same. The outcomes of competition enforcement are determined by the facts, alongside many other factors, such as the standard of proof and the attitudes of courts.

Nonetheless, the exercise has identified some advantages and disadvantages of the alternative standards in relation to each other. Some can be given with higher confidence than others but, in general:

- While perhaps the most controversial standard, the consumer welfare standard, as the current prevailing standard, generally ranks in the middle when considering the different attributes. It does not consider a wide range of welfare effects, and there are arguments to be made that it leads to underenforcement. However, it is well known, reasonably predictable, generally strikes a good mix between the risk of errors, and, when enforced well, appears politically credible.
- The total welfare standard promotes economic efficiency well, and in general is reasonably similar to the consumer welfare standard on a number of counts. However, it also ignores many other broader societal concerns, appears to have a high risk of underenforcement and is likely harder to administer and predict than a consumer welfare standard. Most of this applies to modified total welfare, which may be even harder to predict, but in contrast takes into account distributional concerns.
- The citizen's welfare standard has some significant advantages in that it can take into account a broad range of societal concerns, giving it great potential to lead to better decisions for society. This comes at some cost though, likely being significantly more difficult to administer, less predictable and a high risk of placing complex value judgements on decision makers. There is also the question of how it would interact with other policy tools. A similar assessment is likely applicable

for broad public interest considerations, although it is worth noting that these can be tailored to the specific needs of a jurisdiction.

- While there is significant debate on its relative advantages and disadvantages, the protecting competition standard appears to be reasonably predictable and administrable, although there is some controversy on how objective a measure it is. Regarding its potential role in promoting social welfare, it is well placed to promote welfare in labour markets and economic resilience, but fares less well in relation to economic efficiency and sustainability. Finally, while potentially politically sustainable, it appears likely to come with an increased risk of overenforcement.

# Endnotes

<sup>1</sup> Competition, or antitrust, policy broadly covers the areas of competition enforcement through competition law, as well as related competition policy, such as competition advocacy.

<sup>2</sup> See, for example, (Albaek, 2013<sup>[59]</sup>) noting the prevalence of the standard in the European Union and elsewhere, as well as (Wilson, 2019<sup>[61]</sup>) from 2019. (Lee, 2015<sup>[56]</sup>) demonstrates however that the interaction between objectives and standards is not always straightforward, and that many jurisdictions consider a range of objectives other than just consumer welfare.

<sup>3</sup> There are also numerous articles and essays written to refute, or defend, a particular standard.

<sup>4</sup> See (De Loecker, Eeckhout and Unger, 2020<sup>[60]</sup>) and (Koltay, Lorincz and Valletti, 2022<sup>[50]</sup>) for examples of this literature.

<sup>5</sup> For example, see (Khan, 2018<sup>[6]</sup>) or (Steinbaum and Stucke, 2020<sup>[16]</sup>).

<sup>6</sup> Further, there is significant potential for different authorities to form different views given the same set of facts (Blair and Sokol, 2013<sup>[10]</sup>).

<sup>7</sup> <https://www.oecd.org/competition/the-goals-of-competition-policy.htm>  
<https://www.oecd.org/competition/the-goals-of-competition-policy.htm>

<sup>8</sup> <https://www.oecd.org/daf/competition/competition-policy-time-for-a-reset.htm> and  
<https://www.oecd.org/competition/globalforum/competition-under-fire.htm>

<sup>9</sup> The discussion is further impaired by the lack of consistency in how standards are defined, leading to a situation where different authors can both disagree about exactly what a standard is, as well as what the effects of it might be in practice.

<sup>10</sup> This focus is to allow broader isolation of the key impact of the standard, rather than a view that such considerations are not important.

<sup>11</sup> An alternative to pareto efficiency would be to consider Kaldor-Hicks efficiency, which states that overall welfare can improve if those that benefit are sufficiently better off such that they can, at least in theory, compensate others for their losses while remaining better off themselves.

<sup>12</sup> A typical example of where such models break down would be in the context of addiction, where the assumption that willingness to pay reflects true preferences in the best interest of the individual become hard to justify.

<sup>13</sup> There are many examples of cases that have taken into account competition beyond just pricing effects, including quality and innovation (OECD, 2013<sub>[18]</sub>). As one example from a jurisdiction widely considered to apply the consumer welfare standard, the UK's Competition and Markets Authority considered the proposed acquisition of a supermarket's pharmacy business (Sainsbury's) by a pharmacy chain (Celesio / Lloyds Pharmacy), and considered that the transaction could substantially lessen competition in a number of local areas, despite the fact that price regulation significantly restricted any competition on price.

<sup>14</sup> In the sense that it focuses on outcomes within the market in question, through the purchase of goods and services and how this is affected by competition between suppliers. It does not seek to go further than this economic sense to consider any broader philosophical or moral aspects, for example such as their happiness.

<sup>15</sup> There has been some debate on the extent to which the consumer welfare standard considers net effects to consumers or whether it holds that all consumers must be better off (Heyer, 2006<sub>[21]</sub>). As a general rule, it is difficult to consider individual consumers in the context of competition policy, but where identifiable groups of consumers may be affected differently by an action, it would rarely be considered acceptable to accept harm to one, even if there could be benefits to others.

<sup>16</sup> To some extent, the same criticism could be levelled at the consumer welfare standard. However, as the consumer welfare standard does not take into account the benefits to producers, this may explain why this issue arises particularly in relation to the total welfare standard. As discussed in the section introducing it, there is perhaps legitimacy in arguing that considering "true" total welfare would include a consideration of effects beyond consumers and producers.

<sup>17</sup> Australia has the lowest population density in the OECD with 3 people per square kilometre with Canada joint second lowest with Iceland at 4. New Zealand is the sixth lowest, with 19. By contrast, the United States has 36 people per square km, the United Kingdom 277, Japan 346 and Korea 531. Source: World Bank Population Density data, 2020. <https://data.worldbank.org/indicator/EN.POP.DNST?locations=OE>, <https://data.worldbank.org/indicator/EN.POP.DNST?locations=OE>.

<sup>18</sup> As noted, there would seem to be little reason why a total welfare standard would not also consider different effects on all actors in an economy. Distinguishing these two concepts is therefore not straightforward. One potential angle upon which to do so, could be after comparing how the two standards consider the interest of firms, given that while many citizens will be shareholders, this is likely to be in smaller number than consumers, and therefore the flow-through of benefits to firms may be harder to measure under a citizen's welfare standard.

<sup>19</sup> As discussed in the introduction, as well as the standard, there are other important factors that contribute to enforcement levels, such as the standard of proof, attitudes of courts and agency resources. It is also outside the scope of this paper to assess the extent to which there has been historic underenforcement in any jurisdiction.

<sup>20</sup> As explained above however, this need not necessarily be the case as harm from monopsony and labour markets is not necessarily to be ignored under a consumer welfare standard. Indeed, while most jurisdictions may be considered to employ a consumer welfare standard, it appears that most would also consider cartels between purchasers to be tantamount to a hardcore cartel offence (OECD, 2022<sub>[2]</sub>).

<sup>21</sup> As opposed to an assessment of the effects on outcomes, to consumers or otherwise, as a result of the conduct. It may be that in many cases there would not be an actual effect on competition that did not result in likely effects on outcomes of the same direction, but it would likely see fewer efficiency arguments being successful, such as claims that the overall effect of conduct was to lower prices despite restricting competition.

<sup>22</sup> Alternatively, these could be referred to as public interest tests or concerns, depending on the context or jurisdiction.

<sup>23</sup> <https://www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm>  
<https://www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm>

<sup>24</sup> Another potential categorisation of public interest considerations is whether they are economic or not. Examples of economic considerations are promoting economic development, employment or protecting certain categories of business in some circumstances, such as promoting smaller business growth or shielding critical domestic firms from overseas competition. Non-economic considerations include seeking to protect broader social welfare, such as public health, social welfare or the environment.

<sup>25</sup> While the stylised examples are not intended to be fanciful per se, neither are they knowingly based on any real-life matter, past or present.

<sup>26</sup> They do not overlap in any product or geographic markets.

<sup>27</sup> In this case, as the consumers are assumed to be higher-income individuals, any modification could be in the direction of firms, should they be structured in a way that led to distributional concerns if they suffered harm.

<sup>28</sup> This means that the score of a standard against one attribute may be related to the score on another. Put another way, the scores are correlated.

<sup>29</sup> For example, the standard of proof is likely to have a substantial impact on the predictability of the regime. Similarly, a highly effective and well-resourced regime may make fewer errors than otherwise.

<sup>30</sup> For example, one could place no weight on some attributes or place almost all weight on just one or two.

<sup>31</sup> Recommendation of the OECD Council on Transparency and Procedural Fairness in Competition Law Enforcement, adopted on 6 October 2021. <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0465> <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0465>

<sup>32</sup> In theory, the predictability of a standard could be measured empirically by comparing the accuracy of predictions with outcomes over a long period of time. In practice, such an assessment is infeasible due to the availability of data and the wide range of factors other than the standard that could affect the predictability of the outcome. It is therefore necessary to consider the likely factors that will increase, or decrease, the predictability of a standard.

<sup>33</sup> Note that while this is likely to be generally true, it is not necessarily so. For example, a standard that was decided by the flip of a coin appears fairly simple but could not be predicted beyond a 50/50 chance.

<sup>34</sup> Put another way, in order to fully consider the relative advantages and disadvantages of alternative standards, an assumption that competition law is restricted to narrow fields must be dropped.

<sup>35</sup> It is only possible to truly hold all else equal if they are truly independent of each other. This seems extremely unlikely when considering such a broad issue as wider social well-being.

<sup>36</sup> Such an exercise assumes that it is both possible to incorporate these broader perspectives into a competition assessment and, most crucially and perhaps objectionably, that it is possible to accurately balance them against each other. The extent to which this is true will affect the advantages of different standards, as will relevant considerations captured within the assessment of other attributes, such as administrability and the risk of errors.

<sup>37</sup> As well as authorities that have spoken out noting that they will look at broader considerations, such as labour, other authorities have indicated the contrary. At a recent event, for example, the President of the Brazilian competition authority, CADE, indicated that it was not prepared to look at issues such as labour and sustainability. See: [https://content.mlex.com/#/content/1460663?referrer=email\\_dailysavedsearch](https://content.mlex.com/#/content/1460663?referrer=email_dailysavedsearch), 30 March 2023

<sup>38</sup> For example, there are many broad issues that could be included within the discussion, such as happiness or animal welfare.

<sup>39</sup> For example, jurisdictions such as the United States, the United Kingdom and Portugal, amongst others, have either taken enforcement action in relation to competition law in labour markets or signalled their intention to do so.

<sup>40</sup> CMA (2023) CMA Economic Research Strategy, Microeconomics Unit, March 2023, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1140983/Economic\\_Research\\_Strategy.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1140983/Economic_Research_Strategy.pdf)

<sup>41</sup> For example, as noted by United States Department of Justice Assistant Attorney General (AAG) Jonathan Kanter: “Competitive markets create resiliency. Competitive markets are less susceptible to central points of failure”. US DOJ, Press Release, *Assistant Attorney General Jonathan Kanter Delivers Remarks at New York City Bar Association’s Milton Handler Lecture*, 18 May 2022, <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association>

<sup>42</sup> For example, there has been increased discussion of standards in both legislative and political contexts in some jurisdictions recently, not least in the United States.

<sup>43</sup> For example, if there are strong labour protection rules in place, this could imply lower levels of concern from not considering labour issues in competition enforcement, although such a statement appears increasingly controversial.

<sup>44</sup> One exception could be when a public interest test allows government to intervene in decision making directly, for example by allowing the relevant government minister to decide on certain matters in some circumstances.

<sup>45</sup> One question is whether the error should be judged against overall society, just the standard in question (i.e. against consumer welfare) or in relation to overall levels of competition. For this assessment, errors

relate to the standard itself and overall levels of competition, as broader societal considerations are captured by the social welfare enhancing attribute.

<sup>46</sup> An example of the criticism is spelt out by AAG Jonathan Kanter, where he describes it as the “central planning standard”. US DOJ, Press Release, Assistant Attorney General Jonathan Kanter Delivers Remarks at New York City Bar Association’s Milton Handler Lecture, 18 May 2022, <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association>

<sup>47</sup> This would be the case if the broader benefits of competition are not perfectly correlated with benefits accruing to those designated by the standard (eg. consumers or citizens). If all the benefits of competition were perfectly correlated, then there would not be no risk of underenforcement.

<sup>48</sup> The closer that firms in the economy are to falling below minimum efficient scale, the potentially larger gains to be had from placing greater weight on economic efficiency (Clifford, Opashinov and Hollinger, 2003<sup>[23]</sup>).

<sup>49</sup> For example, a quote from the CMA’s Economic Research Strategy notes that: “Market power may also take the form of monopsony in labour or other input markets, distorting employment and investment choices and harming consumer’s welfare.” [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1140983/Economic\\_Research\\_Strategy.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1140983/Economic_Research_Strategy.pdf)

<sup>50</sup> Even those who largely defend the consumer welfare standard have noted that, when considering competition on suppliers under a consumer welfare standard, it might more truthfully be referred to as the supplier welfare standard (Shapiro, 2017<sup>[4]</sup>).

<sup>51</sup> One proposed example is of a merger between repair shops for luxury cars, where the customers may be better off than the suppliers and therefore a merger could result in better outcomes from a distribution perspective, but would not be allowed under a consumer welfare standard.

<sup>52</sup> US DOJ, Press Release, Assistant Attorney General Jonathan Kanter Delivers Remarks at New York City Bar Association’s Milton Handler Lecture, 18 May 2022, <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association>

<sup>53</sup> Japan Fair Trade Commission, Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society Under the Antimonopoly Act, 31 March 2023, Tentative Translation; UK CMA, Draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements, 28 February 2023, [https://files.lbr.cloud/public/2023-02/Draft\\_Sustainability\\_Guidance\\_document\\_.pdf?VersionId=1BPe5tWhwNuCFotKZ7PHMmulSqYdalM](https://files.lbr.cloud/public/2023-02/Draft_Sustainability_Guidance_document_.pdf?VersionId=1BPe5tWhwNuCFotKZ7PHMmulSqYdalM)

<sup>54</sup> Further, weight could be given to upstream markets.

<sup>55</sup> US DOJ, Press Release, Assistant Attorney General Jonathan Kanter Delivers Remarks at New York City Bar Association’s Milton Handler Lecture, 18 May 2022, <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association>

<sup>56</sup> For example, in a recent comment to media, a counsel to the United States Senate Judiciary Antitrust Subcommittee Chair noted that there was a bipartisan momentum for change because the previous antitrust consensus was in tatters, due to broad public concern about increased market power. See:



[https://content.mlex.com/#/content/1460284?referrer=email\\_dailycontentset&dailyId=7bcadf3d2c894722966d32e04158e53a&paddleid=201&paddleaois=2000;2003](https://content.mlex.com/#/content/1460284?referrer=email_dailycontentset&dailyId=7bcadf3d2c894722966d32e04158e53a&paddleid=201&paddleaois=2000;2003) (29 March 2023)

<sup>57</sup> For example, in the context of United States enforcement, a Department of Justice official noted that it was not their job to balance the tensions between allowing businesses to operate and protecting competition, as Congress has already decided the law which is their job to enforce. See: [https://content.mlex.com/#/content/1460252?referrer=email\\_dailycontentset&dailyId=7bcadf3d2c894722966d32e04158e53a&paddleid=201&paddleaois=2000;2003](https://content.mlex.com/#/content/1460252?referrer=email_dailycontentset&dailyId=7bcadf3d2c894722966d32e04158e53a&paddleid=201&paddleaois=2000;2003) (29 March 2023)

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