

# 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)

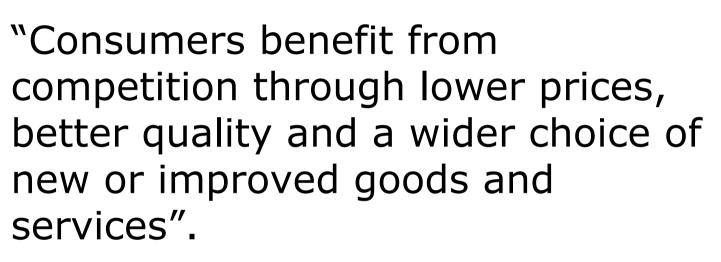
#### o Fines

- 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