

**Unclassified****English - Or. English**

23 May 2018

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Roundtable on designing and testing effective consumer-facing remedies - Note by  
Consumers International****5 June 2018**

This document reproduces a written contribution from Consumers International submitted for Item 4 at the 127th Meeting of the Working Party No 3 on Co-operation and Enforcement on 5 June 2018.

More documentation related to this discussion can be found at [www.oecd.org/daf/competition/consumer-facing-remedies.htm](http://www.oecd.org/daf/competition/consumer-facing-remedies.htm)

Please contact Ms. Despina Pachnou if you have any questions regarding this document [phone number: +33 1 45 24 95 25 -- E-mail address: [despina.pachnou@oecd.org](mailto:despina.pachnou@oecd.org)].

**JT03432286**

## *Consumers International*

### 1. Introduction

1. The design of remedies is often the most difficult part of the work of a competition agency. In cases that involve consumers or customers it is important that authorities are aware of how those entities behave in the market and whether remedies under consideration require any change in that behavior. Viewing inertia as a problem, rather than an indicator of a dysfunctional market, will lead to the design of remedies that are unlikely to work. Requiring consumers to change their behavior when they have indicated an unwillingness to engage in a particular market, absent, structural changes, will not succeed.

### 2. Summary

- Inertia needs to be viewed as a rational consumer response to dysfunctional markets
- Expecting consumers to change behavior without structural changes to a market is unlikely to succeed
- More effort needs to be applied to understanding how consumers engage in particular markets and accepting that this is a series of rational responses to dysfunctional markets rather than ‘irrational’ behavior.

### 3. Identifying the circumstances in which “customer-facing” remedies are likely to be worth considering.

2. These remedies already play a role in some market studies and consumer protection cases, but there may also be scope for considering consumer behaviour measures in antitrust cases (e.g. encouraging browser choice), or as an ancillary measure in merger cases (e.g. commitment decisions with consumer-focused measures).

### Comments

3. The degree to which ‘customer-facing’ remedies are appropriate in any particular competition case must, obviously, be assessed on an individual basis. But as a matter of principle it must be first decided if the measures are ‘customer’ or ‘consumer’ facing. This most basic of distinctions is important because it speaks to the degree to which the end user groups in focus is likely to conform to the base model of ‘rational’ consumer that modern competition analysis still relies upon. If customers are intermediate and not entirely small and medium sized enterprises, then it is more likely that they will employ staff specifically to negotiate input prices and manage items such as utility bills. If the group is composed of primarily SMEs and consumers, then it is less likely that the end group will employ specialists, or indeed have specialist knowledge, of the service or product in question.

4. We would argue that consumer or customer behavior should be considered in all cases that rely on consumers or customers acting or reacting in a specific manner for a remedy to be effective. If customers or consumers are simply assumed to respond as ‘rational’ consumers, we would argue that the design of remedies in such a manner are flawed.

5. We consider that there is often a rather technocratic assumption in some competition authority decisions that providing more choice will trigger greater consumer engagement. However, it might be important to accept that consumers have already made perfectly rational decisions not to engage in a market that is dysfunctional or provides little utility gain relative to the investment of time needed to enhance that utility by a small amount. In such cases simply presuming greater choice is desired by consumers will lead to the design of remedies that will deliver little or no gain.

6. Without understanding how consumers or customers currently engage with a market no authority will be able to design effective remedies. In such cases the application of consumer-focused remedies may do considerably more harm than good. Poorly designed remedies in markets of this type can lead to poor outcomes for consumers and damage the reputation of authorities. This can lead to popular pressure on politicians to intervene in ways that are less market friendly and more likely to produce adverse outcomes.

7. An example of this pressure is often found in utility markets where seemingly never ending efforts to activate consumers to ‘switch’ suppliers regularly fail to produce any significant market change. This leads to political moves to cap prices, limit market shares, or otherwise replace market interventions with non-market ones. This political pressure responds to consumer distrust of the particular market and a perfectly rational assessment that engagement in the market will either not deliver benefits at all, deliver benefits so small as to not warrant engagement or indeed provide benefits that, relative to activities in other markets, will produce lesser benefits.

8. If authorities fail to take account of relative utility calculations by consumers, then they are likely to continue to develop remedies that simply fail in the market. If the target group being relied upon to ‘switch’ in utility markets has a finite amount of time in which to make decisions, it has to be recognized that the opportunity cost of researching options for switching may well be greater than the gain from carrying out this research. A half hour spent working out utility options will produce a much lower utility gain than a half hour planning a holiday, buying music, or indeed simply interacting with family or watching television.

#### **4. Diagnosing demand-side problems correctly.**

9. For example, when ‘loyal customers’ of a firm remain on high cost tariffs while ‘switchers’ are offered better rates, it may be worth considering in what circumstances customer inertia rather than strategic behaviour by suppliers should be identified as the competition problem. It can also be challenging to determine what level of engagement in retail markets can be reasonably expected from customers. We can also discuss the types of markets, which are particularly prone to these types of problems.

## Comments

10. Consumer ‘inertie’ is often discussed in competition analysis as either a problem, an indicator of irrationality or a sub-conscious bias. In many modern markets ‘inertia’ is simply a measure of consumer rationality. If a consumer takes the view that the utility that they gain from engagement is lower than the effort required to gain that utility, or is less than competing utility enhancing activities, then they will simple disengage.

11. There is a degree to which certain decisions are less likely to be utility enhancing. It is no coincidence that consumer ‘inertia’ is a problem in a large number of OECD economies in pretty much the same sectors. It may be worth considering if there is something about those sectors that makes ‘inertia’ the default activity of consumers. If we assume inertia to be the rational default option, rather than an aberration, then we are required to identify factors that explain that inertia. If the services or products are essential to the operation of daily life (such as financial services or utilities) then it is worth asking if the market that supplies those services to consumers is structured in such a way to encourage inertia or exploit is once it has emerged.

12. A focus on the reasons for inertia will provide indicators of possibly more structural solutions to that inertia, than yet more behavioral remedies that are destined to fail.

13. The fundamental problem for authorities lies in their assumptions and models of consumer behavior. Seeing consumer inertia as a problem in a market, will lead to efforts to combat inertia, through behavioural remedies. Viewing inertia as a rational consumer response to a poorly functioning marketplace points to solutions of a more structural nature. There is considerable evidence in financial markets in particular, that excessive choice and confusing supply can either lead consumers to exit the market, or make poor choices.

## 5. Selecting appropriate remedies for demand-side problems.

14. The discussion can cover agencies’ experience, in terms of which remedies were the most effective in addressing consumer switching (e.g. price comparison tools, facilitating switching, etc.). New types of approaches (e.g. actively engaging with specific consumer groups to encourage switching) can also be discussed.

## Comments

15. We have argued that agencies may be mistaken in viewing inertia as anything other than a rational consumer response to dysfunctional markets. We would welcome discussion in this section of the relative costs and benefits of efforts to activate consumers further in dysfunctional markets compared to more structural approaches to remove the drivers of inertia in the first place. We would welcome an assessment of the costs of investigations, remedy design and implementation compared to the gains consumers actually made as a result of those remedies.

16. We are nervous of efforts to target specific consumer groups to encourage an activity that they have clearly signaled that they do not wish to undertake. If we assume inertia is a rational response, then spending large sums of money to encourage a one-off engagement could well do more harm than good. If firms in that dysfunctional market are

able to price discriminate between switchers and non-switchers then making a non-switcher into a switcher on a one off instance will not change the market dynamic. Absent any other structural reform, that switcher will simply return to being a non-switcher and thus return to a new dysfunctional equilibrium in the near future. The market will not function any more effectively and indeed may become more dysfunctional as the newly converted ‘switcher’ comes to regret the decision to ‘switch’, something that may undermine their general attitude to switching in ancillary or related markets.

## 6. Ensuring that the “supply side” responses to interventions amplify, rather than offset or nullify, the benefits of consumer-focused remedies.

17. The discussion can consider how small or growing providers –or search intermediaries– may be encouraged to take advantage of a regulatory intervention to take on larger incumbents. We can also consider in what circumstances there is a need to be concerned about rebalancing of prices (‘waterbed effects’) if prices are adjusted to reflect greater levels of customer engagement.

### Comments

18. We are concerned, again, that this series of questions assumes that the natural state for consumers in such dysfunctional markets is to be engaged. It is clear that the natural state for most consumers in dysfunctional markets is to not be engaged. This is a rational decision made by consumers. It would require a good deal of analysis and evidence to show that activating consumers on a one off basis will lead to long term behavior changes. Absent this evidence we would remain skeptical that such a change can occur as a result of behavioural remedies.

19. If no structural changes are made in a market it is important to understand how consumers view competition in the marketplace. If an authority simply tries to add more choices to a market where consumers see choice as having little impact on utility, then that remedy will be unlikely to succeed. In dysfunctional marketplaces with consumers making rational decisions not to engage then ‘waterbed’ effects are almost guaranteed to occur, either along the existing pattern of rebalancing or new methods. Viewing consumers, rather than the market, as the problem will not deliver consumer benefits.

## 7. The impact of technology on demand-side problems.

20. We can explore whether there are new problems arising as a result of advances in big data (e.g. extreme price differentiation) and, conversely, when technology can be harnessed to help develop more effective interventions.

### Comments

21. Other OECD Roundtables have explored in some detail the particular problems generated by the emergence of Big Data and Algorithmic Competition. For consumers’ organisations, these problems are particularly acute where consumers have an existing expectation of reference prices and other proxy measures for choice and competition. If as a result of technology changes, reference prices become less reliable, an apparent proliferation of choice is illusory (as suppliers utilize multiple identities to micro-target

consumers), or their own willingness to pay becomes transparent to suppliers, then consumers will likely lose out.

22. Authorities need to be careful not to substitute themselves for market participants by attempting to use the emergence of new technologies as an excuse to establish market participants themselves. If the market has not responded to consumer harm by developing intermediaries to help consumers navigate complex markets, then we would be special that authorities can replace the market.

## **8. Ex ante evaluations of consumer-facing remedies to maximise success.**

23. The discussion will also cover the experience of agencies in running field trials, “lab experiments” or other forms of road-testing the impact and design. Particular focus will be given to what is currently feasible within regulatory timelines, and how capabilities can be developed further.

### **Comments**

24. We welcome efforts by agencies and authorities to road test consumer facing remedies. If this helps authorities to understand actual, rather than theoretical, consumer behavior in the marketplace then we welcome it.