

'Consumer' versus 'Customer': the Devil in the Detail

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BACKGROUND

- The ultimate objective of EC competition rules is arguably the enhancement of 'consumer welfare'.
- However, in EC competition law, 'consumer' merely means 'customer'. Not being limited to final consumers, the concept also encompasses intermediate customers, whose welfare may not signify anything about the welfare of final consumers.

METHODOLOGY

- This paper questions whose welfare the standard of 'consumer welfare' in EC competition law is concerned with, and the implications of this.
- In particular, the paper questions the appropriateness of a presumption under Article 82EC: harm to intermediate customers is generally presumed to create harm to consumers, and where intermediate customers are not competitors of the dominant undertaking, there is no requisite to assess the effects of conduct on users further downstream.
- The paper considers the presumption in the light of recent advances in economics, specifically that of vertical restraints and, in particular, non-linear pricing.

KEY FINDINGS

- The presumption embedded in Article 82EC may be an adequate reflection of reality when the conduct of the dominant undertaking involves merely linear pricing.
- However, although this presumption may have been appropriate as a general rule of thumb when the economics of non-linear pricing were not as advanced as today, it is no longer so for conduct involving non-linear pricing. This is because recent advances in economics point out various scenarios where the welfare of the 'customer' and the welfare of the 'consumer' would be affected in opposite directions as a result of a certain business practice.
- Given that many cases under Article 82EC to date have involved examples of non-linear pricing, this raises concern and implies that in certain cases the presumption should be given up in favour of an actual assessment of harm in order to avoid Type I and Type II errors.

POLICY ISSUES

- The paper concludes that if the law is to serve the interests of 'real' consumers, the EC Commission should reconsider the presumption and its interpretation of the 'consumer' in 'consumer welfare'. Until then, it remains questionable and objectionable whose interests EC competition law and, in particular, Article 82EC, serve.

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ABOUT THE AUTHORS

- **Dr Pinar Akman** is a Lecturer at the Norwich Law School and a member of the ESRC Centre for Competition Policy (CCP), at the University of East Anglia. Her main research area is EC and UK competition law and economics, and she is particularly interested in the prohibition of abuse of dominance, the interface between competition law and other areas of law, such as consumer law, contract law and unfair competition law.

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