

## CUTS Global Forum

### Theme: Should Consumer Welfare Standard Rule the World?

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#### Backgrounder

Tracing back to its origin, the term ‘consumer welfare standard’ (CWS) seems to have been enveloped in controversy and shrouded in confusion.<sup>i</sup> The phrase does not appear in any statute, legislative history or common law precedents.<sup>ii</sup> However, since it was first coined in Bork’s Antitrust Paradox,<sup>iii</sup> it has been a raging debate among anti-trust professionals.

This theoretical debate was triggered due to the criticism of Bork’s view that consumer welfare means a total surplus, which seemed to obscure basic economic concepts.<sup>iv</sup> Some scholars interpreted CWS as one focused on price and output without considering welfare or other factors<sup>v</sup>; some opined that consumer surplus should determine CWS<sup>vi</sup>. Others, such as the Neo Brandeisian<sup>vii</sup> movement, seek to replace the term CWS altogether and replace it with a legal standard that better reflects other purposes of competition law.<sup>viii</sup> In this regard, total welfare<sup>ix</sup> or an eco-systemic approach.<sup>x</sup> This includes suggestions of new emerging approaches such as the transactions cost approach.<sup>xi</sup>

Till now, there are no legally accepted guiding principles of CWS interpretation, and the standard is regarded as ambiguous and inadequate.<sup>xii</sup> Further, a gap exists in the theoretical understanding of CWS and the implementation or competition enforcement.<sup>xiii</sup> However, these differing interpretations have not stopped jurisdictions across the globe from taking competition enforcement actions. Considering the transformative phase competition law enforcement is in, particularly due to the accelerated digitalisation of economies,<sup>xiv</sup> it is imperative that competition enforcement incorporates a precise and modern interpretation of consumer welfare.

With this context, an e-forum is being launched to discuss and deliberate on the principles, standards, determinants and envisaged approach for consumer welfare interpretation in competition analysis. It will also be useful to discuss what is best suited for developing and least developed jurisdictions.

A few indicative issues that may be discussed are listed below:

## Agenda of Discussion

### **1. Crystallisation of Competition Law Goals: What is the goal of competition law?**

The first indicative issue relates to whether CW should be considered a goal of competition law. Scholars have often taken polar stances on competition law's goals and debated the economic and non-economic welfare angle of competition law.<sup>xv</sup> While some proponents believe that CW is the only goal of anti-trust policy<sup>xvi</sup>, some say that it is not the primary goal<sup>xvii</sup>, and others that the goals must be reconsidered.<sup>xviii</sup> Others reflect not merely on the goal but call for the adoption and a revival of a structure-orientated competition policy, which focuses on promoting competitive markets.<sup>xix</sup>

### **2. Relationship between Competition and Consumer Welfare: Is the existence of competition itself a yardstick of consumer welfare?**

As per some scholars,<sup>xx</sup> competition law assesses CW for allocating available productive forces and materials among the lines of industry and effectively coordinating various means of production in each industry into groupings that will produce the greatest result.<sup>xxi</sup> This leads to the foundation of the second issue, to determine whether effective competition necessarily leads to CW or poses a case of 'competition overdose'<sup>xxii</sup>?

### **3. Investigating and deep diving into the term consumer welfare: Ascertainment of the approach to the interpretation of CWS**

Two approaches have been undertaken to investigate CWS. From an economics point of view<sup>xxiii</sup> as the difference between what the consumers would be willing to pay and what they have paid, or as individual benefits derived from the consumption of goods and services.<sup>xxiv</sup> Inclusion of non-price factors is also gaining traction. This third issue seeks to unpack the lens through which CWS is to be viewed.

### **4. Peeking beyond the traditional interpretation of consumer welfare: Should we consider Total Welfare/Total Welfare Plus?**

Some proponents refer to CWS as an 'outdated holdover from a discredited economic theory'<sup>xxv</sup> and that the same has failed even according to its myopic terms.<sup>xxvi</sup> In this light, scholars are considering a 'blended/ecosystem approach' that focuses on efficiency and guarantees complex equality.<sup>xxvii</sup> The discussion may determine if it is time for competition law to embed standards which, instead of focusing on all welfare issues, form a part of a government toolkit to meet the goals of the social contract.<sup>xxviii</sup> The discussion may also determine the inclusion of innovation/dynamic effects.<sup>xxix</sup>

## Endnotes

- i Welfare Standards Underlying Antitrust Enforcement: What you measure is what you get, Christine S. Wilson, Commissioner, U.S. Federal Trade Commission (FTC), available at: [https://www.ftc.gov/system/files/documents/public\\_statements/1455663/welfare\\_standard\\_speech\\_-\\_cmr-wilson.pdf](https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf)
- ii The United States, Department of Justice, Antitrust Enforcement:: The Road to Recovery, available at: <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-university-chicago-stigler>
- iii The Anti-Trust Paradox by Robert Bork is a landmark piece of work on competition law and consumer welfare, influenced by the Chicago school which has faith in unfettered markets with no government intervention. In his book, Bork opined that the guiding principle should be economic efficiency, i.e. total welfare as the goal. However, he refers to total welfare as consumer welfare, which has been the cause of confusion in the terms till date.
- iv Barak Y Orbach, The Antitrust Consumer Welfare Paradox, Journal of Competition Law and Economics, available at: <https://academic.oup.com/jcle/article-abstract/7/1/133/750979>
- v Christine S. Wilson, Welfare Standards Underlying Antitrust Enforcement: What you measure is what you get, available at: [https://www.ftc.gov/system/files/documents/public\\_statements/1455663/welfare\\_standard\\_speech\\_-\\_cmr-wilson.pdf](https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf)
- vi Edward E. Schlee, Expected Consumer's Surplus as an Approximate Welfare Measure, available at: <http://fmwww.bc.edu/repec/esNASM04/up.22953.1074023610.pdf>
- vii The Neo Brandeis movement which emerged in around 2010 runs on the ideology 'big is bad' and is opposed to the idea that competition law is based on consumer welfare. Instead, its focus remains economic welfare.
- viii Leah Samuel, Fiona Scott Morton, What economists mean when they say "consumer welfare standard", available at: <https://www.promarket.org/2022/02/16/consumer-welfare-standard-antitrust-economists/>
- ix Total Welfare standard refers to the analysis of effect of practices or transactions on economic welfare of all participants in a market. Therefore, this concept is not limited to consumers but also considers producers in the ecosystem. Available at: [https://www.ftc.gov/system/files/documents/public\\_statements/1455663/welfare\\_standard\\_speech\\_-\\_cmr-wilson.pdf](https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf). As a result of this standard, it is possible that total welfare increases with a decrease in consumer welfare.
- x OECD Competition Policy and Law, Ioannis Lianos on the role of competition authorities in promoting sustainability, available at: <https://www.youtube.com/watch?v=vGE-h-61ItQ>
- xi Darryl Biggar, Allan, Alberto Heimler, The Goals of Competition Law Debate and Competition Policy for Labor Markets, available at: <https://www.competitionpolicyinternational.com/the-goals-of-competition-law-debate-and-competition-policy-for-labor-markets/>
- xii Marshall Steinbaum, Maurice E. Stucke, The Effective Competition Standard, available at: <https://www.jstor.org/stable/26892422>
- xiii International Competition Network, Competition Enforcement and Consumer Welfare, available at: [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/11/SP\\_CWelfare2011.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/11/SP_CWelfare2011.pdf)
- xiv With the onset of the pandemic and greater reliance on e-commerce platforms, a chain of irreversible events have been triggered. By giving an accelerated push to digitalization, e-commerce platforms are here to stay. This has led to an increasing concretization of consumer preferences online, therefore raises greater chance for information asymmetry and unequal bargaining power. Secondly, there are multiple stakeholders which have entered the market exchange process. There are several intermediaries now and it is not purely a consumer-producer game anymore.
- xv Dr Ioannis Lianos, Some reflections on the question of goals of competition law, available at: <https://www.ucl.ac.uk/cles/sites/cles/files/cles-3-2013new.pdf>
- xvi Barak Orbach, The Consumer Welfare Controversy, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3489458](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3489458)
- xvii International Competition Network, Competition Enforcement and Consumer Welfare, available at: [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/11/SP\\_CWelfare2011.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/11/SP_CWelfare2011.pdf)
- xviii Maurice E. Stucke, Reconsidering Competition, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1646151](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1646151)

- xix Philippe Aghion, Reda Cherif, Fuad Hasanov, Competition, Innovation and Inclusive Growth, available at: <https://www.elibrary.imf.org/view/journals/001/2021/080/article-A001-en.xml>
- xx FH Knight, The Economic Organisation, University of Chicago Press, Chicago, 1933
- xxi FH Knight, The Economic Organisation, University of Chicago Press, Chicago, 1933
- xxii Competition Overdose: How free market mythology transformed us from citizen kings to market servants, Maurice Stucke, Ariel Ezrachi, <https://www.concurrences.com/en/review/issues/no-3-2020/books/competition-overdose-how-free-market-mythology-transformed-us-from-citizen>
- xxiii V. Daskalova, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?' [2015] 11(1) The Competition Law Review, page 133
- xxiv R. S. Khemani and D. M. Shapiro (eds.), 'OECD Glossary of Industrial Organisation Economics and Competition Law' (OECD Glossary of Statistical Terms, 1993)
- xxv Marhsall Steinbaum, The Consumer Welfare Standard is an outdated holdover from a discredited economic theory, available at: <https://rooseveltinstitute.org/2017/12/11/the-consumer-welfare-standard-is-an-outdated-holdover-from-a-discredited-economic-theory/>
- xxvi William Markham, The Consumer-Welfare Standard should cease to be the north star of anti-trust, available at: <https://www.markhamlawfirm.com/the-consumer-welfare-standard-should-cease-to-be-the-north-star-of-antitrust/>
- xxvii Ioannis Lianos, Competition as a Form of Social Regulation, available at: <https://journals.sagepub.com/doi/full/10.1177/0003603X19898626>
- xxviii Reconciling Efficiency and Equity: A Global Challenge for Competition Policy, available at: <https://www.concurrences.com/en/review/issues/no-4-2020/books/reconciling-efficiency-and-equity-a-global-challenge-for-competition-policy-97388>
- xxix Schumpeterian Competition and Antitrust, available at: <https://www.competitionpolicyinternational.com/schumpeterian-competition-and-antitrust/>