The Application of the Welfare Standard in Competition Decisions

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General Principles: Welfare Standards and Competition Enforcement

Why welfare standards?
• May serve as an analogue to the competitive market.
• Create an standard analytical framework designed to produce consistent outcomes free of excessive ideological bias.
• Produce welfare enhancing versus reducing results;
  ... But –
• No welfare standard is wholly neutral: Whose welfare is included?
• No welfare standard can (or should) eliminate the exercise of judgment: What considerations are weighed to determine “welfare”?
• What standard will achieve optimum desired results?
Defining “Welfare”

• What values should be embodied?
• What questions should be answered?
• Who will be applying the tests?
• What will ensure appropriate flexibility and consistency?
• What presumptions are embodied in the definition?
• Who bears the burden of proof?
• Is Antitrust or competition law the appropriate tool?
Principles of the Consumer Welfare Standard

Antitrust and Competition should:

• Focus is on “Consumers” – Direct and Indirect;
• Economics based; Doesn’t “pick winners or losers”
• Encourage output as high as consistent with sustainable competition;
• Encourage low prices based on competition;
• Focus on market structure as it effects output, prices, entry and innovation;
• Consumer loss or gain is central to analysis; if consumers lose then the practice is inefficient; no producer balancing?;
• Efficiencies must be specific not general - only if could not otherwise be achieved without conduct being evaluated.
What’s Included in “Total Welfare”

• “Total” welfare looks to measure the effect of a practice or transaction on the economic welfare of all participants in a market, including both producers and consumers.

• It does not make any distinction between how the losses or gains are distributed.

• Measures the aggregate value on economic production and the gains and losses, with regard for how they are distributed.

• Both consumer and producer welfare is considered to reach decision.
Identifying and Correcting for Bias

• Skepticism or Benefit of the Doubt Applied to Analysis: Non-empirical preference – thumb on scale should be avoided;
• Market definition principles – Clear, empirically-based market definition;
• Rigorous, specific, fact-based, case-by-case analysis;
• More evidence-based factual conclusions; less reliance on assumptions and presumptions.
Challenges for Agencies Applying Standards

• Getting the necessary evidence to effectively analyze the specific facts and apply the standard appropriately;

• Avoiding tropes and shorthand as substitute for evidence and analysis;
  • Big is bad, small is good;
  • Large companies have scale economies that always advantage consumers;
  • Large companies are always more efficient or innovative;
  • False positives; false negatives;
  • Per se Rules – Shift from illegality to legality presumptions.

• Applying the standard to rapidly evolving new industries and new business models.