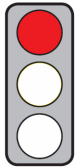


Status: 2008-05-19

MAIN ISSUES

Objective of the Communication: The Commission intends to monitor markets in order to find out whether they generate the “best possible outcomes” for consumers. Should a “market malfunction” be detected, the Commission would like to assess whether regulations or measures in the field of competition law or consumer policy are required.

Parties Affected: Consumers; manufacturers of products and services for consumers.



Pros: –

Cons: (1) The present communication reveals a fundamental lack of understanding of market mechanisms and demonstrates a blatant contradiction of the concept of the autonomous consumer.

(2) Behind the idea that markets should generate pre-defined results is the presumption to know the preferences of consumers and “correct” market outcomes.

(3) Prices reduced under political pressure lead to an artificially produced scarcity of goods.

Changes Required: The Commission should waive the Consumer Market Scoreboard.

CONTENT

Title

Communication from the Commission **COM(2008) 31** of January 29, 2008: Monitoring consumer outcomes in the single market: the **Consumer Markets Scoreboard**

Abstract

► Background

- The Commission deems an “effective competition policy and occasional supply-side regulation” necessary but not sufficient for safeguarding “efficient and highly performing markets”. According to the Commission, market efficiency is reduced where consumers “are confused, misled, have no access, or have little choice”.
- The Commission’s communication announces a shift from an “action-oriented” to an “outcome-oriented” approach regarding consumer protection.
- According to the Commission, “better outcomes for consumers” are the ultimate goal of all single market policies. Evidence of the performance of the single market should be gathered in selected markets and displayed in the form of a regularly published “Consumer Markets Scoreboard”.
- The Commission assumes that “citizens expect single market policy to deliver socially acceptable outcomes, sometimes at the expense of economic efficiency.”
- The Commission further holds that there is also a consensus that “affordable access to certain essential commercially provided services, vital for economic and social inclusion” should be guaranteed throughout the European Union.
- Therefore, the target of the Consumer Market Scoreboard is to “develop indicators to better monitor the demand-side aspect of the single market”. It shall show where “markets are failing to maximise economic outcomes for consumers” and also where “they are failing to deliver the key social outcomes.” The gathered data should allow for a better integration of consumer interests into all EU-policies.
- Along with the communication, the Commission presents a first Scoreboard. It contains the results of various consumer surveys and price research, yet without drawing any concrete conclusions. Markets selected for investigation are, amongst others, telecommunications, electricity and gas; future scoreboards are to focus on commodity markets.

► Functions of the Consumer Markets Scoreboard

- The Consumer Markets Scoreboard shall serve to monitor the “performance” of different markets from a consumer’s perspective.
- In addition, the Scoreboard shall also assess the degree of integration of the retail internal market. This shall be accomplished in light of the Commission’s “EU Consumer Policy Strategy (2007-2013)” (cp. CEP-Analysis) objective of making consumers and retailers by 2013 “as confident” about shopping in other EU-member states as in their home country.

- Finally, the Scoreboard is intended to provide comparative data on the consumer markets of the single Member States.

► **Analysis Phases and Structure of the Scoreboard**

- Within a first screening phase markets are investigated which, according to the Commission, are threatening to fail to meet consumers' demands. The five following indicators were developed in order to assess markets:
 - consumer complaints
 - price levels
 - consumer satisfaction
 - switching
 - product safety
- This is followed by an assessment of the level of integration of the retail internal market on the basis of the following data:
 - the presence of non-national retailers
 - the volume of cross-border foreign direct investment
 - the degree of purchase and sale in cross-border retail trade
 - consumer confidence in cross-border buying and selling
- Moreover, the Commission intends to benchmark the effectiveness of legal redress for consumer protection in different Member States. For such purpose the Commission plans to:
 - analyse the quality of consumer rights enforcement regimes
 - measure the effectiveness of judicial and extrajudicial remedies on the basis of consumer perceptions
 - analyse the strength of consumer organisations and of national "consumer empowerment"
- The subsequent analysis phase serves to investigate the causes of market malfunctioning. Therefore, the following aspects shall be studied "in more detail":
 - consumers' perception of the products offered and consequently their "ability to understand the choices available to them"
 - "ability of consumers to make effective choices"
 - the relationship between import prices and consumption prices over time
 - the level of compliance with legal requirements
 - access to and affordability of essential services
 - the ability of offered products to work with other products "without special effort on the part of the consumer"

► **Further Development of the Scoreboard**

Given the fact that most of the indicators can only be assessed in a very limited number of sectors and not by all Member States, the Commission intends to broaden the data basis of the Scoreboard in the future. Such data shall first be gathered by authorities, professional associations, consumer associations and statistics agencies.

Change of Status Quo

The Communication does not directly modify applicable law. However, where markets which allegedly do not produce "best outcomes" for consumers are therefore viewed as needing correction, then a significant increase of political intervention into the economic market is to be expected.

Subsidiarity and Requirements for EU-Actions

Subsidiarity is not subject to the Commission's considerations in this case.

Position of the EU Organs

European Commission

See above.

Committees of the Regions

Open.

European Economic and Social Committee

Open.

European Parliament

Open.

Council

Open.

Political Context

In its “Consumer Policy Strategy of the EU (2007-2013)” dated 13.03.2007 the Commission makes it an objective to strengthen consumer dimensions in the internal market and to put EU consumer policy at the centre of the next development stage of the single market. The Scoreboard is a crucial instrument for implementing the Commission’s strategy.

Options for Influencing the Political Process

Competent Directorate General:	GD Health and Consumer Protection
Committee of the European Parliament:	Internal Market and Consumer Protection (in charge), representative: Anna Hedh (PSE-Fraction, Sweden)
Committee of the German Bundestag:	Food, Agriculture and Consumer Protection (in charge); Economics and Technology; Affairs of the European Union
Consultation Procedure:	The Member States and Interest Groups were heard before the publication of the Communication.

ASSESSMENT

Economic Impact

An Ordo-Liberal Assessment

The Communication challenges the “action competence” of consumers and this **constitutes an erosion** of the Commission’s **original approach**, namely **to address autonomous consumers**.

The Communication is based on a **completely mistaken understanding of the functioning of markets**. The quality of the internal market is not valued according to whether it guarantees a barrier-free exchange of goods, services, capital and labours, but whether social and other consumer needs – as defined by the Commission – are met. However, markets are platforms for exchange, where people pursue their own, individual goals; they are not institutions implementing politically prescribed – collective – targets. Therefore, they *cannot* serve the purpose of satisfying socio-political objectives.

If market players are forced to meet socio-political requirements, this will restrict their ability to calculate prices based on costs. An artificial **reduction in prices** created for certain consumer groups **by political pressure** must always be financed by higher prices for other groups and thus **results in an artificial scarcity of goods**. Such intervention disturbs the functioning of the price system as a scarcity indicator.

Moreover, it is highly alarming that the Commission expects the market to generate “best possible outcomes” for consumers. **To predefine desirable market outcomes is not consistent with an open and competitively structured free market economy**. Additionally, **a general statement on whether a market produces “best possible outcomes” for consumers is not possible**. In order to make such statements, the “real” preferences of consumers have to be considered. Irrespective of the fact that the preferences of 450 million consumers cannot be lumped together, no-one can really know or predict which market outcomes would entail the best possible social benefit. Therefore, the Commission’s **considerations constitute a presumption of knowledge**.

The issue is further exacerbated by the list of parameters which, according to the Commission, should be examined in order to assess the “efficiency” of markets. Therefore, the information value of statements on price level, safety or “consumer satisfaction” is purely a matter of interpretation. Any consumer dissatisfaction with prices and quality may simply be an expression of a general unwillingness to bear the production costs of high-quality products or services. A fair evaluation of supplier and consumer interests is thus not guaranteed. However, it is only through such an evaluation that the costs of consumer protection can be brought into proportion with the benefits expected from consumer protection.

Finally, it is somewhat problematic that the Commission favours a comprehensive market monitoring which, depending upon certain circumstances, might lead to measures being taken in the field of competition law, consumer protection law or sector-specific regulations. **If consumers are asked specifically about possible problems** in the market, and if it is further suggested to them that such problems might be solved by political means, then **consumers will certainly find and state such problems** accordingly. Consequently, there is a risk of setting in motion a regulatory spiral.

From an ordo-liberal perspective, first and foremost it is the assumption that markets work that should apply, and not the opposite. To the extent that structural imbalances affect the functionality of single consumer markets, an abuse of market power or unfair competition might exist. It is the obligation of antitrust authorities to remedy such market disturbances. Furthermore, injured parties are entitled to search redress. Therefore, the anticipated “screening procedures” of the Commission, which intend to analyse systematically and without concrete cause the “efficiency” of markets are mistaken.

Impact on Efficiency and Individual Alternatives

The Commission holds the view that inefficient consumer markets are identifiable through a “non-satisfactory choice” for consumers. However, this is only plausible in the case of markets restricted by monopolies and oligopolies. Market surveillance is the job of the competition authority. If a market is structured competitively, it does not run the risk of failing consumer demands in terms of product variety. There

is no reason why suppliers should not satisfy recognisable consumer demands in such a market as long as it is profitable. On the contrary, it is the Commission's proposal for state-intervention in pricing that would in fact produce artificial scarcity.

Impacts on Growth and Employment

Should the the intended market analysis result in measures being taken to eliminate alleged "market malfunctioning", there is a risk of over-regulation causing detrimental effects on growth and employment.

Impacts on the Economic Quality of Europe

Since policies designed to eliminate alleged "market malfunctioning" would affect not the production of goods but their sales and marketing, irrespective of the production location, there are no relevant disadvantages to Europe in terms of its location as an economy.

Legal Assessment

Legal Competences

Competence for the evaluation and assessment of information from Member States in connection with consumer policy are subject to sec. 153, sub-sec. 3, lit. b TEC. If the Scoreboard generated data that led to new measures being taken in the field of consumer policy or other political fields, then every single action would have to be assessed separately.

Subsidiarity

The principle of subsidiarity is not affected in this context.

Commensurability

The principle of commensurability is not affected in this context.

Compatibility with EU Law

Unproblematic.

Compatibility with German Law

Unproblematic.

Alternative Procedure

The Commission should waive the Scoreboard.

Possible Future Actions of the EU

The switching announced in the Communication from an "action-oriented" to an "outcome-oriented" approach regarding consumer policy might entail a significant increase in economic interventions in terms of antitrust proceedings, regulations and consumer protection policies. Furthermore, the Communication claims that the significantly increased demands of the Commission regarding data and information should be provided by the competent authorities, trade associations, consumer associations and statistics agencies in the Member States. However, it is highly likely that on a national level companies will be faced with additional reporting commitments, for instance to statistics agencies.

Conclusion

The Communication reveals a fundamental lack of understanding of the functioning of markets. Further, the Commission assumes to know the real preferences of consumers or, at least, to be able to evaluate such preferences and hence derives desirable market outcomes. Such an approach is not consistent with a free market economy that is designed along competitive lines. Moreover, it contradicts the concept of a autonomous consumer as formerly proclaimed by the Commission. From an ordo-liberal perspective it is mistaken to subordinate free market mechanisms to socio-political targets and to manipulate the free formation of prices. In order to create scoreboards, the Commission intends to screen markets which allegedly demonstrate a "malfunction"; behind this approach is a tendency to over-regulation with damaging economic consequences.