Comments by the
***Business at OECD* (BIAC) Competition Committee**
to the OECD Competition Committee

Advantages and Disadvantages of Consumer Welfare Standards

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I. Introduction

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

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

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

4. This submission adds to BIAC's previous contributions on similar topics, including sustainability and competition[2] and purchasing power and buyers' cartels.[3]

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1 *See* HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 1 (2005).

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

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

II. Broadly, BIAC Sees Five Categories of Welfare Standards in Antitrust Cases, Though Terminology and Mix of Underlying Norms May Differ

5. In recent years, certain scholars and commentators have proposed many welfare standards as replacement options for the consumer welfare standard, with the call to reconsider the consumer welfare standard. These intensified calls for antitrust welfare reform are primarily being driven by "Neo-Brandeisians" – those who associate themselves with the thinking of former U.S. Supreme Court Justice Louis Brandeis and staunchly oppose any concentration of corporate economic power.[4]

6. When distilled down to their key attributes, antitrust welfare standards can be broadly categorized into one of the following overarching standards: total welfare, public interest, producer welfare, consumer welfare, or competitive process. The antitrust welfare standards often share the same underlying norms, but their implementation calls for trade-offs between norms that underscores why the implementation of a standard itself is so important. In that respect, brilliant theory without skillful implementation is a bad match, which is why administrability and predictability are critical factors. Therefore, practical implementation is an essential consideration when evaluating welfare standards.

7. A gradual evolution of the consumer welfare standard is to be expected as it is refined overtime and the economic theory upon which it rests evolves. BIAC has in the past acknowledged the risk associated with "too narrow a focus on consumer welfare," calling for a "careful and balanced approach to intervention."[5] Possible alternative welfare standards can provide helpful guidance for that continuing evolution.

A. Total Welfare Standard

8. The total welfare standard maximizes the sum of consumer and producer surplus, regardless of how the surplus is distributed between the two.[6] It therefore also incorporates efficiencies that improve production, innovation, or market entry depicted in the producer surplus even when possibly resulting in higher consumer prices. It has been suggested that the Kaldor-Hicks improvement principle, which considers a scenario to be efficient if those benefitting could compensate others without sacrificing the entirety of the gained surplus, could be used to assess the effect of conduct on total welfare.[7] While the total welfare standard considers the allocative and productive efficacy effects of business conduct and mergers, it ignores equity or distributional concerns. The practical effect of a total welfare standard could be the allowance of anticompetitive conduct and mergers that harm consumers or specific subsets of producers. In addition, for those who view competition law as a means to maximize consumer surplus, an impartial surplus maximization policy would not meet what they would consider as the very purpose of competition law.[8]

9. Because the total welfare standard objectively focuses on maximizing the sum of consumer and producer surplus, it is administrable in the sense that consideration of consumer surplus against producer surplus is not required. This, however, would require a willingness to accept harm to consumers at the expense of producers,[9] which, for the most part, would be a significant departure from today's perceived

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[4] *See* Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. OF EUR. COMPETITION L. & PRAC. 131, 131 (2018).

[5] BIAC Purchasing Power Note, *supra* note 3, ¶ 28.

[6] *See* Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471 (2012); Fiona Scott Morton & Leah Samuel, *What Economists Mean When They Say "Consumer Welfare Standard"*, PROMARKET (Feb. 16, 2022), https://www.promarket.org/2022/02/16/consumer-welfare-standard-antitrust-economists/.

[7] *See* Blair & Sokol, *The Rule of Reason*, *supra* note 6, at 473.

[8] *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 86 (D.C. Cir. 2001) (rejecting the total welfare standard as inconsistent with the Sherman Act).

[9] Herbert Hovenkamp, *Roger Blair and the Goals of Antitrust*, 61(3) THE ANTITRUST BULLETIN 382, 383 (2016) ("For example, if a joint venture creates market power that increases prices by a given amount but also lowers the venturers' costs, then under a total welfare standard

intention of competition laws, as evidenced by the widespread reliance on the consumer welfare standard. Broadly speaking, a merger to monopoly would pass under an aggregate economic welfare standard if costs were reduced significantly to raise the selling firm's profits by more than the total aggregate harm to consumers. This is well known as the standard Williamson-Diagram trade-off.[10]

10. The total welfare standard's holistic view of surplus inherently carries a risk of unpredictability, as the degree of consumer harm or producer harm being offset by welfare gains will vary in each situation, especially given different market structures. Without any agreed upon thresholds or accepted metrics, one could envisage a scenario where conduct so grossly benefits producers (or even a subset of producers) to the detriment of consumers (or other producers), that the conduct should not be permitted, even if the resulting surplus is a net positive. Such a scenario has led some to argue that the total welfare standard is most prone to Type II (false negative) enforcement errors.[11] Furthermore, without any agreed-upon framework, it would be difficult for market participants to gauge the lawfulness of their conduct given that there is limited precedent regarding the use of the total welfare precedent upon which to rely.

B. Public Interest Standards

11. Public interest standards aim to balance the effects of business conduct and mergers with other policy goals, including social justice, environmental protection, national security, and labor rights. This concept gained much attention within the European Union by the prohibition of the proposed *Alstom/Siemens* merger,[12] a decision often criticized by some Member States on the basis that it fails to take due account of wider industrial policy considerations.[13] These wide-ranging goals generally do not incorporate economic analysis of efficiency or welfare, and can even be viewed as being at odds with competition law objectives.[14] For example, the "variety of goals" standard would prohibit conduct causing harm to wages, consumer privacy, or income inequality.[15] It is even possible that these different public interest standards could contradict each other. This means that a clear weighting of objectives cannot be fully objective. For example, when an undertaking results in economically defensible monopoly profit based on successful innovation but at the same time access for socially precarious individuals is impeded.[16]

12. Although these goals are admirable, they are not easily quantifiable and not easily subject to economic analysis which makes the implementation of these standards very challenging. Relatedly, applying a standard that may involve many different policy goals risks inconsistent and unpredictable application. Public interest standards are also not ordinarily associated with core competition law principles and risk politicizing competition laws in multiple ways. For example, the variety of goals standard would prohibit conduct that causes income inequality. And while enforcement of competition laws may address income inequality, there are other policies better suited for this issue, as competition law experts have observed.[17] Another concern is that using competition laws as policy tools to solve discrete societal issues

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consumer welfare losses from the price increase, and lower output would have to be netted out against producer gains. A net gain indicates that the practice is efficient, or wealth-increasing, even though consumers are injured.").

10 *See, e.g.*, Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968).

11 Eleanor Fox, *Against Goals*, 81 FORDHAM L. REV. 2157, 2158 (2013).

12 *See, e.g.*, Press Release, Eur. Comm'n, Mergers: Commission Prohibits Siemens' Proposed Acquisition of Alstom (Feb. 6, 2019), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_881.

13 *See, e.g.*, Germany & France, A Franco-German Manifesto for a European Industrial Policy Fit for the 21st Century, https://www.bmwk.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf?__blob=publicationFile&v=1.

14 *See* United States v. AT&T Inc., 916 F.3d 1029, 1034-35 (D.C. Cir. 2019) (affirming rejection of the public interest standard as irrelevant to the antitrust analysis of the AT&T-Time Warner transaction).

15 *See* Senate Democrats, A Better Deal: Cracking Down on Corporate Monopolies, at 1-2 (2017), https://appliedantitrust.com/00_basic_materials/hipster_antitrust/A-Better-Deal-on-Competition-and-Costs.pdf.

16 *See, e.g.*, OECD, Excessive Prices in Pharmaceutical Markets – Background Note by the Secretariat, DAF/COMP(2018)12 (Oct. 3, 2018), https://one.oecd.org/document/DAF/COMP(2018)12/en/pdf.

17 *See, e.g.*, Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. OF INDUS. ORG. 714, 746 (2018) ("[A]ntitrust cannot be expected to solve the larger political and social problems facing the United States today. In particular, while antitrust enforcement does tend to reduce income inequality, antitrust cannot and should not be the primary means of addressing income inequality; tax policies and employment policies need to play that role. . . . Trying to use antitrust to solve problems outside the sphere of competition will not work and could well backfire.").

risks the impartiality of competition law enforcement agencies, potentially subjecting them to being improperly influenced by politicians, and may lead to problematic overlaps with other administrative agencies who have specific non-competition policy mandates.[18]

C. Producer Welfare Standards

13. Producer welfare standards prioritize the protection and enhancement of the welfare of producers, defined as the sellers of relevant products or services. Advocates of industrial policy, especially those favoring protection of small business, tend to prefer these standards. Generally, these standards require the consideration of business conduct and mergers on producer surplus (the difference between the price received and the cost of production), including efficiencies that improve production, innovation, or market entry.

14. Increases in producer welfare may lead to increases in consumer welfare, but sometimes such increases may also be at the expense of consumer welfare. In Canada, where there is a codified producer efficiencies defense, the Competition Bureau has acknowledged this problem, observing that under its framework an "anticompetitive merger is allowed to proceed if it produces anticipated gains in efficiency that are greater than and offset its anti-competitive effects. . . . Even for mergers that raise prices for consumers."[19] While producer welfare, which may manifest in the form of efficiencies, is a relevant consideration, significant issues, such as those identified by the Canada Competition Bureau, may arise if it trumps consumer welfare. Recognizing this, the Canada Competition Bureau has proposed repealing the efficiencies defense and making it merely a factor for consideration,[20] similar to other jurisdictions like the United States.[21]

15. The above Canadian example is indicative of one of the key drawbacks of producer welfare standards. Often viewed by some as having more structuralist characteristics, producer-centric standards can be detached from comprehensive market dynamics, sometimes yielding results where producers only benefit at the expense of consumers. Even assuming an agreed upon acceptance that some degree of consumer harm will have to be tolerated in certain situations, consistent administration of producer welfare standards across different industries would still likely be difficult, as there is an inherent variation by industry in the effect of increases or decreases in upstream welfare on downstream consumers. Consequently, from a consumer perspective, an administrable test attempting to equally protect all consumers when a certain level of harm is affected has yet to be developed.

16. In isolation, applying a producer welfare standard in a relevant market may benefit some producers and harm others, depending on the conduct and market dynamics. For example, larger producers with significant economies of scale may benefit from conduct that, in turn, decreases the availability of supplies available to smaller competitors, thereby decreasing the smaller competitors' margins. It is also not clear how much consideration will be given to efficiencies, which, too, may benefit some producers at the expense of others. Because the extent to which producer harm outweighs producer benefits will vary by market, producer welfare standards can be unpredictable. The lack of precedent only further compounds

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[18] *See id.* at 716 ("Asking the DOJ, the FTC to evaluate mergers and business conduct based on the political power of the firms involved would invite corruption by allowing the executive branch to punish its enemies and reward its allies through the antitrust cases brought, or not brought, by antitrust enforcers.").

[19] Matthew Boswell, Canada Needs More Competition, Address Before the Canadian Bar Association Competition Law Fall Conference (Oct. 20, 2021), https://www.canada.ca/en/competition-bureau/news/2021/10/canada-needs-more-competition.html.

[20] The Competition Bureau, The Future of Competition Policy in Canada § 1.8 (Mar. 15, 2023), https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/future-competition-policy-canada#sec-1-8.

[21] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 10 (2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010#2g [hereinafter U.S. HORIZONTAL MERGER GUIDELINES].

the inherent ambiguity in the application of public interest standards, providing little guidance to competition law enforcers and market participants.

D. Consumer Welfare Standard

17. The consumer welfare standard protects and enhances the welfare of consumers, defined as the buyers of relevant products or services, by considering the effects of business conduct and mergers on consumer surplus – the difference between the price consumers are willing to pay and the price that consumers actually pay. In practice, the consumer welfare standard champions competition that maximizes output and lowers prices, both to the benefit of consumers. The consumer welfare standard focuses on allocative efficiency, the effects of business conduct and mergers, and more dynamic efficiency effects relating to innovation and consumer choice. Under the consumer welfare standard efficiency benefits are also taken into account. However, this is only the case if there is evidence that the efficiency benefits passed on to consumers are large enough. In other words, consumers directly benefit from those efficiencies on balance from the conduct. At the same time, harm to competitors is not directly analyzed unless the conduct also likely harms consumers. In contrast to the consumer welfare standard, the total welfare standard equally weights the harm to competitors and consumers, as all contribute equally to the total welfare (consumer surplus plus producer surplus).

18. Widely supported by courts, competition authorities, and scholars, the consumer welfare standard remains the primary welfare standard in the United States,[22] European Union,[23] and many other jurisdictions.[24] Recently, however, the consumer welfare standard has become increasingly subject to criticism and debate for not capturing the full social costs and benefits of business conduct and mergers. U.S. Federal Trade Commission Chair Lina Khan, for example, has derided the consumer welfare standard as "warp[ing] America's antimonopoly regime" with its fixation on "promoting 'efficiency' on the theory that this will result in low prices for consumers," at the expense of other harms, including those on "workers, suppliers, innovators, and independent entrepreneurs."[25]

19. Given the consumer welfare standard's flexibility, there can be some resultant ambiguity in its application, thereby reducing desired predictability. But because the consumer welfare standard has demonstrated a propensity to gradually evolve, it is reasonable to assume that aspects of alternative welfare standards could, within reason, be incorporated into the consumer welfare standard, should it remain the primary antitrust welfare standard. At the same time, the consumer welfare standard is seemingly the most predictable welfare standard, relative to the alternative welfare standards discussed in this contribution, due in large part to its application to various industries for decades and its reliance on economic theory.

E. Competitive Process Standards

20. Competitive process standards are highly structural standards that tend to be disconnected from welfare analysis. Structural competition standards promote competition without further considering subsequent competitive effects on a case-by-case basis. In essence, the idea is that if markets are structured appropriately, markets will function properly.

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[22] *See* Herbert Hovenkamp, *Implementing Antitrust's Welfare Goals*, 81 FORDHAM L. REV. 2471, 2476 (2013) ("[C]ourts almost invariably apply a consumer welfare test."); Jonathan M. Jacobson, *Another Take on the Relevant Welfare Standard for Antitrust*, ANTITRUST SOURCE, Aug. 2015, at 1, 2 ("[The] consumer welfare standard is the standard understood to be employed in practice by the federal enforcement agencies.").

[23] *See* Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 FORDHAM L. REV. 2497, 2510 (2013) ("[S]ince the E.U. competition system has been modernized to reflect, among other things, an analysis more heavily based on economics, the focus increasingly has been on consumer welfare . . . .").

[24] *See id.* at 2502 ("Indeed, if anything, it seems to be consumer welfare that is the standard on which there is increasing international convergence.").

[25] Khan, *supra* note 4, at 132.

21. For example, the "protection of competition" standard would consider whether conduct is "merely part of the competitive process, or is [] meant to 'suppress or even destroy competition'."[26] The protection of competition standard is intended to protect a process and not to maximize certain welfare outcomes, in part, because of the belief that "judges and enforcers are ill-equipped to measure" welfare outcomes.[27] Advocates of the protection of competition standard suggest that implementation should draw on "more than a century of economics," including such concepts as price and quality competition, market power, market entry, barriers to entry, and ability to raise rivals' costs.[28]

22. Similarly, the "effective competition" standard focuses on preserving competitive market structures at every level of the supply chain to benefit producers.[29] Under this standard, market structure preservation is primarily determined by assessing market power, either through market shares or other evidence (e.g., ability to charge supracompetitive prices, ability to exclude competitors, ability to restrict output, ability to price discriminate).[30] Should any of these indicia support a finding of market power, the effective competition standard would "impose a more restrictive competition policy . . . by default on firms with significant market power."[31] This is the end of the inquiry. The effective competition standard does not require demonstrating "how the lessening of competition harms consumers, nor balance[ing] the harms to one set of stakeholders against the supposed benefits for another."[32]

23. It has been suggested that competitive process standards are more administrable and practical than the consumer welfare standard because a highly fact-dependent, case-by-case inquiry into effects and welfare is not required.[33] The ease of applying the same structural analysis across many different industries cannot be denied. However, there is a tension between proactively molding markets to ensure what is deemed, subjectively, to be the appropriate level of competition or innovation and the more traditional method of enforcing competition laws to remedy the caused or imminent anticompetitive effects.[34] These types of structural competition standards are therefore prone to Type I (false positive) enforcement errors, which can lead to overenforcement and risks deterring legal, procompetitive conduct. They are also prone to politicization. As critics of competitive process standards have pointed out, establishing "market power screens" as the basis for antitrust intervention, absent a showing of corresponding effect, may be dangerous and cause welfare losses to society.[35]

24. Furthermore, there is still a disconnect between policy and implementation. Proponents of the protection of competition standard, for example, have acknowledged that its "development will require much further work and practice to arrive at practicable standards."[36] Such underdevelopment inherently carries a real risk of unpredictability and inconsistent application.

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[26] Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice*, COMPETITION POL'Y INT'L (Columbia Pub. L. Rsch. Paper No. 14-608, 2018), at 2, https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3294&context=faculty_scholarship.

[27] *Id*. at 2.

[28] *Id*. at 9-11.

[29] *See* Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, 86 UNIV. OF CHICAGO LAW REVIEW 595, 602-03 (2020).

[30] *See id.* at 606.

[31] *Id.* at 607.

[32] *See id.* at 604.

[33] *See, e.g.*, Wu, *supra* note 26, at 2.

[34] *See, e.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (holding that the Clayton Act protects competitors from injury resulting from anticompetitive conduct, not from increased competition); United States v. Syufy Enters., 903 F.2d 659, 663-64 (9th Cir. 1990) (rejecting the producer welfare standard as being inconsistent with the Sherman Act).

[35] A. Douglas Melamed & Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, 54 REV. OF INDUS. ORG. 741, 764-66 (2019).

[36] Wu, *supra* note 26, at 9.

III. Alternative Welfare Standards and Consumer Welfare Standard Have Many Shared Attributes

25. In light of the criticisms levied against the consumer welfare standard, it is important to acknowledge the consumer welfare standard's inherent flexibility and reduced risk of inconsistent decisions, political capture, or rent seeking by special interests, especially as compared to alternative standards. Since its adoption over 40 years ago, the consumer welfare standard has gradually evolved to accommodate dynamic markets and ever-changing economies. And though the Chicago School's influence on the consumer welfare standard has been profound, the influence of other scholarship, including the modern Harvard School, should not be ignored.[37] In its evolution, the consumer welfare standard has already incorporated many factors now proposed as being relevant to various alternative welfare standards.

26. In the first instance, the consumer welfare standard already involves structural market screens akin to those incorporated in the competitive process standards. The effective competition standard, for example, focuses on assessing market power and recommends establishing a default enforcement policy for firms exceeding certain market share thresholds. The consumer welfare standard, in a similar manner, treats market shares and Herfindahl-Hirschman Index (HHI) calculations as key determinants of potentially anticompetitive conduct.[38] Some jurisdictions, such as the United States, have even established certain presumptions associated with particularly high HHIs.[39] Importantly, though, market power and concentration is not the end of the inquiry under the consumer welfare standard, as any such presumptions can be rebutted by an effects analysis that considers and weighs other real world market dynamics.

27. For example, concepts such as entry barriers, elasticity of demand, the ability to raise rivals' costs, and innovation are integrated into the consumer welfare standard.[40] These concepts are not dissimilar from those relevant to the alternative welfare standards. The protection of competition standard, in evaluating whether conduct is inherently competitive or intended to destroy competition, requires a consideration of factors such as whether the conduct at issue negates price or quality competition or blocks challengers,[41] which depends on familiar concepts like entry barriers and the likelihood of raising rivals' costs.[42] Likewise, the effective competition standard assesses evidence of market power, such as the ability to charge supracompetitive prices, ability to exclude competitors, ability to restrict output, ability to price discriminate,[43] similar to how the consumer welfare standard considers other indicia of market power, such as "reduced product quality, reduced product variety, reduced service, or diminished innovation."[44]

28. Although alternative welfare standards contemplate many concepts that are relevant to the consumer welfare standard, there is still a key difference between the consumer welfare standard and some of the alternative welfare standards. The consumer welfare standard considers the competitive effect of conduct in each individual scenario, instead of making standard assumptions regarding possible effects that are based largely on structurally-driven inferences.

29. Aside from market structure, the consumer welfare standard broadly captures many other considerations that are relevant to the alternative welfare standards. For example, although the consumer welfare standard focuses on maximizing consumer welfare, it does consider relevant producer efficiencies

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37 *See* William E. Kovacic, *The Chicago Obsession in the Interpretation of US Antitrust History*, 87 U. CHI. L. REV. 459 (2020).

38 Melamed & Petit, *supra* note 35, at 767 ("The market power element in U.S. antitrust law serves several important purposes: First, it limits antitrust enforcement to those cases that have a material impact on competition and thus serves to weed out cases that do not warrant the often costly and burdensome intrusion of antitrust investigation and litigation.").

39 U.S. HORIZONTAL MERGER GUIDELINES , *supra* note 21, § 5.3.

40 *See, e.g.*, *id*.

41 *See* Wu, *supra* note 26, at 10.

42 *See id*.

43 Steinbaum & Stucke, *supra* note 29, 606.

44 U.S. HORIZONTAL MERGER GUIDELINES , *supra* note 21, § 1.

that may benefit consumers.[45] Though these efficiencies must be cognizable and provide some benefit to consumers, the analysis undertaken is similar to that of producer welfare standards. Even more prospective concepts like the mere opportunity for collusion, which is a consideration under the protection of competition standard,[46] is relevant to the consumer welfare standard where coordinated effects can provide the basis for finding certain conduct to be unlawful.[47]

IV. Conclusion

30. While many factors may feed into the consumer welfare standard – at its core – with its focus on whether conduct reduces output and increases prices to the detriment of consumers, the consumer welfare standard is a relatively straight-forward concept, grounded in well-established economics, that makes it easier to apply across industries and geographies. Though the consumer welfare standard has remained grounded in this core concept, it has gradually and carefully evolved over the four decades since its initial adoption, as evidenced by the concepts discussed above that are relevant to both the consumer welfare standard and alternative welfare standards. It is also less prone for Type I (false positive) enforcement errors, which can lead to over-enforcement and risks deterring legal, procompetitive conduct. If provided the opportunity, BIAC expects that the consumer welfare standard will continue to evolve without ultimately losing sight of its principal goal to protect consumers.

31. Because the consumer welfare is ultimately more objective in its application, the consumer welfare standard is generally more easily administrable and predictable than the alternative welfare standards. Remaining committed to a well-established and well-rounded welfare standard only further enhances the credibility, legitimacy, and overall effectiveness of antitrust law as a field, and those that enforce it.

45 *See, e.g.*, U.S. HORIZONTAL MERGER GUIDELINES , *supra* note 21, § 10.
46 *See* Wu, *supra* note 26, at 9-10.
47 *See, e.g.*, U.S. HORIZONTAL MERGER GUIDELINES , *supra* note 21, § 7.