COMPETITION COOPERATION
EU-INDIA Partnership

# The Application of the Welfare Standard in Competition Decisions


Carolyn Galbreath

Former Member of the Irish Competition Authority


1st EU-India Competition Week
10 December 2018
Delhi, India


*A project funded by the European Union*

# 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.