



Discussion Points

**Presented by Business at OECD (BIAC) to the
OECD Competition Committee
Working Party No. 3**

Designing and Testing Effective Consumer-Facing Remedies

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Business at OECD (BIAC) appreciates the opportunity to submit these comments to the OECD Competition Committee's Working Party No. 3 for its roundtable on designing and testing effective consumer-facing remedies.

I. Introduction and Summary

1. Competition agencies have traditionally focused on whether the supply side of markets works well. Indeed, it is fair to say that the larger part of the “output” of competition agencies seeks to address competitive concerns involving suppliers of products and services, as opposed to consumers and other buyers. Accordingly, when reviewing business conduct, competition agencies tend to concentrate on the structure and functioning of that part of the market. As a result, competition agencies' enforcement actions, such as intervention against cartels, abusive conduct resulting in elevated prices and mergers that are likely to increase market power, are primarily aimed at maintaining or restoring competition at the supply side of markets.

2. However, in some markets supply-side related factors do not or do not fully explain why markets appear not to function well and to generate suboptimal levels of consumer welfare (for instance in the form of low quality or high prices). This has prompted a growing sense among competition agencies, notably those with consumer protection powers, as well as consumer protection agencies and regulators that in some of these markets eliminating inefficiencies at the demand-side of the market may have beneficial effects.

3. Demand-side “remedies” taken or imposed in response to (perceived) demand side competitive issues are typically aimed at (i) enhancing consumers' information regarding options available to them in the market, (ii) facilitating consumers' exercise of “rational” decisions and (iii) removing consumers' switching barriers. In this respect, Fletcher identifies three categories of demand-side remedies: (i) disclosure remedies, for instance to address asymmetric information or to prevent misleading offers, (ii) shopping around remedies, including measures that require bundling of information to facilitate search and comparison by

consumers, and (iii) switching remedies that make switching less costly, quicker or more reliable.¹

4. Fletcher notes that, particularly prior to 2008-10, there was a view that demand-side remedies should focus on providing information, easing search and easing switching. Accordingly, these types of remedies were intended to empower consumers. However, she observes that there has been a gradual realization that some of these remedies have, for a number of reasons, not been sufficiently effective and that it is important to actually and more fully engage customers to ensure that the objectives of the remedies are achieved.²

5. In tandem with the belief that effective demand-side remedies may require more than merely improved information, or lowering of switching barriers, the attention to behavioral economics when analyzing consumer markets has increased.³

6. Traditional economics assumes that consumers are rational and use all available information and will generally act in a way that maximizes their utility. In contrast, behavioral economics relies on psychological insights into how consumers make choices in real life and takes account of consumer cognitive “biases,” such as overconfidence, inertia, loss aversion, lack of self-control and post-purchase rationalization, potentially leading to irrational or “bad,” sub-optimal consumer choices and outcomes.⁴ Behavioral economics also takes account of “framing effects,” i.e. the way in which consumers’ are influenced in their decisions by the way a proposition is framed. As a result, it is claimed that behavioral economics may be useful in designing remedies that take account of flawed preferences and decision-making abilities.

7. Not surprisingly then, most of the recent attention in relation to consumer-facing remedies relates to consumer markets, particularly those that involve complex products and services offered to consumers, such as financial services, energy and telecommunications services, and other areas where there is perceived to be a risk that consumer biases are exploited, perhaps at the expense of “naïve” customers.

8. At this stage, however, behavioral economics appears more able to identify apparently irrational consumer behavior than to design practical remedies to secure better outcomes. As observed in the announcement of the Roundtable on consumer-facing remedies, the results to date of these types of remedies are mixed: while some interventions have achieved their aims and have demonstrated clear improvements to customer outcomes, others have had little or no impact. In this respect, it is noted that consumer-facing remedies may also have downsides and

¹ Amelia Fletcher, *The Role of Demand-Side Remedies in Driving Competition. A Review for Which?*, CENTRE FOR COMPETITION POLICY (Nov. 7, 2016), available at www.staticwhich.co.uk/documents/pdf/the-role-of-demand-side-remedies-in-driving-effective-competition-456067.pdf.

² *Id.* at 5.

³ See, e.g., *Behavioural economics, competition and remedy design (revisited)*, OXERA (Apr. 2015), available at www.oxera.com/Latest-Thinking/Agenda/2015/Behavioural-economics,-competition-and-remedy-desi.aspx (and the sources mentioned therein).

⁴ See, e.g., Fletcher, *supra* note 1, at 17; *How can consumers be persuaded to shop around*, OXERA (Aug. 2016), available at www.oxera.com/Latest-Thinking/Agenda/2016/How-can-consumers-be-persuaded-to-shop-around.aspx.

can, for instance, prove to be unnecessary, distort consumer choices and give rise to unintended or unwanted supply-side reactions.⁵

9. It is important to acknowledge that, while consumer-facing remedies are generally aimed at improving customers' choices, for instance by mandating the way in which products and service information are presented, they may still inflict significant (compliance) costs on businesses that are disproportionate to the intended aim or outcome. In addition, particularly if they are not well-defined, consumer-facing remedies may harm businesses by constraining legitimate competitive conduct.

II. BIAC's Views Regarding the Use of Consumer-Facing Remedies

10. BIAC acknowledges that some markets, particularly consumer markets involving complex services, may in some circumstances appear to function sub-optimally from a consumer welfare perspective and that, potentially, regulatory intervention in the shape of consumer-facing remedies might yield consumer benefits. BIAC also appreciates that insights based on behavioral economics may be instructive to identify consumer biases and the associated reasons for and effects of specific behavior at the demand side of markets. As such, BIAC is supportive of further work by government agencies' to explore appropriate design of behavioral remedies.

11. However, as with any regulatory action that potentially interferes with legitimate competitive conduct of businesses, intervention in the form of consumer facing remedies should in BIAC's view only be permitted if there is compelling empirical evidence that such action is necessary, proportionate and likely to be effective. This is because consumer-facing remedies may involve significant compliance and other costs for businesses and may, in addition, give rise to distorted consumer preferences that do not reflect the competitive offerings of businesses. In addition, consumer-facing remedies may also give rise to other (non-intended) effects on the supply side of the market.

12. Accordingly, any decision to subject specific sectors, markets, transactions or business conduct to remedies that are intended to change or improve consumer behavior should be based on robust empirical research into actual consumer conduct to ensure that the proposed remedies are necessary, will most likely be effective, do not go beyond what they aim to achieve and can be justified in light of the cost to businesses and society. The business community, and, more generally, all stakeholders should be given a genuine opportunity to make their views known early on in the process.

13. Where agencies conduct market studies consumer surveys and other research with a view to establishing whether particular remedies should be imposed, they should ensure that such studies are reasonably necessary and proportionate, that businesses concerned are fully

⁵ See Fletcher, *supra* note 1, at 21 et seq.

consulted on research design and that excessive (administrative and compliance) burdens on the business community are avoided.⁶

14. Once mandated, consumer-facing remedies should be regularly evaluated to ascertain whether they are effective and do not result in unintended effects. BIAC submits that, at the time consumer-facing remedies are imposed, the empowering legislative measure should clearly indicate the when and how the remedy will be evaluated, how the imposing agency will report on the effectiveness and broader effects of the remedy and under which circumstances the remedy will expire, subject to renewal if required. In addition, there should be an easily accessible procedure for the affected businesses to request the discontinuation of consumer remedies prior to their expiry.

15. BIAC is of the view that there might be some room, albeit quite limited, for competition enforcement agencies to consider and impose consumer-facing remedies or to consider accepting such remedies when offered as part of a negotiated settlement in response to identified competition law violations or suspicions thereof. One example is where such a remedy is deemed necessary to eliminate the negative effects of an anti-competitive tying strategy, as in the European Microsoft Tying case.⁷ In those cases, it is important to ensure that the proposed remedy properly reflects the identified competitive issue and that the common procedural safeguards are observed.⁸

16. BIAC is of the view however that in the large majority of competition cases, competition law does not provide for a sufficient and suitable basis for imposing consumer-facing remedies. Indeed, competition enforcement agencies are charged with the investigation of plausible violations of competition law—cartels and other anti-competitive collusive conduct and anti-competitive unilateral conduct and concentrations. It is only when actual anti-competitive conduct as prohibited by competition law, is established that conduct needs to be changed to comply with the law and there is a legitimate legal basis for pecuniary and other sanctions, possibly including (consumer-facing) remedies.

17. Accordingly, BIAC is of the view that in the vast majority of cases consumer-facing remedies are and should remain exclusively in the domain of consumer protection agencies and

⁶ BIAC, Discussion Points Presented by the Business and Industry Advisory Committee (BIAC) to the Global Forum on Competition—Market Studies as a tool to promote competition (Dec. 1, 2016), available at <http://biac.org/wp-content/uploads/2016/11/2016-11-14-BIAC-Market-Studies-FINAL2.docx>.

⁷ See Case COMP/39.530—Microsoft (Tying), Comm'n Decision (Mar. 6, 2013) (summary at 2013 O.J. (C 120) 15), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39530/39530_3162_3.pdf.

⁸ BIAC, Discussion Points Presented by the Business and Industry Advisory Committee (BIAC) to the OECD Competition Committee Working Party No. 3—Roundtable on Extraterritorial Reach of Competition Remedies (Dec. 5, 2017), available at http://biac.org/wp-content/uploads/2017/11/BIAC_2017-11-14-BIAC-Extraterritorial-Remedies-FINAL3.pdf; BIAC, Summary of Discussion Points Presented by the Business and Industry Advisory Committee (BIAC) to the OECD Competition Committee Working Party No. 3—Roundtable on Remedies in Merger Cases (June 28, 2011), available at http://biac.org/wp-content/uploads/2014/05/BIAC_WP3_Merger_Remedies_2011-06-21_FINAL.pdf; BIAC, Summary of Discussion Points Presented by BIAC to the OECD Competition Committee—Roundtable Discussion on Remedies and Sanctions in Abuse of Dominance Cases (June 8, 2006) available at http://biac.org/wp-content/uploads/2014/05/Fin_07-06-06_Remedies_and_Sanctions.pdf.

regulators and that competition enforcement agencies—acting under their competition law mandates, as opposed to other regulations—are ill-placed to consider imposing such remedies. It should be equally rare for competition agencies to need to consider accepting consumer-facing commitments from businesses as a condition to close their investigation into conduct that is potentially objectionable under competition law.

18. BIAC is of course conscious of the fact that some agencies are not only charged with the enforcement of competition law, but also have mandates under consumer protection law and other regulatory laws. BIAC is of the view that it is important for agencies to separate these non-competition functions and to (continue to) apply a rigorous, economics-based analytical framework for the application of competition law. This does however not imply that the insights and resources of competition agencies should never be used to inform decisions regarding consumer-facing remedies that may be imposed by the consumer protection arm of such an agency or other agencies. On the contrary, competition enforcement agencies are potentially well-placed to contribute to better informed decisions of other government agencies involving consumer-facing remedies. In fact, that is what agencies' competition advocacy programs is all about.