

How are consumers' interests taken into account when applying competition law?

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"Defending consumer's interests is at the heart of the Commission's competition policy"

Neely Kroes





- 1. When are consumers' interests taken into account?
- 2. What interests? Which consumers?
- 3. How do we know what is in the interest of consumers?



 At what stage(s) in the decision making process are consumers' interests taken into consideration?

- Framing stage
- Decision stage



Framing stage

Priority setting

- E.g. Guidance on the Commission's enforcement priorities in applying Article 82 EC to abusive exclusionary conduct
- Decision to take up an individual case
- Preference for one type of error



Decision stage (1)

- Finding of infringement under art.
 81 or 82 EC
 - Treaty does not impose showing of consumer harm
 - But decisions and judgements often refer to the fact that a prohibited conduct resulted in consumer harm



Decision stage (2)

• Exemption under art. 81 (3) EC

- Benefit to "consumers" is a necessary condition for exemption
- Consumer advantage redeems an otherwise unlawful conduct
- Note of caution: "consumers" and/or customers? (Cp. FR: "utilisateurs", DE: "Verbraucher")



Decision stage (3)

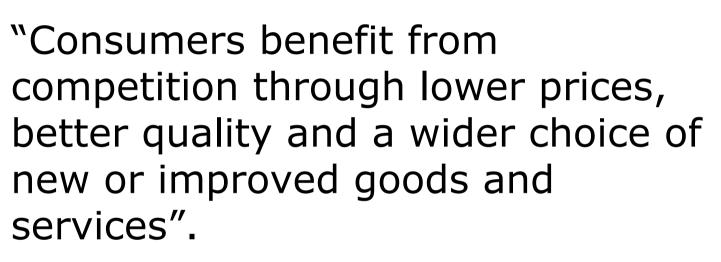
o Fines

- Magnitude of consumer harm matters
- Notice on fines, para. 22, 23, 31 (implicitely)

Remedies

- Example: MS decision, para. 1025 [regarding the remedy imposing MS to un-tie the OS and WMP]
- "such bundles [windows with other media players] will reflect what consumers desire and not what Microsoft imposes"
- "the ability to *choose* the media player component of the bundle will be restored"

2. What consumer interests? Université de Liège



Guidance notice on exclusionary abuses, para. 5 and 19



Lower prices

- Art 81, para. 1 (a) and 82 (a)
- Case C-395/87, Tournier
- o Greater choice
 - Art. 81, para. 1 (b) and 82 (b) EC
 - Cases C-241/91 P and C-242/91 P, RTE (Magill), para. 54 (new product)



Access to technical progress

- Art. 81, para. 1 (b) and 82 (b) EC
- Opinion Jacobs in Case C-53/03, Syfait, para. 95

• Consumer protection?

Case C-238/05, Asnef-Equifax, para.
 67 (overindebtedness)



Which consumers?

o Groups of consumers/customers

- COMP/M.2416 Tetra Laval/Sidel, para.
 359 (group of customers sensitive to leveraging strategy)
- Cases C-468/06 to C-478/06, Syfait: parallel traders v. patients



Focus on marginal consumers (not "important" consumers)

- Case 27/76, United Brands, para. 31
- Case T-342/99, Airtours, para. 32
- Idea of consumer v. real consumers (E. Fox)



3. How do we know consumers interests?

"The identification of likely consumer harm can rely on qualitative and, where possible and appropriate, quantitative evidence". Notice on exclusionary abuses, para. 19



- Is evidence always needed or can a competition authority/court know what lies in consumers interest?
 - Paternalism problem: e.g. overindebted borrowers in Case C-238/05, Asnef-Equifax
 - Risk is to call "consumer interest" something else (e.g. market access)
- Need for a timeframe for assessment of consumers interests



Challenges in assessing consumers' interests



Factual challenges

- Plurality (groups of consumers)
- Conflicting interests (consumers/customers)



Methodological challenges

- Can one really think of consumer satisfaction in terms of consumer welfare/consumers preferences?
 - Kahnemann & Tversky's (1979)
 - Preferences are not given
 - Choices are not rational
 - Systematic biases can be observed
- Has behavioural economics developed an operational framework?
- Are empirical observations robust enough to justify general presumptions?



• Practical challenges

- How much do empirical studies cost?
- Can they be conducted in a reasonable timeframe?
- Is the offer for expertise sufficient?



Conclusion

- Consumers interests are at the heart of competition law
- But better empirical knowledge of how the heart works is needed