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# 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

## 3 questions

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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?

# 1. When are consumers' interests taken into account?

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

# Framing stage

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- 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)

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- 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)

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- 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)

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### ○ Fines

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

### ○ 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?

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“Consumers benefit from competition through lower prices, better quality and a wider choice of new or improved goods and services”.

Guidance notice on exclusionary abuses, para. 5 and 19

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- Lower prices
    - Art 81, para. 1 (a) and 82 (a)
    - Case C-395/87, Tournier
  - 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?

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- 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

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



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- 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?



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## ○ Practical challenges

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

# Conclusion

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