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Summary of Discussion of the Roundtable on consumer-facing remedies

Annex to the Summary Record of the 127th Meeting of Working Party 3 on Co-operation and Enforcement

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This document prepared by the OECD Secretariat is a detailed summary of the discussion held during the 127th meeting of Working Party 3 on 5 June 2018.

More documentation related to this discussion can be found at www.oecd.org/daf/competition/consumer-facing-remedies.htm

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Summary of discussion of the roundtable on consumer-facing remedies

By the Secretariat

The OECD Competition Committee held a roundtable discussion on consumer-facing remedies in June 2018 chaired by Professor Frédéric Jenny. The invited speakers were:

- **Professor Amelia Fletcher**, Professor of Competition Policy, University of East Anglia (UK)
- **Dr Stefan Hunt**, Head of Behavioural Economics & Data Science, Financial Conduct Authority (UK)
- **Mr Adam Land**, Senior Director, Competition and Markets Authority (UK).

Introducing the session, the chair noted that the area of consumer-facing remedies is a new one for many competition authorities. However, the UK has had significant experience with this topic, as reflected in the composition of the panel. He also commended the UK's Competition and Markets Authority for the interesting background note¹ they prepared for this session.

Next, the chair recognised that there was some scepticism about the use of consumer-facing remedies expressed from two very different perspectives, namely businesses (as represented by BIAC) and consumer organisations.

The session would cover: the sources of demand-side problems in markets; available remedies; testing, refinement and evaluation of demand-side remedies; and practical implementation challenges.

1. Sources of demand-side problems in markets

Adam Land of the UK Competition and Markets Authority (CMA), author of the background paper, explained that the CMA had proposed the topic of consumer remedies because they have dealt with several cases, for example in retail banking and energy, with a demand-side focus. The CMA and UK regulators have also been working to understand how best to intervene in markets for the benefit of consumers.

The CMA's overall philosophy is that both the demand side and the supply side of markets need to work well. On the demand side, a well-functioning market can be characterised by 'three As' whereby consumers *access* the right information, *assess* that information, and *act* on their assessment in choosing products and providers.

Three kinds of problems can disrupt this process. First, search and switching costs can affect consumers' ability to access information or act on it. Second, behavioural biases and the context of decisions (such as urgency or distress) can lead to mistakes by consumers. Third, suppliers themselves can make things worse for consumers, for example by not providing transparent information, locking them into contracts, or exploiting biases.

¹ Available at: [https://one.oecd.org/document/DAF/COMP/WP3\(2018\)2/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3(2018)2/en/pdf)

Consumer-facing interventions, Mr Land explained, often involve getting suppliers to change their behaviour, either because it was the root cause of the problem, or because this is more practical than changing human nature.

Next, the chair invited **Croatia** to discuss how firm conduct, and specifically an abuse of dominance, exacerbated the demand-side concerns present in utility markets. The delegate described efforts by a dominant water supplier to limit the information available to consumers, and the authority's order to cease this conduct, which ensured that consumers had sufficient access to information to consider alternative suppliers.

The chair noted that consumer organisations might take issue with the notion that consumers commit mistakes. He posed two questions. First, does it matter whether consumer errors or supplier behaviour are responsible for a competition problem? Secondly, what should be the division of responsibilities of competition law enforcement and consumer protection, particularly in jurisdictions (unlike the UK) where there were separate agencies for these two things?

Mr. Land replied that the UK CMA focused on market outcomes. Thus, it would consider a market-level intervention if it could clearly improve welfare, regardless of whether the underlying problem should be characterised in terms of behaviour by suppliers (e.g. in attempting to conceal a price increase) or consumers (e.g. in failing to perceive and act on the increase).

Professor Fletcher added that the CMA and regulators had possibly sometimes given the impression that consumers were “failing” or “at fault”, which was not intended. In her view, consumer policy can be very effective when suppliers attempt to confuse or mislead consumers, but competition-focused intervention is also needed in some markets because of the nature of information, search and switching, even where firms are not behaving badly towards consumers.

Dr. Hunt then pointed out that consumer decision-making reflects the cognitive structure of the brain, which evolved before even agriculture. Consumer ‘mistakes’ are specific types of inconsistency affecting all humans. Welfare can be improved by enabling consumers to act more consistently in their own best interests. As shown by recent research in behavioural industrial organisation, promoting aggressive competition may not always be the solution when consumers have limited capacity to act in their own best interests. In this sense, he said, the line between consumer protection and competition is amorphous.

The chair then called on the **European Consumer Organisation (BEUC)**. The delegate said that the question of whether consumers make mistakes depends on the type of behavioural or choice theory one accepts. It is more important that the work of an authority reflects and helps to address consumer biases in the best way.

Consumer organisations can help consumers by developing comparison tools or applications for managing their finances. At the same time, both consumer authorities and competition authorities have a very important role to play. While consumer authorities focus on enforcing consumer law, competition authorities reflect consumer behaviour in their remedies. For example, the Microsoft Internet Explorer case was essentially a behavioural remedy to help consumers decide which default browser to use.

However, remedies will only work if they are well designed based on an understanding of how choices are made. Not many authorities are currently equipped to address this area, but the behavioural insight team of the CMA and a team of dedicated psychologists at the Netherlands Authority for Consumers and Markets (ACM) are leading examples.

Finally, testing and assessing remedies can inform future cases. The speaker gave the example of a CMA report showing how consumers had saved money as a result of orders applied to contracts by one of its predecessor organisations, the Office of Fair Trading (OFT).

2. Available remedies

The chair invited **Amelia Fletcher** to talk about the kinds of consumer-facing remedies available. Professor Fletcher explained that her interest in the subject came from her long-time former role as Chief Economist at the OFT where many such remedies were put in place, and from a report she was commissioned to write for the UK consumer body *Which?* in her current role as an academic.

She speculated that consumer bodies were sceptical about the effectiveness of consumer remedies and believed that more interventionist methods like price regulation should be used. Her review of the evidence for *Which?* found quite a mixed picture regarding effectiveness and drew lessons for improvement.

In the UK, there is a variety of legal routes for the introduction of consumer remedies. These include the competition authority's powers in connection with market investigations, market studies, and competition investigations. They can also come out of consumer enforcement and from legislation by government. Sector regulators often also put such remedies in place, and industry can sometimes be persuaded to place remedies on itself.

The three types of remedy set out in her report corresponded to the three As of consumer decision-making described by Mr Land earlier. First, helping consumers *access* information requires disclosure remedies to address the long-recognised issue of asymmetric information between supplier and consumer. However, more recent behavioural economics has shown that overloading consumers with information can make their task harder. Thus, it is important to be prescriptive about the information format so that it is easily comparable across products and suppliers.

Secondly, there are two kinds of remedy to help consumers *assess* the available information and shop around. One remedy involves encouraging third-party intermediaries to collate this information in a convenient form and assist consumers in making comparisons. Such intermediaries might be advisors (such as financial advisors), price comparison websites or other directories of information. Another such remedy is a trigger, i.e. a well-timed disclosure of information (for example regarding a price increase) that can prompt consumers to exploring their options with other suppliers.

Finally, remedies for the *act* stage of decision-making can address real or behavioural switching costs. These can involve removing contractual barriers, such as exit fees or complex termination windows, or easing the process of switching. For example, in the UK much has been done to make switching banks easier. Another example is mobile number portability.

The chair then asked two countries, **Iceland** and **Mexico**, to describe consumer-facing remedies they had implemented, and whether they were satisfied with the outcomes.

A representative of the **Icelandic Competition Authority (ICA)** described how the adoption of consumer-facing remedies in the banking sector grew out of a competition case involving the three largest commercial banks in the country. The ICA's statement of objections concerned certain terms of older mortgage loans that had a significant tying

effect, but the case was settled by commitments to reinforce competition in the market for banking services more broadly.

The main goals of the settlements are i) to mitigate the costs consumers incur when they switch retail banks, ii) to make it easier for individuals and small companies to shop around for financial services, and iii) to counter conditions that could facilitate tacit collusion.

The commitments include the following:

- Customers will not be charged redemption fees for early payments in the case of loans with variable interest rates.
- Fees for switching private pension savings to another management company will be capped.
- Swapping of mortgage debtors via property transactions will no longer be conditional on the buyer moving all his or her banking services to the respective bank.
- The banks must adopt systems and technical solutions to make customer switching easier, and carry out surveys to identify customer preferences in this respect.
- Customers must be notified about significant changes to interest rates and service fees in order to enable them to transfer their banking elsewhere if they choose to.
- Each bank will publish all information on general fees, rates and loans on its website and make this information available through an open API to third parties, who can set up comparison websites to reinforce consumer awareness and create more effective competition.
- The banks will not enforce contractual clauses under the older mortgage loans with a significant tying effect, which triggered the original investigation by the ICA.

The speaker explained that these settlements were made in 2017, so it is too early to assess their impact. A report of the competitive environment in banking will be produced in future years.

Next, a representative of Mexico's **Federal Institute of Telecommunications (IFT)** spoke about a set of tools launched in September 2017 for the benefit of telecoms consumers.

IFT surveys of consumption patterns, satisfaction levels and user experience between 2014 and 2017 showed that consumers often lack information about the telecommunications services they rely on. For example, only 45% of users between 18-35 years of age are aware of the speeds they have contracted in the fixed internet access service, and only 26% of users compare the services offered by different operators before signing a contract.

The IFT therefore developed a user information and empowerment system to provide consumers with a single package of tools to inform their decisions. The system is based on the idea of a cycle of decision-making with four components: first, the user is *formed*; secondly, he/she is *informed*; thirdly he/she is given *tools*; and finally, a *mechanism* is established for the exercise of choice.

The tools include a mobile data consumption simulator that allows users to estimate their monthly usage. This is linked to a price comparison tool that shows available tariff plans and the services they include. Consumers can consult maps of guaranteed mobile coverage down to neighbourhood and street levels, differentiated by technology (2G, 3G and 4G). There is also a catalogue of compliant handset equipment and specifications such as

operating system, camera type, screen size and memory, plus an additional catalogue of accessible devices for persons with disabilities. Users can check the International Mobile Equipment Identity (IMEI) number of a handset against a GSMA (Global System for Mobile Communications Association) global database of lost and stolen devices to check that is not being sold illegally. There is a portability procedure tracker for users changing service provider, which they are entitled to do within 24 hours free of charge. There is also a catalogue of contract terms and a mobile service quality monitor.

The tools were only brought together in September 2017 but had already been visited over a million times. Portability applications were running at a high level, suggesting that consumers were actively switching.

The chair then invited **Consumers International (CI)** to take the floor. The speaker from CI began by agreeing with the statement earlier in discussion that there is no longer a sharp line between competition and consumer protection. The CI believes that consumer inertia should be viewed as a rational consumer response to dysfunctional markets, and that structural changes are often necessary. The CI finds it frustrating that consumer-facing remedies often put an onus on consumers to engage more. The emphasis on road testing was welcome if it helped authorities understand actual rather than theoretical consumer behaviour. The delegate asked (i) if the CMA has plans to develop the capacity to model and test the impact of remedies and (ii) whether, given the limited effectiveness of some measures focusing on consumer engagement in the energy and finance sector, other approaches are being considered.

Invited to respond by the chair, **Professor Fletcher** said that in fact consumer-facing remedies are almost always targeted at suppliers' interactions with consumers, rather than placing a burden on consumers themselves. Remedies such as providing more information, facilitating the development of third-party intermediaries or changing contractual terms for switching are imposed on suppliers in recognition of the problems consumers face. She agreed, however, that consumer engagement was a challenge, and pointed out that this, rather than supply-side monopoly concerns, was why the UK was moving towards full price regulation of energy.

Mr Land fully agreed with the CI speaker about the importance of road testing and explained that the CMA was actively examining how to maximise the time available for developing, testing and refining remedies within the rigorous statutory timetables that apply to it.

The chair then turned to the delegate from **BIAC** who, he noted, agreed with Professor Fletcher that the burden of consumer remedies fell on suppliers. The BIAC representative said that consumer-facing remedies clearly have a place in the competition toolbox when they address competition issues in the competition statutes. In the absence of an antitrust violation, however, specialist sector regulators or consumer protection agencies are better placed to deal consumer issues. In common with the consumer organisations represented at the discussion, BIAC supported further work to explore consumer-facing remedy design. Such remedies needed to be effective and proportionate, and to minimise compliance costs.

3. Testing, refining and evaluating demand-side remedies

The chair invited **Stefan Hunt** to talk about testing, refining and evaluating consumer-facing remedies. Dr Hunt said that, in addition to characterising consumer-facing measures in terms of the three As, they could also be thought of as more or less 'soft' or 'hard'. In

addressing demand-side issues, there is a case for adopting either relatively interventionist measures, or none at all. He referred the audience to the Ely Lecture of the American Economic Association by John Campbell in 2016, which argues this point in relation to consumer financial markets.

Understanding real consumer behaviour and designing consumer-facing remedies is complex and requires an intuitive approach along with testing and reassessment. In Dr Hunt's experience, field experiments and rigorous data analysis were particularly powerful, and the results sometimes contradicted expectations.

He illustrated these points with two examples. The first concerned the high cost of overdrafts, which was part of the CMA's market investigation into retail banking. The FCA carried out econometric work to measure the causal effect of annual summaries, which were intended to help users understand overdraft costs and encourage switching. The causal effect was found to be zero. Subsequently the CMA came up with overdraft alerts, which give consumers a grace period until 3pm to cover an overdrawn amount without incurring charges. This new measure was found to reduce unarranged overdrafts significantly and cut overdraft costs by 20-25%. The FCA has put together a rich array of information including analysis of 1 billion transactions by 1.5 million consumers, along with qualitative research, surveys, lab experiments and field experiments, and has introduced a series of further alerts based on this evidence.

Dr Hunt's second example concerned consumer inertia in switching savings accounts. The FCA ran field experiments on over 100,000 consumers to test various nudges. For Dr Hunt, the most striking evidence about the extent of inertia was found in an experiment where consumers were encouraged to switch bank accounts, which would have resulted in an annual gain of £125 on average. They were sent a stamped addressed envelope and form that required them to simply tick a box to switch. However, the switching rate was only 14%, compared with 6% in the control group, demonstrating substantial inertia.

The chair turned next to the **Netherlands ACM**, which had been testing consumer-facing remedies in health insurance markets. The speaker explained that many consumers in the Netherlands do not compare plans when they sign up for health insurance, let alone in order to switch providers. This inertia softens price competition and is therefore a concern for the ACM and the Netherlands Healthcare Authority, who are working together on this issue.

They tested three interventions in a randomised control trial. The research distinguished an intention phase, an information phase and an action phase in the consumer choice process, similarly to the three As paradigm. The outcome variables were the percentage of switchers, the percentage of people comparing offers, and the number of steps taken in comparing offers.

One treatment was about overcoming obstacles and misconceptions in the intention phase and involved giving consumers information relevant to their demographic group about the ease of switching, combined with an illustrative example. This appears to have had no effect on the number of people switching or comparing offers, but slightly increased the number of steps people took in comparing different offers.

The second treatment addressed obstacles in the information phase and involved showing consumers how their current plan compared to a matrix of similar and often-cheaper alternative plans. This did not affect switching, but did increase the number of people comparing offers and the number of steps they took in doing so.

The third treatment concerned the action phase and involved giving consumers the option to sign up for email or SMS reminders to compare insurance offers. It appears to have had some effect on switching, but not on comparison behaviour.

Subsequent research made suggestions for improved remedies, which were now under testing.

A representative of the **Italian Competition Authority (ICA)** spoke next. The speaker explained that the ICA did not have sophisticated methods for testing consumer-facing remedies, but nevertheless wished to share three lessons from past experience.

A first lesson is that authorities need to revisit and reinforce consumer remedies over time. In 2007, an ICA market study led to the introduction of a cost comparison indicator for bank accounts displaying the total annual costs charged by each bank for six hypothetical consumer usage profiles. A second market study in 2013 revealed that this comparison tool had not been made sufficiently accessible to consumers. The ICA therefore advocated measures to increase its visibility to consumers.

More generally, the delegate observed that the communication of remedies to consumers is fundamental. For example, the ICA successfully advocated for the abolition of charges for closing bank accounts and for easier procedures to transfer a mortgage to another bank, but it took some time for consumers to become aware of this opportunity and to take advantage of it.

A third lesson concerned the synergy between competition measures and consumer protection, in which the ICA has dual competency. From its consumer policy work it has learned that simplification is key to consumer empowerment, and this lesson is now becoming a guiding light in its competition work. For example, the ICA intervened against a price comparison website for car insurance policies that did not inform consumers that it was not neutral but only displayed selected offers. This was an example of using consumer protection measures to address competition issues.

The relevance of consumer behaviour to competition remedies was then taken up in a contribution from the **United States**. The speaker explained that the US competition authorities, the Federal Trade Commission (FTC) and the Department of Justice (DoJ), prefer structural remedies in merger cases, which often include divestitures of tangible and intangible assets. However, in a number of cases courts had been sceptical about whether consumers would engage adequately with the new owner of the package of assets proposed by the parties for divestiture. A retrospective study by the FTC bore out this scepticism. In particular, contractual terms or customer loyalty could prevent the buyer of the assets from competing for customers effectively, particularly where they did not constitute an entire ongoing business unit.

Remedies to help customers switch in these circumstances might include transferring customers' contracts to the new competitor, or allowing customers to terminate their contract with the merging parties without penalty. The remedies must be based on a close understanding of the market in question.

The FTC also addresses demand-side factors in non-merger conduct investigations. These often involve industry trade groups imposing restrictions on their members in terms of opening hours, soliciting of rival customers or advertising, which inhibits customer choice, information and ability to switch. In such cases, remedies are typically effected by a court injunction that prevents such agreements being enforced.

4. Practical challenges

The chair turned to **Adam Land** to introduce the topic of practical challenges in the implementation of demand-side remedies. Mr Land said that a big issue for the CMA was responding to the view of consumer representatives that consumer remedies such as nudges were not effective and that other approaches were needed. He acknowledged that some interventions had had less impact than intended, as Professor Fletcher's review had shown. Refining and testing such measures should improve their effectiveness, but there are also fundamental barriers to such remedies, he explained.

He gave two examples of such barriers. The first concerned disclosure remedies, where the challenge is to get a message across to consumers in an information environment that the authority does not control. A previously popular enforcement remedy in the UK were 'wake-up' letters to consumers, which reminded them that they had not switched provider for a long time and explained how they could do so easily. Mr Land recalled seeing one such letter, which was prominently headed "You do not have to do anything as a result of this letter", thus compromising the intention of the remedy.

Another practical challenge concerned barriers to consumer engagement. He gave the example of elderly fixed-line telephone subscribers in the UK, who often are not Internet users and who have limited scope and energy to compare providers. In such situations, he said, it might be necessary to consider interventions that are more direct.

Mr Land suggested that authorities should be pragmatic and use whatever interventions were demonstrably necessary. It was right to improve the design, testing and evaluation of remedies and to build the evidence base. If structural intervention or longer-term direct regulation proved necessary to make a market work, those measures should be adopted.

Mr Land's final remark concerned the need to be alive to new possibilities and the role of technology. His organisation's approach was evolving from communicating directly with consumers, to encouraging third party commercial intermediaries to engage them. He gave the example of the Open Banking initiative, and agreed with the delegation from Iceland about the potential of third party fintech enterprises in this regard.

The delegate from **Denmark** then described two examples of recent work on consumer-facing remedies by the Danish Competition and Consumer Authority (the "Authority"). When devising remedies and recommendations, the Authority has a twofold intention of increasing the ability of firms to compete with one another, and making it easier for consumers to choose and switch between providers.

The Authority recently conducted a study of the mortgage market. Although mortgages can be difficult to understand and choose with confidence, a few items of information are key. The Authority therefore developed an information template, which, echoing a point made by Amelia Fletcher earlier, was not only standardised but also simple. The intention is that information in this template would be attached to every mortgage loan offered by a provider. The template was tested in a laboratory setting by comparing one group of subjects who were given only the loan documentation with another group who were also given the template. Comprehension tests and biometric readings of facial expressions showed that the template reduced subjects' levels of frustration and made it easier for them to compare the offers. The Authority is now considering how to implement this template in the market.

The Authority also carried out a study of the payday loan market. It found that many consumers do not consider the need for such credit or compare it with cheaper alternatives,

and that many regret taking such loans and have difficulty repaying them on their time. This and other evidence indicates that there is a degree of impulsivity in the decision to take out such a loan. The Authority therefore devised a cooling-off mechanism whereby anyone offered such a loan must wait 48 hours before re-contacting the provider to accept it. The provider itself may not re-contact the consumer of its own accord.

The cooling-off remedy was imposed only on certain types of loan, and providers have been able to circumvent it by, for example, changing the loan duration. The Authority is therefore considering how to make this remedy more effective.

The chair asked the panel for its reactions to the delegations' presentations. **Professor Fletcher** highlighted two points. First, it is important to think through suppliers' possible reactions to interventions, which cannot be done through consumer testing. Secondly, evaluating and revising remedies after a certain time is good regulatory practice rather than an indication of failure. **Mr Land** agreed with the Iceland delegation that very small businesses faced similar demand-side issues to consumers in areas such as energy and banking.

In connection with suppliers' reactions, a delegate from **Australia** said that the Australian Competition and Consumer Commission was currently undertaking a market study, in the course of which it had gained access to sophisticated consumer testing carried out by suppliers. The delegate suggested that such material could be a good starting point for authorities investigating particular markets.

The chair turned to the consumer and business representatives for final comments. **Consumers International** welcomed the focus on understanding actual rather than theoretical consumer behaviour, and the role of testing in this regard. **BEUC** added that it was increasingly important to help consumers make good choices in connection with non-financial terms, such as privacy in markets where consumers access services in exchange for personal data. **BIAC** said that the focus should be not only on actual rather than theoretical consumer behaviour, but also on actual rather than theoretical consumer harm. It also said it made sense to review remedies and revise them so that they address the antitrust harms they are intended to.

The chair concluded by highlighting three observations of particular interest from the session. First, he noted that even if some of the issues may seem to be more focused on consumer protection, they can have very real impacts on competition measures. For example, behavioural issues may undermine the effectiveness of merger remedies, and so should not be ignored. Second, he suggested that the design of remedies was an art as well as a science, and so authorities may need to respond with additional or different measures once the effectiveness of a given remedy (or lack thereof) becomes apparent. Third, the chair emphasised the importance of testing before implementing remedies.