



Business and Industry Advisory Committee to the **OECD**

Comité Consultatif Economique et Industriel Auprès de l' **OCDE**

SUMMARY OF DISCUSSION POINTS

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of the Business and Industry Advisory Committee (BIAC) to the OECD

at the OECD Joint Meeting of the

Competition Committee and the Committee on Consumer Policy

on Identifying and Tackling Dysfunctional Markets

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BIAC welcomes the opportunity to provide its views to the OECD Consumer Protection and Competition Committees with regard to identifying and tackling dysfunctional markets. BIAC also commends the Secretariat for a comprehensive and balanced discussion paper on this issue. (See Note by the Secretariat, September 6, 2004.)

INTRODUCTION AND SUMMARY OF COMMENTS

1. The business community shares and supports the OECD consumer protection and competition committees' interest in identifying and remedying problem areas where consumers are harmed by market failure. It is an important issue and in the interest of both consumers and legitimate businesses and industry. We enthusiastically agree with the Secretariat's discussion paper in its recognition that when markets are competitive, they encourage rivalry among suppliers in the quest to satisfy consumer needs. This competition typically motivates suppliers to provide useful information about product prices, qualities and other terms of sale. Well-designed competition and consumer protection policies should ultimately complement each other based on a shared goal of promoting and preserving consumer welfare.
2. We also agree that it is critically important to properly define what is meant by a dysfunctional market and to recognize that there are a variety of factors that may contribute to creating a dysfunctional market. As the Secretariat's discussion paper points out these factors include anti-competitive practices and deceptive advertising and other deceptive business practices by private firms, as well as government market intervention that can interfere with the proper functioning of markets. These government interventions include regulation that may create unnecessary barriers to entry, prohibitions on certain types of advertising, or excessive government-imposed product standards.
3. Assuming a properly defined dysfunctional market, BIAC firmly believes that careful and deliberate evaluation is essential to determine the appropriate approach for remedying the problem market. The remedies for tackling a dysfunctional market are complex, as the Secretariat points out. Remedies include consumer education, voluntary industry

regulation, law enforcement by consumer protection and competition authorities, and reforms of laws and government regulations that may cause dysfunctioning markets or could contribute to the lessening of same. BIAC would caution that these remedies should not be undertaken unless the necessity for the remedy and its possible consequences have been fully examined and weighed. In particular, BIAC would urge thorough analysis prior to the deployment of market interventionist approaches intended to make markets work better for consumers.

4. BIAC also cautions that broad-sweeping so-called dysfunctional market monitoring and the deployment of remedies intended to right problem markets could have a chilling effect on global businesses efforts to market and sell products in creative and diverse ways designed to meet equally diverse customer needs. Thus, a balanced and carefully considered approach to addressing problem markets is essential to ensure that the ultimate goal of consumer welfare is in fact promoted.
5. The OECD's choice of focusing on the market for legal services is a good example of a market where entry and conduct can be regulated by professional bodies in an effort to assure quality. The U.S. experience, for example, has shown that a reduction in the number and scope of the conduct restrictions relating to advertising, marketing and fees arrangements contributes to improving market transparency without necessarily compromising professional quality standards.
6. Similarly, in recent years the FTC and the U.S. Department of Justice have urged various U.S. state officials to refrain from enacting laws that would eliminate non-lawyer competition for real-estate closing business.¹
7. The OECD's focus on the funeral and related death services market provides a useful example of where a regulatory requirement of transparency in prices and the terms of sale can be encouraged on a self-regulation basis to improve consumer purchase decision-making. BIAC would encourage measured and voluntary approaches such as these.

IDENTIFYING DYSFUNCTIONAL MARKETS

8. BIAC agrees with the Secretariat's discussion paper that a variety of market characteristics may be indicative of dysfunctional markets.² However, BIAC urges recognition that there are not necessarily bright-line systematic frameworks to identify dysfunctional markets. A practical method to identify such markets and to measure the magnitude of the dysfunction requires thorough investigation, assessment of objective criteria, and finally, and importantly, comprehensive consideration of the costs and benefits of deploying solutions intended to remedy the dysfunction.
9. A key to identifying information failures that cannot be remedied by competition or consumer protection policy alone is to judge what can be done to avoid or remedy the information failure. Can a but-for scenario be constructed that reflects a workable solution to the consumer information deficit? If, for example, the information shortfall is due to the

¹ See Letter from FTC and DOJ to the Rhode Island House of Representatives (March 28, 2003) (urging the rejection of legislation that would prevent non-lawyers from competing with lawyers to perform real estate closings); see also Letter from FTC and DOJ to the Georgia Standing Committee on the Unlicensed Practice of Law (March 20, 2003) (urging the Committee to reject a request for an opinion that would prevent non-lawyers from competing with lawyers to perform certain real estate closing functions).

² These include infrequently-purchased products; complex products where consumer search costs may be too high to allow consumers to gather adequate information; and complex products such that consumers cannot rely on their own experience in evaluating quality claims, such as some repair services, health care, legal services, or products with quality claims that are not observable or readily testable (e.g., "fat free," and "environmentally friendly").

inherent complexity of the good, it may be impossible to reduce consumer search costs effectively and to remedy the information deficit. Workable tests for identifying dysfunctional markets or markets characterized by imperfect and asymmetric information or in markets where information failure is likely (and profitable) will likely require substantial data-gathering from consumers and suppliers.

10. Current programs of collecting and analyzing consumer complaints made to consumer protection regulatory agencies can provide the first level in the framework of identifying potentially dysfunctional markets. BIAC would support a jointly organized effort based on the experience records of the International Consumer Protection and Enforcement Network (ICPEN)³ as a first step in systematically addressing the identification of potentially dysfunctional markets.⁴

TACKLING DYSFUNCTIONAL MARKETS

11. Imperfectly informed consumers can lead to market failure and a loss in consumer welfare. To the extent that this information deficit can be efficiently and effectively improved, it may be worthwhile to seek remedies. This requires a thorough understanding of why consumer information is lacking. What incentives are faced by suppliers in providing information to consumers, what costs are associated with searching or obtaining relevant information by consumers, and what incentives do suppliers have to intentionally mislead consumers? It also requires a practical assessment of the magnitude of the consumer welfare loss associated with information deficit balanced against a realistic estimate of the cost of implementing particular remedies. From this inquiry, a practical framework for the authorities to use to address and potentially remedy the market failure may be developed.
12. BIAC believes that a key starting point to tackling dysfunctional markets should be a consideration of the extent to which a competition remedy alone could address the market dysfunction and improve consumer welfare, recognizing that the most appropriate intervention may properly be *ex post* competition enforcement.
13. It is well-documented that the forces of competition change rapidly and can alter the extent to which relevant product characteristics and information gaps exist. And, the individuality of consumers themselves results in consumer information problems which vary across groups of individuals – implying that single, one-size-fits all remedies will have differing effects (and net costs) across those consumers. The ability to modify any remedies in order to maintain the flexibility to change in response to rapid industry changes is a key feature to any intervention or remedy.

³ ICPEN is a network of governmental organizations from 29 countries involved in the enforcement of fair trade practice laws and other consumer protection activities. Members include Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Estonia, France, Finland, Germany, Greece, Holland, Hungary, Ireland, Italy, Japan, Korea, Latvia, Luxemburg, Malta, Mexico, New Zealand, Norway, Poland, Portugal, Slovakia, Spain, Sweden, Switzerland, United Kingdom, United States, with participation from representatives of the OECD and the EU. See <http://www.icpen.org>.

⁴ BIAC's comments on international cross-border enforcement of consumer protection also emphasize the need for international enforcement authorities to share experiences in identifying and responding to consumer deception. This type of cooperation would provide the platform that BIAC recommends here.