

# Competition and Consumers in the 21<sup>st</sup> Century

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

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Note to interpreters

It is likely that I will skip parts of the text below. Depending on the time which will be allocated to my intervention, it is my intention to skip slides 4-10 in totality or in part.

Thank you Mr. Chairman.

## Slide 1

The topic I want to address in this presentation is *how* consumer interest is protected by competition law enforcement.

This is of course linked to the question put to our panel: “what has competition law delivered to consumers?”

Competition law enforcement will deliver something different if

- the thinking behind it is that competition law is there to protect the *process* of competition among firms and that benefits from competition naturally flow to consumers in the form of lower price, greater choice and innovation

or

- if competition law enforcers think that consumers interests need to be taken into account as such

The difference is between inadvertent and incidental protection on the one hand and conscious and purposeful protection on the other.

## Slide 2

In connection to this second view, I would like to quote our hostess today. Commissioner Kroes has – I daresay on a number of occasions – insisted that “defending consumers’ interests is at the heart of the Commission’s competition policy”.

Note that, in this quote, “consumers’ interests” is in the plural form, which is not the case in the phrase “consumer welfare”, also often used in

speeches and policy documents. I'll stick to the plural because I think it captures an important aspect of reality.

### **Slide 3**

In order to discuss how consumers interests are taken into account, I was my intention to ask a three questions.

First, “When are consumers’ interests taken into account?” By “when” I mean at what stage of the decision making process are arguments relating to consumers either necessary, relevant or, on the contrary, superfluous?

Second, if consumers interests are plural, it is important to know what consumer interests matter. This raises a double question: “what interests?” and “which consumers?”

Finally, I would like to address a question which lawyers may view as a question of proof – or, more precisely, of evidential requirements – but which is more fundamentally a question of a cognitive nature: “How do we know what is in the best interest of consumers?”

I hope you will forgive me for rushing through the first question, as I don't want to be too long and I don't want to skip the second and third questions either.

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### **Slide 4**

Consumers interests is at the heart of competition law enforcement, but is it possible to be more precise and say at what stage of the decision making process is it taken into consideration?

The answer is that consumers' interests are present at two different stages

- the framing stage, by which I mean when making architectural choices regarding the decision framework common to all individual decisions
- the individual decision stage

### **Slide 5**

At the framing stage, there are at least three different ways of taking consumers into consideration.

First of all, when setting general enforcement priorities, the Commission can decide, for example, that “[i]n applying Article 82 to exclusionary conduct by dominant undertakings, [it] will focus on those types of conduct that are most harmful to consumers” as it recently did in relation to exclusionary abuses<sup>1</sup>.

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<sup>1</sup> Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, OJ [2009] C 45/7, para. 5.

Second, when deciding whether or not to investigate a particular complaint, the Commission may, among other criteria, consider that cases that relate to consumer goods – rather than, say, turbopropellers for jet engines – deserve more resources. Arguably, those cases are easier to advertise in the public at large and contribute to consumers understanding that competition law is enforced for their benefit.

Third, and this is very important although somewhat less obvious, consumers interests are at stake when setting the Commission's preference for one type of error over another. Let me explain.

### **Slide 6**

Cases are often hard to decide. It happens that, even after careful enquiry, there is still a doubt as to whether or not a conduct should be prohibited. This is why it is important to have rules which say what to do when in doubt. These are a sort of default rules which say which way to go when evidence is inconclusive. These rules are not always explicit, but I think it's fair to say that, in the enforcement of European competition law, the risk of harming businesses through over-enforcement is preferred over the risk of harming consumers through under-enforcement. Economists would call this preferring type I over type II errors.

This choice regarding what errors the Commission most wants to avoid may be criticised, either in principle or as applied.

But, and this is my point, it is a good thing to recognise that interests of consumers and interests of businesses are not aligned. This may seem particularly obvious to consumers associations and, more generally, to everyone using common sense. However, the reason why it deserved to be emphasised is because a very confused and confusing theory has gained acceptance in other jurisdictions. According to this discourse embodied by Professor Bork, consumer welfare is the same as total welfare, therefore consumers are not harmed if total welfare is increased – and it can be increased through more profits.

In Europe, we may still debate whether we have got the balance exactly right between consumers interests and business interests, but at least we recognise that there is a trade-off, which is a good first step for not calling “consumers interests” something which has nothing to do with it.

### **Slide 7**

Consumers interests are not only present at the framing stage, but also at the decision stage, when applying art. 81 and 82 EC to particular facts.

In relation to article 81, it should be noted that showing consumer harm is not always required. Restrictions of competition by object are prohibited in and of themselves. Of course, we know that cartels harm consumers,

and we may think this is why they are prohibited. But here, consumer interest is merely a justification and a principled one. There is no need to show actual consumer harm and far less to measure it.

Even for restrictions by effect, the legal test is “restriction of competition” not “consumer harm”. This being said, the Commission does consider that the exploitation of joint market power through an agreement, which harms consumers, is an indication of harm to competition. An indication of this can be found, for example, in the notice on article 81, paragraph 3.

### **Slide 8**

Another stage at which consumers advantage is legally relevant is precisely when applying article 81 (3) EC. In deed, benefit to consumers is one of the conditions which must be met in order for an agreement to benefit from an exemption when it would otherwise have fallen under the prohibition of article 81(1).

Here however, one note of caution is in order. The English text of article 81(3) mentions “consumers”. However, other linguistic versions use broader terms, which would include both consumers and customers, such as “usagers” in French or “Verbraucher” in German. This ambiguity is not only at stake in article 81(3) but also very much at the centre of discussions on how to interpret and apply article 82.

Finally, concerning article 81, consumer harm may be taken into account at the stage of setting a fine. More precisely the magnitude of consumer harm constitutes one element when setting the amount of the fine. However, it should be said that the guidelines on fines do not mention it explicitly. There are only indications that are consistent the fact that the amount of consumer harm is relevant when determining the amount of financial sanctions.

### **Slide 9**

Consumers interests are also at stake when applying article 82 in individual cases. Here again, consumer harm is not explicitly mentioned in the treaty as one of the conditions for finding an infringement. The detriment of consumers is only mentioned in relation to one particular type of abuse, in the list of examples. More precisely, article 82 paragraph b) states that “limiting production, markets or technical development to the detriment of consumers” constitutes an abuse.

This is not sufficient to clarify the role of consumer harm in finding an abuse in general. In this sense, it is not clear from the treaty whom article 82 is meant to protect: is it competitors, consumers and/or customers?

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## **Finding an infringement**

It is not apparent from the text of the treaty that consumers are at the heart of the enterprise of enforcing articles 81 and 82 EC.

### **Slide 10 – art. 82 infringement**

Views on this have changed over time, as the Commission has stated in its recent communication on exclusionary abuses. “Anticompetitive foreclosure”, which becomes the core criterion for the Commission, is defined as a restriction of market access, which will increase market power of the dominant undertaking *to the detriment of consumers* (para. 19).

It remains to be seen if consumer harm will really become an autonomous criterion, if it will need to be shown in addition to exclusionary effect.

It is too early to say, but the recent Intel decision of the Commission may be a case in point<sup>2</sup>. In this decision, as is well known, the Commission imposed a fine of over one billion Euros to Intel for abusing its dominant position by foreclosing AMD, a competing producer of processors. Foreclosure was evidenced by documents obtained by the Commission during the course of its enquiry, but what about consumer harm?

This was a difficult question. Do consumers really care whether there is Intel inside their PC or AMD? The Commission found that some in deed do, but these sophisticated consumers are usually corporations<sup>3</sup>. If we turn to individual consumers, one could be forgiven to think that many of them don't have a clue. They will buy a new PC when they are enraged with the one they have or when they feel their lap top is so heavy it's causing them back problems, but the make of the processor will only rarely be a criterion for them, let alone a decisive one. In deed, this is exactly what a federation of consumers associations, which joined the case as an interested third party, pointed out<sup>4</sup>.

I don't want to suggest that the Intel decision should have been longer, but I cannot help to regret that, on this particular point, it would have been interesting to know a little more about the reasoning of the Commission and of the federation of consumers associations. My understanding is that it must have been along the following lines: consumers don't realise they would be better off with more choice (here AMD based computers), but that is not a reason not to protect their freedom to choose through exemplary sanctions.

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<sup>2</sup> Commission decision of 13 May 2009, relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (COMP/C-3 /37.990 - Intel), D(2009)3726final.

<sup>3</sup> Intel decision, para. 1607.

<sup>4</sup> Intel decision, para. 1611.

Consumer choice is at the heart of enforcement of article 82, but is this consumer interest?

Before I turn to this question, I wanted to briefly illustrate that there is yet another stage in which consumers interests are relevant for the enforcement of article 82. This is when choosing a remedy (I'm coming back to fines which I mentioned in relation to article 81).

### Slide 11 – remedies

When the Commission imposes remedies, such as injunctions, consumer satisfaction is also a consideration.

This can be illustrated, for example, from the Microsoft decision of 2004<sup>5</sup>. In relation the remedy imposed on MS to un-tie its operating system Windows and its media player, the decision states that

“such bundles [bundles which the remedy will facilitate, i.e. 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”

(emphasis in the original)

Again here, consumers interests is viewed primarily as consumer choice and I now turn to the next question, namely “what is consumer interest?”

### Slide 12 – consumers interests

If we refer to the Commission’s own description of consumers benefit, we can see that it has three components, namely

- lower prices,
- better quality
- and wider choice of new or improved goods and services

Each of these component is present either in the treaty or in the case-law of community courts or both. The examples here are chosen somewhat randomly. In deed there is a number of decisions which refer to lower prices or wider choice.

### Slide 13

**Lower prices** are surely the first benefit of vigorous competition from the point of view of consumers. This is expressed in the treaty, where it is stated that artificially raising prices is prohibited. Some Court cases also

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<sup>5</sup> Commission decision, 2004/111/EC, March 2004, para. 1025.

illustrate that high prices could not be found abusive. Tournier is an old example about a very topical question: fees charged by national societies in charge of managing music rights.

Regarding **consumer choice**, there are numerous examples. A classic one is the Magill judgement. In this case, the conduct of the Irish TV channel RTE was found abusive because it deprived consumers from a new product, namely a comprehensive TV guide including the programmes of all TV channels. This line of reasoning regarding consumers being deprived of new products was refined in Oscar Bronner and IMS and was illustrated recently in the *Intel* decision I just mentioned (para. 1605).

#### **Slide 14**

**Access to technical progress** is also a consideration when discussing consumers' advantage in the context of competition law. Note that it is a different notion from access to a new product I just discussed, because a new product is not necessarily a technical innovation (a fatter TV guide can hardly be described as technical progress). This component of consumer welfare was discussed in *Syfait*, in connection with the issue of parallel trade. The argument put forward by the pharmaceutical company was that if parallel trade was allowed without limit, its capacity to invest in research in development would be reduced and therefore so would consumers access to new medicine. Unfortunately the Court judgement does not discuss this issue in depth, unlike AG Jacobs.

**Are there additional components of consumers advantage** which could be taken into account for the purposes of competition law? This is an open question. In this regard I would just like to share with you my reading of the *Asnef-Equifax* judgement<sup>6</sup>.

This case was about Spanish banks setting up an information sharing facility which was to allow any bank to access the credit history of a borrower.

When considering, under article 81(3) the benefits that this scheme could bring, the Court held that

“registers such as the one at issue in the main proceedings are capable of helping to prevent situations of overindebtedness for consumers of credit as well as, in principle, of leading to a greater overall availability of credit”.

*It then said that, these “objective economic advantages might be such as to offset the disadvantages of [the agreement]”.* The Court did not go

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<sup>6</sup> Case C-238/05, *Asnef-Equifax*, para 67.

further. Since this was a preliminary ruling it said that “*it would be for the national court, if necessary, to verify that*”.

What is I think noteworthy in this case is not the fact that facilitating consumer credit is, as a rule, to be considered as an advantage for consumers. The less obvious point is that the court seems to indicate that preventing over-indebtedness is also to the advantage of consumers. Surely, any reasonable person will agree that overindebtedness should be prevented as a matter of policy. But would a nearly over-indebted borrower think it is in her advantage to be denied a credit. This is not clear.

**My point here is that, just like in the Intel case, EC competition law sometimes takes a view of *what* is favourable to consumers, which may differ from consumers own opinion.**

In deed this touches on the second aspect identifying relevant consumers interests, namely which consumers are we talking about.

### **Slide 15 – groups of consumers**

The issue here is that there may be conflicting interests on the consumer side. Different groups of consumers may be affected differently by a conduct or by a merger. An illustration can be found in the Commission decision in the Tetra Laval/Sidel case<sup>7</sup>. In this case, consumers were customers. The clients of Tetra laval were companies that are in the business of bottling liquid foods. Depending on the sort of food a particular client was concerned with (milk, soups, iced tea), it would take more or less interests in offers combining cartons and plastic bottles and therefore would be more or less sensitive to leveraging strategies of the merged entity.

There are also conflicts of interests between consumers and customers. The Syfait case, already mentioned, illustrates this nicely. In this case, the first beneficiaries of parallel trade would be pharmacists, who could buy medicines cheaper from parallel traders than from the official local distribution channel. It was less clear if end-consumers would benefit, essentially because it was difficult to know if pharmacists would pass on their gains, especially where patients would ultimately be reimbursed by their health insurance.

These are obvious conflicts: between categories of customers and between customers and consumers. I am not aware of a case where conflicting interests of different consumer groups were addressed, but surely it doesn't mean that such conflicts cannot arise.

### **Slide 16 – quantitative question**

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<sup>7</sup> COMP/M.2416, at para. 359.

There is another angle to the question “which consumers?” I hinted at it earlier, about the Intel decision. Is it enough to know that some consumers take chose their computer on the basis of what processor is inside. Shouldn't we also know what proportion of consumers they represent?

This is by no means a new question. In *United Brands* already, a similar question was at stake in connection with market definition. When the Court considered the question are bananas substitutable with other fresh fruits, it gave much weight to the consideration that for a certain category of consumers – those without teeth or not yet trained to peel fruits – bananas had the unique and irreplaceable properties of being easy to peel and to chew.

One can only agree with the Court when it said that

“the banana has certain characteristics, appearance, taste, softness, seedlessness , easy handling (...) which enable it to satisfy the constant needs of *an important section of the population consisting of the very young , the old and the sick*”.

One can only agree but the question that the young, the old and the sick are a socially very important. However, from a competition law perspective, and for the purpose of establishing whether the softness of bananas is a relevant characteristic for consumers in general, it would have been necessary to address the quantitative question: what percentage of bananas are purchased for consumption by very young, old of sock consumers? Products characteristics are not relevant or irrelevant in the abstract. It is necessary to know for which consumers they matter and whether these consumers are in a position to influence market outcomes. This is what the notion of “marginal consumers” captures.

Experience of competition law enforcement to date has taught competition authorities and courts themselves that the consumers that should matter when analysing a competitive threat are marginal consumers – the consumers that are likely to switch to a competing product – not the sentimentally important consumers.

The final point I would like to share with you regarding “which consumers” enforcers of competition law should be looking at has been put very nicely by Eleanor Fox in a short fable inspired from little red hood<sup>8</sup>.

The story goes like this: little innovative entrepreneur is visiting the Sick Economy. But in the wooden hut, under the night cap, it is big bad monopoly who is waiting. Little innovative entrepreneur is proud to show all the world-changing innovation she has brought in her basket. Then

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<sup>8</sup> E. Fox, An antitrust fable - A tale of prédation, *Concurrences*, N°3-2008, p. 1.

they engage in a very interesting conversation about predatory pricing under the law of the forest. And in this discussion, little entrepreneur, who is trying to save her skin, tries the following argument: “but if you eat me, consumers will suffer because they would lose the value of my inventions”. And big bad monopoly replies “consumers, ha!, the law of the forest is not about protecting real consumers, it is about protecting the idea of consumers”. And then he eats little entrepreneur.

One possible teaching of this fable is that the competition authority of the forest should have real consumers in mind, not just the idea of consumers.

This brings me to the final question I would like to address: how do we know consumers interests? And by this I mean real consumers’ real interests.

### **Slide 17**

The guidance notice indicates that “The identification of likely consumer harm can rely on qualitative and, where possible and appropriate, quantitative evidence”<sup>9</sup>

This is a route paved with challenges.

### **Slide 18 (skip)**

One question is: is evidence always needed or can likely consumer harm be inferred as it has often been from an alteration of market structure?

The risk of this type of inference is that competition enforcement may end up delivering the wrong kind of benefits to consumers. Presumed cures for presumed harm. From a political or theoretical point of view, this is an issue of paternalism. How paternalistic can the Commission be with consumers? Can it really know better what is good for them?

The Asnef-Equifax case I mentioned earlier may be a good pointer that some measure of paternalism is acceptable: we may think it is acceptable to say that the prevention of over-indebtedness is in the general interest of consumers, but at the same time we should in principle be wary of such generalisation. Or at least generalisation should have an empirical support.

Another issue is the time horizon in which consumers’ interests are considered. Immediate benefits – e.g. lower price from parallel trade – may have to be balanced against long term losses – e.g. less innovation. This is clearly a very delicate exercise, but it does not mean that the question should be left to speculations. In deed it is only one of many challenges a competition authority has to overcome if it wants to take consumers interests seriously.

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<sup>9</sup> Para. 19.

### **Slide 19 – challenges (1)**

A first type of challenges comes from facts of life. There are conflicting interests in the consumer/customer sphere and they need to be identified if the competition authority wants to avoid putting in the same box different groups of consumers or even opposing groups (consumers and customers). Conceptually, there is no challenge. The Commission and community courts refer to such groups of consumers. The challenge is to have an accurate segmentation of consumers at reasonable cost and within a reasonable time frame.

### **Slide 20 – challenges (2)**

A more daunting challenge is methodological in nature. Consumers interests are sometimes addressed in terms of “consumer choice”. This economic terminology assumes that consumers have well-defined preferences over goods.

We know this to be unrealistic. We know it when we take an honest look at our own buying behaviour, but we also know it from scientific work done thirty years ago by Kahnemann & Tversky. They have shown empirically and robustly that

- Preferences are not given
- Choices are not rational
- Systematic biases can be observed

The immediate teaching of this is that the notion of consumer welfare, which is based on contrary assumptions is not likely to be useful for the purposes of competition law enforcement, at least if competition law about real consumers.

Can economics offer an alternative conceptual framework? Behavioural economics has embarked on this road, by taking on board well established facts concerning consumer psychology. Has it produced an operational framework yet? I keep asking the question to every economist I meet and my provisional conclusion is that it has not, but I would of course be happy to hear otherwise.

Failing an adequate conceptual framework for approaching consumers interests, the Commission could rely on presumptions based not on prior assumptions but on empirical studies. There a crucial question is whether the large number of empirical studies conducted by psychologist are robust enough and relevant enough to be translated into legal presumptions.

### **Slide 21 – challenges (3)**

Finally, there are **empirical challenges**. If the Commission chose not to assume what consumers interests consist of but to study it empirically, how much would this cost in a particular case and generally? Could the relevant studies be conducted in a reasonable timeframe? Is the offer for such expertise sufficient?

I will stop here with my factual, methodological and empirical questions. It is high time to conclude.

### **Slide 22 – conclusion**

All I wanted to say is really this: consumers interests is at the heart of competition, but for many years it has been accepted to rely on very general ideas about how the heart functions. Now the time has come to engage in high definition imaging in order to gain a better understanding of how this heart really works.

It is a precondition for competition law to bring real cures to real harm to real consumers.

Thank you very much for your attention.