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

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?

- 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
○ Consumer interest in the default rule in case of doubt
  - Risk of harming businesses is preferred over risk of harming consumers (type I errors preferred over type II errors)
  - Choice may be criticised (in principle and/or as applied)
  - But conflict is acknowledged and this is to the credit of the Commission
Decision stage (1): art. 81 EC

- Finding of infringement under 81 (1) EC (agreement restricting competition)
  - Restriction by object: consumer harm is a (mere) justification
  - Restriction by effect:
    - The legal test is restriction of competition, not consumer harm
    - But Commission refers to joint creation or exploitation of market power: usually detrimental consumers (Notice on art. 81 (3) para. 25)
Exemption under art. 81 (3) EC
- Benefit to “consumers” is a necessary condition for exemption

Fine
- Magnitude of consumer harm matters
  - Notice on fines, para.
Decision stage (2): art. 82 EC

- Art. 82 EC (abuse of a dominant position) does not mention restriction of competition.
- Only reference to consumers is in an example:
  - “limiting production, markets or technical development to the detriment of consumers” (art. 82 EC sub b)
- It is not clear from the text what the prohibition is meant to protect.
Finding an infringement

- Consumer harm clearly a criterion now
  - Guidance notice on exclusionary abuse, para. 19
- Same note of caution applies as in art. 81 EC
  “The Commission will address such anticompetitive foreclosure either at the intermediate level or at the level of final consumers, or at both levels” (ibid).
- How consumer harm and market access relate still raises questions
○ Fines
  ● Magnitude of consumer harm matters.
    E.g.: MS decision (case COMP C-3/37.792), para. 982

○ Remedies
  ● Consumer satisfaction matters (e.g. MS decision, para. 1025)
“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
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?

- 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