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Integrating Consumer Behaviour Insights in Competition Enforcement – Summaries of contributions

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This document reproduces summaries of contributions submitted for Item 9 of the 138th OECD Competition Committee meeting on 22-24 June 2022.

More documentation related to this discussion can be found at:
<https://www.oecd.org/daf/competition/behavioural-insights-in-competition-enforcement.htm>

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Table of contents

Summaries of contributions 3
Australia..... 4
BIAC..... 5
BEUC..... 6
Brazil 7
Canada 8
Chile..... 9
Costa Rica 10
Hungary 11
New Zealand 12
South Africa 13
Ukraine* 14
United Kingdom 15

Summaries of contributions

This document contains summaries of the various written contributions received for the discussion on Integrating Behavioural Insights in Competition Enforcement (138th Meeting of the Competition Committee on 22-24 June 2022). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an *.

Australia

Understanding consumer behavioural insights can play a significant role in competition enforcement. The ACCC draws on consumer behavioural insights in both its competition and consumer roles. This paper discusses the ways in which consumer behavioural insights have informed the ACCC's work in:

- Market studies, including the Digital Platform Inquiry, Home Loan Price Inquiry, Funeral Services Sector report and Consumer Loyalty Schemes report;
- Presenting expert witness testimony in litigation;
- Consumer redress, particularly where consumers must take action to claim a refund they may be entitled to; and
- Evidence gathering, including incorporating consumer behavioural insights into the ACCC's requests for information from complainants.

BIAC

Competition enforcement agencies rely on models to identify perceived anti-competitive actions. Such models are based on assumptions that are not always accurate, but nevertheless provide a predictable reference framework and starting point to assess the actions being investigated. In particular, the assumptions on which such models are often based, including the notion that market participants are rational and pursue their economic self-interest with perfect willpower and insight, have been put into question by behavioral economists who have pointed to the existence of biases and heuristics, imperfect willpower, and the fact that market participants do not necessarily only care about their own economic self-interest.¹

Consumer behavior insights may play a legitimate role in fine-tuning some of the assumptions about consumer behavior in antitrust enforcement. However, it should be noted that traditional competition policy assessment tools often sufficiently account for the existence and effects of consumer biases.² As such, such insights can be material in those cases where traditional tools fail to properly account for the implications of these biases and to the extent that they do not undermine the predictability of competition enforcement systems.

Business at OECD (BIAC) believes that consumer behavior insights can in well-defined circumstances play a useful role in complementing and supporting proven and established approaches and methods, but should not lead to an overhaul of traditionally adopted analytical frameworks by adopting potentially arbitrary presumptions on the general implications of possible behavioral bias on the health of the competitive process.³ In other words, behavioral insights can in specific circumstances play a useful role in fine-tuning certain assumptions and analyses, rather than providing the analysis framework itself.⁴ In particular, it is unclear that harmless user behavior should be corrected under the assumption that such change will increase the odds of success of competitors—in particular when such change imposes costs on the consumer. The situations when this is an optimal policy measure with material impact are likely to be limited. A thorough competition analysis in the relevant case at hand should not be foregone due to the mere existence of relevant consumer behavior insights.

¹ OECD, Annex to the Summary Record of the 115th Meeting of the Competition Committee held on 13-14 June 2012—Summary Record of the Discussion on Behavioural Economics, DAF/COMP/M(2012)2/ANN5/FINAL, at 2 (May 13, 2016), [https://one.oecd.org/document/DAF/COMP/M\(2012\)2/ANN5/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP/M(2012)2/ANN5/FINAL/en/pdf).

² Oxera (Prepared for The Netherlands Authority for Consumers and Markets (ACM)), Behavioural Economics and Its Impact on Competition Policy, A Practical Assessment With Illustrative Examples From Financial Services 60 (May 2013), https://www.acm.nl/sites/default/files/old_publication/bijlagen/11586_oxera-behavioural-economics-competition-policy.pdf.

³ See Derek Ireland, Practical Guide to Applying Behavioral Economics To Competition Policy and Law In Developing Economies 26 (July 21, 2021), <https://ssrn.com/abstract=3891036>.

⁴ To provide an illustration, it would for instance (understandably) be hard to conceive that a competition authority would be minded to authorize a merger that would substantially lessen competition on the basis that consumer behavioral insights have shown that having less choice would help reduce consumer product choice and decision overload in the relevant market. See *id.* at 26.

BEUC

The rise of behavioural economics over the last decades had caused a shift in how competition authorities' approach and understand consumer behaviour in consumer-facing markets. This shift is relevant since human beings are not the purely rational profit-maximizing individuals that classic economic theory portrays them to be, and companies can undermine competition by taking advantage of consumers' behavioural biases, Digital players in particular have extensively implemented techniques to exploit these behavioural biases to keep consumers using their products and to discourage them from switching to rivals.

The exploitation of consumers' behavioural biases is an insidious practice because the vast majority of consumers will not be aware that they are prone to biases and that companies are actively taking advantage of them. This could risk creating a race to the bottom where companies start to compete not on the normal parameters of competition—inter alia price, choice, quality, and innovation—but on the pervasiveness and the degree to which cognitive biases are exploited.

Competition authorities in the European Union are gradually integrating both consumer behaviour and the more general insights from behavioural economics into their competition assessments. The European Commission implicitly considered consumer behaviour in the 2004 Windows Media Player case and in the 2009 by the Microsoft Internet Explorer case. This was more explicit in the Google Shopping and Google Android cases where the behaviour of consumers was an integral part of the assessment. A similar trend is visible at the national level, with NCAs in the Netherlands and the United Kingdom, for example, highlighting the role of consumer behaviour and behavioural insights in their publications, but also in their enforcement work.

Consumer organisations such as BEUC and its members have an important role to play when it comes to recognising and integrating consumer behaviour into competition analysis. BEUC has intervened in several cases before the European Commission and the European Courts to provide evidence of consumer behaviour and to stress how dominant companies can exploit cognitive biases to their advantage and to the detriment of competition.

By being in close contact with consumers, consumer organisations are able to acquire information and expertise and to develop an understanding of how consumers behave and interact with the products and services of companies that might come under the antitrust spotlight. With the support of its members, BEUC aims to provide competition authorities with a realistic view of how consumer-facing markets work in practice.

To this end, it is crucial to improve and strengthen the cooperation between competitions authorities and consumer organisations since the latter can contribute their expertise and factual evidence to help and support the work of competition authorities. In addition, competition authorities should have the necessary experts, resources, and tools to assess consumer behaviour where it is part of a competition case. The anti-competitive effects generated by practices in consumer-facing markets and their more direct harmful impact on consumers should encourage competition authorities to dedicate sufficient resources to tackling these concerns, and this should be reflected in their enforcement priorities.

Brazil

The recent experience of CADE shows the Brazilian antitrust authority is aware that consumer behaviour can be helpful in its scrutiny. According to the authority's case law, insights into consumer behaviour have been complementary to traditional economic methodologies.

Hence, in Brazil, consumer behaviour has been considered in merger reviews and antitrust violation cases as an effective tool for defining the relevant market, examining the likelihood of market power and abuse of dominant position, and assessing entry barriers and rivalry level of a given market; moreover, it has importantly contributed to the discussion on potential remedies. This contribution describes several precedents in which consumer behaviour played a key role in CADE's analysis, such as in the supermarket, health insurance, and online search platform industries.

To conclude, although a trend in Brazilian competition assessment, analyses of consumer behaviour have not been restricted to newer and innovation-driven economies (e.g. digital markets) but also proved to be useful for brick-and-mortar industries.

Canada

In its submission, the Canadian Competition Bureau (Bureau) describes two instances in which it used behavioural insights in its competition analysis.

From 2018 to 2019, the Bureau conducted a market study examining the state of competition for home internet services in Canada. It sought to evaluate how internet service providers compete for consumers' business and examined what drives consumers' purchase decisions. To do so, the Bureau commissioned Public Opinion Research. This research consisted of focus groups and a consumer survey. In addition, the Bureau retained a behavioural economist who designed a randomized control trial.

The Bureau's findings in this study raise questions for consideration in future competition analysis. These findings touch on role of multi-product bundling in consumer decision-making, the importance of price and other product attributes driving consumer decisions and switching, and the role of consumers' perceptions of their options and of the difficulty of switching. The Bureau also found that consumers could be grouped into distinct types of consumers according to shared preferences.

The second example described in this submission is the Bureau's 2021 consumer awareness campaign: Switch Week. The campaign urged consumers to take advantage of competition by switching or renegotiating with their service providers. By integrating principles of behavioural insights into the campaign, the Bureau was able to develop key messaging targeting perceived barriers to switching. The Bureau participated in a pilot workshop with the Behavioural Insights Team and conducted a consumer survey. Key insights and findings the Bureau applied to the Switch Week campaign include: consumers' underestimation of potential savings from switching, their perception of barriers to switching, and their aversion to loss.

Chile

Since 2020, the Mergers Division of the *Fiscalía Nacional Económica* (FNE), i.e., the Chilean Competition Authority, has introduced the in-house design and implementation of consumers surveys in its investigations. This tool has been mostly used in complex Phase II cases, and mainly with the following purposes: (i) to achieve a better understanding of the market under analysis, (ii) to assess how close the merging parties, (iii) to incorporate consumers' preferences and behavior into the case assessment, and (iv) to identify substitution patterns, among others.

In principle, identifying consumers' behavioral biases has not been the focus of these surveys. However, the design of questionnaires has (at least indirectly) taken into account the possibility that some biases may exist. For instance, in the assessment of the merger between Fiat and Peugeot, we explicitly considered the possibility that consumers' "declared preferences" and "revealed preferences" may substantially differ.

¹ In addition, in other cases these tools have been useful to identify unexpected elements of consumer preferences (e.g., in the acquisition of Cornershop by Uber, survey's results revealed that consumers considered in-store shopping in a physical supermarket as the closest alternative to the on-line shopping).² Furthermore, in some cases, even if survey results are not related to behavioral biases, surveys have been essential for the competition assessment of the case (e.g., the acquisition of OK Market by Oxxo).³

Finally, regarding the experience of the Market Studies Division, in May of 2017 the FNE began a market study on the annuities insurances for retirement—or, simply, the annuities—sector. The working hypothesis was that there were significant distortions in the market that lowered the pensions that retirees received.⁴ The FNE analyzed individual level choice information provided by the Financial Market Commission (or CMF: the financial sector regulator) and the insurance companies participating in the market, between 2004 and 2017. After nine months of work, the Authority concluded that several informational issues in the sector made it difficult for prospective retirees to decide among annuities options, which lowered competition intensity and retirees' pensions.⁵ The FNE's findings triggered a number of regulatory changes which sought to simplify the market's decision environment, improving the quality of retirees' choices and, by doing so, fostering competition among insurance providers.

¹ For more information, the FCA/PSA Conditional Clearance Report is available at: https://www.fne.gob.cl/wp-content/uploads/2021/02/inap2_F233_2020.pdf.

² The final report of the merger ("Uber/Cornershop Clearance Report") is available in the following link: https://www.fne.gob.cl/wp-content/uploads/2020/06/inap2_F217_2020.pdf.

³ For more information, please visit the case press release available in Spanish at: <https://www.fne.gob.cl/en/fne-aprueba-la-compra-de-ok-market-por-parte-de-oxxo-sujeta-a-la-desinversion-de-16-locales-y-otras-medidas-de-mitigacion/>; and the Clearance Report, available in Spanish at: https://www.fne.gob.cl/wp-content/uploads/2021/12/inap1_F250_2020.pdf.

⁴ See Minuta de Lanzamiento del Estudio de Mercado de Rentas Vitalicias, FNE, 2017, available here.

⁵ All analysis and recommendations are documented in the report Estudio de Mercado sobre Rentas Vitalicias (EM01-2017), FNE, 2017, available here.

Costa Rica

The Superintendence of Telecommunications (SUTEL) is the body responsible for regulating, implementing, monitoring and controlling the telecommunications legal system.

In terms of institutional design, SUTEL has a concurrence of functions. Thus, among the different functions of SUTEL there are both the defense and promotion of competition and free competition in the telecommunications sector and networks that support sound and television broadcasting services of free access, such as ensuring and protecting the rights of telecommunications users.

In order to fulfil these two major tasks, SUTEL has the General Directorate of Competition (DGCO, for the Spanish acronym), which is responsible for the defense and promotion of competition, and the General Directorate of Quality (DGC, for the Spanish acronym) responsible for the protection of user's rights, being SUTEL's Council the superior of both said. The interaction between these two units takes place in an agile and fluid manner, both in terms of coordination of functions and access to information and interinstitutional cooperation.

To date, information on user behavior has been obtained from end-user surveys carried out through public procurement. Regarding the addition of information on user behavior as an input for competition law analyses, it should be mentioned that up to now it has been included mainly in two types of analysis, market studies specifically in the "Market study for access to common telecommunications infrastructure in horizontal and vertical condominiums, apartment buildings, closed residential buildings and all those residential properties that have common facilities necessary for the provision of telecommunications services available to end users" and merger notification specifically in a case that landline and mobile telephony services had been involved.

In one of these cases, the consumer behavior insight was consistent with what the competition authority would have concluded without this input, however, in the other case, including this type of information meant that the authority could know additional variables that were taken into account to issue a comprehensive resolution consistent with the situation.

Hungary

The GVH has been strengthening the role of consumer surveys since 2020 when it established the Competition Economics and Market Research Section. Consumer insights are primarily incorporated in sector inquiries and market analyses; however, there are also examples of surveys conducted in merger cases.

In a telecommunication merger investigated by the GVH in 2008 and the repeated case in 2012, market definition, and within that, the substitutability of fixed internet by mobile internet played an important role. A consumer survey was conducted in both years. The surveys aimed at exploring relevant consumer preferences and experience in multiple ways. Responses showed that such a switch is a very rare phenomenon.

In a sector inquiry investigating the pricing of television broadcasters and broadcasting transmission companies, the strategies of market participants and the impact of their behaviour on consumer welfare, a representative consumer survey was executed to explore consumer attitudes, satisfaction, preferences, expectations in the pay tv market. One of the most important results of the consumer survey was that while the price of the service is indeed a very important factor, subscribers also consider several other factors, and they are more satisfied with the large broadcasting transmission companies compared to the smaller ones.

Another (ongoing) sector inquiry concerns the beverage procurement of the hotel, restaurant, and catering (HORECA) sector. A key question of the sector inquiry was around consumer preferences about artisan beverage brands (particularly artisan beers). The authority conducted a representative survey to explore the main factors consumers consider when choosing a place, what their favourite alcoholic and non-alcoholic beverage brands are, how open they are to try new products and if the latter attitudes differ by product. The results of the survey reinforced that consumers have low to moderate interest in artisan and other newly emerged beverages and they strongly prefer old and well-known brands.

Finally, building on the double mandate of the authority, the GVH launched a market analysis to understand the role of data in competition among e-commerce companies as well as to understand how data collection is perceived by the shoppers and whether they are aware of the data collection and type of data processing executed by the online retailers.

The market analysis extensively built on a five-step market research that targeted both consumers and e-commerce companies. The most interesting results were that shoppers were not completely satisfied with the way webstores collected and analysed their data; however, the motivation of a fast and seamless online shopping overwrote their concerns. Nevertheless, the majority of the webstores did not use consumer data except fulfilling the order. Only large e-commerce companies do personalized advertisements, the rest of the companies rely on large tech firms in their advertisement activities.

New Zealand

In November 2020, the New Zealand Government asked the New Zealand Commerce Commission (NZCC) to carry out a market study into whether competition in the grocery sector in New Zealand is working well and, if not, what can be done to improve it. The NZCC published its final report on 8 March 2022.¹

During the study, the NZCC identified several features of the grocery sector which indicated that competition is not working well for consumers. One of these features was that certain pricing, promotional and loyalty practices are limiting consumers' ability to make informed decisions. One of these practices is the use of multiple and complex promotional mechanisms, which make it harder for consumers to make comparisons.

To assist its understanding of consumer decision making under complexity, the NZCC commissioned a behavioural economic research experiment which was conducted by researchers at the University of Waikato.² This research tested how complexity around promotional mechanisms affects consumer decision making, using laboratory experiment data from 180 participants. The study found that the use of multiple promotional mechanisms caused participants to make sub-optimal purchasing decisions. This means participants were less likely to choose the offer providing the best value (i.e. the pricing mechanism and product quantity combination that offered the greatest benefit) when faced with multiple pricing mechanisms, compared with when faced with one, simple mechanism such as a "Special".

Therefore, the NZCC was able to use this research to formally test what was previously intuitive speculation by the NZCC, and to further support its overall finding that competition in the grocery sector was not working well.

¹ Final Report available at https://comcom.govt.nz/_data/assets/pdf_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf.

² Report available at https://comcom.govt.nz/_data/assets/pdf_file/0023/260375/The-University-of-Waikato-Consumer-decision-making-under-complexity-May-2021.pdf.

South Africa

The ability to understand consumer demand behaviour is an essential element of the economic analysis underpinning competition law enforcement efforts by any competition authority. This is particularly relevant in digital markets, which are rapidly changing and evolving, and enforcement tools are required to adapt in order to keep pace.

The Competition Commission of South Africa (“CCSA”) has utilised a wide range of consumer behaviour evidence for both digital and bricks and mortar markets. This includes academic studies, consumer research by respondents (including consumer surveys and focus groups), consumer online tracking data by the respondents and by third party web traffic services and sales pitches by online platforms.

Whilst the CCSA incorporates consumer insights into its analytical framework, there may be a need to deepen its understanding of consumer behaviour across income groups, geographic areas and the role of decision-making heuristics and biases in the brick-and-mortar economy where these no doubt play a role in consumer choice.

Just as firms use behavioural insights to shape conduct and compete in markets, competition agencies need to be doing the same if they are to properly understand competition in these markets. Consumer behavioural insights also need to inform potential remedial action to ensure that it is effective in addressing conduct without unintended consequences.

The CCSA trusts that this submission adds to the discourse and provides insights on this topic, from the perspective of an agency with a developmental mandate.

*Ukraine**

The Antimonopoly Committee of Ukraine (AMCU) actively assesses consumer behavior in a variety of cases. The assessment of actual consumer behavioural was particularly important in several mergers cases, where the AMCU used consumer survey to assess the likelihood of consumers to switch online platforms. The AMCU used this evidence to define the relevant market.

The AMCU also used behavioural economics in a consumer protection case where an internet provider misled consumers with false claims (such as "Join the leader of the new generation of the Internet! The best 4.5G coverage"). The AMCU conducted surveys to assess consumer understanding of the advertising campaign. The majority of consumers (more than 57%) answered that they understood that the internet provider was the leader of the new generation of the Internet in all technical parameters (while it is the largest provider just in terms of amount of spectrum per subscriber). The AMCU decided that the information provided by that internet provider was false because of how it was presented and it misled consumers. The AMCU imposed a fine ordered to stop spreading misleading information.

The AMCU also works closely with the State Service of Ukraine on Food Safety and Consumer Protection (Consumer Protection Service) based on a Memorandum of Cooperation signed between the two bodies. An example of the cooperation is the work on butter, spreads and mixture of vegetable fats. In 2020 the AMCU took action against producers of vegetable spreads regarding packaging and labelling practices that misled consumers. These practices did not allow consumers to distinguish between dairy butter and non-dairy spreads.

United Kingdom

Behavioural insights are an important aspect of the CMA's assessment of competition cases. This is particularly true for cases that involve digital environments. To explore how digital environments affect consumers the CMA has conducted a large scale analysis of literature pertaining to online choice architecture (OCA). OCA can broadly be defined into three large domains, namely choice information, choice structure and choice pressure. OCA can cause three types of harm. One is the direct harm to consumers where OCA can distort their choices. Another is the harm to markets where OCA can weaken or distort competition. Finally, OCA can help businesses exploit or maintain market power.

We demonstrate how behavioural insights are integrated into competition cases with two examples. One is the CMA's market study on mobile ecosystems, where issues such as framing, ordering and defaults feature into the comprehensive analysis. Another is a market study from 2020 on online platforms and digital advertisement where pre-set defaults played a part of the overall assessment.

