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Advantages and Disadvantages of Competition Policy Standards

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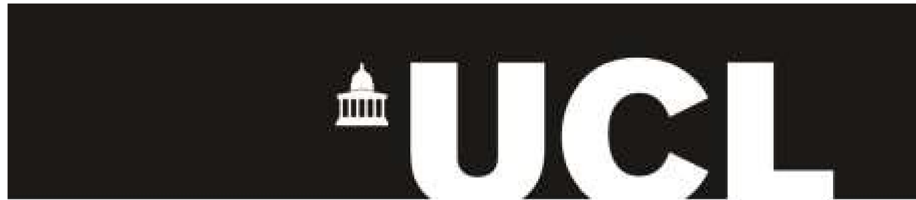

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Advantages and Disadvantages of Competition Policy Standards

Ioannis Lianos and Chrysovalantou Milliou*

1. Introduction

We start with a word of caution. The OECD Background Note seems to tackle the debate over the 'competition policy standards' by dissociating this issue from two interrelated ones: first from that of the goal(s) of competition law, to the extent that setting the goal(s) of competition law, that is a default end-state position that the legal system should or is effectively pursuing preconditions the specific interpretive tool (standard) that will be selected by the adjudicator in order to attain this pre-determined desirable end-state; second, from that of institutional choice, that is, the selection of the social decision-making process that would dispose the residual right of decision-making in a specific context. However, both these issues are not only interrelated but also form a precondition to the choice of the adequate "competition policy standard" for the specific system of competition law enforcement[1]. Furthermore, one may argue that constructing the analysis of 'competition policy standards' on external (to the specific legal system) and sometimes ambiguous (from a legal perspective) sources of authority, without proper discussion of the genesis of these concepts and evolution and an informed translation of their meaning in the legal context they are incorporated to, might lead to misinterpretation and to "lost in translation" phenomena[2].

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

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

2. Competition Policy Standards: a conceptual guide

* The present note was drafted by Ioannis Lianos (Professor of Global Competition Law and Public Policy, Member of the UK Competition Appeal Tribunal, then President of the Hellenic Competition Commission) and Chrysovalantou Milliou (Professor, AUEB, Member of the Board of the Hellenic Competition Commission) in the context of the OECD meeting in June 2023.

[1] See, I. Lianos, Some reflections on the question of the goals of EU competition law, in I. Lianos & D. Geradin (eds.), Handbook on European Competition Law – Substantive Issues (Edward Elgar, 2013), 1-84.

[2] See, the criticism in I. Lianos, 'Lost in translation? Towards a theory of economic transplants', (2009) 62(1) Current Legal Problems 346-404.

The term 'standard' is used in various ways in competition policy. Early discussions in competition law have focused on the fundamental distinction between per se rules and the rule of reason as the fundamental choice to be made, these being broadly conceived as part of a 'standard of reasonableness'. This early debate focused on 'legal standards' i.e., the decision rules[3], which is a different issue from that of the 'substantive (or liability) standards', i.e., the latter focusing on the overall criterion used for establishing competition law liability, such as the 'consumer welfare standard' and the 'total welfare standard'. In this contribution, we will consider only the latter issue.

Legal theory distinguishes between two different concepts of 'standards' as opposed to rules: (i) policy standard, that is the "kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community", and (ii) standard as principle, which is "a standard that it to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable", but "because it is a requirement of justice or fairness or some other dimension of morality"[4].

The first distinction, standard versus rule, describes a type of standard, which "rather than automatically settling all cases to which it applies, instead provides a reason for a particular decision which must then be weighed alongside and against other applicable reasons"; the second distinction, principle versus policy, identifies a particular subset of those standards, principles which take their force from morality"[5]. Hence, from a legal theory perspective, the standards that focus on maximizing 'consumer welfare', 'total welfare', or some other welfare/well-being dimension, that relate to policy, constitute a subset of the overall category of standards, the other subset being principles. In what follows, we will focus on policy 'standards' and exclude principles as 'standards'[6].

It may be concluded that a 'competition *policy* standard' is used to guide the enforcement of competition law[7]; It serves as a benchmark for the evaluation, by competition authorities, of whether conduct that restricts competition (rivalry) is in accordance or not with the normative content of competition law and thus of whether enforcement action is necessary, and which enforcement action may be appropriate.

As it follows from the above definition, 'competition policy standards' and the 'objectives'/goals of competition law are closely related issues, but they are not the same thing. The 'competition policy standard' is one of the methods used for achieving the 'objectives' of

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[3] See Y. Katsoulacos, On the Concepts of Legal Standards and Substantive Standards (and How the Latter Influences the Choice of the Former), (2019), 7 *Journal of Antitrust Enforcement*, 365–385.

[4] R. Dworkin, The Model of Rules I, in R. Dworkin, *Taking Rights Seriously*, (London, Duckworth, 1977), 14, at 22.

[5] C. Webb, Reviewed Work: *Principle and Policy in Contract Law: Competing or Complementary Concepts?* by Stephen Waddams, (Summer 2013), *The University of Toronto Law Journal*, 63 (3), 527.

[6] We acknowledge however that concepts such as "naked restrictions" in EU competition law, which are not assessed with regard to their economic effects and the distinction between 'impediment competition' and 'performance competition' that forms the background of the independent from economic effects (actual or potential) assessment of conduct that may not be considered as being 'competition on the merits', indicate that principles as standards also guide modern competition law enforcement.

[7] Note that in this contribution we use the term 'competition policy standard' instead of the term 'welfare standard' since the focus of some of the suggested standards extends beyond the economics concept of 'welfare' in the market (e.g., they include social and environmental concerns).

competition law[8]. Thus, a 'competition policy standard' should be designed in a way that aligns, supports, and promotes the already specified 'objectives' of competition law, which need to be maximized[9]. Different 'competition policy standards' may place varying degrees of emphasis on different objectives. Therefore, the selection of the 'competition policy standard' reflects the choice of objectives and priorities of competition policy and, more specifically competition law. Furthermore, the selection of the 'competition policy standard' affects the subsequent analytical and methodological approach adopted in competition law enforcement.

Given the above, in what follows we present some of the main 'competition policy standards' and discuss, when appropriate, their relation with different objectives of competition law. Our list is not exhaustive especially since the debate on the welfare standards is ongoing and new proposed standards keep on making their appearance[10]. For each standard, we provide its definition, as well as we provide, when appropriate, some clarifications, and discuss briefly its potential policy implications.

A. Consumer Welfare Standard

The 'consumer welfare' concept is mainly an economics concept[11]. Its definition can be found in any Microeconomics or Industrial Organization textbook and it is always the same (see below). The interpretation of its definition by competition lawyers, practitioners, and judges though, as the recent debate has revealed, is not always the same[12]. Clearly, this divergence means that participants in the debate regarding the abandonment or not of the 'consumer welfare standard' as a competition policy standard do not always talk about the same thing[13].

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[8] The objectives of competition policy refer to the broader goals that competition policy aims to achieve – its desired outcomes. See, I. Lianos, Some Reflections on the Question of the Goals of EU Competition Law, CLES Research Paper Series 3/2013.

[9] If one focuses instead on standards as principles, the determination of the 'objectives' that need to be maximized by the competition law enforcer is not necessary, as the enforcer will need to deliberate whether the moral merits of the legal system as a whole provide sound moral justification for enforcing the specific statute in a certain way. See, R. Dworkin, *Law's Empire*, (Belknap Press of Harvard University Press, 1986). From this perspective, the enforcer/decision-maker may arrive to the conclusion that a certain behavior does not constitute competition on the merits, because it does not accord well with the dominant perspective of (economic) morality[9] inherent in the specific legal system, as interpreted by the decision-maker/enforcer, even if it produces positive effects, from the perspective of some policy standard, such as consumer welfare, total welfare, etc. On 'moral views of the market" or "moral economy", see, M. Fourcade and K. Healy, Moral Views of Market Society, (2007), *Annual Review of Sociology*, 33, 285-311; G.M. Hodgson, *From Pleasure Machines to Moral Communities: An Evolutionary Economics Without Homo Economicus*, (University of Chicago Press, 2012).

[10] See e.g., S. Makris, The Effective Competitive Constrained Standard, (April 12, 2023), *ProMarket*, available at https://www.promarket.org/2023/04/12/the-effective-competitive-constraint-standard/ and S. Salop, The Reasonable Competitive Conduct Standard for Antitrust, (April 6, 2023), *ProMarket*, available at https://www.promarket.org/2023/04/06/the-reasonable-competitive-conduct-standard-for-antitrust/.

[11] Note however the existence of "economic transplants", that is the possibility that once an economic concept is integrated in law it may take a life of its own. See, I. Lianos, Lost in Translation? Towards a Theory of Economic Transplants, (2009) 62(1) *Current Legal Problems*, 346–404.

[12] For the demonstration of the misuse of the 'consumer welfare' concept see e.g., H. Hovencamp and F. Scott Morton, The Life of Antitrust's Consumer Welfare Model, (April 10, 2023), *ProMarket*, available at https://www.promarket.org/2023/04/10/the-life-of-antitrusts-consumer-welfare-model/.

[13] See, L. Samuel and F. Scott Morton, (February 16, 2022), What Economists Mean When They Say 'Consumer Welfare Standard', *ProMarket*, available at https://www.promarket.org/2022/02/16/consumer-welfare-standard-antitrust-economists/.

In light of this, it is very important to resolve first what the ‘consumer welfare standard’ is in theory.

The ’consumer welfare standard’ aims at maximizing ‘consumer welfare’. The latter, also commonly referred to as ‘consumer surplus’, according to its textbook definition, measures the net benefit that consumers enjoy from being able to purchase a product (or a service) in the market. It is computed as the difference between what the consumers are willing to pay (their valuation for the product) and what they actually pay for each unit that they consume[14].

In line with the above, when a price increase (which is not accompanied by quality improvement) occurs, the loss of ‘consumer welfare’ includes: (i) the decrease in the volume (units) bought by the consumers, who will not be able to buy the product any more or they will buy fewer units of the product than they would if the price had not increased – this corresponds to the consumers part of the deadweight loss, and (ii) the overcharge over those units of the product that consumers still buy.

A number of clarifications regarding the ‘consumer welfare standard’ are in place to help avoid the above-mentioned divergence in its interpretations. The ‘consumer welfare standard’:

- Considers the welfare of the consumers in the specific (or relevant) market under analysis and not of all the consumers in the economy. It encompasses both the current and the potential consumers in the market.
- Typically considers the end consumers. This holds not only when they are the direct customers of the firms involved in conduct under analysis but also when they are the indirect customers and the direct ones are instead downstream firms. However, this does not mean that it considers only the direct effects on the end consumers. It also takes into account the indirect effects on the end consumers, that is, how changes on the terms and the conditions of trading (input prices, wages, compatibility, innovation in final products and in inputs) between the upstream and downstream firms can affect the price, the product quality and the variety faced by end consumers[15]. The consideration as ‘consumers’ of downstream firms when the latter are the direct customers (e.g., when they buy inputs) of the firms involved in conduct under analysis is also possible[16].
- Considers the impact of firms conduct only on the welfare of consumers on the specific relevant market(s) directly affected by the conduct and not also on the welfare of the business

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[14] P. Belleflamme, P. and M. Peitz, *Industrial Organization*, (Cambridge University Press, 2015).

[15] For instance, the theoretical literature on upstream horizontal mergers, when it measures the surplus of the end consumers, takes into account how the end consumers (price, quality, variety) will be affected by changes that the merger induces in the trading terms (input prices) and trading conditions (e.g., innovation, compatibility) between the upstream and the downstream firms, e.g., it takes into account whether the end consumers will pay a higher/lower price because the merger increased/decreased the input prices paid by downstream firms and thus increased/decreased their input costs. Similarly, the theoretical literature on downstream mergers, it considers how the end consumers (price, quality, variety) will be affected by changes that the merger induces in the trading terms (input prices) and trading conditions (innovation, compatibility, etc.) between the upstream and the downstream firms.

[16] For instance, the EU Guidelines for the Application of Article 101(3), state in paragraph 84 that "The concept of ‘consumers’ encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers, i.e., natural persons who are acting for purposes which can be regarded as outside their trade or profession. In other words, consumers within the meaning of Article 81(3) are the customers of the parties to the agreement and subsequent purchasers. These customers can be undertakings as in the case of buyers of industrial machinery or an input for further processing or final consumers as for instance in the case of buyers of impulse ice-cream or bicycles".

trading partners of the firms involved in the conduct under analysis[17]. It considers the effects on trading partners (e.g., input suppliers, business customers) indirectly by examining how they can influence market dynamics and eventually impact end-consumers welfare. For example, it allows the consideration of how restrictions that prevent firm entry in the market and harm trading partners can eventually also affect product variety and other factors that have an impact on final consumers.

- Allows for quality-adjusted prices. In particular, the fact that a price increase in the relevant market, *other things being equal*, decreases 'consumer welfare', does not mean that a price increase necessarily decreases 'consumer welfare' *if other things are not treated as being equal*, and especially, if the product quality also increases and thus the consumer's valuation of the product (her willingness to pay) increases too.
- Allows for the consideration of 'consumer welfare' both in a static (in the short-run) and in a dynamic sense (in the long-run)[18]. This clarification is extremely important for competition law enforcement since the considerations of 'consumer welfare' in a static and in dynamic sense do not always coincide and in turn they can lead to different conclusions regarding the impact of firms conduct on 'consumer welfare'. For example, a practice under investigation by competition authorities, such as predatory pricing, can result in low prices in the short-run and thus lead to the conclusion that it does not have an adverse impact on static 'consumer welfare'. The same practice however can have a negative impact on dynamic 'consumer welfare' through the exclusion of rivals and the subsequent increase in future prices relative to the prices charged before its exercise. The dynamic version of this standard clearly also allows the consideration of the impact of firms contact on future (product and process) innovation and market entry and in turn the consideration of how this impact will affect future consumer welfare.

In light of the above, the 'consumer welfare standard' treats final consumers as the ultimate beneficiaries of competition in the market and in turn of competition law when the latter adopts this standard[19]. Furthermore, the 'consumer welfare standard', correctly interpreted and applied, does not only consider the impact that only static price effects have on consumers in the market. It also considers how changes in product quality and product variety (product innovation) as well as changes in firms' costs (process innovation and synergies) affect consumer willingness to pay and prices and in turn the welfare of consumers.

We should note that independently of whether the 'consumer welfare standard' is considered in a static or dynamic way, there are adjustments that need to be made in its use in competition law enforcement in order to take into account the specificities of the digital economy. Some of them may directly concern all options, such as network effects and tipping

[17] In fact, this is its main difference from the 'redefined (expansive) consumer welfare standard' (see below).
[18] For an analysis, see I. Lianos, Competition Law, Intellectual Property Rights and Dynamic Analysis: Towards a New Institutional "Equilibrium?", *Concurrences* N°4-2013, 13.
[19] Bear however in mind that in practice hardly anyone in the field of enforcement ever actually attempts to measure/estimate *actual* changes in consumer welfare. There are some studies into the effects of competition authorities past decisions basically assessing whether their intervention (or lack thereof) has increased consumer surplus. For an overview, see, OECD (2011), Impact Evaluation of Merger Decisions, available at http://www.oecd.org/daf/competition/Impactevaluationofmergerdecisions2011.pdf.

or leverage points that may change the way we think about the need to preserve the competitive process or promote innovation. Personalisation and cybernetics may influence the revealed preferences in the analysis and the view that these always represent consumer choice, as the formation of such preferences may be influenced by a certain industry or market architecture.

Two related changes brought by digital competition are of particular relevance here.

First, it is quite frequent that products may be distributed for 'free' at one side of the platform, this meaning that consumers are not charged a positive price, or even it is possible that consumers receive a reward (they are charged a negative price). Hence, in digital markets, it is of even more critical importance to take into consideration the other parameters of competition that affect consumer welfare, such as variety and quality.

Second, the multisided nature of platforms renders the focused analysis of effects on a specific relevant market rather inconclusive. Anabelle Gawer notes the 'changing roles' of agents in these multi-sided platforms, as it is possible that '(w)hile end-users "consume" the service (search, social networking) offered by these platforms, they also constantly "feed", individually and collectively, their personal data into these platforms (as expressed by the items they search, their location, their preferences as revealed by previous queries, and their personal connections data), thereby providing the very data upon which these platforms draw upon to deliver their services' (akin to input suppliers)[20]. As it is imaginatively explained by Kate Crawford and Vladan Joler, '[…] the user is simultaneously a consumer, a resource, a worker and a product'[21].

Third, the consumer surplus standard has also distributional implications[22], to the extent that efficiency gains that may increase producer surplus may not fully compensate harm to some of the final consumers of the specific relevant market (the marginal consumers)[23]. Fourth, and related to the previous point, the "representative consumer" assumption, although it is clear that "consumers" are highly heterogeneous, in terms of tastes, financial resources, and other defining characteristics, for each type of trade, may not work well in the context of the digital economy in view of the possibilities of firms to proceed to behavioural pricing and *personalized price discrimination*, which comes tantamount to first degree price discrimination (or person- specific pricing), in view of big data and algorithmic pricing as practiced in online

[20] A. Gawer, Bridging Differing Perspectives on Technological Platforms: Toward an Integrative Framework, (2014), 43 *Research Policy* , 1239-1243.

[21] K. Crawford and V. Joler, Anatomy of an AI system: The Amazon Echo As An Anatomical Map of Human Labor, Data and Planetary Resources, AI Now Institute and Share Lab, (September 7, 2018), available at https://anatomyof.ai/.

[22] For an analysis, see I. Lianos, Competition Law as a Form of Social Regulation, (2020), 65(1) *Antitrust Bulletin*, 3-86; I. Lianos, Value Extraction and Institutions in Digital Capitalism: Towards a Law and Political Economy Synthesis for Competition Law, (2022), 1 *European Law Open*, 852-890.

[23] Under restrictive assumptions, the model of partial equilibrium used in competition law analysis, aggregates the individual actions of the sociological categories of 'producers' and 'consumers'. These result from the conceptualization of social interactions through the prism of the theory of supply (producers) and demand (consumers), to an 'economy or market-wide vector of prices, outputs, and the allocation of resources to alternative uses'. The constitution of these categories of agents is made on the basis of interest-analysis in the abstract relational context of expected utility theory (where 'producers' are assumed to have different interests than 'consumers', taking into account a two-person exchange where one person is a 'consumer' and another a 'producer'). Players in these games 'come with (or acquire) labels that assign to them different strategy sets and payoffs': S. Bowles, *Microeconomics – Behavior, Institutions, and Evolution* (Princeton University Press, 2004), 53 et seq.

commerce, as sellers charge different prices depending upon a buyers' search history, or 'digital shadow', thus reducing the possibilities of final consumers for collective action[24].

B. Total Welfare Standard

The 'total welfare standard' considers the sum of the 'consumer welfare' and of firms' profits (also known as the 'producer surplus') in the market.

When a price increase occurs (without being accompanied by quality improvement and/or cost savings), the loss of 'total welfare' includes only the deadweight loss (both the part that corresponds to consumers and to the producers), i.e., the loss due to the decrease in the volume traded in the market between consumers and producers. Thus, in contrast to the 'consumer welfare', it does not also consider the loss from the overcharge over those units of output that consumers still buy. It treats the latter as a wealth transfer from the consumers to the producers based on the idea that the latter may be in a position to compensate (hypothetically) the loss that consumers have suffered while still being able to compensate with this wealth transfer their own losses from the volume reduction.

The following clarifications regarding the 'total welfare standard' are in place:

- Unless otherwise specified, consumers and firms have the same weight in the 'total welfare standard'[25].
- The 'total welfare standard' considers the 'total welfare' generated only in the relevant market and not to the aggregate welfare generated in all the markets of the economy.
- Similarly, to the 'consumer welfare standard', the 'total welfare standard' can be considered both in static and in dynamic sense, and the implications for competition law enforcement of these considerations can diverge.

Some argue that looking at changes in total or consumer welfare makes no difference in practice, since both tend to move in the same. As put by Werden '[a]nything enlarging the

[24] Michel Callon observes the singularisation of each "bilateral trade" in a world in which digital technology enables us to harvest personal data and form specific bespoke products that satisfy the specific preferences of individual consumers (singularization of goods), thus leading to the emergence of atomistic "bilateral markets": M. Callon, *Markets in the Making – Rethinking Competition, Goods and Innovation*, (Zone Books, 2021) (noting how prices as simple qualities participated in the singularization of goods, but also bespoke personalized pricing has become common practice in the digital age). For a discussion of 'personalized pricing', see, among others, P Coen and N Timan, The Economics of Online Personalised Pricing, (2013), OFT available at http:// webarchive.nationalarchives.gov.uk/ 20140402154756/ http:// oft.gov.uk/ shared_ oft/ research/ oft1488. pdf; Oxera, Behavioural Economics and Its Impact on Competition Policy, (June, 2013), available at https:// www.oxera.com/ publications/ behavioural- economics- and- its- impact- on- competition- policy/; T.J. Richards, J. Liaukonyte and N.A. Streletskaya, Personalized Pricing and Price Fairness, (15 September 2015), available at https:// courses.cit.cornell.edu/ jl2545/ papers/ personalized_ Pricing_ IJIO.pdf; CMA 94 Pricing Algorithms (8 October 2018), available at https:// assets. publishing.service.gov.uk/ government/ uploads/ system/ uploads/ attachment_ data/ file/ 746353/ Algorithms_ econ_ report.pdf (defining personalized pricing, at section 7.3, as 'the practice where businesses may use information that is observed, volunteered, inferred, or collected about individuals' conduct or characteristics, to set different prices to different consumers— whether individuals or groups— based on what the business thinks they are willing to pay').

[25] It is possible to construct measures of total welfare that put different weights to consumer surplus and to firms profits.

metaphorical pie offers a potential Pareto improvement because it is possible to make at least one individual better off while no one is worse off[26]. However, the use of the 'total welfare standard' in competition law enforcement can lead to different conclusions regarding the appropriate treatment of firms conduct than the use of the 'consumer welfare standard'[27]. There may be situations in which a specific conduct, while leading to a potential increase of the pie (total welfare), worsens the situation of consumers, therefore having important distributional implications. In such cases, a 'consumer welfare standard' by considering the wealth transfer from consumers to other market players, in contrast to the 'total welfare standard' will capture this negative impact on consumers.

Consider, for example, a horizontal merger that generates cost savings for the merging firms. If the cost savings exceed the deadweight loss (output reduction) that the merger causes, then this merger increases 'total welfare', but reduces 'consumer welfare'. A higher level of (passed on to consumers) cost savings would be required so that the merger does not reduce 'consumer welfare'[28]. Similarly, consider, for example, a situation where due to the exclusion of a less (productively) efficient rival (i.e., as a result of a merger or foreclosure) a larger share of demand is allocated to a dominant firm with lower costs. At the same time, though, the exclusion of a less efficient rival reduces competitive constraints in the market making it possible for the dominant firm to increase prices. The reduction in costs may not be large enough to offset the increase in price and to not cause harm to consumers, while it may be sufficiently large to increase total welfare.

Traditionally, the analysis of market power and the corresponding trade-offs considered by the 'total welfare standard' focus on economic efficiency and do not explicitly deal with distributional issues. Reliance on firms' profitability as a guide for competition law enforcement can be problematic in light of the difficulty to tell whether high profits are the results of superior efficiency/quality or the outcome of anticompetitive entry and expansion barriers. Focusing on the source of the superior profits of the firms, superior efficiency/quality or anticompetitive strategies, indicates some form of 'moral' judgment on the worthiness of curative action, which may be motivated by the idea that competition policy should promote competition 'on the merits' and that a successful competitor should not be turned away when he wins. It may also result from a more Schumpeterian idea that superior profits may lead to an innovation race that would be overall welfare-enhancing (in the sense that technological progress will lead to an increase of total surplus).

[26] G.J. Werden, Antitrust's Rule of Reason: Only Competition Matters, (2014), 79 *Antitrust Law Journal*, 713-759.

[27] In some types of conduct though, such as in the case of cartels, it will not.

[28] The possibility of an efficiency trade-off between allocative inefficiency and productive efficiency has been put forward in the 1960s by Oliver Williamson, who came to the conclusion that cost savings may offset price increases, thus entailing a more permissive standard for antitrust enforcement. However, his conclusions were reliant on strong assumptions, such as that the market configuration before the increase in market power was competitive; whereas if firms had already some degree of market power (so that prices were already above costs), 'total welfare' would most likely be reduced even then alongside the 'consumer welfare'. See O.E. Williamson, Economies as an Antitrust Defence: The Welfare Tradeoffs, (1968), 58 *American Economic Review*, 18-36.

C. *Redefined (Expansive) Consumer Welfare Standards*

The 'expansive consumer welfare standard' includes the consideration of the impact of firms conduct not only on 'consumer welfare' but also on the welfare of the trading partners of the firms involved in conduct under analysis. In other words, it combines the 'consumer welfare' and the 'trading party (or counter party) welfare'[29]. The trading partners can include, depending on the conduct under analysis, (upstream) input suppliers, (upstream) workers, and (downstream) business customers.

While this standard continues to place emphasis on the welfare of consumers, it also recognizes that it is important to take into account the impact on other market participants, trading partners in particular not competitors, to capture additional dimensions of competition.

Applying this standard in competition law enforcement would mean that a firms practice will be judged to be anti-competitive if it disrupts the competitive process and harms trading parties on the other side of the market. It would also mean that, as its supporters argue, in case there is harm from competitive restraints directed at workers and other upstream trading partners, firms claims that this harm is justified by out-of-market benefits will not be accepted[30].

Modified Version: Reasonable Competitive Conduct Standard

Very recently, Steven Salop proposed a modified version of the 'expansive consumer welfare standard', which he named 'reasonable competitive conduct standard'[31]. This is a hybrid standard that combines the 'expansive consumer welfare standard' with some elements of the 'protection of competition standard' (see below).

This standard, in line with the 'expansive consumer welfare standard', suggests that in the enforcement that relates to conduct by dominant firms in vertically related markets, the welfare of counter parties, i.e., workers, small input suppliers or downstream business customers, should be taken into account. In fact, it suggests that in competition law enforcement, the harm to trading partners should not be balanced with out-of-market benefits even when the latter work in favor of end consumers.

At the same time, in the spirit of the 'protection of competition standard', this standard suggests that an anti-competitive exemption should be granted to collective actions by small market participants (e.g., farmers, small businesses, workers), such as the formation of

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[29] See e.g., C. Shapiro, Breathing New Life into Consumer Welfare Standard: The Protecting Competition Standard, (November, 2018), FTC Hearings on Competition and Consumer Protection in the 21st Century, available at https://faculty.haas.berkeley.edu/shapiro/protectingcompetitionstandard.pdf; See also, L. Samuel and F. Scott Morton, (February 16, 2022), What Economists Mean When They Say 'Consumer Welfare Standard', *Pro-Market*, available at https://www.promarket.org/2022/02/16/consumer-welfare-standard-antitrust-economists/

[30] As Laura Alexander and Steven Salop argue, this standard is "broad enough to encompass harms to workers (and other input suppliers) as cognizable competition harms, even if downstream purchasers are not harmed", see L. Alexander and S. Salop, Antitrust Worker Protections: The Rule of Reason Does Not Allow Counting of Out-of-Market Benefits, (December 4, 2022) available https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4094046.

[31] S. Salop, The Reasonable Competitive Conduct Standard for Antitrust, (April 6, 2023), *ProMarket*, available at https://www.promarket.org/2023/04/06/the-reasonable-competitive-conduct-standard-for-antitrust/.

associations to collectively bargain with dominant firms. It also suggests that use of stronger structural presumptions in merger policy.

One could argue that the 'expansive consumer welfare standard' (even more its modified version), brings closer the 'consumer welfare standard' to the 'protection of competition standard' since by considering the effects on trading partners it recognizes that it is important to protect competition across the entire market. Still, in contrast to the 'protection of competition standard' it does not directly try to protect competitors and it does not presume that 'bigness' is necessary bad for consumers.

D. Non-purely Economic Welfare Standards

1. Protection of Competition Standard (or Economic Democracy Standard)

The 'protection of competition standard', often referred to also as the 'protection of the competitive process standard', has been proposed and supported by the so called "Neo Brandeisians" legal scholars, such as Tim Wu and Lina Khan[32].

According to this standard, the evaluation of firms conduct should be done through the lens of its impact on competition and the competitive process in the market and not through the lens of its impact on 'consumer welfare'. Under this standard, firms conduct that restricts the competitive process in the market is undesirable regardless of its impact on consumers. As stated by Tim Wu, a main difference between this standard and the 'consumer welfare standard' is the elimination of "consumer welfare as a final or necessary consideration in every case.[33]"

This standard is based on the idea that consumers, or more generally the public, benefit by a vivid competitive process and thus, the preservation of a competitive process is essential to prevent a prolonged departure from the optimal outcome usually associated to competition[34]. Similarly, it is based on the view that the reduction in market competition, and the subsequent increase in market concentration and market power, can have adverse effects not only to consumers in the relevant markets but also to society as a whole. In accordance with this, 'big' firms are in the position to exploit more disadvantaged groups that include, besides end consumers, small business customers, workers, and small input suppliers (e.g., farmers).

[32] See e.g., T. Wu, The 'Protection of the Competitive Process' Standard, (2018), Columbia Public Law Research Paper No. 14-612, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3276896, and L. Khan, The New Brandeis Movement: America's Antimonopoly Debate, (2018), 9 *Journal of European Competition Law & Practice*, 131-132.

[33] See T. Wu, After Consumer Welfare, Now, What? The 'Protection of Competition' Standard in Practice, (2018). The Journal of the Competition Policy International, Columbia Public Law Research Paper No. 14-608, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249173.

[34] We should note that the German ordoliberal school has arguably put emphasis on the competitive process indicating that we should be concerned if "the number of freely competing producers is artificially reduced in ways that do not result from the normal process of competition itself', and "where this reduces the scope of alternatives among which consumers may freely chose", see P. Behrens, The Ordoliberal Concept of 'Abuse' of a Dominant Position and its Impact on Article 102 TFEU, (September 9, 2015), Nihoul/Takahashi, Abuse Regulation in Competition Law, Proceedings of the 10th ASCOLA Conference Tokyo 2015, available at SSRN: https://ssrn.com/abstract=2658045. For a translation in English of the views of one of the principal authors of the ordoliberal group, see W. Eucken, *The Foundations of Economics – History and Theory in the Analysis of Economic Reality* (Springer, 1992, first published in 1939).

Furthermore, 'big' firms can contribute to the increase in income and wealth inequality and they can even pose a threat to democracy[35]. In light of this, the proposers of this standard argue that the protection of market competition itself could generate positive outcomes not only for the consumers in the specific market under analysis but also for the society as a whole. Some of the New Brandeisias recognize that 'big' is not always bad, in particular, as stated by Lina Khan, they "recognise that certain industries tend naturally towards monopoly" and for such industries the suggested solution is to "design a system of public regulation that prevents the executives who manage this monopoly from exploiting their power"[36]. In other words, they suggest that competition law should be combined with regulation "antitrust law is just one tool in the antimonopoly toolbox"[37].

The 'protection of competition standard' mainly treats market power as a by-product of market concentration. This, as argued by various scholars, suggests that its implementation in competition law enforcement can be based on structural presumptions and in turn on the use of bright line rules, which limit judicial discretion, and do not need to rely on to a large extent on economic analysis. This contrasts to the 'consumer welfare standard' which does not treat market power as a by-product of market concentration and instead uses economic tools to determine whether market concentration is indeed the indicator of market power or its source taking into account that market power can arise from other sources too (e.g., efficiencies). Stated differently, the use of the 'protection of competition standard' in competition law enforcement can result to opposition to any practice that increases market concentration per se, regardless of whether market power is indeed exercised or of whether it is accompanied by significant efficiencies that can potential be beneficial for consumers.

As noted by Johnathan Baker[38], some of the implications for competition law enforcement that can be drawn from the 'protection of competition standard', such as the strengthening the structural presumption in horizontal merger analysis, are aligned/overlap with the views of other scholars (e.g., Valletti)[39] who argue that the emphasis in the reform of competition policy should be on the 'standard of proof'.

2. *Consumer Choice Standard*

Some scholars argue also that competition authorities should aim to preserve an optimal level of 'consumer choice', defined as "the state of affairs where the consumer has the power to

[35] As stated by Lina Khan "Antimonopoly is a key tool and philosophical underpinning for structuring society on a democratic foundation", see L. Khan, The New Brandeis Movement: America's Antimonopoly Debate, (2018), 9 *Journal of European Competition Law & Practice,* 131-132.
[36] L. Khan, The New Brandeis Movement: America's Antimonopoly Debate, (2018), 9 *Journal of European Competition Law & Practice*, 131-132.
[37] Ibid 131.
[38] J. Baker, Finding Common Ground Among Antitrust Reformers, (2022), 84 *Antitrust Law Journal*, 84, 705-751.
[39] See F. Lancieri and T. Valletti, Structuring a Structural Presumption for Merger Review, (April 14, 2023), *ProMarket*, available at https://www.promarket.org/2023/04/14/structuring-a-structural-presumption-for-merger-review/.

define his or her own wants and the ability to satisfy these wants at competitive prices"[40]. This standard thus suggests that the impact on 'variety' should play a key role, even if there is no evidence from the revealed preferences of consumers that they value variety more than price. The same scholars have used interchangeably the term of 'consumer sovereignty', which is defined as "the set of societal arrangements that causes that economy to act primarily in response to the aggregate signals of consumer demand, rather than in response to government directives or the preferences of individual businesses"[41].

Defining the 'optimal degree' of consumer choice or consumer sovereignty and measuring it using some operational parameters seems however a daunting task. Consumer sovereignty may be conceptually appealing but may prove empirically weak as a policy standard to implement in competition law enforcement.

3. Capabilities, Functioning and Inequalities Standards

According to the Kaldor-Hicks economic efficiency approach, a policy entailing losses to the poorest members of the society could be justified if it provided sufficiently large gains to the richest members of the society, so that the latter could hypothetically compensate the former. The dominant approach in welfare economics was however subject to criticism by legal philosophers who were increasingly interested in economic efficiency as the law and economics movement expanded its influence in the legal sphere, but also by economists attached to the idea of equity and to the existence of rights by virtue of being human. These authors diverge from the utilitarian approach and the "sum-ranking" of individual utilities, that of incomes, or any other criterion of economic status, that characterize it, as they underscore the individual freedom of each human being to live the kind of life she or he have reason to value[42]. In particular, Amartya Sen focused on well-being rather than on utility/welfare, the former being a broader concept, at least in the way it has been defined by mainstream welfare economics. Amartya Sen's approach aims to incorporate in the definition of well-being human diversity in terms of each person's maximum potential. The 'space choice' for each individual can involve different concentrations, e.g. liberties, rights, incomes, wealth, resources, primary goods, utilities, capabilities, and so on, and the question of inequality assessment turns on the selection of the space in which equality is to be assessed. The concept of 'functioning' is quite central in the approach. 'Functionings' are 'beings' such as being well-nourished, being undernourished, being safe, being able to participate in social and economic activities, but also being in bad health, and 'doings' such as voting in an election, traveling, eating to your hunger, consuming fuel to get warm, but also taking illicit drugs. Hence, the term has a neutral

[40] R.H. Lande, Consumer Choice as the Ultimate Goal of Antitrust, (2001), 62 *University of Pittsburgh Law Review*, 503-525. For an import of this concept in EU competition law, see P. Nihoul, N. Charbit and E. Ramundo (eds.), *Choice – A New Standard for Competition Law Analysis?* (Institute of Competition Law, 2016).
[41] N.W. Averitt and R.H. Lande, Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law, (1997), 65 *Antitrust Law Journal*, 713.
[42] A. Sen, *Commodities and Capabilities*, (North-Holland 1985), advancing the moral significance of individuals' capability of achieving the kind of lives they have reason to value. On Sen's view on welfare economics and inequality, see A. Sen, Welfare Economics and Inequality, in A. Sen (ed.) *Inequality Reexamined*, (Oxford University Press, 1995).

connotation, its goodness or badness derives from the specific context and/or normative theory. For instance, consuming a lot of fuel might be considered as a positive thing for someone taking a growth perspective, while a bad thing for an environmentalist or someone taking a sustainable growth perspective. Capabilities constitute a person's real freedoms or opportunities to achieve these specific 'functionings'. These 'functionings' and 'capabilities' provide an excellent metric for most kinds of interpersonal evaluations, capabilities enabling interpersonal comparisons of the freedom to pursue well-being, while 'functionings' may operate as metrics for an interpersonal comparison of wellbeing, to the extent that they are constitutive of a person's being. Focusing on the promotion of capabilities, rather than on providing resources or assistance to 'functionings' directly, leaves an important space to be occupied by individual choice, which seems at first sight compatible with the logic of markets and competition law.

Although certainly intellectually appealing, this approach presents several difficulties, the first of which is to determine the capabilities that count for the analysis. One may think that there could be some philosophical disagreement over the content of the list of objective capabilities. Some recent work advocates a multidimensional view of the objective list approach and identifies a number of dimensions of well-being, including material living standards (income, consumption, and wealth), health, education, personal activities including work, political voice and governance, social connections and relationships, environment (present and future conditions), and insecurity of an economic or physical nature[43].

4. Polycentric Competition Law: Complex Equality and the Citizen's Standard

Some authors have criticized the purely economic standards discussed above as not taking into account the polycentric dimension of competition law[44], and a more realist vision of the competitive process in modern economy and of its implications on various dimensions of well-being considered valuable by the different polities[45].

In the consumer and total welfare standards, the various representative agents (consumers, producers) are allocated to distinct structural positions with different strategy sets without necessarily taking into account the broader social context of their position, and their presence and interaction in other spheres of social activity. The competition law assessment

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[43] For an analysis of how these various capabilities may be balanced in the context of a competition law assessment, see R. Claassen and A. Gerbrandy, Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach, (2016), 12 *Utrecht Law Review*, 1-15. Claasen and Gebrandy discuss various alternatives to the consumer welfare standard, (i) a "broad consumer welfare standard," which will indirectly take into account noneconomic interests, to the extent that these are directly related to the relevant market and accrue to the consumers of these markets, (ii) an "inclusive welfare standard" that would take non-economic interests directly into account even if these do not affect the consumers of the relevant market, and (iii) their preferred capability approach, which is a non-welfarist standard.

[44] I. Lianos, Polycentric Competition Law, (2018), 71(1) *Current Legal Problems*, 161; I. Lianos, Reorienting Competition Law, (2022) 10(1) *J*ournal of Antitrust Enforcement, 1–31.

[45] See, for instance, the 17 Sustainable Development Objectives of the United Nations, 'Sustainable Development Goals' (2015) <https://sdgs.un.org/goals . The General Assembly of the United Nations (UN) adopted, in September 20151, broader development targets for both developed and developing countries, encompassing all sustainability dimensions (economic, financial, institutional, social and environmental). In the EU, see European Commission, 'Proposal towards a sustainable Europe by 2030' (February 2019) <https://ec.europa.eu/info/publications/towards-sustainable-europe-2030_en>.

relies on the price-based revealed preferences model, the prices being revealed in the market, or alternatively, if markets do not exist or are distorted, by estimating an implicit value based on an individual's behaviour in a real-life situation in which this individual has to face a trade-off between two competing consumption alternatives. Should market prices not be available, the contingent valuation method aims to calculate the value of a consumer gain or loss, through a survey of a sample of consumers, by testing their 'willingness to pay' when they are faced with a hypothetical consumption choice-set. However, one of the implicit assumptions of revealed preferences theory is that the behaviour of the agent is consistent when exercising her/his choice in the marketplace.

The polycentric competition law approach takes into account the 'conflicting preference maps' that most individuals have, when acting as consumers in the marketplace, and as citizens in the political sphere. Environmental economists have long noted the tension between the 'utilitarian preference based' approach used by the price-based revealed preferences approach and contingent valuation analyses, which focus on consumer wants as utility maximisers, and the 'Kantian (principle based)' approach on what 'we ought to do as a society'[46]. From a methodological perspective, one may question the appropriateness of revealed preferences approach in assessing citizen preferences, as opposed to consumer interests, and the scope of application of the method of cost benefit analysis[47]. For instance, the approach followed by the consumer and total welfare standards usually ignores the implications that a specific conduct may have on the individual consumers, for instance looking to the costs for consumers that are vulnerable (horizontal fairness issues)[48]. Under the consumer welfare approach, the gains for some individuals can be balanced against the losses for other individuals in the specific sociological category of consumers, in order to determine the relative goodness (efficiency) of a state of affairs. However, this trade-off is made in the context of the specific game, without taking into account the 'overlapping games' and the complex web of social relations in which the same individuals may participate, in the multiple spheres of their lives. This further assumes that there are no goods other than the good of the representative agents, and that the social good is the aggregation of personal goods of the representative agents (consumers in this context)[49].

Polycentric competition law advances that there is no reason to limit this evidence-gathering on preferences expressed in the market sphere and not take into account the other overlapping games in which the same individuals participate, in particular as they devise their strategies across the various spheres of social activity in which they interact with each other. Indeed, they may very well leverage their position in one field to a position of power in another. The prevailing revealed preferences approach also assumes, for instance, that the interests of future 'consumers' coincide with the revealed preferences of the current 'consumers', for

[46] M. Sagoff, Aggregation and Deliberation in Valuing Environmental Public Goods: a look beyond contingent pricing, (1998), 24, *Ecological Economics*, 213 -230.
[47] See the discussion in, inter alia, S.W. Orr, Values, preference, and the citizen-consumer distinction in cost-benefit analysis, (2007), 6 *Politics, Philosophy & Economics*, 377.
[48] M. Trebilcock and F. Ducci, The Multifaceted Nature of Fairness in Competition Policy, (2017*), Competition Policy International Antitrust Chronicle*, Fall 1(1).
[49] The concept of 'overlapping games' was suggested by Bowles and Gintis with the aim of understanding the relationship between different spheres of social life and the 'irreducible heterogeneity' of distinct areas of society, such as family, state, the economy and one may add the economic, political and cultural spheres: S. Bowles and H. Gintis, *Democracy and Capitalism*, (Basic Books, 1986).

instance regarding the direction of innovation that is socially valuable, notwithstanding any evolution of the values presently prevailing in society[50], the technologies available, or of what are the requirements of the rules of the prevailing social contract.

Hence, the polycentric approach argues that as any other area of law that has by purpose and design a normative content, competition law should not limit itself to preferences revealed in the marketplace by consumer behaviour, but should also consider preferences expressed by citizens, in particular when they design the constitutional framework regulating their various socio-economic interactions, that is, the rules of the various overlapping games each of them participates in. As a field of social theory, economics assumes that social judgments and public decisions must depend, on individual preferences, broadly understood, as these are expressed in a transparent social process, but there is no reason to consider that the marketplace is the only transparent social process available, the democratic process or that of forming the constitutional rules of the specific polity being at least as important sources of knowledge on collective (and individual) preferences.

From this perspective, competition law should be conceptualized as implementing a social contract[51], and the competition law enforcer should pay particular attention to the overall constitutional framework and values that recognize socio-economic rights and provide broad directions of action to the legislator and the executive, but also to the specific legal framework that applies to a sector or economic activity. For instance, at the EU, Article 3(3) TEU provides that the Union shall establish an internal market with the goal of achieving "a highly competitive social market economy," aiming at full employment and social progress. Broad horizontal integration provisions aim to manage the interaction between the different policies pursued by the Treaty, including competition law[52]. In addition to these legal expressions of social choice, other social contract approaches may help us better conceptualize (in social science terms) the interpretative work that needs to be undertaken by the competition law enforcer and the metrics and other qualitative measures that need to be adopted so as to implement this polycentric approach[53].

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[50] E.g. future consumers may have stronger preferences for sustainability than current consumers, in view of climate change or the degradation of standards of living due to pandemics, geopolitical turmoil etc,

[51] M. S. Gal, The Social Contract at the Basis of Competition Law, in *Reconciling Efficiency and Equity – A Global Challenge for Competition Policy*, in D. Gerard & I. Lianos eds., (Cambridge University Press, 2018), 88; I. Lianos, Competition Law as a Form of Social Regulation, (2020), 65(1) *Antitrust Bulletin*, 3-86.

[52] See, for instance, the general integration clause at Article 7 TFEU, "(t)he Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers." These are included in Title II of the TFEU entitled "Provisions having general application." Services of general interest are recognized by Protocol No 26, while the concept of Services of General Economic Interest appears in Articles 14 and 106(2) TFEU and in Protocol No 26 to the TFEU. See also Article 36 of the Charter of Fundamental Rights, according to which "The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union."

[53] See, most notably, J. Rawls, *A Theory of Justice*, (Harvard Univ. Press 1999, first pub. 1971); T.M. Scanlon, Contractualism and Utilitarianism, in *Utilitarism and Beyond* 103, A. Sen & B. Williams eds., (Cambridge University Press, 2013) and more recently, T.M. Scanlon, *What We Owe to Each Other*, (Harvard University Press, 1999); K. Binmore, *Natural Justice*, (Oxford University Press, 2005) and the discussion of the hypothetical revealed preferences approach. Hypothetical revealed preference theory defines an agent's preferences in terms of what she would choose if she were able to choose, thus switching from actual to hypothetical choice. For a discussion, see I. Lianos, Competition Law as a Form of Social Regulation, (2020), 65(1) *Antitrust Bulletin*, 3, 50 (citing work by K. Binmore, Playing Fair (MIT Press, 1994).

Such an approach may bring in consideration not only individual use value benefits that derive from the consumption or the use of the products covered by the agreement under assessment, as it is the case under the 'consumer welfare standard', but also individual non-use value benefits, that is indirect benefits resulting from the appreciation by the consumers of the impact of their sustainable consumption on others, as well as collective benefits, occurring outside the affected relevant market, that may also be taken into account under specific circumstances, if one focuses on citizens' welfare and there are specific constitutional duties to act so that the government can be held legally accountable for not taking sufficient action to prevent foreseeable harm, also in the long term[54].

In contrast to the consumer welfare perspective, which is narrow, as it tends not to take into account externalities (including pecuniary externalities) if they are mot in relevant markets, the polycentric competition standard accepts such trade-offs, to the extent that distributional implications may also be taken into account, either under a priority principle[55]. Furthermore, the concept of consumers should not be understood as referring only to current customers of the undertakings in question in the relevant market, but also to subsequent purchasers, but by discounting future gains for consumers, the current interpretation of this concept does not sufficiently account for the interests of future generations.

The consumer welfare approach usually does not allow the consideration of income effects. This is justifiable when consumers spend only a small fraction of their income in the good in the relevant market or else when the market is small relevant to the entire economy so that it does not generate income effects – an assumption which is implicitly made in the IO-based consumer welfare approach. A polycentric competition standard caters for situations of "structural inequality[56]. The concept of structural inequality is used to denote the vulnerability to domination that a type of market actors may experience due to social structure processes, beyond their control. Polycentric competition law may also intervene with the aim to establish the structural conditions that will make markets work for the benefit of the people, eventually also integrating in the competition analysis broader public interest concerns that go beyond the usual focus on price and output.

The practical implications of such an approach to competition law enforcement are yet however to be determined and relevant metrics of power triggering competition law

[54] See, for instance, the recent judgment of the Dutch Supreme Court in its Urgenda judgment: Supreme Court of the Netherlands, 20 December 2019, ecli:NL:HR:2019:2006, English translation ecli:NL:HR:2019:2007. The Dutch Supreme Court relied on the obligation of the State to protect its residents' right to life (Article 2 of the European Convention on Human Rights – ECHR) and right to family life (Article 8 ECHR). It also noted that the there is a serious risk that the threat of climate change will affect the current generation of inhabitants of the Netherlands who may suffer loss of life or a disruption of family life or both.

[55] See, I. Lianos, Competition Law as a Form of Social Regulation, (2020), 65(1) *Antitrust Bulletin*, 3-86. That will deem transfers from better off agents to worse off agents as compatible with "a socially preferred distribution" to the extent the transfer of utility does not make the situation of the better off agent worse than that of the agent who is worse off: M. Fleurbaey, Equality Versus Priority: How Relevant is the Distinction?, (2015), 31 *Economics & Philosophy*, 207 (this complies with the Pigou-Dalton transfer principle, that is the idea, that a transfer from the rich to the poor is socially desirable, as long as it does not bring the rich to a poorer situation than the poor).

[56] I. M. Young, *Responsibility for Justice*, (Oxford University Press 2011), P. Pettit, Freedom in the Market, (2006), 5 *Politics, Philosophy & Economics*, 131-149.

enforcement intervention need to be more systematically applied[57]. Furthermore, exploring from a complex equality perspective the position of the various stakeholders affected by competition law violations will require the recourse to tools such as agent-based modelling[58]. This tool provides a bottom-up approach to simulate a system of heterogeneous autonomous agents, thus accounting for different attributes, such as the size, the business model, as well as the specific ownership structure and corporate governance of undertakings, and could also integrate a dynamic perspective by designing these agents to be adaptive through learning. A similar modelling can be done for various sociological categories of individuals, such as "investors", "labour", "consumers", accounting for their income, education or wealth level, varying degrees of rationality, thus not relying on the average behaviour of individuals defined *in abstracto*, but on the basis of their real attributes and those the theory/hypothesis to be tested considered important. The model may not focus on price-system intermediated interactions but also centre on or combine non-price ones[59].

3. Competition Policy Standards in Action: The Example of Greece

The implementation of competition law in Greece takes into account mainly the 'consumer welfare' and the 'expansive consumer welfare standard', as the competition authority examines the impact of a firms conduct not only on the welfare of final consumers but also on the welfare of the business trading partners of the firms involved in the conduct under analysis (e.g., input suppliers, business customers) by examining how they can influence market dynamics and eventually, without that always being necessary, impact end-consumers welfare (potential consumer harm)[60]. The case law also adopts a principles-standard that conduct which does not form competition on the merits may be considered abusive, without any need for the authority to bring evidence of concrete effects on final consumers[61].

At the same time, the Hellenic Competition Commission (HCC) has recognized in its recent case law that, under specific circumstances, the concept of effective competition may

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[57] See, for instance, I. Lianos & B. Carballa-Smichowski, A Coat of Many Colours—New Concepts and Metrics of Economic Power in Competition Law and Economics, (2022) 18(4) *Journal of Competition Law & Economics*, 795-831.

[58] There is a significant literature on agent-based modelling. For its use in economics and industrial organization theory, see, among others, Robert Axelrod, The complexity of cooperation: Agent-Based models of competition and collaboration (Princeton Univ. press, 1997); Leigh Tesfatsion, Agent-based computational economics: A constructive approach to economic theory, in Leigh Tesfatsion & Kenneth L. Judd (eds.), Handbook of computational economics: Agent-based computational economics (Vol. 2, North-Holland), 831; Lynne Hamill & Nigel Gilbert, Agent-Based Modelling in Economics (Wiley 2016); Juan Manuel Sanchez-Cartas, Agent-based models and industrial organization theory. A price-competition algorithm for agent-based models based on Game Theory, Complex Adaptive Systems Modelling, (2018) 6 Article no 2. https://doi.org/10.1186/s40294-018-0053-7 .

[59] For a discussion of the application of agent-based modelling in competition law enforcement regarding digital platforms, see I. Lianos, A. McLean, Competition Law, Big Tech, and Financialisation: The Dark Side of the Moon, in (M. Corrad & J. Nowag eds.), *Intersections between Corporate and Antitrust Law* (Cambridge University Press, 2023), 319-336.

[60] See, for instance, HCC Decision 762/2021, para. 120 (even the exclusion of less efficient competitors may harm consumers and emphasising equality of opportunity); HCC Decision 741/2021, paras. 145 & 147 (the exclusion of less efficient competitors may also in some circumstances lead to consumer harm in terms of price, output, quality, variety and choice, innovation); HCC Decision 711/2020, para. 90.

[61] HCC Decision 741/2021, para. 147.

be interpreted by taking into account broader socio-economic rights as these are recognized by the constitutional framework, thus adopting a polycentric competition approach.

With its Decision No. 741/2021, the HCC imposed upon the company ELTEPE SA (currently ENDIALE SA) a fine totalling EUR 111.600 for infringing Articles 2 of Greek Law 3959/2011 (the Greek Competition Act) and 102 TFEU in the Greek market for waste oils management. The case was initiated following complaints by the companies GREEN OIL AEVE, ESK OIL AEVE, as well as the Association of Collectors of Waste Oils. The complainants essentially allege that ELTEPE SA abused its dominant (*de facto* monopolistic) position in the market for waste oils management, through several different practices, in order to exclude other market players from that market, as well as from the relevant upstream (remediation/ recycling of such oils) and downstream (collection of such oils) markets. The HCC found that ELTEPE's anti-competitive practices resulted in horizontal foreclosure of its competitors in the market for the organisation and operation of waste lubricants oils management systems. In particular, these exclusivity clauses aimed at directing every source of supply to ELTEPE, and as a result foreclosed potential competition from other possible Alternative Administration of Waste Lubricants Oils Collection Systems, which would not have access to sources of supply for their activity. It is worthy of note that the HCC specifically considered the possibility of justifying, following a proportionality assessment, the company's behaviour as not constituting an abuse, the dominant company claiming reasons of environmental protection, also in view of the principles of sustainable development and of the methodology set out in the HCC's Technical Report on Sustainability and Competition published in January 2021. However, the HCC concluded that ELTEPE did not provide any evidence of a possible objective justification that could establish that the said exclusivity clauses were necessary in order to increase the effectiveness of the overall management of waste lubricant oils as regards environmental protection and sustainable development[62].

Similarly, in the context of its Opinion on the Press Distribution market, on December 23, 2019[63], the HCC analysed the effects on effective competition and many factors that may affect the interpretation and application of competition law to press distribution or the press in general, in particular constitutionally protected rights or rights protected by the Charter of Fundamental Rights of the European Union. The HCC noted that the Hellenic Constitution guarantees pluralism in public discourse as a precondition for the free expression of opinion and freedom of information as a constituent element of the functioning of democracy. In particular, Article 14(9) of the Constitution provides for safeguarding pluralism and prohibits the concentration of control over more than one media outlets of this or any other kind. Concerning the press, the Constitution empowers the State to take measures to ensure a minimum level of pluralism. The key role of media in shaping public opinion serves as a basis for specific arrangements aimed at ensuring media pluralism (the presence of a sufficient number of media representing different and independent voices) and diversity of similar media

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[62] Note that in some merger transactions, the notifying parties raised sustainability-related arguments, however these were not examined by the HCC: see, Case N. 615/2015; Case N. 682/2019; Case N. 694/2019. For a discussion, see HCC Staff Discussion Paper on Sustainability Issues and Competition Law (HCC, 2020), available at Staff_Discussion_paper.pdf (epant.gr) pp. 42-45.

[63] HCC Opinion 39/2019.

(the presence of different political and cultural views). Furthermore, the HCC noted that media pluralism and freedom of expression are also supported by EU law. The HCC has therefore interpreted competition legislation in light of the principles ensuring media pluralism through the improvement of the conditions of economic competition in the market. Specifically, there are various methodologies for incorporating these more general constitutional and other interpretative requirements, for example by analysing them as an element of product quality at an empirical level or, possibly, by using a more deontological approach in the interpretation of the specific provisions and rules of competition law. The HCC also sought to reflect the real conditions in the market and the structure of media. The market is characterised by significant downturns due to a variety of causes, such as the economic crisis and the digital transformation of the press. The Opinion was based on a thorough economic analysis of market conditions, business models of the undertakings active in it and the national legal framework for press distribution or the press in general making recommendations to the government.

The HCC concluded that when investigating the possibility of taking measures concerning (i) the legal form of the printed-press agencies, (ii) changes to the existing institutional framework, and/or (iii) measures concerning intervention in the press market itself, the Government should aim at ensuring both the benefits brought by effective competition to consumers and society, as well as the pluralism of the press, in the sense of ensuring pluralism of media and the proper functioning of the market, not only in the present but also in the future. It is further deemed necessary that this balancing exercise of the various parameters at play, that go beyond even the relatively broad framework of the concept of effective competition developed by the HCC, should be carried out by State institutions, such as the legislature, which enjoy broader legitimacy in weighing the general interest, even where this does not coincide with the protection of "effective competition". In that context, the Opinion analyses the pros and cons of various measures, which may bring about solutions to some of the problems identified above, some of which arise from the nature and characteristics of the market (i.e. from the fact that it bears the characteristics of a natural monopoly or an essential facility), and some others are associated with the risk of adoption of anti-competitive practices by the participants (i.e. issues related to the shareholding structure of the distribution agency and the activity of some publishing companies also at the level of printed-press distribution). In the context of this analysis, it has been found that the systematic application of competition law against behaviours that lead to the exclusion of certain publishing companies may partially address some of the problems but, as mentioned above, is not a solution to the structural problems existing in the press distribution market, because of its specific characteristics.

Of particular interest are also the HCC's initiatives regarding sustainability and in particular the adoption by Law 4886/2022 of the new provision in the Competition Act – Article 37A – which provides the possibility for one or more undertakings to submit a request for issuance of a no-action letter by the President of the HCC, stating that no action will be taken against a horizontal or vertical agreement for violation of Article 1 of Law 3959/2011 or article 101 TFEU or against a practice for violation of Article 2 of Law 3959/2011 and Article 102 TFEU[64]. Undertakings can submit such request on public interest grounds, especially with

[64] See, https://www.epant.gr/en/enimerosi/competition-law-sustainability.html .

regard to implementation of the sustainable development goals. The procedure laid down in Article 37A is a simplified procedure in the sense that the President of the HCC, by issuing a relevant letter, following a proposal by the Directorate-General for Competition (DGC), can determine that there are no grounds for further action. DGC will examine the relevant requests taking into account the arguments and evidence provided by the undertakings concerned. This letter creates legal certainty for undertakings, as long as the factual circumstances on which the issuance of the no-action letter was based at the time of its issuance do not change.

In order to consider a submitted no-action letter request, the requesting undertakings must invoke and sufficiently substantiate: (1) the overriding grounds of public interest in the particular case (see below), and (2) that genuine uncertainty arises due to a novel or difficult issue within the scope of competition law. A typical case is where an agreement or practice raises issues that have not previously been dealt with by the HCC, the European Commission, national or EU Courts, (3) the agreement/practice is of major importance for the requesting undertakings, and the national economy, in general.

Furthermore, the HCC adopted Guidelines in order to specify the reasons of public interest that may be taken into account[65], which make extensive reference to the Sustainable Development Goals (SDGs) are specified in texts of the United Nations (see, in particular, the "2030 Agenda for Sustainable Development" and the Paris Agreement) and the European Union (see in particular the European Green Deal which Greece is committed to implement). The sustainable development goals that the HCC intends to consider include, inter alia: (i) Environmental protection and limiting the negative effects of climate change, by reducing greenhouse gas emissions; (ii) Achieving technological innovation aimed at meeting sustainable development goals (e.g., smart cities); (iii) Protecting and enhancing the green transition of small and medium-sized enterprises (SMEs).

The reference to the attainment of sustainable development goals in Article 37A of the Greek Competition Act is indicative and does not preclude the adoption of no-action letters in cases where other reasons of public interest are present. Reasons relating to the public interest further mean the reasons recognised as such in the case-law of national and EU Courts, including the following reasons: public order; public security; public health; preserving the financial equilibrium of the social security system; the protection of consumers, recipients of services and workers; fairness of trade transactions; combating fraud; the health of animals; intellectual property; preservation of the national historic and artistic heritage; social policy objectives and cultural policy objectives. Reasons of public interest for the purposes of article 37A, apart from those mentioned above, may also be (i) ensuring the supply and appropriate distribution of essential products and services and security of supply chains, especially in times of crisis; (ii) protection of public health; (iii) achieving or advocating the objectives of the Common Agricultural Policy, especially so far as sustainable development is concerned; (iv) strengthening regional sustainable development; (v) reaching/defending energy self-sufficiency within the framework of the National Energy and Climate Plan and the Long-term Strategy 2050; (vi) ensuring employment opportunities and decent working conditions for

[65] HCC Decision 789/2022, available at https://www.epant.gr/en/legislation/no-action-letter.html.

citizens and vulnerable groups of the population (vii) putting to effect or protecting social cohesion.

Although a pioneer in issues of integrating sustainability concerns in competition law, the HCC's approach is not unique in Europe. Recent case law of the EU courts but also draft guidelines by the Commission indicate that competition authorities adopt an extensive perspective on consumer welfare/well-being that is not confined as it is the case in economic IO literature on the sole parameters of price and output, or innovation, but also includes, among other things, privacy protection [66]. In its new draft Market Definition Notice, the Commission further notes that "(w)hen defining the relevant market, the Commission takes into account the various parameters of competition that customers consider relevant in the area and period assessed. Those parameters may include the product's price, but also its level of innovation and quality in various ways – such as its durability, sustainability or availability, including in terms of lead-time, reliability of supply and transport costs, the value and variety of uses offered, the image conveyed or the privacy protection afforded"[67].

The citizen's standard has also made inroads in EU (but also UK) competition law, following the inclusion of (environmental) sustainability goals in competition law.

According to the Draft EU Horizontal Guidelines (2022)[68] the notion of sustainability objective […] includes, but is not limited to, addressing climate change (for instance, through the reduction of greenhouse gas emissions), eliminating pollution, limiting the use of natural resources, respecting human rights, fostering resilient infrastructure and innovation, reducing food waste, facilitating a shift to healthy and nutrious food, ensuring animal welfare, etc[69]. However, the Draft EU Guidelines provide that sustainability benefits that ensue from the agreements have to be related to the consumers of the products covered by those agreements, the Commission making the choice of requiring an *actual* and *total/full* compensation for the consumers of the relevant market affected by the restriction of competition. The negative effects on consumers resulting from the restriction of competition need to be fully cancelled out by the alleged benefits. In other words, a *hypothetical* compensation would be insufficient to the extent that it compensates only *a part* of the loss to consumers resulting from the specific restriction of competition. However, this is not the only possible interpretation of the condition of "fair share", as one should also keep in mind that not all consumers/users are responsible to a similar extent for the social costs generated by the externalities of their consumption behaviour. The "polluter pays" principle justifies that producers polluting more be treated differently [70]. Similar principles should also apply, from the demand side, to consumers polluting more than others through their consumption behaviour. In this context, it would be "fair" to apportion a higher weight for the benefits taken into account in order to compensate the costs to the consumers that contribute to the negative externalities (pollution), so that these are only partly compensated.

[66] Case C-377/20, Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato and Others, ECLI:EU:C:2022:379, para 45 & 48.
[67] European Commission, Draft Market Definition Notice, (2023), para. 12.
[68] See, https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en.
[69] European Commission, Draft Horizontal Guidelines, (2023), para. 543.
[70] See, HHC Decision 615/2015, para. 174 ("the polluter pays" in proportion to the environmental impact it causes).

We also note the approach followed by the recent UK CMA Draft Guidance[71], which acknowledge that it is not normally appropriate to offset the harm to consumers in one market against benefits arising to a different set of consumers in another market, and that where two markets are related, benefits achieved on separate markets can be taken into account, provided that the consumers affected by the restriction and receiving the benefit are substantially the same or substantially overlap but however also accepts that in the case of agreements to achieve environmental sustainability benefits, the overall benefits of these agreements may extend beyond the consumers of the specific products in question, and in particular adopts, for climate change agreements, a more permissive approach to assessing consumer benefits, and in particular who are the relevant consumers, departing from the general approach and exempting such agreements if the 'fair share to consumers' condition can be satisfied taking into account the totality of the benefits to all UK consumers arising from the agreement, rather than apportioning those benefits between consumers within the market affected by the agreement and those in other markets, to the extent that climate change represents a special category of threat that sets it apart and requires a different approach to the pass-on criteria (thus adopting an approach which seems to be close to a citizens' standard).

A similarly broad perspective is also adopted by the EU Article 210a of the consolidated CMO Regulation[72], adopted pursuant to Article 42 TFEU and stipulates that "Article 101(1) TFEU shall not apply to agreements, decisions and concerted practices of producers of agricultural products that relate to the production of or trade in agricultural products and that aim to apply a sustainability standard higher than mandated by Union or national law, provided that those agreements, decisions and concerted practices only impose restrictions of competition that are indispensable to the attainment of that standard" (Article 210a, paragraph 1). Sustainability standards are defined in Article 210a, paragraph 3, as (i) "environmental objectives, including climate change mitigation and adaptation, the sustainable use and protection of landscapes, water and soil, the transition to a circular economy, including the reduction of food waste, pollution prevention and control, and the protection and restoration of biodiversity and ecosystems, (ii) "the production of agricultural products in ways that reduce the use of pesticides and manage risks resulting from such use, or that reduce the danger of antimicrobial resistance in agricultural production", and (iii) "animal health and animal welfare". Note that these requirements are less strict than those of Article 101(3) TFEU, hence they enable the exclusion from the prohibition principle of restrictive agreements that may not qualify for an exemption under Article 101(3) TFEU.

4. Conclusion

The contribution aimed to explore the various 'competition policy standards' put forward by the literature, by examining their respective advantages and disadvantages. It is important to acknowledge that the debate over 'standards' should not be dissociated from the broader

[71] UK CMA, Draft guidance on environmental sustainability agreements - GOV.UK (www.gov.uk), (2023).
[72] Regulation (EU) of the Parliament and of the Council establishing a Common Organisation of the Markets in agricultural products, (2013), OJ L347/671.

question of the goal(s) of the specific competition law and will inevitably have to tackle the institutional characteristics and capabilities of the specific enforcement system. Indeed, one may adopt a different approach concerning ‘competition policy standards’ in a competition law system that relies on enforcement by an integrated competition and market agency (i.e. combining roles of competition authority, sector-specific regulator and consumer protection), or on an integrated competition authority (only focusing on competition law enforcement) or on enforcement mainly by generalist or specialized courts (quasi- prosecutorial or prosecutorial systems of enforcement). Similarly, one may implement a different ‘competition policy standard’ for some markets with a strong polycentric dimension, to the extent that they may be considered as involving basic or sensitive for human well-being (or other public interest reasons) products, which reflect the societal choices of the specific polity. Competition authorities most often will use a toolkit approach that would take into account the overall legal framework and the characteristics of the specific market(s) before selecting the ‘policy standard’ that ‘fits’ the occasion. Guaranteeing consistency and transparency in the implementation of these standards, as well as following the broader directions provided by the legislator or the constitution, and drawing on a social contract approach, seems to us the most defensible position, from the perspective both of democratic governance and efficiency.