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Editorial

*Michael Waterson**

Competition policy aims to tackle situations where there is a clear lack of competition in a market, or a danger that this will develop as a result of actions contemplated (such as mergers). In doing so, it commonly has two incidental positive impacts, one on productivity (because poor productivity can fester under conditions of limited competition) and one on consumers (because competition allows consumers a choice of suppliers). It also commonly has an impact upon employment, which may be either positive or negative. Competition policy can have an impact on consumers outside the jurisdiction as well as inside it. However, there may be a negligible impact upon final consumers in some cases (for example, whether or not a merger between two major suppliers of baby incubators to the NHS takes place) and clearly impact on consumers is not a necessary condition for investigation. At the same time, some competition investigations have a clear and obvious potential impact upon consumers. A prime example must be the current Competition Commission investigation into the groceries sector in the UK, a sector accounting for a significant proportion of consumer expenditure and one that has been the subject of more than one previous investigation.[1]

Consumer policy aims to redress a potential imbalance between (domestic) consumers considering a purchase and firms aiming to satisfy that desire. Firms normally deal with many consumers and in doing so can maintain informational advantages over them. For example, they can take advantage of the fact that consumers may face switching and search costs, or may be unaware of their opportunity to change supplier. Firms can pursue obfuscatory marketing tactics, such as making misleading statements or presenting unanticipated dilemmas. A policy to reduce search costs (for example providing a website on which consumers can compare prices amongst electricity suppliers), or to inform consumers of their rights (for example, that they need not buy their spectacles from the company where they had their eyes tested), or to enforce a standard approach to expressing the true rate of interest on a loan, has a direct impact upon competition. But consumer policy also aims to protect consumers against fraudulent traders who may abscond with their money, which is only tangentially related to competition. Consumer policy is used in many sectors to enforce adequate standards of service, which again is not obviously tackled under competition policy.

Despite the differences, competition policy and consumer policy share one aim, to make markets work more effectively. They tackle different problems that markets may

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[1] I am a member of the Competition Commission. However, I am not engaged on the Groceries enquiry.

exhibit. But a solution to one problem may have a positive effect on the other area, as the examples above have illustrated, and it would be awkward if competition and consumer policy were actually in conflict. Whether they can move closer is a moot point, discussed by some of the contributors to this issue.

The Papers

In 'The Controversies of the Consumer Welfare Standard', the author raises the question of whether it is more appropriate to determine competition cases on the basis of total welfare (consumer plus producer welfare, without regard to distribution) or consumer welfare (assigning producer welfare zero weight). At first sight, the only logical basis for competition policy would seem to be enhancement of total welfare, following the principle of Pareto optimality,[2] and this will often be to the benefit of consumers. A simple, if far-fetched, example illustrates the problem. A policy action to reduce price from monopoly to competitive level enhances consumer welfare more than it reduces producer welfare, by capturing for consumers the previously unavailable deadweight welfare loss,[3] and so enhances overall welfare. However, a policy that supplied a monopolist with sufficient information to enable it to practise first-degree price discrimination between consumers would also enhance overall welfare by enabling the monopolist to capture the pre-existing deadweight loss - each consumer would be charged precisely according to their willingness to pay, so long as this was no less than marginal cost. Yet, this might not meet with social approval! To take a third example, a merger between two competitors that would have clear and demonstrable efficiency benefits (perhaps a tall order!), but at the same time would reduce the industry to a monopoly, yet affect the competitive outcome less than it enhanced efficiency, would be allowed under a total welfare standard, but not under a consumer welfare standard. The difficulty lies in the fact that the overall welfare standard requires only that the gainers can in principle compensate the losers, not that this is at all practicable. Hence one appeal of the consumer welfare standard is that it does indeed entail consumers becoming better off. But for a thorough investigation of the topic, see the paper itself.

The general issue is developed from the particular viewpoint of the link with consumer policy in 'Competition Law, Consumer Policy and the Retail Sector …' the thoughtful second contribution in this issue. This explores the linkages between competition law and consumer protection law in some depth, both in the abstract as a question of logic, and with particular implications drawn from what the author sees as a movement towards international strengthening of consumer protection and an enhancement of its role in competition policy.

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[2] An action is Pareto-optimal if a movement from one allocation to another can make at least one party better off, *without making any other party worse off*. It is the italicized qualification that makes for the difficulty, as I discuss below.

[3] Some consumers are willing to pay more than the resource cost of obtaining the item, but less than the monopoly price. These are the subjects of the deadweight welfare loss.

The third paper 'Representation of Consumer Interest by Consumer Associations …' relates implicitly, like the first, to the Coase Theorem.[4] As the University of Chicago, School of Law website puts it:

> The Coase Theorem can be simply stated: in a world where there are no transaction costs, an efficient outcome will occur regardless of the initial allocation of property rights. This revolutionary idea is simple in statement but extremely useful and complex in practice[5]

To explain the connection, going back to the first contribution, if there were no transactions costs, the overall welfare standard would clearly be superior, assuming the property rights were allocated to consumers, because the gainers could compensate the losers and so Pareto-optimality would be assured. If, to take my third example, the customers in the merging industry held the property rights, then the firm would be willing to compensate them for the increased prices they would then suffer, in exchange for the merger being allowed to go ahead. In practice, of course, consumers are generally a diverse group, whose interests are commonly not sufficient for any one of them to pursue a claim against a firm for proven excessive pricing. The "class action" approach is one solution to this problem, probably explaining in part the much greater prevalence of private actions in competition policy in the US than in Europe, but it is definitely not a solution without transactions costs- lawyers take a substantial cut! An alternative solution to the problem of diffuse consumer interests is the 'supercomplainant'. This paper argues that despite the introduction of representation powers for these bodies in competition legislation, they still have limited ability to represent consumer interests.

The final paper, 'The Supermarket Sector in China and Hong Kong: a tale of two systems' is somewhat different from the other papers included in this issue. This is an interesting case study that brings out a number of points. First, Hong Kong is (or was) a very small economy. As we might expect, in some sectors there will be a very small number of market players due to the small market size.[6] What is less expected, in an economy often thought to be the epitome of competitive capitalism, is that Hong Kong has no general competition law. Therefore we are enabled to see what would happen in a market in the absence of competition policy (something that, paradoxically, some competition authorities would like to be observed, in order that the value of in fact having a competition authority can be demonstrated). The author argues that the supermarket sector has been characterised by abuses of market dominant positions by the incumbent duopolists. In contrast, in the supposedly non-competitive economy of China, competition in the supermarket sector flourishes, it is argued.

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[4] Neither, however, cites the fundamental article: Coase, RH, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1-44.

[5] They should know; Coase taught there and evidently still occasionally visits.

[6] For a classic exploration of the (inverse) relationship between market concentration and market size, see Sutton, J, *Sunk Costs and Market Structure*, MIT Press, 1991.

Altogether, the papers included in this issue provide a variety of interesting perspectives on the interrelationship between competition and consumer policy.

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The Controversies of the Consumer Welfare Standard

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This article deals with the consumer welfare standard in competition law enforcement. It explores the inherent economic and legal 'geography' of this notion by looking beyond the borderlines of competition rules. While the consumer welfare standard has been widely discussed as a legal and economic notion of competition law, this article approaches this concept from a new angle by making use of its interpretation in consumer law. In competition law the primary role of the consumer welfare standard is to verify the goals of competition policy and to delineate the general legal framework of competition law enforcement by establishing the basis for the standard of proof. In consumer law consumer welfare stands for correcting market failures in order to improve the consumer's position in market transactions. Consumer welfare is concerned with efficient transactions and cost-savings but it is also directed at social aspects of the market such as the safety and health of consumers. Consumer welfare is an economic concept with relevant socio-political and legal implications. However, the economic rationale seems to be often overridden by a political rationale, which is to legitimize the enforcement work of competition authorities' and to reflect society's preferences on income distribution. This article addresses the implications of the consumer welfare standard in welfare economics, political economy and law. The analysis points out to what extent the enforcement of competition law can prevent (final) consumer harm and make (final) consumers better off and what the inherent limits of the promotion of consumer interests are in competition law. Such comparisons clarify and identify the function of this standard and delineate the borderlines between the two disciplines, the possible gaps and unnecessary overlaps they create in regulating markets.

INTRODUCTION

This article deals with the notion of the consumer welfare standard in competition law enforcement. The underlying idea is to explore the inherent economic and legal 'geography' of the consumer welfare standard by looking beyond the borderlines of the competition rules and making reference to notions common to consumer law. The discussion will in the first place focus on the application of the consumer welfare standard in competition law enforcement but will approach this issue from a new angle. While the consumer welfare standard has been widely discussed as a notion of competition law, and explained with the help of legal and economic terms common to competition law, this article will make use of the interpretation of this standard in consumer law. In competition law the primary role of the consumer welfare standard is to verify the goals of competition policy and to delineate the general legal framework of competition law enforcement by establishing the basis for the standard of proof required in investigation and litigation. In consumer law consumer welfare stands for correcting market failures in order to improve the consumer's position in market

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transactions. Consumer welfare is concerned with efficient transactions and cost-savings but it is also directed at social aspects of the market such as the safety and health of consumers

Consumer welfare is an economic concept with relevant socio-political and legal implications. However, the economic rationale behind the consumer welfare standard seems to be often overridden by its political rationale, which is to legitimise the enforcement of competition rules by competition authorities and reflect society's preferences on income distribution. The discussion below will address the implications of the consumer welfare standard in welfare economics, political economy and law. Its application is neither without practical difficulties nor without the requirement to make considerable tradeoffs in decision making. The implementation of the consumer welfare standard in competition law is a political choice rather than an economic or legal rationale. The legal and economic implications of consumer welfare may differ and various combinations are possible when it comes to enforcement. These combinations have a direct impact on the way competition cases are decided and how competition policy is shaped by competition authorities.

The term consumer welfare has several interpretations and it has often been misinterpreted or even misunderstood in competition law analysis.[1] It is sometimes used to refer to economic efficiency or a certain consumer interest without defining its real content. Depending on its exact content the consumer welfare standard can lead to different policy decisions in competition law enforcement. This is most explicit in merger cases such as *GE/Honeywell*,[2] but has relevant implications for cases of collusive and unilateral behaviour, as in the recent judgment of the European Court of First Instance in *GlaxoSmithKline,*[3] or some of the controversial predatory pricing cases of the European Court of Justice.[4]

In economics the consumer welfare standard has a number of shortcomings vis-à-vis the total welfare standard. The consumer welfare standard lacks a firm basis in welfare economics and its enforcement confronts private companies with a complicated burden of proof. Competition authorities can take various approaches when they want to reconcile the overall interest of society with the particular interests of consumers.

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[1] 'The term consumer welfare is the most abused term in modern antitrust analysis', Brodley, JF, 'The economic goals of antitrust: efficiency, consumer welfare, and technological progress', (1987) 62 NYUniv LR 1020, p 1032.

[2] Both the US DOJ and the European Commission based its decision on the consumer welfare standard in their decision in the *GE/Honeywell* merger case. Nevertheless, the two competition agencies reached opposing decisions. The American antitrust enforcement agencies pursued the consumer welfare standard by recognizing certain efficiency gains that produce no short-term consumer benefit but benefit consumers in the long term. The European Commission seemed to be less satisfied with promises of long-term benefits for consumers and preferred to see short-term advantages. Commission's Decision In General Electric/Honeywell, Case No. COMP/M.2220, July 3, 2001.

[3] Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission*, judgment of 27 September 2006.

[4] Case C-62/86 *AKZO v Commission* [1991] ECR 3359, Case T-83/91 *Tetra Pak International SA v Commission* [1994] ECR II-755.

Moreover, the approach of lawyers and economists may diverge as well. The need for unambiguous standards and consistency and uniformity among these standards worldwide is gaining importance as transactions more frequently take place in global dimensions.

A discussion of the possible interpretations of the consumer welfare standard is topical considering the fact that it is, today, a commonly proclaimed goal of competition policy and an often applied benchmark of competition law enforcement. European competition policy has recently come to acknowledge that besides market integration the enhancement of consumer welfare is the ultimate goal of the enforcement of competition rules. This recognition has taken place parallel to the decentralisation of European competition law enforcement and the introduction of a more economics and effects based approach. Effective enforcement, and an enhanced role of enforcement agencies, has increased through the introduction of the new enforcement system under Regulation 1/2003. The success of the new enforcement system will fall or triumph on whether national courts and competition authorities will develop a sufficient degree of expertise to handle cases consistently in a uniform manner. A clearly set and uniformly enforced standard is, therefore, of utmost relevance for European and national enforcement agencies, the business community and final consumers.

This article will contribute to a more realistic picture as to what extent the enforcement of competition law can prevent (final) consumer harm and make (final) consumers better off. The analysis will also point out which consumer interests competition law can effectively address and what the inherent limits of the promotion of consumer interests are in competition law. Comparing the consumer welfare standard in competition law and in consumer law helps to clarify and identify the function of this standard. Such comparisons also help to delineate the borderlines between the two disciplines, and the possible gaps and unnecessary overlaps they create in regulating markets. It, moreover, contributes to understanding how markets work, how markets fail to work, and how these market failures can efficiently be corrected.

This article will be structured into four parts. In the first part the different interpretations of the consumer welfare standard in competition law and consumer law will be set out. The second part will discuss the application of the consumer welfare standard in competition law enforcement. This part will deal with the implications of the welfare standard with regard to efficiency claims and the pass-on rate in merger cases as well as with the implications of the consumer welfare standard in cases of collusive and unilateral behaviour by addressing the nature of consumer harm and the efficiency defense. The third part will give a short discussion of the consumer welfare standard against the backdrop of EC competition law with minor references to the US antitrust system. This part will explain the implications of this welfare standard under Article 81 EC in more details. The fourth part will describe the legislative policy and the institutional implications of the accepted welfare standard in competition law.

THE INTERPRETATIONS OF THE CONSUMER WELFARE STANDARD

While for many the derived consumer benefits of competition policy seem to be obvious, the role competition law and policy have in pursuing consumer interests is not always well understood or even misunderstood.[5] Competition law is primarily concerned with economic efficiency and with the overall welfare of society, without distinguishing between different groups of society. While competition regimes all around the world pursue this goal they are usually not based exclusively on efficiency arguments. Accordingly, competition law guarantees that consumers get a fair share of the economic benefits resulting from the effective working of markets and economic and technical progress. Such economic benefits can be realised through lowering the costs of production, expanding output, improving the quality of the product or creating a new product and spurring innovation. This implies that competition policy has as one of its goals the improvement of consumers' economic interests. However, is this the ultimate goal of competition policy? And does this goal correspond to the consumer welfare standard applied in consumer law? Which consumer interests can competition policy effectively pursue and how does it maximise consumer welfare? These questions will be discussed below.

Consumer Welfare as the Goal of Competition Policy

Consumer welfare is generally defined as the maximisation of consumer surplus, which is the part of total surplus given to consumers. This is realised through, 'direct and explicit economic benefits received by the consumers of a particular product as measured by its price and quality'.[6] The consumer welfare model argues that the ultimate goal of competition law should be to prevent increases in consumer prices, restriction of output or deterioration of quality due to the exercise of market power by dominant firms.

Competition policy generally has as its aim to increase the overall material welfare of society through maintaining rivalry among firms. The ultimate goal is to increase overall economic efficiency while providing consumers with a fair share of this total wealth. While society's total welfare is usually the ultimate goal of competition policy it is rarely its exclusive goal. Competition policy usually focuses on a specific reconciliation of the

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[5] Such a misconception can be found in the way Judge Bork explained the goal of antitrust law. In his view the ultimate goal of antitrust policy was the maximisation of consumer welfare. Bork argued that, '… the whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare.' Bork identified consumer welfare with overall economic efficiency when he considered productive efficiency as part of consumer welfare as he considered the sum of consumer and producer surplus. Bork, R.H. *The antitrust Paradox: a policy at war with itself*, New York, Basic Books, 1978.
If the aim of antitrust is the maximisation of consumer welfare then, it gauges the level of allocative efficiency, typically measured by the difference between marginal cost and the valuation of a marginal production unit by consumers. Therefore, it cannot be equated with economic efficiency, which stands on the basis of the total welfare standard. The consumer welfare standard does not seek to maximise total surplus, it is only concerned with consumer surplus.

[6] Brodley, op cit, n 1, p 1033.

overall interest of society with the particular interests of consumers. The difference between competition policies lies in the particular way in which they reconcile these interests. Whether a given competition policy strives to achieve pure economic goals, in particular economic efficiency, or whether it includes non-economic goals, like income distribution, diffusion of economic and political power or fostering business opportunity, as well depends on the economic goals of the political system it is part of.

Three approaches are possible. First, competition policy may ignore consumer interests and focus solely on total welfare and economic efficiency. Second, it may recognise the immediate and short-term interests of consumers as the primary aim of competition policy. Third, competition policy might recognise consumer welfare as an essential long-term goal where the immediate interests of consumers are subordinated to the economic welfare of the society as a whole.[7]

The first approach seems to have little attraction for policy-makers as it ignores the wealth transfer from consumers to producers and thereby neglects any kind of protection for consumer interests. This approach would find little support in society as it ignores consumers who 'by definition include us all'.[8] Still, certain scholars, especially those associated with the Chicago School, argue that competition law is not suited to deal with income distribution and that other public policies are better suited to deal with such equity goals – 'Antitrust thus has a built in preference for material prosperity, but it has nothing to say about the way prosperity is distributed or used.'[9] The school considered efficiency gains as politically neutral, but regarded wealth transfers as politicised. Wealth should go where it is the most appreciated.[10] This Chicago premise stands for a policy which is considered to be efficient when the total gain of those who gain from the policy is greater than the total losses to those who lose as a result of the policy. The Chicago School therefore considers a policy which produces greater gains to business than losses to consumers to be efficient. This approach, considers a monopoly which produces cost savings, but at the same time higher prices for consumers, as legitimate. Despite its economic rationale, it is unlikely that competition agencies or courts would adopt a policy that permits fixed cost-savings of producers and thus increase in total welfare but harms consumers by increasing prices.

The second approach would prefer immediate short-term consumer interests to the overall social interests. This approach ignores the inherent tension between consumers' immediate interests and producers' incentives to sustain innovation and productive efficiency.[11] It disregards efficiency gains and benefits that drive productivity growth and innovation and that could actually benefit consumers in the long run.

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7 Brodley, op cit, n 1, p 1035.

8 President Kennedy's message to the United States Congress in 1962.

9 Bork, op cit, n 5, p 90.

10 Posner, RA, *The Economics of Justice*, Harvard University Press, 1981, p 92; Bork, op cit, n 5, pp 418-25.

11 Brodley, op cit, n 1, p 1036.

The third approach aims at long-term consumer interests through subordinating short-term consumer interests to the overall welfare of the whole society on condition that consumers are provided with a fair share of the overall economic welfare:

> Antitrust policy, therefore, need not concern itself directly with increasing the purchasing power of the poor because it accomplishes this indirectly when it prohibits cartels and monopolies in the single-minded pursuit of efficiency.[12]

Competition policy following this approach will, however, only allow activities that increase the overall welfare of society but harm consumers' short-term interests if three conditions are fulfilled. First, the activity must increase total welfare by realising substantial production and innovation efficiencies. Second, the activity has to be necessary, reasonable and proportionate so as to harm consumers as little as possible. Third, it must not lastingly impair competition and be able to re-establish competition on the market. This condition requires that a fair share of efficiency gains is passed on to consumers.[13]

The Debate on the Proper Welfare Standard: insights from welfare economics

Ideally, competition policy makers select the goals of competition policy on the basis of economic needs of society. These goals should correspond to the actual failures of the market and economic problems consumers face. Almost unavoidably these goals will be part of political bargaining and as such may not always correspond to the practical realities of enforcement. There might be potential conflicts between the selected policy goals and the way they can be enforced. These potential conflicts are discussed below.

The debate about the proper welfare standard for competition policy implies that the chosen standard makes a significant difference when it comes to enforcement of competition rules. However, some commentators argue that under both the total welfare as well as the consumer welfare standard similar outcomes can be attained.[14]

Economists traditionally favour a total welfare standard on the basis that it generates the most for society as a whole and strives for the maximisation of efficiency. The total welfare standard stands for allocating resources to those who value them most and it takes account of both allocative and of productive efficiency. It, furthermore, treats wealth distribution between consumers and producers neutrally. Economists consider the consumer welfare standard as arbitrarily favouring one group over another, at the same time impeding the maximisation of efficiency, innovation, competitiveness and economic growth. As Okun argued, 'We can't have our cake of market efficiency and share it equally'.[15]

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12 Elzinga, KG, 'The Goals of Antitrust: other than competition and efficiency, what else counts?' (1977) 125 U Pa LRev 1191 at 1194-95.

13 Brodley, op cit, n 1, p 1037-9.

14 Baker, JB, 'Competition Policy as a Political Bargain', Working Paper, 26 December 2005, p 59.

15 Okun, A, *Equality and efficiency: the big tradeoff*, Washington, DC, The Brookings Institution, 1975, p 2, cited in Elzinga, op cit, n 12, p 1194.

The consumer welfare criterion lacks a firm foundation in welfare economics. In welfare economics equal gains will yield equal increases in utility and these will have equal effects on social welfare. According to the consumer welfare standard utility transferred from consumers to producers will not improve total social welfare, although it will make someone better off. This standard discriminates between individuals in different interest groups as it assigns zero weight to seller-shareholder profits and disregards the fact that gains to sellers, producers and shareholders can be socially positive. As the consumer welfare approach considers wealth transfers from consumers to producers as being rather harmful than neutral, it is more critical of efficiency claims.[16]

Competition policy is an economic efficiency-oriented policy and therefore apt to target and promote the overall economic welfare of society instead of making value judgments on how such economic welfare should be distributed between different social groups. There are other public policies that are better suited to address the distribution of income on the basis of fairness and relative deservingness such as taxation or consumer protection.[17] Moreover, while it could be argued that real world markets do not correlate with the theoretical assumptions of economic theory, a competition policy focusing on pure efficiency arguments has an important virtue as compared with a competition policy pursuing equity goals. Efficiency is relatively objective and predictive as compared to equity. It avoids the uncertainty associated with value judgments about the fair distribution of economic benefits and about determining relative deservingness.[18]

Still, efficiency should not be absolute. It should not be the end but the means to achieve social goals.[19] Competition policy is not made on the basis of simple derivations from analytical models and policy goals have to be transformed into feasible enforcement objectives on the basis of which a clear benchmark in competition cases can be put forward. If we accept that competition policy arises out of repeated interaction and coordination between two large interest groups and is eventually the result of political bargaining between consumers and producers[20] then the selection of policy objectives also has to be regarded as a result of this bargaining process. In other words, a certain set of policy objectives is the result of political bargaining aiming at maximizing economic efficiency gains rather than being a pure economic or legal rationale. If we, furthermore, accept that consumers usually have a weaker position in the process of bargaining, lobbying and litigation then a pro-consumer policy objective

[16] Duhamel, M, & Townley, PGC, 'An effective and enforceable alternative to the consumer surplus standard' (2003) 26(1) World Competition 18; Piaskoski & Finkelstein. 'Do Merger Efficiencies Receive "Superior" Treatment in Canada? Some Legal, Policy and Practical Observations Arising from the Canadian Superior Propane Case' (2004) 27(2) World Competition 259, pp 280-281.

[17] Farrell, J, & Katz, M.L, 'The Economics of Welfare Standards in Antitrust', Competition Policy Center Paper CPC06-061 (2006), pp 9-10.

[18] Farrell, Katz, ibid, p 9.

[19] Elzinga, op cit, n 12, pp 1212-3.

[20] Baker, op cit, n 14, p 2.

seems justified. Therefore, the consumer welfare standard can be seen as a kind of 'rebalancing' measure.

This seems to be in line with the rationale that enforcers of competition rules are increasingly concerned about political support for their work. Any competition law enforcement, which transfers rents from consumers to firms, by allowing firms to adopt practices that generate allocative efficiency benefits while reducing consumers' surplus threatens to undermine consumer confidence. Confidence of consumers in the market is relevant in order to have consumers' political support for the political bargain in favour of competition law.[21]

No democratic government would impose legal rules that are based on sole efficiency arguments and the total welfare standard. Lyons gives a number of further explanations for the political considerations in favour of the consumer standard. These include the following: voter preference under majority rule, when more people think of themselves as consumers than as recipients of profits, evolution of legislation originally targeting different goals like conserving small firms for social reasons, national indifference to foreign owners, second-best counterbalance to trade protection lobbyists and random historical events.[22]

What is more, lawyers and policy-makers tend to think in a more nuanced way. Lawyers become lawyers by partly studying legal traditions and becoming familiar with the underlying values of a certain legal system. In a way they absorb these values in their legal thinking. When lawyers make policies or draft laws they take these traditions and values of their legal system into account. Moreover, they take wider public interests into account in cases where economists would be solely concerned about efficiency arguments. In this way, the dilemma between the total welfare standard and the consumer welfare standard reflects the conflict between the approach of lawyers and economists.

Competition authorities all around the world are becoming more conscious of the impact that competition policy and law enforcement has on consumers. They seem to be ever more anxious to declare and demonstrate the significant role they play as enforcers of competition law in consumers' economic life. The European Commission is no exception.[23] In the footsteps of former EC Commissioner Mario Monti, Neelie Kroes formulated the competition policy message of her cabinet as the following, 'Our

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[21] Baker, op cit, n 14, p 56. 'Can we imagine a press release by an enforcement agency that claims its enforcement of the antitrust laws, instead of vindicating consumer interests, has protected competitors, dispersed political or economic power, advanced populism, or eliminated corporate corruption?' WH Rooney, 'Consumer injury in antitrust litigation: Necessary, but by what standard?' (2001) 75 St John's LRev 561 at 563.

[22] Lyons, B. R. 'Could Politicians Be More Right Than Economists? A Theory of Merger Policy', Centre for Competition and Regulation, UEA, Working Paper 02-01, 2002 p 2.

[23] The European Commission emphasizes that anti-competitive practices raise the price of goods and services, reduce supply and hamper innovation, which in turn increase the input costs for European businesses and as a result consumers end up paying more for less quality. European Commission, Annual Report, 2005, p 7.

aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources'.[24] Director General of DG Competition, Philip Lowe emphasized that, 'competition is not an end in itself, but an instrument designed to achieve a certain public interest objective, consumer welfare'.[25]

Thereby the European policy makers finally synchronize with other enforcement agencies around the world. In the United States antitrust enforcement has a much longer tradition. Besides the Antitrust Division of the Department of Justice, 'the FTC acts to ensure that markets operate efficiently to benefit consumers'. In the United Kingdom the Office of Fair Trading's Statement of purpose declares, 'The OFT's goal is to make markets work well for consumers'. These and similar statements imply that competition policy works towards the improvement of consumer interests. Who are the consumers and which are the interests consumer welfare as the goal of competition policy refer to?

This is the question that is going to be discussed in the following. This discussion will take place against the backdrop of consumer protection laws and EC competition law with minor references to the US antitrust system. It will deal with efficiency arguments in merger cases and with the nature of consumer harm as well as the efficiency defense in other anti-competitive practices.

Consumer Welfare as the Goal of Consumer Protection

Consumer protection rules are to provide final consumers assistance in their market transactions either through preventing or remedying market failures. These rules target areas where competition rules are inapplicable or ineffective. Consumer law can address information inefficiencies like imperfect information, information asymmetries or even bounded rationality as well as health and safety aspects of market transactions. The provision of good quality and cost of consumer information makes free and well-informed decisions possible. Furthermore, while health and safety measures might be less efficient in terms of economic efficiency, they achieve social objectives of overriding interest.

In consumer law everything revolves around the consumer. This special economic actor, and his psychological mind set, is the subject of consumer rules. Accordingly, consumer law follows a subjective approach by paying more attention to the consumer, rather than to the 'act of consuming'.[26] The consumer's point of view, his interests and needs and his economic role define the content and orientation of consumer law. Consumer law has to take account of the individual as well as the collective interests of consumers. While most of the measures concern the collective market position and

[24] European Commissioner for Competition Speech at the European Consumer and Competition Day. London, 15 September 2005

[25] 'Preserving and Promoting Competition: A European Response', EC Competition Policy Newsletter, 2006 - Number 2 – Summer, p 1.

[26] Bourgoigne, T, 'Characteristics of Consumer Law', (1991) 14(3) Journal of Consumer Policy 293, p 298.

general interests of consumers, individual consumer problems have to be analysed in order to find credible and efficient ways to resolve them in a collective dimension.

Consumer law consists, first of all, of mandatory rules that guarantee that parties will not depart from the legislative rules to the detriment of the consumer. It comprises the obligation of information disclosure as information plays a significant role in consumers' lives. Measures address safety and quality controls of consumer goods and services, indebtedness and dispute resolution. Consumer law, further, contains legal rules aimed at the improvement of existing substantive law, like liability, standard form contracts, competition or advertising. Consumer law is considered to be a more effective instrument of consumer protection when it prevents rather than provides a remedy for loss or damage. The advantage of preventive measures is avoiding the social costs of loss and damage and that they focus on collective consumer interests, while remedial consumer law is aimed at the loss and damage suffered by individuals.[27]

Consumer welfare is also the benchmark of consumer protection laws. While various theories exist on the goals of consumer protection, their starting points coincide: market failures have to be corrected in order to assist the weaker party in their transactions. Consumer related regulations are aimed at correcting market failures in order to improve the consumer's position in market transactions. Such regulation should concentrate on empowerment of rational market players rather than the protection of weak dummies. In this context the notion of consumer means the final consumer and the protected consumer interests extend beyond economic benefits to non-economic aspects of market transactions. Consumer law is not only concerned about efficient transactions and cost-savings but it is also directed at social aspects of the market such as the safety and health of consumers. It focuses on people's standard of living and on its improvement. Besides cost-efficient substantive rules, the toolbox of a modern consumer law system contains procedural rules for cheap, fast and easy access to justice and is concerned about effective enforcement methods.

Welfare is, therefore, expressed in both economic and non-economic aspects within the realm of consumer protection. Economic efficiency is not the sole guiding principle in this realm of the law. There is almost always a social justice component as well. Economic efficiency is, however, of utmost relevance when regulatory tools and enforcement institutions are being selected and implemented. Efficiency can be maintained when consumers' capacity and resources are improved in a way that allows them to promote and enforce their interests instead of a mechanism where the state does so.

Analysing the consumer welfare standard against the backdrop of consumer protection theories sets the discussion in competition law in a different light and provides a challenging contrast to the competition law framework.

[27] Goldring, J, 'Consumer Law and Legal Theory' (1990) 13(2) Journal of Consumer Policy 113, pp 124-126.

Whose Welfare Standard Counts?

For analytical clarity it is illuminating to have a look at the question whether the consumer welfare standard in competition law is the same or similar to the consumer welfare standard of consumer laws. In other words, whose welfare is taken into account through competition rules and whose welfare is the benchmark in consumer protection. Such an analysis can point out to what extent separate consumer protection legislation is justified and necessary in order to enable consumers to capture the advantages that had been made possible by effective competition and competition law enforcement. In the following the difference between these two interpretations will be analyzed through first, explaining the different notions of the consumer and the various consumer interests that are addressed by the two legal areas.

It is difficult to find a consistently applied consumer notion in consumer law. EC Directives on consumer matters lack a uniform definition. However, four decisive features can be distinguished. Most EC Directives on consumer protection refer to consumers as natural persons acting for purposes outside their trade, business or profession.

In contrast, under the competition rules consumers usually constitute a broader group. In EC competition law, for example:

> [T]he concept of "consumers" encompasses all users of the products covered by the agreement, including wholesalers, retailers and final consumers. In other words, consumers within the meaning of Article 81(3) are the customers of the parties to the agreement and subsequent purchasers. These customers can be undertakings as in the case of buyers of industrial machinery or an input for further processing or private individuals as for instance in the case of buyers of impulse ice cream or bicycles.[28]

This definition makes it clear that competition rules promote intermediate buyers to 'honorary' consumers.[29] Trade practices that come before competition authorities concern intermediate inputs and final products. The direct consumers of these inputs, and thus the entities most frequently involved in the impact assessment of a merger or other unilateral or collusive practice are intermediate buyers and not or not exclusively final consumers. The effects of a certain commercial conduct on these intermediate

[28] Guidelines on the application of Article 81 (3), point 84

[29] 'If we think of competition as a regime in which the different suppliers contend to sell their products to participants on the other side of the market, then the benefits reaped by the other side of the market will themselves provide a measure of how well competition works. For final-products markets, this observation leads directly to a consumer welfare standard. For primary- or intermediate-products markets, a consumer welfare standard is obtained by adding the observation that the vertical organization of industry itself is a subject of competition the ultimate beneficiaries of which are the final consumers. In either case, competition forces the supply side of the economy to be responsive to consumers needs with respect to price, quality, variety, etc.; business strategies that respond to these needs and raise consumer welfare are likely to be legitimate competitive strategies.' Report by the EAGCP, 'An economic approach to Article 82', July 2005, p 8.

customers can be different from the effects on the ultimate consumers to whom they sell. Purchasers of intermediate goods may employ different production techniques in producing the competing final goods. On the one hand, some of these producers may rely less heavily on a particular input than do others, and therefore the impact on the former group may be positive even if a merger threatens to raise the incremental costs for that firm and its rivals. On the other hand, some producers may have substantial stocks of the input either warehoused, or incorporated into final products not yet sold and thus they may benefit from the higher incremental costs. In effect, firms that face relatively small cost increases may benefit on net from the fact that consumers shift towards them and away from competitors whose costs have increased even more. Moreover, where final demand is inelastic and pass-through is likely to be nearly complete, intermediate goods customers may believe that they will not be very much harmed by even a substantial post-merger increase in the price of what they buy. Final consumers, however, may be harmed.[30]

Competition authorities, therefore often examine the intermediate impact on these direct buyers and presume that any harm to intermediate buyers create harm to final consumers, i.e. harm to final consumers can be inferred from harm to direct buyers and the benefits flowing to these direct buyers are passed through to the final consumers. In any case, competition rules do not differentiate between final consumers and firms who are the immediate buyers of the products or services of the parties being investigated. Such a differentiation does not seem necessary in every case and harm to intermediate buyers can be presumed to create harm to final consumers. However, there are situations where end consumers will be affected in a different way than intermediate buyers. As has been illustrated above most welfare standard analysis takes place in a simple framework where firms are selling products to final consumers and where the firms are the sellers and consumers are the buyers. However, economic conduct often takes place between producers on one level selling inputs for intermediate sellers who produce their own products and then sell on the retail market. When intermediate firms have some market power and thus competition is not strong they may decide not to pass on efficiencies in the form of lower prices but keep these savings as rents. Pass-through of efficiencies to final consumers depends on demand side conditions and the oligopoly game firms are playing.[31] Thus there are situations where final consumers would be left worse off, even as some (or even all) intermediate good producers benefit. The investigation competition authorities conduct today pay no attention to these differences except in cases where the retail market is the relevant market where the parties set off their products. Such a case has been the subject of the recent judgment of the Court of First Instance in *GlaxoSmithKline Services*.[32] In this case

[30] Heyer, K, 'Welfare Standards and Merger Analysis: Why not the Best?', Economic Analysis Group Discussion Paper 06-8, March 2006, pp 17-18.

[31] Heyer, ibid, p 11.

[32] Case T-168/01 *GlaxoSmithKline Services v Commission*, Judgment of 27 September 2006.

the CFI explicitly referred to the impact of an agreement on the welfare of final consumers throughout the whole judgment.

In sum, competition rules and the enforcement agencies consider the welfare of final consumers in a broader pool of intermediate sellers and customers of the firms and only occasionally consider the impact on the economic interests of final consumers.

The consumer who is protected through consumer protection legislation is in most cases restricted to final consumers. This difference between the broader notion of consumer in competition law and the narrower notion in consumer law can be understood by the diverging goals of competition law and consumer law. Competition law focuses on the maintenance of competitive markets without artificial restraints and it is more concerned with the general economic interests of society than with the specific interests of final consumers. The benefit of competition law enforcement will, therefore, not always have a direct and immediate impact on final consumers. For example, the advantages innovative firms generate by spurring the overall economy and using resources in order to develop new and improved products and services whereby they increase the variety and the quality of goods and services available for consumers, takes time and cannot be translated into immediate consumer benefits. When these long-term benefits are passed-through to final consumers in the form of improved quality and output or even lower prices is not always predictable.

Claiming that competition laws and enforcement should be at all times concerned with the interests of final consumers seems neither a realistic nor a feasible requirement. A more robust assessment of the impact of trade practices on final consumers is nevertheless necessary. It helps to design objective, effects based, standards for investigation and self-assessment. Furthermore, a sound market regulatory system should take account of the useful effect competition law enforcement has for consumers' economic well-being and identify those consumer interests and market failures that competition laws cannot take care of and that can be addressed by other regulatory means. Consumer protection legislators sometimes disregard the potential benefits of an effective competition regime for final consumers and impose overreaching regulations or do not single out the blank areas.

Which Consumer Interests Are At Stake?

Consumer interests are difficult to define. They are diffuse and diverse. They vary between different groups of consumers and they are mixed with the interests of suppliers. This, however, is not conclusive to argue that consumer interests cannot be represented and protected.

While it would be difficult to draw an exhaustive list of the various consumer interests consumer law and enforcement aim to guarantee low prices, a wide variety and high quality of products and services, free choice among these, and adequate information about the nature and consequences of purchasing decisions. Besides these aspects access to justice through effective judicial or extra-judicial means to enforce consumer rights and seek appropriate remedies are the core goals. Effective enforcement of

consumer rights and efficient access to justice are just as important as the substantive rights themselves.[33]

Information plays a significant role in consumers' lives; they communicate to sellers their preferences and provide firms with incentives to compete by producing goods and services that consumers value. Information, therefore, functions as a competitive constraint on firms to compete on price, quality and other terms of transactions. Information is an important sunk cost in many transactions and plays a key role in bargaining processes. It is of strategic value and trading and contracting practices are all about either exploiting or securing this advantage or protecting against such an advantage. Buyers of information often have difficulty in determining the value of the information and thus the price they are willing to pay for it.[34] Further, the nature and the distribution of the information is crucial in assessing how consumer markets work. Identifying potential information failures such as misallocation of consumer resources, informational market power, artificial product differentiation and problems of information processing are key to designing strategies and measures from make markets work more efficiently.[35]

Potential sources of information failures are also present in fully competitive markets. Information failures then may lead to situations where consumers face high search and switching costs. Consequently, consumers conclude bad deals or might get disconnected to markets which in turn may retard competition in the marketplace.[36]

Consumer interests are not only directed at economic, but also at social aspects of the market. The protection of consumers is thus not limited to preventing enterprises from asking excessively high prices and to oppose the one-sided communication structure on the market. Consumers also attach great importance to the quality of living standards. These non-economic interests include health and safety concerns, environmental

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[33] Directive 98/27 EC on injunctions for the protection of consumers' interests, OJ 1998, L166/51, Regulation 2006/2004 on consumer protection cooperation, OJ 2004, L364/1. The International Consumer Protection Enforcement Network is a worldwide network of national authorities with the aim of strengthening and improving the enforcement of consumer protection legislation (except product safety and the prudential regulation of financial institutions). The Network of European Consumer Centres is there to help with such questions and any other problems you may have concerning your activities as a consumer in Europe.

[34] Good examples are credence goods and especially those liberal professions that involve complex technical services. Liberal professions often have a legislative monopoly and can therefore influence access to the profession as well as they are involved in fixing the fees. The customers of these professional practitioners, for example the clients of a lawyer may never be able to precisely assess whether their lawyer did indeed provide high quality services. Information is thus essential for consumers to assess the possibilities the market offers and to select the best combination of price and quality that fit their individual needs.

[35] Ramsay, I, 'Framework for Regulation of the Consumer Marketplace' (1985) 8(4) Journal of Consumer Policy 353, p 360.

[36] Examples can be found in the recently liberalized utility markets, such as telecommunications, electricity or gas. For more on this issue Cseres, KJ, 'The impact of consumer protection on competition and competition law: switching of consumer in deregulated markets', 2005 OECD Roundtable discussion on demand-side economics for consumer policy: summary report, DSTI/CP(2006)3 Final, 2006.

protection, culture or even sports.[37] Some of these specific interests of consumers have been promoted a special status within the EC Treaty, like environmental considerations[38] in Article 6 EC or services of general economic interest through Article 86(2) EC,[39] and consequently are given more emphasis in other policy areas including competition law.

The time-frame within which consumer benefits should be realised is another issue that calls for a more nuanced approach. In merger cases, but to some extent in cartel and monopolization cases, consumers' immediate interests through lower prices and no restriction of output are balanced with long-term economic interests of the whole economy in the form of firms' cost savings and technical development. The balancing of these short-term and long-term benefits requires a careful analysis that needs to take into account a reasonable time period in which innovative firms are able to make investments and produce efficiencies. Exact quantification of such a time period depends on the nature of the products or services, and the industry characteristics; thus the nature of the expected consumer benefits might differ greatly from case to case.

This trade-off and the relevance of innovation has been recently spelled out in a US monopolization case. The United States Supreme Court in its *Trinko* decision[40] declared that:

> the mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices - at least for a short period - is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth.[41]

The Court then proceeded to reject expansive views of a monopolist's duty to deal with its competitors, emphasizing that compelling firms to share the source of their advantage, 'is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities'.[42] Thus innovation and the prospect of a wider range

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[37] Sports seem to be another area, which has been given special attention in the enforcement of competition law. Case C-415/93 *Bosman and others v Union Royale Belge des Sociétés de Football Association and others* [1995] ECR I-4921, On 23 July 2003, the Commission exempted the joint selling agreements regarding the media rights of the UEFA Champions League, Commission Decision of 23 July 2003, Case COMP/C-2/37.398, OJ 2003, L291/25.

[38] Case IV.F.1/36.718. *CECED*, OJ 2000, L187/48.

[39] See also the Commission's Communication on services of general economic interest in Europe, OJ 2001, C17/4, point 10: 'The needs of users should be defined widely. Those of consumers clearly play an important role. For consumers, a guarantee of universal access, high quality and affordability constitutes the basis of their needs.'

[40] *Verizon Communications Inc. v Law Offices of Curtis v. Trinko, LLP*, 124 S. Ct. 872 (2004).

[41] *Trinko, LLP*, 124 S. Ct. 872 (2004) at 879.

[42] *Trinko, LLP*, 124 S. Ct. 872 (2004) at 879.

of products in the future should be balanced with short-term restrictions of competition.

This section can be concluded by two remarks. On the one hand, it has been shown that competition rules and enforcement equate consumer welfare with the welfare of intermediate sellers and customers of the firms together with final consumers and only occasionally considers the impact on the economic interests of final consumers. On the other, reviewing the list of various consumer interests, it can be argued that competition law is first of all to benefit consumers in terms of price and output and it is less capable of taking into account broader consumer interests, like health, safety or information problems. Although competition enforcement might incidentally address consumers' non-economic interests, it is neither fit nor effective in doing so.

THE ROLE OF CONSUMER WELFARE STANDARD IN COMPETITION LAW ENFORCEMENT

The primary role of the consumer welfare standard in competition law enforcement is to form the framework of reference where liability under competition rules is determined. On the one hand, it provides the standard of proof required from competition agencies and from private individuals in order to prove the negative effects of companies' conduct and thus a violation of the competition rules. On the other, it determines what companies need to bring as evidence to demonstrate positive effects in order to justify their otherwise restrictive conduct on the market. In other words, the consumer welfare standard sets the criteria of the assessment and measurement of the anti-and pro-competitive effects of business practices.

It is generally acknowledged that increased prices, reduced output and decreased quality are the prime indicia of negative effects on competition. These indicators are the hallmarks of consumer injury, which is generally regarded as an inherent part of the adverse effects on competition. It is generally accepted that a business conduct which makes consumers worse off in terms of price, output and quality makes the competitive process worse off.

Consumer Welfare as the Benchmark of Competition Law Enforcement

The consumer welfare standard plays a different role in merger cases and in cases of collusive or unilateral behaviour. A separate discussion of these practices seems justified as a consequence of the different time framework of enforcement and the standard of proof required in their assessment. The consumer welfare standard has different implications in anti-competitive practices that are the result of cartel agreements, unilateral behaviour and in merger cases.[43]

In merger cases the discussion strongly focuses on efficiency claims and whether enforcement policy should be based on the total welfare standard or the consumer

[43] State aid and the granting of exclusive and special rights to undertakings will be outside of the scope of this paper.

welfare standard. The debate is reduced to the question whether the total welfare standard favours producers to the disadvantage of consumers and whether the consumer welfare standard has a distributional bias in favour of consumers. Moreover, should the analysis of efficiencies focus on price effects (i.e., the likelihood that the transaction will raise price and reduce consumer surplus) or on effects on productive or technical efficiency (i.e., the prospect that the transaction will lower or eliminate costs), or both? It is regularly debated whether the two welfare standards lead to significantly different enforcement outcomes in terms of welfare and what the advantages and drawbacks of both welfare standards are. This discussion is vivid both in the US, where recently the Antitrust Modernization Commission[44] discussed the issue as well as in the EU.[45] Alternative welfare models try to provide possible compromises between the consumer welfare and total welfare standards. They explain and demonstrate that considering these welfare standards in a broader political economy framework can prove their practical usefulness. Whether these alternative approaches can be transferred to other parts of competition law should be further considered.

In collusive and unilateral trade practices the main question is what has to be proved by the competition agencies and private parties before liability under the competition rules can be established. Is it harm to competition, harm to consumers or harm to competitors that counts? What is the impact of the given conduct on the competitive process and on the welfare of consumers? In the following these issues are addressed in more detail.

Merger Cases

It is in merger cases that the balancing of efficiencies and anticompetitive effects is the most explicit and therefore the outcome of competition enforcement depends very much on the chosen welfare standard. This has been illustrated by Williamson's famous trade-off model.[46]

The consumer welfare standard is concerned with direct welfare of the purchasers in the relevant output market. While a competition authority operating on the basis of the total welfare standard makes full trade-offs between consumer and producer benefits in merger cases, a competition authority pursuing the consumer welfare standard does not

[44] Summary of Antitrust Modernization Commission Hearing on the Treatment of Efficiencies in Merger Enforcement, November 17 2005, http://www.abanet.org/antitrust/at-links/pdf/at-mod/efficiencies-merger-enforcement.pdf

[45] De la Mano, M. Enterprise Directorate – General European Commission, 'For the customer's sake: The competitive effects of efficiencies in European merger control', Enterprise Papers No 11, 2002, European Communities.

[46] Williamson's model demonstrates the anti-competitive as well as the pro-competitive effects of a merger. It describes the economic effects of a merger that leads to both an increase in market power and cost savings. As the firm's market power increases, it reduces its output and increases its prices. This results in a loss in allocative efficiency. But at the same time the merger generates cost savings as the firm's level of average costs drops. The model demonstrates that in spite of increased market power, society might still be better off. Williamson, O, 'Economies as an antitrust defense: the welfare tradeoffs', (1968) 58 AmEconRev 18; Williamson, O, 'Economies as an antitrust defense revisited', (1977) 125 U Pa LRev 699.

weigh producer benefits against consumer losses. In this sense it favours consumers to producers. The total welfare standard considers transfers from consumers to producers as not being harmful from an efficiency point of view. There are several relevant questions: does the total welfare standard favour producers to the disadvantage of consumers, does the consumer welfare standard have a distributional bias in favour of consumers, and, ultimately, which welfare standard leads to more efficient market performance? In other words, does it matter which welfare standard is applied and do they lead to significantly different results in terms of welfare?

The following alternative welfare standards imply that the actual outcome of merger decisions depend more on the way a given welfare standard is enforced than on the fact which welfare standard has been chosen as the basis of the competition policy.

Alternatives to the Two Welfare Standards

In the following three alternative models will be presented that all provide a possible compromise for having to choose one or the other welfare standard and thereby disadvantaging either consumers or producers. Actually all three models provide a new approach to the way welfare standards should be enforced rather than a new welfare standard. The first model of 'long-term consumer interest' is an approach that harmonizes immediate consumer interests with the overall welfare of society. This model has been adopted in New Zealand and might be considered in other countries as well. The second model, a balancing of weights approach, is a Canadian 'invention' and it strikes a balance between the redistributive effects that would arise as a result of increases in firms' market power post-merger. The third model is based on insights from political economy.

Long-term consumer interest

This approach harmonizes immediate consumer interests with the overall welfare of society by subordinating consumer interests to aggregate social interest. However, it does so only temporarily.[47] This approach is based on the idea that efficiency gains that are not of immediate benefit to consumers should nevertheless be considered as welcome because in the long run producers' innovation and efficiency gains will benefit consumers. This approach is based on the condition that consumers at one point in time receive a reasonable part of the efficiencies realized by firms. A reasonable or fair share of the efficiencies is 'simply the share of economic surplus that a competitive market would provide'.[48]

The difficulty of this approach lies in its enforcement. How can a competition authority assess whether the efficiency claims should be allowed because it is highly probable that a fair share thereof will be passed on to consumers or, conversely, whether they should not be allowed. Furthermore, it requires a prediction as to long-term competitiveness.

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[47] Ahdar, R, 'Consumers, Redistribution of Income and the Purpose of Competition Law' [2002] ECLR 341, p 351.

[48] Brodley, op cit, n 1, p 1039.

How long can the time-lag be between implementation of the merger and the realisation of efficiencies for consumers?

This approach has been followed by New Zealand in amending its competition law statute, the Commerce Act 1986. The new Act reads that, '[t]he purpose of this Act is to promote competition in markets for the long-term benefit of consumers within New Zealand'.[49]

In the United States there is a widespread perception that the consumer welfare test is applied in a way that takes into account only those efficiencies that are likely to be passed on to consumers in the form of lower prices. On the basis of the 1992 Horizontal Merger Guidelines US competition agencies give most weight to efficiencies that will be passed on to consumers through lower prices in the short term, but will consider the effects of cognisable efficiencies with no short term, direct effect on prices where they think that those efficiencies will ultimately benefit society's welfare. This approach is based on the idea that efficiencies that benefit consumers immediately through decreased prices or increased output will receive the most weight, but others will be considered to the extent that they will ultimately benefit consumers.[50] The discussion around and the recent Supreme Court judgment in *Weyerhaeuser v. Ross Simmons*[51] pointed out the difficulties of applying the consumer welfare standard to monopsony power cases, where the focus is not primarily on the impact of the predatory bidding on consumers but on sellers. Nevertheless, the discussion within the Antitrust Modernization Commission demonstrates that even though there are considerable economic arguments for the total welfare standard, serious proposals for shifting away from the consumer welfare standard have not been made in the US. The overall conclusion is rather that a consumer welfare standard should not be applied in a rigid manner that would lead to absurd outcomes.[52]

The balancing weights approach

This approach tries to find a balance between the negative effects on consumers and the positive effects on sellers/shareholders that result from the income or wealth redistribution as a result of increases in firms' market power post-merger. Increasing a firms' market power has a negative effect on consumers as they lose consumer surplus and a positive effect on sellers and shareholders who gain extra profits. This approach

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[49] 1A Purpose of the New Zealand Commerce Act 2001

[50] Goldman, CS, & Gotts, IK, 'The role of efficiencies in M&A global antitrust review: still in flux?', Fordham Corporate Law Institute 29th Annual Conference on International Antitrust Law and Policy, New York, November 2002 pp 254-5, see also Heyer, op cit, n 30.

[51] *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.* No.(05-381)

[52] Salop, SC, 'Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard', presented to the Antitrust Modernization Commission (Nov 4, 2005) http://www.amc.gov/public_studies_fr28902/exclus_conduct_pdf/051104_Salop_Mergers.pdf; Summary of Antitrust Modernization Commission Hearing on the Treatment of Efficiencies in Merger Enforcement, November 17, 2005 http://www.abanet.org/antitrust/at-links/pdf/at-mod/efficiencies-merger-enforcement.pdf

attempts to consider the wealth transfers or redistributive effects by assigning relative weights to each of the losses to consumers and the gains to sellers and shareholders when weighing the costs and benefits of a transaction. The difficulty in making this efficiency equity trade-off lies in the fact that while efficiencies are to some degree measurable, equity impacts are partly qualitative in nature. This is a mathematical equation that has to make an ethical decision by using value judgements.[53]

The balancing weights approach is allegedly one way to deal with this trade-off problem. It starts from calculating the ratio of gains and losses in a specific merger case. Then the question is whether there is sufficient evidence that the merger has distributional impacts that are so immense that the losses of the losers should be given a premium in excess of the formerly established ratio of gains and losses. If evidence shows that such an excess premium is needed then the merger should be prohibited. The test makes it possible to avoid the shortcomings of both the total welfare and the consumer welfare standards. The total welfare standard neglects distributional impacts even when they deserve consideration and the consumer welfare standard considers distributional impacts to be severe, even when they are not. The balancing weights approach is allegedly capable, on the basis of the facts of the specific case to consider distributional impacts as severe when they indeed are so and neglecting them when they are negligible.[54] This approach involves a socio-economic decision and a value judgment depending on the individual characteristics of the consumers and sellers/shareholders affected by the merger.

In Canada, this test has been applied by an expert witness of the Canadian Commissioner of Competition in the Propane merger when interpreting the efficiency defence under Section 96 of the Canadian Competition Act. The Competition Act adopts a standard somewhere between the total and consumer welfare standard by allowing a merger that substantially lessens competition if efficiencies attributable to the merger are 'greater than and offset' the anticompetitive effect. Thus, if efficiencies are strong enough then even a merger that raises prices for consumers can be allowed.

While the test was rejected by the Competition Tribunal[55] at first instance, it was accepted by the Federal Court of Appeal on appeal.[56] The Competition Tribunal in Superior Propane rejected this test and opted instead for a 'part total welfare, part wealth distribution weighting' test, which it held was mandated by the Canadian statute.[57] The total surplus standard had been the proper test since the early 1990s in

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[53] Duhamel, M, & Townley, PGC, 'An effective and enforceable alternative to the consumer surplus standard' (2003) 26(1) World Competition 3, p 11.

[54] Duhamel & Townley, ibid, pp 11-12.

[55] *The Commissioner of Competition v. Superior Propane Inc.*, 2000 Comp.l Trib. 15, File No. CT1998002 (Aug.30, 2002)

[56] *The Commissioner of Competition v. Superior Propane and ICG Propane Inc.* (2001), 199 DIL.R. 94th 130

[57] Under this test, the Tribunal would approve a merger even if it is likely to result in higher prices, so long as the cost savings exceed what economists call the 'deadweight loss' from any reduction in output plus any negative wealth distribution effect on poor consumers. *Commissioner of Competition v. Superior Propane, Inc.*, CT-98/02 (Competition Tribunal, April 4, 2002) (Reasons and Order Following the Reasons for Judgement of

Canada and it has also been adopted by the Canadian Merger Guidelines. The Tribunal rejected the balancing weights approach, because among others it was of the view that the adoption of this test would lead to inconsistent decisions based on the individual and perhaps subjective views of the members of the Tribunal and that the members of the Tribunal were not qualified to make assessments on the social merit of competing social interests.[58]

In this case the redistributive effects relating to low-income households that used propane for essential purposes and had no good alternative was argued to weigh more heavily than the interests of the shareholders of the merged firm. However, the number of households was rather small. Therefore the adverse redistributive effects of the merger were eventually found to be too small in comparison with the efficiency gains.[59] Propane eventually also led to the amendment of the Canadian Competition Act.

The shortcomings of this test is on the one hand, the problem of how to determine the appropriate weights assigned to each of the societal groups and on the other, the problem of predictability as well as the inevitable risk of subjectivity. While it might improve political flexibility it at the same time endangers legal certainty.[60]

The 'rebalancing' model

This concept is based on insights from political economy and it argues that there are a number of reasons for applying the consumer welfare standard in merger cases. Information asymmetry and information advantages for firms, lobbying advantages and better representation, and the first mover advantage of firms in selecting mergers are the strategic considerations in favour of the consumer welfare standard. It is argued that these advantages on the firms' side create a bias in favour of the firms and the consumer welfare standard can rebalance or counterbalance this bias in the assessment of mergers.[61]

Besanko and Spulber argue that the consumer welfare standard functions as a compensation for information asymmetry. They hold that the information advantage which firms have vis-à-vis regulators in respect of cost savings is a justification for adopting the consumer welfare standard. The consumer welfare standard can rebalance firms' information advantage.[62]

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the Federal Court of Appeal Dated April 4, 2001), available at: http://www.ct-tc.gc.ca/english/cases/propane/0238a.pdf

58 *Commissioner of Competition v. Superior Propane, Inc.*, CT-98/02 paras 431-437, Goldman, CS, & Gotts, IK, 'The Role of Efficiencies in Telecommunications Merger Review' (2003) 56 FCLJ 87, pp 138-139.

59 Gotts, Goldman, op cit, n 50, p 240.

60 See also Kiljański, K, "'Pass-on" in merger efficiency defence' (2003) 26(4) World Competition 651, p 661.

61 Lyons, op cit, n 22, p 14, see also Baldwin, R, & Cave, M, *Understanding Regulation: theory, strategy and practice*, Oxford, OUP, 1999.

62 Besanko, D, & Spulber, D, 'Contested mergers and equilibrium antitrust policy' (1993) 9(1) J Law Econ Organ 1.

Lyons shows that there are circumstances where the consumer welfare standard achieves higher total welfare than the direct application of the total welfare standard. The conditions for this to hold true are more likely to be satisfied in large, complex or internationally integrated economies. He provides a forward-looking rationale for total welfare to be enhanced ex post by the strategic adoption of an ex ante consumer welfare standard. He argues that competition authorities have the disadvantage that they are only able to appraise a merger brought before them. They cannot propose mergers. Firms have a first mover advantage as they can choose whichever merger they wish, including one that just fulfils the criteria of the substantive test. The sequence of mergers they propose can block a more desirable market structure that would evolve under a more restrictive standard. Inasmuch as profits and consumer benefit are negatively correlated along the margin, firms are likely to choose mergers that create negligible total welfare benefit – these would just pass the total welfare standard and maximise profits. Lyons concludes that while the consumer welfare standard is not inevitably optimal, it does have advantages in large, complex economies where there are socially preferable but privately less profitable merger opportunities. When also taking into consideration other reasons in favour of the consumer welfare standard, such as informational advantages of the firms or the effect of lobbying activities, it is far from obvious that economists are right to argue that the total welfare standard provides a better policy rule than the consumer welfare standard. According to Lyons both welfare standards fall short of being optimal rules, but given the need for a single, simple rule, their relative merit is an empirical matter, depending on the prevalent market conditions in merger intensive sectors.[63]

Neven and Röller analyzed merger control in a common agency framework where firms and their competitors can influence the competition authority and where transparency, which makes lobbying less effective, also implies real resource costs.[64] Distinguishing between working under a total welfare standard and a consumer welfare standard Röller examined the performance of the two welfare standards that can be assigned to the antitrust agency in the presence of regulatory failures. Regulatory failures can arise from asymmetric information between the merging firms who have an information advantage with regard to the merger-specific cost savings that are unknown to the competition authority. Röller found that, while under the total welfare standard, the lobbying of firms leads to type I errors, that block efficient mergers, the consumer welfare standard leads to type II errors, namely the clearance of relatively inefficient mergers, that decrease welfare.[65]

Röller found that lobbying could show significant differences between the two welfare standards. Lobbying is characterised by transparency and co-ordination costs. Transparency and co-ordination costs make lobbying less effective. Under the total

[63] Lyons, op cit, n 22, pp 3, 13.

[64] Neven, DJ, & Röller, L-H, 'Consumer Surplus vs. Welfare Standard in a Political Economy Model of Merger Control', Discussion Paper FS IV 00-15, Wissenschaftszentrum Berlin, 2000.

[65] Neven & Röller, ibid, p 20.

welfare standard lobbying, on the one hand, reduces the number of undesirable deals that firms can complete, while on the other, firms can cope with transparency and co-ordination costs only at a certain cost. Under the consumer welfare standard transparency merely affects the balance between incorrect decisions and waste in lobbying. More transparency reduces the effectiveness of firms' lobbying.[66]

Under a total welfare standard, Röller argues that when authorities make mistakes it is most likely to be a mistake of allowing relatively inefficient mergers that decrease welfare to go ahead. In this case, lobbying of firms is a waste of social resources since it is likely to increase the risk of this event. The policy conclusion of this is that, under a total welfare standard, transparency should be maximised in order to minimise wasteful lobbying. In other words, lobbying is more costly when transparency is low.

However, under a consumer welfare standard, Röller finds that there is effectively a bias against firms and that the lobbying of firms 'rebalances' this disequilibrium. Under a consumer welfare standard, the risk of a mistake by the authorities is likely to be in not permitting a merger that is relatively efficient and that would increase consumer welfare, because they only permit those where the efficiencies are very large and clear. In this situation, Röller argued that lobbying by the merging parties is desirable and should be encouraged. In addition, he concludes that transparency is not desirable under a consumer surplus standard as it would reduce the effect of this necessary lobbying.[67] One may question the extent to which a competition authority can be or should be open to being 'lobbied' directly by the parties when they submit their own economic evidence.

Pass-on Rate

The previous sections discussed the implications of the chosen welfare standard when efficiency claims are made. The assessment of these efficiency claims and of the proposed mergers from a consumer perspective is not complete without discussing the pass-on rate of claimed efficiency benefits. The pass-on requirement is the proportion of the efficiencies that have to be passed on to consumers. In order to measure the effects of a merger the extent of price increase has to be set off against the extent to which cost savings are passed through into consumer prices. In a case where the second element is greater than the first, the merger will be beneficial for consumers.[68]

Firms are profit maximizing organizations. Economics teaches us that when the consumer welfare standard is applied the distinction between fixed and marginal cost savings is of particular consequence. Fixed cost savings have no effect on a firm's profit maximizing price or the level of output of profit-maximizing. Thus fixed cost savings alone will not effect consumer welfare and are assumed not to be passed-on to

[66] Neven & Röller, ibid, p 21.

[67] Neven & Röller, ibid, p 21.

[68] Stennek, J, & Verboven, F, 'Quantitative techniques to assess price effects in European merger control from a consumers' perspective', Report for EC Contract no B5-1000/02/000519 between the European Commission and Frank Verboven, 2003, p 4.

consumers. Marginal cost savings will more likely be passed on even in the case of a monopoly. The reason is that demand curves slope downwards and profit-maximizing firms set marginal revenue equal to marginal cost. At least they do not have considerable effect on consumers in the short-run even though might be given some weight with regard to the fact fixed cost savings have substantial efficiency implications for the whole economy and as such may produce benefits for consumers in the long-run.[69]

Pass-on rate will depend on the pass-on level, whether it is industry-wide or firm-specific, on the nature of product, whether it is homogenous or heterogeneous, and on the form of competitive interaction; whether it is perfect, monopolistic or oligopolistic. The question is whether the firm will have incentives to share its cost savings with consumers by lowering prices? For example, a pure price taker, an 'infra-marginal producer' will not find it profitable to pass on marginal cost savings in the form of lower prices but will keep those as rents.

Without elaborating on the pass-on rate in detail, one point should be made from a consumer perspective. When pass-on rate is considered the assessment generally will be restricted to measuring the pass on rate to consumers in the competition law sense, which as has been explained above are all the customers downstream the market. The consumer price at the next level of the production chain, i.e. the price paid by the customers of the firms, will not be the same as the consumer price which these intermediate firms pass on to lower levels of the production chain and eventually for final consumers. Especially if the firms at the intermediate level have some market power they can keep some of the cost savings as rents and not pass it on to the next level.

The current discussion on pass-on rate is vigorous in cartel cases when considering the pass-on of cartel price overcharge to consumers. It is a complicated and complex economic assessment, but one without which damages claims for final consumers would be ruled out altogether.[70] On the basis of the rationale that passing on will be an essential component of cartel litigation, a more elaborated discussion seems legitimate in merger cases too.

Implications of the alternative models

The alternative models described above loosen the strict division between consumer welfare and total welfare standards. They demonstrate that considering these welfare standards in a broader social and political framework, by taking not just pure economic arguments into account, proves their practical usefulness. However, at the same time they demonstrate that both welfare standards in their pure and strictly interpreted form contain little value for efficient enforcement policy. It follows that policy-makers and

[69] Heyer, op cit, n 30, pp 7-8; Stennek, & Verboven, ibid, pp 6-8.

[70] Cseres, KJ, 'Collective consumer actions: a competition law perspective', in, WH Van Boom & M Loos (eds), *Collective Consumer Interests and How They are Served Best in Europe; Legal aspects and policy issues on the border between private law and public policy*, Europa Law Publishing, forthcoming April 2007.

enforcers should not only make their choice for the total or the consumer welfare standard, but also elaborate on the shortcomings of the chosen welfare standard and try to find their refinement in order to maximise their benefits.

One might ask the question whether these alternative standards can be transferred to other parts of competition law. Their practical relevance is explicit in efficiency claims when evaluating anticompetitive conducts that are the result of restrictive agreements and unilateral behaviour. The first alternative advocating a long term view of consumer interests can be considered when efficiencies of an otherwise anti-competitive practice are assessed. Obviously, the assessment of such practices is ex post and therefore the evidence of long term consumer benefits will be substantial.

The political economy arguments of the rebalancing model can similarly find their way in the other parts of competition law. It has, for example, been taken into account by the Economic Advisory Group for Competition Policy in its report on Article 82 EC:

> Referring to this [consumer welfare added] standard is all the more important because, in the actual proceedings on a given case, competitors are usually much better organized than consumers. The competition authority receives more complaints and more material from competitors, so the procedure tends to be biased towards the protection of competitors. Developing a routine for assessing consumer welfare effects provides a counterweight to this bias.[71]

The different role consumer welfare standard plays in collusive and unilateral trade practices will be discussed in the following section.

Collusive and Unilateral Practices

In the case of collusive and unilateral trade practices the relevant questions are less about the choice between a total or a consumer welfare standard than about the criteria on the basis of which the effects of business practices are assessed. Application of a total welfare standard would quickly lead to cases where harm to competitors would qualify as competition law liability and this would lead to undesirable decisions protecting competitors. The established standard should assist competition authorities and private parties to evaluate the effects of business practices on an objective basis. The standard of actual or potential harm to consumers seems to provide such an objective standard of assessing competition law liability. The consumer welfare standard provides a suitable benchmark, when it evaluates the impact of the business conduct on prices, output, choice, quality and innovation. Such a standard has to provide clear guidelines on what amounts to consumer harm. Should there be a direct proof of (final) consumer harm or can such a liability be inferred indirectly from harm to competition or even harm to competitors? When restriction of competition has been established in a case what does a private party need to bring as justification in order to prove that the otherwise anti-competitive agreement brings about substantial efficiencies and therefore the restriction on competition is objectively necessary.

[71] Report by the EAGCP, 'An economic approach to Article 82', July 2005, p 9.

The answers to these questions are directly linked to and largely depend on how explicitly enforcement agencies require evidence of consumer injury. Formulating an adequate standard of proof brings analytical clarity and legal certainty into the enforcement of competition law, which saves transaction cost for enforcement agencies and for private firms.

The Consumer Harm Test

A competition enforcement regime based on consumer welfare cannot but focus on the impact of business practices on consumers as the core issue to establish liability under the competition rules both in public and private enforcement.[72] Therefore, when competition authorities and courts challenge business practices they should require explicit proof of consumer harm in the relevant output market. However, such an explicit requirement of proving actual harm to consumers is often absent from competition cases. It is generally believed that competition is always good for consumers and it is often believed that restriction of competition has detrimental effect on consumers.[73] However, that is not always the case. Even a clear reduction of competition can at the same time bring substantial economic benefits for consumers. This has been overtly the case, for example, in *Broadcast Music Inc. v. CBS*,[74] where the Supreme Court challenged a blanket license issued by a group of corporations consisting of owners of performance rights compositions. The blanket license allowed the licensee to play any composition in Broadcast Music Incorporated's collection. The challenged measure escaped the per se prohibition under Section one of the Sherman Act against price fixing because it promoted competition and increased efficiency in terms of saving millions of dollars in transaction costs for consumers. This case demonstrates that exclusively focusing on the effects of the arrangements on competition one may neglect the efficiencies that had positive economic effect on consumers of music.[75]

In monopolization cases, better known in Europe as abuse of a dominance cases, assessing the business conduct requires an even more finely tuned assessment of consumer harm. In these cases effects on competition and effects on competitors through exclusionary practices should be clearly distinguished from cases where consumers suffer material harm as a result of increased prices or reduced output and quality. What might be unfair vis-à-vis competitors and result in foreclosure is not

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[72] Joffe briefly discusses the proposition for a divergent standard of proof in private enforcement cases. He rejects this proposal. Joffe, RD, 'Antitrust law and proof of consumer injury' (2001) 75 St John's L Rev 615 at 623.

[73] 'The economics of antitrust policy is based upon the proposition that competition ends up, in one way or another, always being good for consumers. That proposition is the central proposition of microeconomics.' Fisher, 6/2/99am, 20:14-19. Microsoft Trial Transcript at 20 (No.98-1232; 98-1233) (June 2, 1999, AM Session) *United States v Microsoft Corp*, 97 F. Supp. 2d 59 (DDC 2000).

[74] *Broadcast Music Inc. v. CBS*, 441 U.S. 1 (1979).

[75] See also Joffe, op cit, n 72, pp 620-621.

necessarily anti-competitive. The controversial assessment of predatory pricing[76] and rebate systems[77] in the EC is well-known. The need for a more economic effects based approach and sharpened evidentiary requirement of explicit consumer harm is indispensible if enforcement agencies want to reliably differentiate between anti- and pro-competitive conduct.

There has always been a tension in competition cases over the risks of enforcing the law so leniently that firms think they can get away with anti-competitive conduct and being so strict that courts would condemn trade practices that benefit consumers but at the same time stifle the competitive process itself.[78] An appropriate consumer harm test should, therefore, be based on objective and hard evidence in order to evaluate the state of competition in the relevant market and the negative effects of practices. Similar evidence should be required from enforcement agencies and private parties when they prove the negative or positive impact of corporate conduct on consumers. Mere assumptions and pure theoretical presumptions do not suffice as once competition liability is established structural and behavioural relief is imposed which on the one hand, reduces the competitiveness of the defendant and on the other, imposes costs on both firms and consumers. Such relief should only be imposed when substantial harm to consumers and competition has been proved.

In the US the Clinton Administration had been criticised for relying on a relatively weak consumer harm test in the assessment of competition liability in cases brought against Intel, Microsoft and Visa. In these cases the US Government argued that explicit proof of consumer harm does not always mean evidence of immediate and actual consumer harm, potential harm suffices. In *FTC v. Intel Corp.* the FTC argued that the undertakings were 'reasonably capable'[79] of making a significant contribution of preserving dominance without factual evidence on reduced rate of innovation, lowered prices or restricted output. Similarly, in *Visa U.S.A., Inc.* the government put forward that:

> to show consumer harm, it is not necessary to prove precisely what choices consumers would have made, precisely how individual firms would have tried to respond to consumers, or whether they would have won or lost the competitive battle; it is sufficient to prove that the challenged restraint had a significant impact on the process by which competitive decisions were made.[80]

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[76] Case C-62/86 *AKZO v Commission* [1991] ECR 3359, Case T-83/91 *Tetra Pak International SA v Commission* [1994] ECR II-755.

[77] Case T-219/99 *British Airways plc v Commission*, [2003] ECR II-5187, Case T-203/01 *Michelin v Commission (Michelin II)* [2003] ECR II-4071.

[78] HH Chang, DS Evans, & R Schmalense, 'Has the consumer harm standard lost its tooth', AEI-Brookings Joint Center for Regulatory Studies, 2002, p 41.

[79] *Intel Corp.*, FTC Docket No.9288 (Feb.25, 1999)

[80] Pls.' Post-Trial Proposed Conclusions of Law P 10 (No. 98-7076) (Sept. 22, 2000), *Visa U.S.A., Inc.*, 1999-2 Trade Cas. (CCH) P 72, 584 (S.D.N.Y. 1999).

The Court in *Microsoft* even described the standard employed by the government as 'toothless'.[81]

Strong evidence can show substantial restriction of the competitive process and material harm to consumers in light of the impact of the practice on the allocation of resources. From the perspective of allocative efficiency, an anti-competitive effect occurs when the challenged conduct restricts output, in a properly defined relevant market, by a material amount for a material duration. A pro-competitive effect takes place when the practice in question expands output in the relevant market by a material amount for a material duration.[82]

A credible enforcement system cannot accept evidence of consumer injury when it is merely inferred from harm to competition or even harm to competitors. Consumer harm can be inferred from harm to competition when the nature and the effect of the conduct is plainly anti-competitive; these are the so-called per se illegal cases in the US and the so-called hard-core cases in the EC. In these cases it can reasonably be presumed that consumers have been harmed and no further analysis is necessary. In all other cases, in the US often labelled as rule of reason cases, substantial and actual harm to consumers has to be proved before competition liability can be established. Strict standards of actual and substantial harm to consumers have been established by the US Supreme Court in *Brooke Group,*[83] for predatory pricing, and in *California Dental As'n.*[84]

In *Brooke Group Ltd v Brown & Williamson Tobacco* the Supreme Court introduced a strict standard for a showing of predatory conduct. The Supreme Court held that a plaintiff alleging that the seller of a product had engaged in predatory pricing must show: (i) that the defendant had engaged in below-cost pricing in the short term; and, (ii) that the defendant had a dangerous probability of recouping its losses in the long term.

The Supreme Court argued that, 'the mechanism by which a firm engages in predatory pricing -- lowering prices -- is the same mechanism by which a firm stimulates competition'.[85] The Court emphasized that 'unsuccessful predation is in general a boon to consumers',[86] and that the government must be very careful not to 'chill the very conduct the antitrust laws are designed to protect'.[87] The Court referred to *Brown Shoe*[88] to affirm that, 'below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: it is axiomatic that the antitrust laws were passed for "the protection of competition, not competitors"'.[89]

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81 *United States v. Microsoft*, 253 F.3d 34, 106-7 (2001) at 79.

82 Rooney, op cit, n 21, p 562.

83 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

84 *California Dental As'n v. FTC* (97-1625) 526 U.S. 756 (1999).

85 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) at 226.

86 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) at 224.

87 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) at 224.

88 *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, (1962).

89 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) at 225.

In *California Dental Association v Federal Trade Commission*, the Supreme Court adopted another narrowly formulated test. The Federal Trade Commission (FTC) condemned as anticompetitive some advertising restrictions, including restrictions affecting price advertising, adopted by a dentists' association in California. The Supreme Court reversed the finding of the Ninth Circuit Court endorsing the FTC allegation, on the basis of a lack of empirical evidence of consumer harm. The Supreme Court argued that in the absence of empirical evidence:

> the point is that before a theoretical claim of anticompetitive effects can justify shifting to a defendant the burden to show empirical evidence of pro-competitive effects, as quick-look analysis in effect requires, there must be some indication that the court making the decision has properly identified the theoretical basis for the anticompetitive effects and considered whether the effects actually are anticompetitive. Where, as here, the circumstances of the restriction are somewhat complex, assumption alone will not do.[90]

A clear and explicit benchmark in competition law enforcement is not only essential because of legal certainty and predictability. Such a standard helps swift resolution of legal disputes and establishes clear and objective guidelines for businesses. It reduces transaction costs associated with uncertainty and enables firms to develop business strategies with greater confidence. In the field of private enforcement such bright line rules help the courts to screen out merit less private claims.[91]

Difficulties of Enforcement and Burden of Proof

The difficulties of enforcing the consumer welfare standard concerns two aspects. On the one hand, the consumer welfare standard discriminates between individuals in different interest groups, namely between producers and consumers. On the other, the proof of actual consumer harm and the inherent requirement that consumers have to be provided a fair share of the overall economic welfare, can be difficult to prove. Both these issues can be further complicated by introducing the question of who is considered as a consumer: intermediate sellers as customers or final consumers?

The consumer welfare standard will permit a certain trade practice when there is no net reduction in consumer surplus irrespective of the increase or decrease in total surplus. It discriminates between different efficiencies depending on whether consumers or producers will benefit from them. It assigns zero weight to seller-shareholder profits and actually disregards the fact that gains to sellers, producers and shareholders can have significant positive effect on the overall welfare of society. As it considers wealth transfers from consumers to producers as being rather harmful than neutral, it is more critical of efficiency claims This means that a consumer welfare-based policy will take into account only those firms' cost savings that are passed on into lower consumer prices and that are of direct benefit to consumers.

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[90] *California Dental As'n v FTC* (97-1625) 526 U.S. 756 (1999) at 775, n 12.

[91] Joffe, op cit n 72, pp 616-617.

Another concern that consumer welfare might raise is connected to the way it is applied. If the consumer welfare standard is applied in a static framework it can lead to sub-optimal outcomes. This is especially the case when the consumer welfare standard is applied in a way that believes that any profit earned by firms is at the cost of consumers. In a dynamic framework, where firms innovate and invest to the ultimate benefit of consumers focusing rigidly on immediate consumer benefits can stifle competition and can have adverse effects for consumers. A short-term consumer welfare standard can be damaging to firms' incentives to invest. If regulators treat firms' profitability with too much suspicion they remove the profits that firms expected to be rewarded for their risky investments by forcing the successfully investing firms to lower their prices. This regulatory approach can lead to discouraging firms from investing and innovating. However, such an approach involves difficulties of enforcement. The impact of trade practices on consumers is often measured and limited to effects in price and output. While price and output effects are easily quantifiable measurements, they are not always accurate indicators of competitive or anti-competitive effects. Quality, consumer choice and innovation are of critical importance when a market's competitiveness is assessed. However, consumer choice and innovation are less apparent and more difficult to prove.[92] The non-economic nature of these efficiencies makes it more difficult to translate their value into terms of economic efficiency.

A further concern is that when measuring consumer harm is complicated and time consuming there might be a concern for the substantial time lag between violation and remediation. This might risk the infliction of severe harm to consumers before remedial measures can be ordered.[93]

Enforcement of the consumer welfare standard can be further complicated by the passing on requirement. The rationale for passing on efficiencies to consumers may fail altogether when 'consumers' are actually large companies who are customers of the parties in the transaction. In these cases the buying firms, not final consumers, will be the beneficiaries of the passed-on efficiencies.

In competition law enforcement it is commonly presumed that efficiencies are passed through to end consumers and where the trade practices have no harmful effects on intermediate buyers the same will be true with regard to the impact on final consumers. However, there might be situations where otherwise restrictive trade practices produce substantial efficiencies and parties have demonstrated the probability of passing on of the efficiencies to consumers at the next level of the supply chain, however, final consumers will not benefit; as a result of for example monopoly pricing by the intermediate buyers.

In the following sections the consumer welfare standard will be discussed against the backdrop of EC competition law.

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[92] Houck, SD, 'Injury to competition/consumers in high tech cases' (2001) 75 St John's LRev 593 at p 603.

[93] Houck, ibid, p 597.

THE ROLE OF CONSUMER WELFARE STANDARD IN EUROPEAN COMPETITION LAW

Even though early Commission Reports on Competition Policy strongly suggested that European competition policy was aimed at the promotion of consumer welfare,[94] there was a certain vagueness about the precise goals of EC competition law and what role economic efficiency played in competition decisions. One goal of EC competition law has always been a political consideration to integrate the markets within the European Community. Besides market integration, the Ordoliberal concept of competition, namely achieving effective competition through the realisation of individual economic freedom, has been a relevant standard for interpreting EC competition rules. On the basis of Commission decisions such as *GE/Honeywell*[95] it could reasonably be argued that the structural goal of European competition policy is a diversified market with as many players as possible and no dominant competitor.

Until recently market integration and economic freedom seemed to have overshadowed efficiency considerations in the objectives of European competition policy. Accordingly, European competition policy was risking adverse effects on consumer interests. For example, the prohibition of absolute territorial protection is clearly directed at market integration; although economic analysis can show that a vertical agreement may have outcomes enhancing allocative efficiency and thereby consumer welfare.[96] Similarly, the utmost protection of openness, access to markets, and levelling the playing field by the prohibition of foreclosing markets by dominant firm strategies might have negative effects in the long run. It might scare off innovative firms that would deliver substantial consumer benefits.

Market integration actually became an aim in itself and after more than forty years it is still a relevant objective of EC competition law.[97] However, the primacy of market

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[94] European Commission, Ist Report on competition policy 1971, 11-12 (1972): 'competition policy endeavours to maintain or create effective conditions of competition by means of rules applying to enterprises in both private and public sectors. Such a policy encourages the best possible use of productive resources for the greatest possible benefit of the economy as a whole and for the benefit, in particular of the consumer'. See also European Commission, VIth Report on competition policy 1975, (1977): '[competition policy's] aims is to ensure that business operates along competitive lines, while protecting the consumer by making goods and services available on the most favourable terms possible. It therefore endeavours to cut monopoly profits'. Neven, Papandropoulos and Seabright were also often cited arguing that, 'it seems reasonable to say that the promotion of consumer welfare is one of the main goals of European competition policy. At least in its declared objectives, the choice has clearly been made to favour income redistribution from producers with market power to consumers'. Neven, D, Papandropoulos, P, & Seabright, P, 'Trawling for minnows. European competition policy and agreement between firms', London, Centre for Economic Policy Research (CEPR), 1998, p 12.

[95] Commission Decision 2004/134/EC (Case IV/M/2220), OJ 2004, L48/1.

[96] For a detailed analysis on the adverse effects of market integration of consumer interests in the enforcement of EC competition law see Buttigieg, E, 'Consumer interests under the EC's competition rules on collusive practices' (2005) 16 EBLR 643, pp 696-700.

[97] It has been considered as the most significant means of creating and maintaining economic freedom, even if the market integration imperative has to take priority over other goals of competition law, like economic

integration among the policy goals of European competition law does not hold anymore.

Shift to Consumer Welfare Standard: an economics and effects based approach

Since the end of the 1990s a noticeable shift has taken place from a form based legal approach to an effects based approach making use of economic insights. The discussion around European competition policy has focused on exactly which efficiency standard should be implemented in policy making and how that standard should be effectuated when European competition law is enforced.[98] The role of the consumer welfare standard in EC competition law has been fuelled through the intention of the European Commission to modernise and improve its competition law enforcement by introducing more economic insights in its overall approach. In the course of the modernisation of European competition law the Commission has been anxious to make the goals of EC competition law more explicit and accordingly adjust policy tools. Competition Commissioner Neelie Kroes has made clear that, 'consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of Articles 81 and 82'.[99]

In the first place, the adoption of a consumer welfare standard in EC competition law took shape through endorsing a more economics based approach. The Commission has considerably reviewed and revised its policy documents such as block exemption regulations and the accompanying guidelines and notices and pronounced a new line of enforcement that focused on the effects of business conduct and the way they impact consumer welfare. Neelie Kroes explained that, 'an effects-based approach, grounded in solid economics, ensures that citizens enjoy the benefits of a competitive, dynamic market economy'.[100] This new line of policy should be considered and criticised with realistic expectations. European competition policy has not taken up new legislative responsibilities in the interest of consumers and DG Competition has not turned into an agency enforcing both competition rules and consumer protection rules. The new developments have evolved along the lines of an enforcement agenda, which focused on an efficient allocation of resources to address the most severe competition law violations and which rationalized old analytical tools and introduced new policy measures such as the advanced leniency programme and private enforcement. Even though consumer welfare has been in the forefront of every major policy statement, viewed realistically these activities were first and foremost targeted at stepping up overall enforcement efforts and increasing the deterrent effects of competition rules.

efficiency. The Commission's Irish Distillers decision is an example of how this kind of one-sided policy can lead to adverse effects on market integration, (Case IV/28.282) *The Distillers Company Limited.*

[98] For example the debate after *GE/Honeywell* (Case COMP/M.2220, July 3, 2001) pushed the role of economic models and especially the treatment of efficiencies into the spotlight. This case made it clear that the Commission was unclear about which welfare standard it pursued.

[99] European Commissioner for Competition, Speech at the European Consumer and Competition Day, London, 15 September 2005.

[100] Ibid.

Improving legal predictability, analytical clarity and decisional accuracy is expected to result in more credible enforcement and indirectly benefit consumers. A consumer welfare based approach can improve the standard of proof by introducing sound economics in the identification of competitive harm and by requiring factual and empirical evidence of consumer harm. It can, moreover, require proper identification and quantification of efficiencies and how they are passed on to consumers and in what way they benefit them. However, beyond these indicators the consumer welfare standard cannot evaluate how business behaviour affect consumers or let alone press firms to respond to consumers' needs. Competition policy is in the first place a reactive policy tool and cannot intervene in order to prevent market failures. The only area where the consumers' role has been made more explicit, and has been somewhat increased, is in the procedural framework of Articles 81 and 82 EC. Consumers' contribution to the enforcement of EC competition law by providing market information, bringing complaints and in the future bringing damages claims has been considerably encouraged by the Commission. This has been reaffirmed by the European CFI in *Österreichische Postsparkasse*:

> It should be pointed out in this respect that the ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase the well-being of consumers. That purpose can be seen in particular from the wording of Article 81 EC. … Competition law and competition policy therefore have an undeniable impact on the specific economic interests of *final customers* who purchase goods or services.[101] (emphasis added)

In the second place, however, European competition policy has been pursuing a pro-active policy which is addressing consumer interests more directly and more explicitly. Such policy tools are the European Commission's recent sector inquiries and its advocacy work by which it makes competition policy more visible for consumers. Since Mario Monti became Commissioner in 1999, consumer interests have been high on the agenda of DG Competition. Monti has repeatedly pointed out how competition law is to protect consumers and Commission documents have explicitly referred to the relevant role competition law can play in consumers' lives. One of Monti's priorities was to make consumers aware of the fact that, 'the protection of the interests of consumers, and therefore of European citizens, is at the heart of Community competition policy'.[102]

[101] Cases T-213/01 & T-214/01 *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v Commission* [2006] ECR II-1601, para 115.

[102] XXIXth Report on Competition Policy – 1999, p 5, see Monti's other speeches: Monti Content, Competition and Consumers: Innovation and Choice, European Competition Day, Stockholm, 11 June 2001, Competition and Consumer: the case of Pharmaceutical Products, European Competition Day, Antwerp - 11.10.2001; What are the aims of European Competition Policy, European Competition Day, Madrid, Spain - 26.02.2002); Competition enforcement and the interests of consumers - a stable link in times of change, European Competition Day, Athens, Greece - 14.02.2003; Competition for consumers' benefit, European Competition Day, Amsterdam, 22 October 2004

The EC competition rules refer to consumer welfare only in one provision of the EC Treaty: Article 81(3) EC. Further Article 2(1)(b) of the Merger Regulation makes reference to the development of technical and economic progress in the interest of consumers.[103] These provisions form a relevant starting point in the assessment of which consumer interests competition law can take care of and which consumer problems it cannot address. The new decentralised enforcement of Article 81 in its entirety indicates a change in the way the Commission will deal with the assessment of the criteria under Article 81(3) EC. The analysis below will concentrate on the interpretation of the consumer welfare considerations under Article 81(3) EC both in the decisions of the Commission as well as in judgments of the European courts.

The Implications of the Consumer Welfare Standard under Article 81 EC

The explicit adoption of the consumer welfare standard has reacted to the long emphasised requirement of the European Courts to refine the definition of what constitutes a restriction of competition since the early 1980s. The Courts have been developing a more differentiated analysis of the purpose of Article 81 EC than the European Commission. These attempts have included an increased demand for economic analysis of competition cases under Article 81 EC. Since 1966 the ECJ has been emphasising that all agreements are to be evaluated by their factual, legal and economic context:[104]

> It is settled case-law that, in defining the criteria for the application of Article 81(1) EC to a specific case, account should be taken of the economic context in which undertakings operate, the products or services covered by the decisions of those undertakings, the structure of the market concerned and the actual conditions in which it functions.[105]

Throughout the years the ECJ and the CFI have developed an approach that followed a narrow interpretation of Article 81(1) EC and denied the existence of a US kind of rule of reason.[106] In the recent *GlaxoSmithKline* the CFI added that:

> [in] effect, the objective assigned to Article 81(1) EC, which constitutes a fundamental provision indispensable for the achievement of the missions entrusted to the Community, in particular for the functioning of the internal market … is to

[103] Council Regulation 139/2004/EC of 20 January 2004 on the control of concentrations between undertakings, OJ 2004, L24/1.

[104] Case C-56/65 *Société La Technique Minière v. Maschinenbau Ulm GmbH* [1966] ECR 235, para 8, Case C-23/67 *Brasserie De Haecht v Wilkin* [1967] ECR I-407; Case C-234/89 *Delimitis v. Hanninger Bräu* [1991] ECR I-935

[105] Case C-399/93 *Oude Luttikhuis and Others v. Commission* [1995] ECR I-4515, para 10, see also C-180-184/98 *Pavlov and others* [2000] ECR I-6451, para 91

[106] In the US under the Sherman Act certain restraints of trade are automatically, in other words per se prohibited and further investigation of the effect of the restraint is considered unnecessary. Per se rules declare certain arrangements to be illegal without exception. This approach had a negative impact on business and, accordingly the US courts began to examine on a case-by-case basis whether the restraint could be found to be reasonable. This was the more general use of the so-called rule of reason, which requires courts to measure a practice's anti-competitive effect against its pro-competitive benefits.

> prevent undertakings, by restricting competition between themselves or with third parties, from reducing the welfare of the *final consumer* of the products in question.[107] (emphasis added)

The adoption of a more economics based approach focusing on consumer welfare began in the field of vertical agreements, where a new block exemption[108] accompanied by the Commission's Guidelines[109] was adopted in 1999. This block exemption ensured undertakings a more tolerant approach and broader exemption possibilities. In the field of horizontal agreements three new block exemptions were published concerning specialisation agreements,[110] research and development agreements[111] and technology transfer agreements.[112] The first two block exemptions are accompanied by the Commission's Guidelines on the applicability of Article 81 to horizontal co-operation agreements[113] and the last one is accompanied by Guidelines on the applicability of Article 81 to technology transfer agreements.

The more economics based approach in Vertical Guidelines is apparent in the extensive discussion of the efficiency-enhancing effects of vertical agreements that way counterbalance their possible anti-competitive effects.[114] The Guidelines also devoted a substantial part to explain the economic analysis of the negative and positive effects of vertical agreements.[115]

The Guidelines on horizontal cooperation agreements presume that if parties have a low combined market share, co-operation is not likely to restrict competition. The horizontal guidelines do not prescribe a single rule, because market conditions such as the nature of the agreement, the nature of the products, market concentration, barriers to entry, stability of shares and the countervailing power of buyers or suppliers and effects can vary considerably, but they do suggest particular levels for certain kinds of agreement. The horizontal guidelines devote separate sections to explain how cooperation between competitors in the framework of production specialisation and

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[107] Case T-168/01 *GlaxoSmithKline Services v Commission*, para 118

[108] Regulation 2790/99/EC, OJ 1999, L336/21.

[109] Commission Notice - Guidelines on Vertical Restraints, OJ 2000, C292/1.

[110] Regulation 2658/2000/EC on the application of Article 81(3) of the Treaty to categories of specialisation agreements, OJ 2000, L304/3.

[111] Regulation 2659/2000/EC on the application of Article 81(3) of the Treaty to categories of research and development agreements, OJ 2000, L304/7.

[112] There is a new block exemption regulation and guidelines on the application of Article 81 to technology transfer agreements, Commission Regulation 772/2004/EC on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ 2004, L123/11, Commission Notice - Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, OJ 2004, C101/2.

[113] OJ 2001, C3/2.

[114] The Regulation refers to the presumption of pro-competitive effects of vertical agreements when the parties' market share does not exceed 30%. Points 6 and 7 of the Guidelines on vertical agreements refer to the case-law of the European Courts when it is explained why vertical agreements have to be analysed in their legal and economic context.

[115] Guidelines on Vertical Restraints, op cit, n 109, paras 103-118.

R&D agreements can contribute to economic welfare without restricting competition to a significant extent. They do, however, as a general rule recognize that the effects of the agreements have to be analyzed in the following way:

> For this analysis it is not sufficient that the agreement limits competition between the parties. It must also be likely to affect competition in the market to such an extent that negative market effects as to prices, output, innovation or the variety or quality of goods and services can be expected.[116]

This implies that the impact on consumers is a relevant part of the assessment.

The Commission's new approach to vertical and horizontal agreements was a considerable step in terms of introducing more economics-based insights in its assessment and developing a policy that is more flexible and attractive for business. In 2004 in the framework of the modernisation package the Guidelines on the application of Article 81(3) have been adopted, which described in detail how the Commission is going to proceed in Article 81 cases in the future. In the following first the standard of restriction to competition and consumer harm as established under Article 81(1) will be analysed and second, the benefits under Article 81(3) will be assessed.

Restrictions of Competition: harm to consumers?

The assessment under Article 81 EC has been several times explained by the European Courts. The analysis is first to be conducted under Article 81(1) EC in order to ascertain in a rather abstract way whether the conduct in question constitutes an appreciable restriction of competition. When this is the case an economic balancing takes place under Article 81(3) EC in order to evaluate whether the economic advantages of the agreement outweigh its restrictive effect on competition so that an exception can be granted from the general prohibition. This approach has always pleaded for a 'market effect' based evaluation as opposed to the old-fashioned formalistic 'clause' driven approach.

The Commission has now followed up on this approach and has set the benchmark for assessing the negative effects of corporate behaviour under Article 81(1) in its Guidelines on the application of Article 81(3).[117] In paragraph 18 of the Guidelines the relevant test constitutes of two parts. The first test asks whether, 'the agreement restrict actual or potential competition that would have existed without the agreement?' and the second whether, 'the agreement restrict actual or potential competition that would have existed in the absence of the contractual restraint(s)?' The two tests examine two possible scenarios, namely when inter-brand and when intra-brand competition is effected by the arrangement under investigation. While the first test evaluating the effects of the arrangement on inter-brand competition is logical and rational from both an economic and a legal point of view, the second test focusing on the effects on intra-brand competition is less straightforward. There are categories of vertical agreements

[116] Guidelines on Horizontal Cooperation Agreements, op cit, n 113, para 19.

[117] Commission Notice – Guidelines on the application of Article 81(3) of the Treaty, OJ 2004, C101/97.

that cannot be justified for the restrictive effect they have on intra-brand competition, however, they are from an inter-brand competition perspective consumer welfare enhancing.[118] Absolute territorial protection is once again called into question and shows little recognition of its underlying economic reason: free-riding.[119]

The following paragraphs of the Guidelines explain what the Commission means by restrictions of competition. Paragraph 21 says that:

> restrictions by object such as price fixing and market sharing reduce output and raise prices, leading to a misallocation of resources, because goods and services demanded by customers are not produced. They also lead to a reduction in consumer welfare, because consumers have to pay higher prices for the goods and services in question.

Paragraph 24 adds that:

> [for] an agreement to be restrictive by effect it must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability.[120]

Footnote 84 summarizes once again what is meant by competitive harm: it is referred to in terms of higher prices; competitive harm could also mean lower quality, less variety or lower innovation than would otherwise have occurred.

This formulates a proper benchmark that focuses on the impact of the agreement on consumers. The factors that are considered as evidence of proving of competitive harm are:

> in particular, the content of the agreement and the objective aims pursued by it. It may also be necessary to consider the context in which it is (to be) applied and the actual conduct and behaviour of the parties on the market. In other words, an examination of the facts underlying the agreement and the specific circumstances in which it operates may be required before it can be concluded whether a particular restriction constitutes a restriction of competition by object. The way in which an

[118] Hancher and Lugard bring the example of an exclusive distribution agreement obliging the distributor not to actively sell outside of his contract territory. This obligation cannot be justified by the argument that the distributor has to be protected outside his contract territory. Hancher, L, & Lugard, P, 'Honey, I shrunk the article! A critical assessment of the Commission's Notice on Article 81 (3) of the EC Treaty' [2004] ECLR 410, p 414.

[119] Guidelines on vertical restraints, OJ 2000, C291/1, point 7.

[120] Paragraph 25 adds that, 'negative effects on competition within the relevant market are likely to occur when the parties individually or jointly have or obtain some degree of market power and the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power. Market power is the ability to maintain prices above competitive levels for a significant period of time or to maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a significant period of time'.

> agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect.[121]

However, this benchmark has to be made hard in the actual enforcement.

In *GlaxoSmithKline* the CFI made a considerable contribution to what actual consumer harm means under Article 81(1).[122] Glaxo Wellcome, a Spanish subsidiary of the GlaxoSmithKline group (GSK), one of the world's leading producers of pharmaceutical products adopted new General Sales Condition in March 1998, which stipulated that its medicines would be sold to Spanish wholesalers at prices differentiated according to the national sickness insurance scheme which will reimburse them. In practice, medicines intended to be reimbursed in other Member States of the Community would be sold at a higher price than those intended to be reimbursed in Spain. This system was introduced in order to limit parallel trade in medicines between Spain, where the administration sets maximum prices, and other Member States, in particular the United Kingdom, where prices are fixed at a higher level, with a view to allocating the surplus thus obtained to innovation. GSK notified those General Sales Conditions to the Commission in order to obtain a decision declaring that they are not prohibited by Community competition law (Article 81(1) EC) or, failing that, a decision granting them an exemption (Article 81(3) EC) as an agreement contributing to promoting technical progress. At the same time, the Commission received a number of complaints directed against the General Sales Conditions from a number of Spanish or European wholesalers' associations and from one Spanish wholesaler.

On 8 May 2001, the Commission decided that the General Sales Conditions were prohibited by Community competition law, because they constituted an agreement in restriction of competition. It also decided that GSK had not proved to the Commission that the conditions necessary for such an agreement to be able to benefit from an exemption were satisfied. It therefore ordered GSK to bring the practice to an end.

GSK requested the Court of First Instance to annul the Commission decision in its entirety. The CFI came to the conclusion that the Commission's analysis is invalid in part. Among other things, the CFI concluded that the Commission's main conclusion, that the General Sales Conditions have as their object the restriction of competition because they make provision for differentiated prices which seek to limit parallel trade in medicines, was incorrect. The CFI emphasized that case-law, such as *Consten and Grundig* and *Société Technique Minière* require that examination of the clauses of an agreement is carried out in their legal and economic context and when such an examination reveals in itself the existence of an alteration of competition, it may be presumed that that agreement has as its object the prevention, restriction or distortion of competition. In such a case there is no need to examine its effect.[123]

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[121] Paragraph 22

[122] Case T-168/01 *GlaxoSmithKline Services v Commission.*

[123] Cases 56 & 58/64 *Consten & Grundig v Commission* [1966] ECR 299, para 110; Case 56/65 *STM* [1996] ECR 235, para 55.

Earlier cases have required the Commission to analyze agreements by reference to their legal and economic context and determine whether they have as their, 'object or effect the prevention, restriction or distortion of competition on the relevant market, to the detriment of the final consumer.'[124] Moreover, as the CFI noted the wholesalers, whose function is to ensure that the retail trade receives supplies with the benefit of competition between producers, are economic agents operating at an intermediate stage of the value chain and may keep the advantages of the price differentials which parallel trade may entail, in which case that advantage will not be passed on to the final consumers.[125]

However, in the present case the Commission did not take proper account of the specific nature of the pharmaceuticals sector. Unlike the situation in other economic sectors, the prices of medicines reimbursed by the national sickness insurance schemes are not freely determined by supply and demand, but are set or controlled by the Member States.[126] For that reason, it cannot be presumed that parallel trade tends to reduce prices and thus to increase the welfare of final consumers, as it would do in the absence of those special regulations.[127] It is the repercussions which that restriction of parallel trade has or may have on one or other of the parameters of competition, such as the quantity in which a product is supplied or the price at which it is sold, that provides evidence of such a restriction.[128]

While the Court considered that GSK has not succeeded in invalidating the Commission's subsidiary conclusion that the General Sales Conditions have as their effect the restriction of competition, it found that the measures taken by the Member States to recover a part of the profits made by parallel traders, for the benefit of the national sickness insurance schemes and patients, a specific examination of the situation in the sector lead to the finding that parallel trade permits a limited but real reduction in the price and the cost of medicines. Therefore, in so far as they prevent that advantage from being produced, the General Sales Conditions diminish the welfare of final consumers.[129]

The relevance of the CFI's analysis is, however, that it shifts the scope of analysis of the effects of the agreements from the limitation of parallel trade and the freedom of action of the wholesalers unambiguously to the question whether the agreements had the effect of reducing the welfare of final consumers.[130] This is significant in cases where

[124] T-168/01 *GlaxoSmithKline*, para 119.

[125] T-168/01 *GlaxoSmithKline*, para 122.

[126] T-168/01 *GlaxoSmithKline*, para 133.

[127] T-168/01 *GlaxoSmithKline*, paras 134-135, 147.

[128] T-168/01 *GlaxoSmithKline*, para 167.

[129] T-168/01 *GlaxoSmithKline*, paras 187-195.

[130] 'However, not every agreement which restricts the freedom of action of the participating undertakings, or of one of them, necessarily falls within the prohibition in Article 81(1) EC … In the present case, whatever the price at which the Spanish wholesalers agree to buy a medicine from GW on the Spanish market (the Clause 4A price or the Clause 4B price), they are limited in their freedom of action since, from an economic point of

the negative effects of an agreement may simply be to alter the division of profits among producers and intermediaries up and down the distribution chain, but without real adverse effects on final consumers. Even if such cases might be exceptional, as they arise where, legitimately, price competition at the retail level is already limited, the explicit requirement to explain and support by factual evidence the impact on final consumers as the ultimate benchmark of restricting competition and thus competition liability under Article 81(1) is to be welcomed.

Consumer Benefits under Article 81(3) EC

In the following Article 81(3) EC will be analysed in order to show how the Commission has proceeded in the past when considerations of consumer welfare had to be balanced with other competition objectives. This analysis clarifies, on the one hand, how consumer interests are perceived in EC competition law and, on the other, how economic and non-economic benefits are balanced when the two are in conflict. Article 81(3) EC is concerned about the benefits consumers would get as a result of an agreement that otherwise restricts competition. The broad and open formulation of Article 81(3) makes it possible to balance the core values of competition, like market integration, economic efficiency and undistorted competition with certain non-competition policy objectives.[131] The Commission's task is to make a trade-off between the efficiency gains for consumers and the efficiency losses that are the result of the agreements restricting competition. Resolving this conflict is one of the essential tools to take account of consumer interests through the application of competition rules.

What 'consumer benefit' exactly means under Article 81(3) EC used to be decided by the Commission on a case-by-case basis. Until May 2004 the Commission had a monopoly on the application of Article 81(3) and enjoyed a considerable margin of discretion in applying the conditions under Article 81(3). The European Courts have on several occasions acknowledged the Commission's discretionary powers to pursue other non-competition related Community objectives under Article 81(3).[132] The Courts have neither dealt with the Commission's substantive application of the criteria

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view, they are not capable in the long term of reselling them at a lower price on the other national markets of the Community. However, as the objective of the Community competition rules is to prevent undertakings, by restricting competition between themselves or with third parties, from reducing the welfare of the final consumer of the products in question (paragraph 118 above), it is still necessary to demonstrate that the limitation in question restricts competition, to the detriment of the final consumer', T-168/01 *GlaxoSmithKline*, para 171.

[131] As AG Cosmas in *Deliège* said: 'It must also be recognised, however, that Article 85(1) does not apply to restrictions on competition which are essential in order to attain the legitimate aims which they pursue. That exception is based on the idea that rules which, at first sight, reduce competition, but are necessary precisely in order to enable market forces to function or to secure some other legitimate aim, should not be regarded as infringing the Community provisions on competition'. Opinion of AG Cosmas delivered on 18 May 1999, Cases C-51/96 and C-191/97 *Christelle Deliège*, para 110.

[132] Case C-26/76 *Metro I* [1977] ECR 1875, para 45, Case C-71/74 *Frubo* [1975] ECR 563, para 43. The Courts have held that the judicial review of the Commission's decisions under Article 81(3) is limited to establish whether the Commission committed a manifest error of assessment, whether procedural rules had been complied with, whether proper reasons had been provided. Case C- 42/84 *Remia* [1985] ECR 2545, para 38.

under Article 81(3), nor intervened with Commission decisions that took non-competition policy objectives into account under the same provision.[133] More explicitly, the CFI even noted that, 'the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under Article 85(3) of the Treaty'.[134]

Article 81(3) EC initially refers to the economic interests of consumers in terms of price and output. Despite this express recognition of consumer interests, this criterion has not become a substantive right of consumers. It has not been made explicit whether a direct or indirect benefit suffices, what is meant by a 'fair' share of the benefit and whether there is a guarantee that those expected benefits would be passed on to the consumers.

In its past practice the Commission has focused mainly on the two last conditions of Article 81(3) EC concerning indispensability and no elimination of competition. Up until now the first two conditions under Article 81(3) concerning efficiency gains and verifying that consumers receive a fair share of the efficiencies played a limited role in the Commission's analysis. As long as competition was not eliminated the last two conditions were assumed to had been fulfilled.[135] As the Commission has generally assumed that consumers receive a fair share of any benefits as long as competition has not been eliminated explains why Article 81(3) has not been developed into an autonomous objective of consumer protection.

The Commission usually has required some kind of economic advantage for consumers, like increasing the range of products or the quality of products or services. This criterion has not been extended to much more than requiring increased choice for consumers or the guarantee of high quality services. For example in *Metro-Saba I*. the improvement in supply was sufficient to prove that the agreement produced substantial efficiencies for consumers.[136]

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[133] Bailey, D, 'Scope of judicial review under Article 81 EC' (2004) 41 CMLRev 1328, p 1347; This, however, did not mean that the logic and rationality of Commission decisions under Article 81 (3) have not been scrutinized and criticized. The CFI has on several occasions criticized the lack of a proper economic analysis in the Commission's decisions. See for example Case T-374/94 *European Night Services* [1998] ECR II-3141, paras 103-15, 140, 159; Case T-528/93 *Métropole* [1996] ECR II-649, para 120.

[134] Case T-528/93 *Métropole* [1996] ECR II-649, para 118.

[135] The reason behind this approach was the following. The condition of indispensability was well suited for the system of prior notification and authorisation created by Regulation 17/62. This system led to a reactive enforcement culture where the Commission spent a considerable amount of time checking individual clauses in notified agreements. Kjolbye, L, 'The new Commission Guidelines on the application of Article 81(3): an economic approach to Article 81' [2004] ECLR 566, p 573.

[136] Case C-26/76 *Metro/Saba I* [1977] ECR 1875, para 47: 'According to the contested decisions the conditions of supply for wholesalers under the cooperation agreement are such as to provide direct benefit for consumers in that they ensure continued supply supplies and the provisions of a wider range of goods by retailers for private customers. Furthermore, the lively competition existing on the market in electronic equipment for leisure purposes exercises sufficient pressure to induce Saba and the wholesalers to pass on to consumers the benefits arising from the rationalization of production and the distribution system based on the cooperation agreement'.

Furthermore, the cumulative nature of the conditions in order to grant an exemption meant that the agreement at stake had to show improvement either in the production or in the distribution or in the technical or economic progress.[137] When these conditions are fulfilled there are inevitably going to be some resulting benefits for the consumers as well.[138] Thus the assessment of consumer benefit could easily become a formality in the examination. The Commission in the past often used consumer interests to support the application of competition policy, where consumer benefit was only a consequence of efficient competitive structures. Under Article 81(3) EC there was no independent significance credited to consumers and consumer benefit was not given separate identity.

In the following the difference between the substance of the Commission's decisions under Article 81(3) EC in the past and what the expected substance of these decisions will be in the future will be reviewed. The main difference originates from the fact that Article 81(3) is directly applicable since May 2004 and therefore the Commission no longer enjoys a monopoly on the application of this Treaty provision, but shares this competence with the national competition authorities (NCA) and the national courts of the Member States. Consequently, the Commission's past practice will provide less guidance for undertakings who have to self-assess their agreements. The new approach is laid down in the Guidelines on the application of Article 81(3).[139] However, the question whether and to what extent non-competition policy objectives can be taken into account under Article 81(3) remains unclear.

The Commission's Decisions in the Past

In most decisions of the Commission under Article 81(3) EC consumer benefits comprised the economic interests of consumers. For example, agreements were exempted on the basis of reorganisation and expansion of airline operators' existing networks[140] or developing a new technically advanced engine reducing operating costs, servicing longer routes on a non-stop basis and meeting new airport noise restrictions as well as offering customers substantial cost savings.[141] Similar examples are the

[137] Evans, AC, 'European competition law and consumers: the Article 85(3) exemption' [1981] ECLR p.429

[138] Evans, ibid, p 430.

[139] OJ 2004, C101/97.

[140] The Commission exempted a joint venture agreement between British Midland International, Lufthansa and SAS under which they agreed to coordinate their services within the EEA to and from London Heathrow and Manchester International airports. The Commission concluded that British Midland's withdrawal from the London-Frankfurt route represented an appreciable restriction of competition but the agreement allowed Lufthansa and SAS to compete for domestic UK traffic as well as for traffic between the UK and Ireland and to carry passengers from any point in the STAR network to regional destinations in the UK and also led furthermore to an increase in network competition. Case COMP/37.812, public notice of 14.3.2001 (OJ 2001, C83.

[141] The Commission considered environmental issues and the benefits of a new technological product, but eventually granted exemption on the basis of efficiency arguments in a case concerning three agreements between General Electric Aircraft Engines (GEAE) and Pratt & Whitney (P & W). The agreement created a joint venture in order to develop, manufacture, sell and support a new aircraft engine. The Commission found that this cooperation enabled the parties to develop an engine that was less expensive in maintenance

improvement of beer distribution ensuring supplies of goods of satisfactory quality at fair prices and conditions and wider range of products of different manufacturers,[142] reducing transaction costs and realising efficiencies in distribution and improving a wide range of services and raising the quality of services for consumers,[143] or qualitative improvement of European telecommunications through larger product portfolio of newly developed services and lower pricing.[144] These examples illustrate that in most of the cases the enforcement of the consumer welfare standard leads to better prices, greater product and service choice as well as higher quality.

Consumer protection is concerned with more than mere economic interests and covers health, safety and information issues, which often cannot and should not be considered under Article 81(3) EC. Nevertheless, in the past the Commission has on a number of occasions granted exemption to restrictive agreements on the basis of public interest objectives or social concerns. Furthermore, in a number of cases the European Courts affirmed that the Commission was free to take considerations connected with the pursuit of the public interest into account under Article 81(3). In *Métropole Télévision and Others* the CFI stated that the Commission was entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under Article 81(3). However, in the present case it did not show that such considerations required exclusivity of rights to transmit sports events and that that exclusivity was indispensable in order to allow them a fair return on their investments.[145] In *Verband der Sachversicherer*[146] the ECJ stated the wording of Article 81(3) makes it possible to take account of the particular nature of different branches of the economy.

Thus, in some of the Commission's decisions consumer benefit was interpreted so as to encompass wider consumer interests than mere economic ones. For example, in *Asahi* the exempted agreement was to introduce new technology, which would enhance product safety.[147] In *CECED*[148] the Commission took environmental considerations

and cost per passenger and per mile covered, and also had lower gas and noise emissions than the parties' existing engines. Furthermore, there was no engine which fulfilled these criteria on the market. Case IV/36.213/F2 — *GEAE/P & W*, paragraphs 79-82.

142 Case No IV/35.079/F3 – *Whitbread*, Commission Decision of 24 February 1999.

143 Case IV/36.592 — *Cégétel + 4* Commission Decision of 20 May 1999.

144 Case No IV/35.337 – *Atlas*, Commission Decision of 17 July 1996.

145 Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole Télévision and Others v Commission* [1996] ECR II-649, para 118.

146 Case C-45/85 *Verband der Sachversicherer e.V. v Commission,* [1987] ECR 405, para 15.

147 Case IV/33.863 - *Asahi/Saint-Gobain* OJ 1994, L354/87, paras 24-26: 'There is a demand from the side of the automotive glazing industry for safety glazing products which are more flexible in shape and lighter in weight than existing multi-layer products.... This product could have a significant impact on the design, safety and price of cars and other motor vehicles. … It is thus expected that the cooperation in developing urethane-based bi-layer product will contribute to improving the production of goods and to promoting technical progress… The greater impact resistance of bi-layer glass could reduce personal injuries in the event of collision. Improved optical quality would contribute generally to driver safety. The lighter weight would reduce costs and help fuel efficiency. The cooperation between AG and SG will further reduce the R& D costs for bi-layer products and thus also the price of such products to consumers and the entry of such products on the market will thus be accelerated'.

into account. It approved for the first time an agreement where the parties had agreed to cease the production of certain categories of washing machines with a view to improving the environmental performance of products. The parties to the agreement, nearly all the European producers and importers of domestic washing machines, agreed to stop producing or importing into the EU the least energy-efficient machines in order to reduce the energy consumption of such appliances and thereby reduce pollutant emissions from power generation.[149] The Commission noted that although the participants restricted their freedom to manufacture and market certain types of washing machine and thereby restricted competition within the meaning of Article 81(1) EC, the agreement would bring advantages and considerable savings for consumers, in particular by reducing pollutant emissions from electricity generation.[150] The Commission said that its decision to exempt the agreement took account of this positive contribution to the EU's environmental objectives, for the benefit of present and future generations.[151]

Future decisions

Under the new approach Article 81 EC is to be assessed in its entirety and the emphasis is more on the self-assessment of undertakings under Article 81(1) EC and not under Article 81(3). The latter now becomes a legal exception.

It is clear from the White Paper as well as from the Guidelines that Article 81(3) will be interpreted in a narrower and more economic effects oriented way in the future. According to the Guidelines the general principles of the assessment under Article 81(3) will be the following. Only objective economic criteria can be taken into account in the assessment.[152] This has been declared by the ECJ already in *Consten and Grundig*:

> this improvement must in particular show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition.[153]

Efficiencies can take the form of distribution, licensing of technology, joint production, joint research and development or wider efficiency enhancing effects like reducing industry wide costs.[154]

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[148] Case IV.F.1/36.718, *CECED*, OJ 2000, L187/48.

[149] Case IV.F.1/36.718, *CECED*, paras 19-20.

[150] Case IV.F.1/36.718, *CECED*, paras 47-57.

[151] XXXth Report on competition policy, European Commission 2001, paras 96-97; The Commission's decision in DSD has already signalled the increased willingness to exempt restrictive agreements on the basis of environmental objectives. Cases COMP/34493 – DSD, para 144, 'Regular collection from private final consumers of used sales packaging differentiated into specified reusable materials, and subsequent sorting or preparation for full recovery, gives direct practical effect to environmental objectives'.

[152] See points 33 and 49 of the Guidelines on the application of Article 81(3), op cit, n 112.

[153] Cases 56/64 & 58/64 *Consten and Grundig*, op cit, n 123.

However, point 42 of the Guidelines states that, 'goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Art 81(3)'. Besides a high degree of competitiveness and convergence of economic performance Article 2 EC lists a number of other Community goals like a high level of employment and of social protection, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States. Will non-economic benefits be recognized as defence in the primarily economic context of Article 81(3)?

A non-economic objective can only be pursued under Article 81(3) EC if doing so translates into economic benefits that satisfy the four conditions thereof. In principle, it is not possible to use Article 81(3) as a basis for pursuing non-competition aims that cannot be subsumed under these conditions.[155] In, for example *Metro-Saba I* the Court did not consider employment to qualify as an objective economic benefit falling under Article 81(3). It did, however, take the stabilising effect on employment into account as it improved production. The argument was that the stabilising effect of an agreement on employment may translate into cost savings and other efficiency gains.[156] While it does not seem very clear from this case where the border between economic and non-economic interests, in this case social concerns are, the following case is more illuminating.

In *Ford/Volkswagen* the Commission examined the setting up of a joint venture company between Ford and Volkswagen for the development and production of a multi-purpose vehicle (MPV) in Portugal. Although the agreement between Ford and Volkswagen fell within the prohibition of Article 81(1) EC, the Commission argued that it exempted the agreement between Ford and Volkswagen. The ground of the exemption was that the cooperation made available an advanced vehicle designed to meet the requirements of European consumers, which was to be separately offered by the partners in differentiated versions throughout the Community.[157] The Commission

[154] See EC Guidelines on the application of Article 81(3), op cit, n 117, point 53 The Guidelines mention cost efficiencies and efficiencies in the form of new or improved products as examples of consumer benefits. See points 59-72.

[155] Kjolbye, op cit, n 135, pp 570-71; Van de Gronden, JW, Mortelmans, KJM, Wouters; is het beroep van advocaat een aparte tak van sport/, AA 51, 2002/ 6 p 324

[156] Case C-26/76, [1977] ECR 1875, para 43, 'Furthermore, the establishment of supply forecasts for a reasonable period constitutes a stabilising factor with regard to the provision of employment which, since it improves the general conditions of production, especially when market conditions are unfavourable, comes within the framework of the objectives to which reference may be had pursuant to Article 85(3)'. This analysis was restated in Case C-42/84 *Remia*, [1985] ECR 2545, para 42.

[157] As a result of the cooperation, mainly due to the sophisticated production technology and the economies of scale, the consumer was offered two versions of a high-quality and reasonably priced MPV. The Commission further argued that Ford and Volkswagen was forced to pass on the benefits to the consumer, because as a result of their entry other manufacturers would enter into the expanding MPV segment, which would increase competitive pressure on all suppliers leading to a more balanced segment. Case IV/33.814 - *Ford /Volkswagen* paras 24, 27.

further stated, that in its decision for an individual exemption it took note of the fact that the project constituted the largest ever single foreign investment in Portugal, it was estimated to lead, inter alia, to the creation of about 5,000 jobs and indirectly create up to another 10,000 jobs, as well as attracting other investment in the supply industry. It therefore contributed to the promotion of the harmonious development of the Community and the reduction of regional disparities. It also furthered European market integration by linking Portugal more closely to the Community through one of its important industries. However, the Commission stated that these facts, 'would not be enough to make an exemption possible unless the conditions of Article 85(3) were fulfilled, but it is an element which the Commission has taken into account'.[158]

The CFI in *Matra* affirmed that the Commission was right to conclude that the impact of a joint venture between Ford and Volkswagen for the production of a multi-purpose vehicle on public infrastructures and on employment in Portugal, and its impact on European integration was not enough to make an exemption possible.[159] This implied that non-economic objectives alone are not sufficient to save a restrictive agreement under Article 81(3) EC.

The time-horizon within which consumer benefits have to be realised can be the decisive element in an assessment of an otherwise anti-competitive practice. Although the Commission acknowledges that in some cases a certain period of time may be required before the efficiencies materialise, it declares that, 'the greater the time lag, the greater must be the efficiencies to compensate also for the loss to consumers during the period preceding the pass-on'.[160] In *Shaw* the CFI argued that:

> from the point of view of the grant of an individual exemption, it is not material that the benefits produced by the notified agreements do not entirely compensate the price differential suffered by a particular tied lessee if the average lessee does enjoy that compensation and it is therefore such as to produce an effect on the market generally.[161]

The Commission does, however, indicate that it prefers direct and short-term benefits to long-term future benefits to consumers:

> In making this assessment it must be taken into account that the value of a gain for consumers in the future is not the same as a present gain for consumers. A gain for consumers in the future therefore does not fully compensate for a present loss to consumers of equal nominal size. In order to allow for an appropriate comparison of a present loss to consumers with a future gain to consumers, the value of future gains must be discounted applying an appropriate discount rate.[162]

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[158] Case IV/33.814 - *Ford Volkswagen*, para 36.

[159] Case T-17/93 *Matra* [1994] ECR II-595, para 139.

[160] EC Guidelines on the application of Article 81(3), op cit, n 117, point 87.

[161] Case T-131/99 *Michael Hamilton Shaw and Timothy John Falla v Commission* [2002] ECR II-02023, para 163.

[162] Point 88 of the EC Guidelines on the application of Article 81(3), op cit, n 117.

However, point 44 of the Guidelines seems to take long-term investments also into account:

> Article 81 cannot be applied without taking due account of such ex ante investment. The risk facing the parties and the sunk investment that must be committed to implement the agreement can thus lead to the agreement falling outside Article 81(1) or fulfilling the conditions of Article 81(3), as the case may be, for the period of time required to recoup the investment.

Similarly, point 92 of the Guidelines seems to refer to recognising the relevance of long-term efficiencies.[163]

Immediate consumer benefits is clearly closer to what a pure consumer oriented approach would prefer, however competition law enforcement has to be careful in this aspect. Focusing solely on short-term consumer benefits will have adverse effects on both competition and consumers in the future. Certain trade practices might restrict competition to a certain extent in the near future in order to produce substantial efficiency gains in the long-run. Competition law enforcement has a difficult task distinguishing such cases. The balancing of such efficiency gains and losses has been one of the issues the CFI ruled on in *GlaxoSmithKline*. The CFI found that the Commission did not carry out an adequate examination of GSK's request for an exemption. In particular, the question whether the General Sales Conditions might give rise to an economic advantage by contributing to innovation, which plays a central role in the pharmaceutical sector, was not examined with sufficient thoroughness. The Commission did not validly take into account all the factual arguments and the relevant economic evidence and did not sufficiently substantiate its conclusions.[164]

According to the second condition[165] under Article 81(3) EC consumers must receive a fair share of the efficiency gains generated by the restrictive agreement. As has been mentioned above, consumers within the meaning of Article 81(3) are not only final consumers, but also the customers of the parties to the agreement and subsequent purchasers.[166] The Commission's concept of 'fair share' under Article 81(3) sets the

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[163] 'If the agreement has both substantial anti-competitive effects and substantial pro-competitive effects a careful analysis is required. In the application of the balancing test in such cases it must be taken into account that competition is an important long-term driver of efficiency and innovation. Undertakings that are not subject to effective competitive constraints such as for instance dominant firms have less incentive to maintain or build on the efficiencies. The more substantial the impact of the agreement on competition, the more likely it is that consumers will suffer in the long run'.

[164] T-168/01 *GlaxoSmithKline*, paras 258-276.

[165] The Guidelines on the application of Article 81(3) EC, op cit, n 112, state that first the types of efficiency gains that can be taken into account as objective benefits created by the agreement and the economic importance of such efficiencies have to be defined in order to be subject to the further tests of the second and third conditions of Article 81(3). Therefore it is necessary to verify what is the link between the agreement and the claimed efficiencies and what is the value of these efficiencies. Efficiency claims must therefore be substantiated so that the nature of the claimed efficiencies, the likelihood and magnitude of each claimed efficiency can be verified, and how and when each claimed efficiency would be achieved. Points 50-58 of the EC Guidelines on the application of Article 81 (3) EC

[166] Point 84 of the EC Guidelines on the application of Article 81(3), op cit, n 117.

benchmark against which it is assessed whether a sufficient portion of the efficiencies are passed on to consumers. Fair share implies that the passing on of benefits must at least compensate consumers for any actual or likely negative impact that they will experience by the restriction of competition under Article 81(1). The Commission holds that the net effect of the agreement must at least be neutral from the point of view of consumers within each relevant market. This is once again clear evidence of the consumer welfare approach, which does not allow an agreement as a result of which consumers are worse off.[167]

However, it is not required that consumers receive a share of each and every efficiency gain generated by the agreement and identified under the first condition. It suffices that sufficient benefits are passed on to compensate for the negative effects of the restrictive agreement in which case consumers obtain a fair share of the overall benefits. If a restrictive agreement is likely to lead to higher prices and consumers are not fully compensated through increased quality or other benefits, the second condition of Article 81(3) EC will not have been fulfilled.[168]

The Commission acknowledges on the one hand, that it is difficult to accurately calculate the consumer pass-on rate and other types of consumer pass-on and on the other, that certain types of efficiencies are more likely to be passed on than others. Therefore the following guidelines have been provided in this respect. Efficiencies of qualitative nature, that take the form of improved goods or services are generally passed on.[169] In case of cost efficiencies the likelihood that these will be passed on to consumers requires a more detailed assessment of the characteristics and the structure of the market, the nature and magnitude of the efficiency gains, the elasticity of demand, and the magnitude of the restriction of competition. Reductions in variable costs are more likely to be passed on than fixed cost reductions.[170] These new

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[167] 'The positive effects of an agreement must be balanced against and compensate for its negative effects on consumers within each relevant market. When that is the case consumers are not harmed by the agreement. Moreover, society as a whole benefits because the efficiencies lead either to fewer resources being used to produce the output consumed or to the production of more valuable products and thus to a more efficient allocation of resources', EC Guidelines on the application of Article 81 (3), op cit, n 117, point 85.

[168] EC Guidelines on the application of Article 81(3), op cit, n 117, point 86; see also Case C-26/76 *Metro (I)* [1977] ECR 1875, para 48: 'In the circumstances of the present case regular supplies represent a sufficient advantage to consumers for them to be considered to constitute a fair share of the benefit resulting from the improvement brought about by the restriction on competition permitted by the Commission. Even if it is doubtful whether the requirement in this connexion of Article 85(3) can be said to be satisfied by the assumption that the pressure of competition will be sufficient to induce Saba and the wholesalers to pass on to consumers a part of the benefit derived from the rationalization of the distribution network, the grant of exemption may, however, in the present case be considered as sufficiently justified by the advantage which consumers obtain from an improvement in supplies'.

[169] Point 104 of the EC Guidelines on the application of Article 81(3), op cit, n 117.

[170] According to economic theory undertakings maximize their profits by selling units of output until marginal revenue equals marginal cost. Marginal revenue is the change in total revenue resulting from selling an additional unit of output, and marginal cost is the change in total cost resulting from producing that additional unit of output. If marginal costs fall even undertakings with market power may have an incentive to reduce prices. Points 95-101 of the EC Guidelines on the application of Article 81(3), op cit, n 117.

guidelines reflect more economics based approach and correspond to the insights introduced above on pass-on rate.

Evaluation of the Commission's Approach

The Commission's future approach to the criteria under Article 81 EC is clear. On the one hand, under Article 81(1) effects count and not presumptions, and on the other, under Article 81(3) efficiency gains will gain more weight in the future assessment under Article 81(3). Article 81(3) is first of all to take account of efficiencies of objective economic nature. However, the question is still whether non-economic interests can also be subsumed under Article 81(3). The Commission has accepted in the past non-economic interests, especially related to environmental issues as justification for agreements distorting competition in the common market. As was mentioned above the White Paper emphasised that the integral nature of Article 81 requires economic analysis of the overall impact of agreements and it declared that the Commission would adopt a more economic approach to the application of Article 81(1) in its handling of individual cases.[171] But even more important the Commission made clear that the purpose of Article 81(3), 'is to provide a legal framework for the economic assessment of restrictive practices and not to allow application of the competition rules to be set aside because of political considerations'.[172]

The application of Article 81(3) EC to non-economic objectives can prove to be an especially dangerous exercise when national courts apply that provision. National courts are unlikely fit to assess whether the restriction of competition within the internal market can be justified by non-economic objectives of other Community policies. National authorities might justify anti-competitive practices on the basis of national policies. Therefore, as the Commission argues a pure economic approach is more appropriate in the decentralised enforcement.

The Commission wants to transform Article 81(3) EC from a discretionary norm to one of pure economic efficiency. This increased economic approach under Article 81 is understandable in the light of the fact that on 1 May 2004 this provision became directly applicable. This means that from May 2004 the NCAs as well as the national courts of all European Member States can also apply this Treaty provision. This change eliminates the Commission's discretionary powers under Article 81(3) as well as considerably reduces the possibility to take other Community objectives into account. The application of Article 81(3) is now subject to 27 national procedural laws and unlike the European Courts the national courts have full jurisdiction on the merits of Article 81(3). The possibility that national authorities will reach divergent decisions and judgments as regards Article 81(3) is very real. Therefore the Commission's efforts to provide an economic framework for and to rationalise the application of Article 81(3) in its previous decisions seems logical and necessary in order to preserve the uniformity of EC law.

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[171] White Paper, paras 49, 78.

[172] White Paper, para 57.

The Implications of the Accepted Welfare Standard in Competition Law Enforcement

The consumer welfare standard in competition law enforcement implies in the first place an effects based approach, which measures the impact of corporate behaviour on consumers. Such a standard is argued to provide an objective benchmark for establishing the anti- and pro-competitive effects of the conduct by assessing its impact on consumer prices, scope of output, quality and innovation in the relevant market. In this respect competition law enforcement is an indirect way to enforce consumers' interests. The adoption of the consumer welfare standard vis-à-vis the total welfare standard places consumers' economic needs and responses to firm behaviour further into the focus of competition law enforcement. It, moreover, can counterbalance firms' information advantages, lobbying advantages, the fact they are better represented, as well as their first mover advantages in selecting the strategic moves they pursue. The consumer welfare standard seems, from both the legal and political aspect, an appropriate standard of enforcement.

How consumer interests are perceived and taken into account in the enforcement of competition law was examined previously. While it is apparent that the awareness of (final) consumer interests in the enforcement of competition law is increasing, it is obviously not capable of protecting certain final consumers' needs. Competition law has inherent limits in that respect. First, the notion of consumer under competition law is broader than under consumer law. This means that competition law might acknowledge certain situations as favourable for consumers while such situations do not benefit the final consumers; only the direct customers of the undertakings. Second, competition law is mostly concerned with the economic interests of consumers and while in a few cases it might take account of wider consumer interests it is definitely not concerned with other significant consumer interests like health and safety issues or information disclosure.

The role of competition law is above all to address economic efficiency concerns and it should consider non-economic objectives merely in exceptional cases. These issues should be the primary objectives of consumer protection laws and other sector specific regulation.

Consumer protection rules ideally should provide protection for final consumers in those areas where competition rules are ineffective. Consumer protection should address information inefficiencies like imperfect information, information asymmetries and bounded rationality. Its true focus is to provide good quality and cost of consumer information and to make free and well-informed decisions possible. Furthermore, while health and safety measures might be less efficient in terms of economic efficiency, they achieve social objectives of overriding interest.

In sum, when competition law is enforced on the basis of the consumer welfare standard, it can be reasonably assumed that consumers' economic interests in terms of price, output and quality are being seriously pursued. Acknowledging this effect should influence the point where and the category of consumer needs for which consumer

rules have to be legislated and enforced. Consumers need to be empowered to make use of the possibilities offered by effective competition law enforcement rather than being protected against the stronger producers on the marketplace. A more coordinated approach between these two fields of the law and policy making seems necessary.

INSTITUTIONAL QUESTIONS

Coordination may focus beyond the process of legislating substantive rules to another dimension of the consumer welfare standard: enforcement methods and the institutional setup. The effect of the institutional structure on consumer welfare is not yet proved. However, several agencies have positive experience with an integrated approach. Combining competition law and consumer protection matters under one administrative institution has practical benefits and produces useful synergies through taking a broader look at the whole market. It helps to achieve complementarities and to avoid potential conflicts between the enforcement of competition law and of consumer protection. Bringing a "consumer welfare" perspective to competition law enforcement can also increase public awareness and approval of the agency's activities, with potential derivative benefits for competition enforcement.[173]

There are cases where both competition law and consumer law violations are present that can give rise to a mix of competition and consumer issues and which can be more efficiently viewed and solved together. Considerations in one policy area can provide useful guidelines in the other policy area and mutually draw the attention of enforcers in one area to the concerns of the other area. Co-operation between the competition policy and consumer protection officials through effectively sharing information and collaborating can help to adjust the two policies to each other which in turn prevents thwarting each other's goals.[174] The combination of functions allows the consideration of whether competition or consumer protection remedies are the most appropriate and permits consumer protection decisions to be guided by considerations of economic efficiency. Examples of the practical advantage of such a combined approach can be seen in cases of recently liberalised markets, where abuse of a dominant position and unfair trade practices often go hand in hand.

However, there are also a number of questions that should be considered before the choice is made for such a single combined agency. The experience gained in the

[173] Consumer outreach by ICN Members, A report on outreach undertaken and lessons learned, April 2005, p 41.

[174] As FTC Commissioner Muris said, 'well-conceived competition policy and consumer protection policy take complementary paths to the destination of promoting consumer welfare. I also submit that there are benefits from combining both functions in a single public institution. Our experience at the Federal Trade Commission suggests several synergies. First, performing the consumer protection function can provide useful insights about how we should execute competition policy. In several important instances, enforcing our laws concerning advertising and marketing practices has improved our understanding of how markets operate'. Muris, TJ, 'Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy' (New York, N.Y., Dec. 10, 2002) (remarks for the Milton Handler Annual Antitrust Review), available at http://www.ftc.gov/speeches/muris/handler.htm#N_103_ (last visited in July 2006), p 5.

consumer protection function could provide useful information for addressing competition issues and consumer protection activities might enhance the credibility of the agency with the public and improve public understanding of the agency's antitrust mission. Competition agencies have to develop a consumer welfare standard that makes appropriate distinctions between generally 'unfair' conduct and conduct that harms the competitive process.[175]

Conversely, enforcement authorities should be alert to avoid taking actions in either competition law or consumer protection enforcement that may have potentially adverse consequences in the other area. Further, a more integrated approach can increase public awareness of anti-competitive and anti-consumer corporate conduct and may gain support for the agency's enforcement activities with potential derivative benefits for both enforcement areas.[176]

CONCLUSIONS

This article went behind the notion of consumer welfare in competition law by applying insights about and interpretation of the same notion in consumer law. The purpose of this exercise was twofold. On the one hand, it was to point out that the consumer welfare standard proves to be the appropriate benchmark of competition law enforcement in order to identify anti- and pro-competitive firm behaviour on an objective basis. Acknowledging the fact that the notion of consumer in competition law stands for intermediate sellers and customers of firms, unlike in consumer law the impact of trade practices on final consumers is not explicitly spelled out. While the focus of the assessment is on the actual economic effects of the conduct on consumers in terms of price, output and quality for analytical clarity as well as for the achievement of a more economic effects based approach more outspoken assessment of the effects on final consumers can be argued for.

On the other hand, the article explained the inherent limits of competition law enforcement to protect consumer interests. Competition law is primarily concerned with economic efficiency and with the overall welfare of society, without distinguishing between different groups of society. Competition policy also has other goals than improving final consumers' welfare and therefore final consumers cannot and should not become the sole focus of competition laws. Although none of its policy goals is exclusive, consumer protection in its broad meaning is not a goal of competition policy. Consumer measures concerning health, safety and information disclosure are public policy considerations that may be analysed or even recognised in competition cases but should not represent overriding concerns.

The promotion of consumers' economic interests, namely lower prices and unrestricted or even increased output nevertheless does remain one of the core values of

[175] Consumer outreach by ICN Members, A report on outreach undertaken and lessons learned, April 2005, p 28.

[176] Ibid, p 41.

competition policy. A more economics based competition law enforcement can contribute to a better monitoring of what exactly the effects will be or have been of a certain trade practice on final consumers. US case-law and policy decisions provide useful guidelines that may be transferred into European competition law thinking with certain limitations. One such lesson is that of *California Dental Association*, namely that an economics based approach should not result in decision making relying on theoretical assumptions. Actual and empirical evidence and ultimately the affect on consumers should be always required. The CFI seems to have acknowledged these insights and required similar hard evidence in *GlaxoSmithKline*.

Understanding more about the consumer welfare standard can be one way to understand more about the relationship between competition law and consumer law as well as between their enforcement methods and their enforcement agencies. Consumer protection and competition law seems to have developed in many legal systems along each other and not in cooperation with each other. This has lead to overlaps and gaps between the legal rules and the ways these rules are enforced. Both the complements and the tensions have to be addressed between the two areas. Synergies should be more extensively discussed and taken into consideration when policy decisions are made. Outlining neglected tensions between the two areas enhances conceptual clarity as well as the protection of both competitive markets and individual consumers. When policy claims are made about the benefits of competition law enforcement for consumers hard cases and solid evidence should support these claims. At the moment, at least in EC competition law, there are little of both.

These two areas of the law share a common goal that is to provide consumers with access to a range of competitively priced goods and services in markets free of unfair and deceptive practices. It is commonplace that a competitive market structure needs active consumers and vice versa. Yet, this fact seems to be more often forgotten than realised.

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Competition Law, Consumer Policy and the Retail Sector: the systems' relation and the effects of a strengthened consumer protection policy on competition law

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In March 2006, the French Competition Council fined 13 leading brands in the cosmetics industry and 3 major distributors of luxury perfumes a total of €46.2m for violating competition law. While cartels and competition enforcement are not new to competition law, the case triggers significant questions as it affects a retail sector, with an obvious, explicitly-recognised and direct impact on consumers. As distinct from competition infringements that are found to have taken place on a wholesale market and presumed to have an effect on consumers further down the chain, infringements in retail markets trigger more direct consumer concerns inasmuch as they may more directly and obviously harm consumer price, choice or other interests, thereby also triggering a potentially harsher application of competition law itself. Who is the consumer? What is the role of the consumer in competition law? How does consumer policy and law interact with competition policy and law? How do the developments in one body of law impact on the developments on the other body of law? And what implications does a strengthening in the perceived role of the consumer have on competition law and enforcement? This paper begins by defining and giving the basics of competition and consumer policy and law. It then inquires into the 'theoretical' relation between the two bodies of law, and finally, it explores the 'practical' implications of the consumer interest, and its strengthening, within competition law (procedural and substantive). The paper concludes by triggering some questions on 'harm to consumers' vs 'harm to competition', and whether the former could become an alternative threshold to competition enforcement.

1. INTRODUCTION

Opening a leading textbook on competition law and searching for the role of the consumer therein has brought out very little information on the subject in question. Usually it will just be a short sentence, in the form of an almost dogmatic statement – competition should be preserved and encouraged as it is in the interest of the consumer.[1] By safeguarding and promoting competition, the ultimate benefactor is the

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[1] See for example the Government's main economic witness in Microsoft who stated: 'The presumption of antitrust policy is that competition itself brings consumer benefits, and the lessening of competition brings consumer harm. Hence, plaintiffs are required to show an injury to competition rather than immediate harm to consumers.' DS Evans, FM Fisher, DL Rubinfeld, & RL Schmalensee, 'Did Microsoft Harm Consumers: Two Opposing Views' (2000) 88 AEI- Brookings Joint Center for Regulatory Studies.

consumer.[2] Competition leads to reduced prices and to more choices, which benefits the consumer.

This statement, however, is often both unsubstantiated, insofar as no supporting evidence is presented in that respect, and insufficient, in that it fails to address all the of issues raised by the relationship between competition law and consumer policy and law. Who is the consumer? What is the role of the consumer in competition law? How does consumer policy and law interact with competition policy and law? How do the developments in one body of law impact on the developments on the other body of law? How does consumer protection impact on competitive markets? And what implications does a strengthening in the perceived role of the consumer have on competition law and enforcement?

On 14 March 2006, the French Competition Council fined 13 leading brands in the cosmetics industry and 3 major distributors of luxury perfumes a total of €46.2 m for violating competition law. Manufacturers were found to have engaged in price-fixing arrangements by suggesting retail prices and maximum discounts. Each agreement was accompanied by a price control system and pressures and threats of reprisals against distributors refusing to apply the price imposed by the brand. The Council found that, 'this absence of competition … enabled all of them to increase and then share out the surplus obtained to the detriment of the consumer'.

While cartels and competition enforcement are not new to competition law, the case triggers significant questions as it affects a retail sector, with an obvious, explicitly-recognised and *direct* impact on consumers. As distinct from competition infringements that are found to have taken place on a wholesale market and *presumed* to have an effect on consumers further down the chain, infringements in retail markets trigger more direct consumer concerns inasmuch as they may more directly and obviously harm consumer price, choice or other interests, thereby also triggering a potentially harsher application of competition law itself.

Competition law aims to protect competition in the market as a means of enhancing consumer welfare and ensuring the efficient allocation of resources. While to a large extent, it is therefore a 'consumer-focused competition policy', the consumer interest would often merely be taken into account indirectly, in the form of an assumption that consumers would benefit from the protection of the competitive process and structure. Other consumer considerations would not be taken into account in the application of competition laws, at least not directly. For example, while competition law may seek to encourage competition in pharmaceutical products it is not primarily and/or particularly concerned about the timing of such action, which is mostly left to other

[2] See for example the European Commission Discussion Paper on the application of Article 82 EC to exclusionary abuses, 19 December 2005, which defines exclusionary abuses as 'behaviours by dominant firms which are likely to have a foreclosure effect on the market, i.e. which are likely to completely or partially deny profitable expansion in or access to a market to actual or potential competitors and which ultimately harm consumers.'

consumer and/or health policies such as incentive schemes encouraging the early commercialization of inventions; see, for example, the Orphan Drugs Act.[3]

Throughout Europe there is a trend to strengthen and better articulate consumer protection policy and law together with the means of enforcement, whether as part of a separate consumer policy or as part of another policy organ such as sectoral regulation or competition law. Along these lines are initiatives such as Directive 2005/29/EC on Unfair Commercial Practices,[4] the Consumer Protection Co-operation Regulation 2004,[5] as well as the Green paper on actions for damages for breaches of competition law.[6]

While so far competition law has therefore mostly focused on 'unfair' trading between competitors, more attention may now be called to be placed on the effects of business practices on consumer welfare, not only in terms of price, choice and availability, but possibly in terms of other factors also such as timing as well as the means to address possible negative effects. John Vickers recently admonished that there is a trend to integrate consumers and competition laws, both procedurally and substantively, highlighting the need for the two policies to, 'work together in tandem if not as one', and, 'Competition policy must be consumer orientated and consumer policy must have competition at its core.'[7] As such, new questions have arisen, firstly as to the relationship of competition law and consumer policy and laws, and secondly as to the role of consumers within competition law itself.

While competition and consumer policy have the common goal of helping markets work well for consumers and for fair-dealing companies, the two policies often target different types of conduct in a non-interchangeable way: consumer policy for example may point at misleading and deceptive advertising, while competition policy may aim at cartels. Things may be of concern from a competition perspective that do not raise any direct consumer concern, and vice versa. For example, the terms in an individual contract may be of great consumer concern but have no competition implications.

The relationship between consumer policy and competition law remains to a large extent an unexplored area, as do the implications that a strengthened consumer role may have on or within competition law. A more consumer-focused competition enforcement approach, may, for example, impact on the fields under investigation by shifting attention to markets with a more obvious effect on the retail level. Also, competition policy may become more mindful of timing concerns, such as the means

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[3] Regulation 141/2000/EC, on Orphan Medicinal Product, OJ 2000, L18/1. See DM Richardson, 'The Orphan Drug Tax Credit: An Inadequate Response to An Ill-Defined Problem' (1987) 6 The American Journal of Tax Policy 135. See also, PJ Kenney, 'The Orphan Drug Act -Is it a Barrier to Innovation? Does it Create Unintended Windfalls?' (1988) 43 Food Drug Cosmetic Law Journal 667-679.

[4] OJ 2005, L149/22, adopted in 2005 and coming into force in 2007.

[5] Regulation 2006/2004/EC, OJ 2004, L364/1.

[6] COM(2005) 672.

[7] J Vickers, Opening remarks to the European Competition and Consumer day, 15 September 2005 at www.oft.gov.uk.

to encourage the early introductions of competing products on the market, and not only of the number of actual and potential competitions and the structure of the market.

This paper seeks to address the relationship between competition law and policy and consumer law and policy, and the impact that trends in the latter have on competition law enforcement. Could, for example, pressure selling, such as misleading marketing, bait and switch tactics and falsely claiming to adhere to a code of conduct constitute abusive practices if undertaken by dominant undertakings?

In what follows I proceed first to define and give the basics of competition and consumer policy and law. I then inquire into the 'theoretical' relation between the two bodies of law, and finally, I examine the 'practical' implications of the consumer interest, and its strengthening, within competition law - procedural and substantive.

2. COMPETITION LAW AND CONSUMER PROTECTION LAW DEFINED

> 'Consumption is the sole end and purpose of production and the interest of the producer ought to be attended to only so far as it may be necessary for promoting that of the consumer.'
>
> Adam Smith, *The Wealth of Nations*, 1776, Book 4 chapter 8.

2.1 Competition Policy & Law and the Consumer

The competition regime is well known to most people, both in terms of its aim and in terms of its application: on a European level it relies on a clear set of principles - Articles 81 and 82 EC and the Merger Regulation - with the concomitant harmonized incorporation into national law.[8] Competition law is intended to ensure that the marketplace is competitive and is not distorted by anticompetitive practices, so that worthy options are made available to consumers. In the short term, consumers are allowed to choose from an array of options that would have been produced absent a competition violation; in the long term, it ensures the free market will be able to innovate. Competition law ensures, *inter alia*, that the economy responds to consumer demand rather than to government directions or individual business preferences.[9]

Competition enforcement may therefore be seen as a means of protecting consumer *options* in the marketplace. Indirectly, it may also assist the consumer in making a choice by allowing them to compare products in the market, but that is only an indirect effect of competition law on the exercise of consumer choice. Competition's ultimate goal, therefore, is to benefit consumers. By preserving and promoting competition, competition law preserves the means to ensure efficient allocation of resources, thereby

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[8] See for example the OFT study on Competition Act & Consumer Rights, May 2006 in which the awareness of the Enterprise Act is calculated to have risen to 41%, rising to 70% amongst companies with more than 200 employees, and respectively 51% awareness of the Competition Act, rising to 87% amongst companies with more than 200 employees.

[9] RH Lande, 'Consumer choice as the ultimate goal of antitrust', (2001) 62 U Pitt LRev 503 p 2.

resulting in the best possible choice of quality, the lowest possible prices and adequate supplies to consumers.[10] Evidence has shown that with competition prices go down while without competition prices go up.[11] Equally, there may be other benefits in terms of improvements not only in prices but also in services offered and choices available to consumers.[12] Competition is therefore perceived as a driving force of choice. Competition among producers tends to lower prices, provide consumers with choice, generate more information for consumer decisions and open new markets for competitive firms. Competition is therefore seen as a necessary element for consumer welfare[13] though not in itself a sufficient one. Competition cannot in and of itself create development, make all products accessible to all people, or otherwise guarantee redistribution of wealth. The latter are left to other areas such as industrial or social policy. The dividing line between consumer welfare, and wider welfare is not a clear one, however.

Improper restrictions on consumer choice may occur either directly, by such practices as tying, or indirectly, through the effect they have on the competitive process and/or competitors, such as in the case of an anticompetitive merger: tying directly affects consumers in that it prevents the consumer from buying products separately; an anticompetitive merger, however, whereby a firm merges with all its competitors and then raises prices, involves indirect means of impeding consumer choice. The practice of raising pricing or of producing a single brand of itself is not illegal. While competition law is therefore to a large extent a 'consumer-focused competition law', the consumer is often merely the intended ultimate beneficiary; the immediate goal being the elimination of efficiency losses associated with monopoly and collusive behaviour. While ultimately competition is warranted on the grounds of the consumer being the ultimate benefactor, and while at times competition law pursues goals that may *directly* intend to benefit consumers (such as redistribution of market surplus or income in favour of consumers) at other times, competition goals may be largely independent of consumer welfare (e.g. the promotion of SMEs).

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[10] Consumers International, 'Consumer Benefits of Competitive Markets, Presentation and Compilation of competition cases', 2003 at www.consumersinternational.org

[11] Ibid. Consumers International indicate a number of examples that can be used to support this. For example, when competition was introduced in the sale of metal cans within Peru, prices went down from US$28.07 before competition (before 1992), to US $17.70 by 1995. Similarly, after the end of the cartel in citric acid (1991-1995) prices fell by approximately 15%. The liberalisation of the domestic airlines sector also in the US in 1979 led to the number of passengers being increased from 200 million in 1975 to more than 600 million in 2000, with prices falling by over 50% in the same period.

[12] Ibid. In Peru the connection fee for a fixed line fell from $1500 in 1993 to $150 in 2001, and the waiting time for installation fell from 118 to 2 months. Other changes also came as a result of liberalisation, such as an increase in the total number of telephones per hundred inhabitants, an increase in internet provision, as well as in employment in the sector.

[13] According to the consumer welfare standard, the competition rules ought to prevent unfair transfers of wealth from consumers to producers. See PD Camerasca, *European Merger Control: Getting the Efficiencies Right*, Antwerpen, Insertia-Hart 2000.

It is indicative, that to establish a competition law violation, there is no requirement to prove that consumers have been harmed, and that consumer harm of itself, may be insufficient to trigger a finding of competition violation. Competition law violations rest on a test of 'harm to competition' rather than 'harm to consumers'. Moreover, it is not a given that competition law actually enhances consumer welfare, let alone that in each and every case it actually leads to a benefit to consumers.[14]

A study on the effects of antitrust policy (as distinct from competition itself) on consumer welfare suggests that competition law remedies may not always bring about meaningful competition to the benefit of consumers.[15]

- Specifically, the decree in *United States* v *American Tobacco*[16] that divided cigarette production into a three-firm oligopoly, unleashed a battle for market share through advertising, rather than price, 'The stability of the industry's profit rate and the absence of any clear decline in prices after 1911 suggest that the American Tobacco case did little to spur meaningful competition in the industry.'[17]

- Similarly, the *Paramount* decision[18] prohibiting agreements to maintain uniform prices and competitive bidding among theatres for each run of a feature film, did not lead to a reduction in prices; in fact the average real price of a movie ticket rose in the two decades following the decision. The trend is explained on the basis that either the defendants' original actions were not raising ticket prices and restricting output, in which case the antitrust suit should not have been filed, or the decree failed to end collusive behaviour.

The apparent failure of antitrust enforcement to increase competition to the benefit of consumers, is attributed to either the fact that it often takes so long for cases and remedies to be implemented that industry competition has changed in the meantime, or to the fact that in monopolization cases the remedy often turns out to have a negligible practical impact. The study concludes that:

> 'retrospective assessments of some of these cases have failed to find much direct benefit from curbing alleged instances of collusion. (Besides price fixing very few empirical studies exist of cases involving collusive practice). For example, Newmark (1988) found that an antitrust indictment of bakers in Seattle had no effect on the price of bread, and Morrison and Winston (1996) concluded that a consent decree

[14] See for example in the US where the courts prevented consumers from challenging overcharges from price fixing under the federal antitrust laws, requiring that actions only be brought by direct purchasers. *Ill. Brick Co. v. Illinois*, 431 US 720, 746 47 (1977). See also S. Weber Waller, 'In search of economic justice: Considering competition and consumer protection law' (2005) 36 Loy U Chi LJ 631.

[15] R Crandall & C Winston, 'Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence' (2003) 17(4) Journal of Economic Perspectives 3.

[16] 221 U.S. 106 [1911]

[17] R Crandall & C Winston, 'Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence' (2003) 17(4) Journal of Economic Perspectives 3, p 9.

[18] Ibid, *US v Paramount Pictures* 334 US 131 [1948].

> that prohibited airlines from announcing the ending dates of their fare promotions had no effect on fares.'[19]

Again, the explanation may be that the competition authorities are prosecuting firms that are engaging in activities that involve other goals besides raising prices.[20]

The effect of these studies is not to undermine the importance of competition enforcement, nor the fact that competition law's ultimate objective is to enhance consumer choice and welfare, but rather to emphasize the fact that competition enforcement as distinct from policy, may not always bring a *direct* benefit to consumers, and may not always lead to an increase in choice or reduction in price. Moreover, competition enforcement often merely relies on vague statements about the consumer impact that may ignore the effect on the ultimate consumer, let alone exhaustively address the 'consumer interest'. The relative scarcity of study on the standing of the consumer in competition enforcement is in direct antithesis with the fact that it is ultimately grounded and justified on the interests of consumers. In fact confusion even surrounds who the consumer is.

2.2 Consumer Protection Policy & Law

Consumer protection policy and law, however, target the interests of the consumer more directly and aim at levelling the playing field between people that are acting in their trade or profession and people who are not. The Directive on Unfair Commercial Practices Directive 2005/29/EC defines the consumer as, 'any natural person who is acting for purposes which are outside his trade, business, craft or profession.' Consumer protection, in this respect, aims at addressing asymmetric information between producers and users and other 'contractual' unfair practices on consumers:

> the system of protection introduced by the Directive [on Unfair Terms in Consumer Contracts] is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both the bargaining power and his level of knowledge.[21]

Consumer protection therefore covers a broader and more diffuse bundle of areas such as unfair and deceptive advertising and fraud, and can sweep to, *inter alia*, product safety, food and drug regulation, and consumer education, conceivably, covering almost everything that governments do or should do.[22]

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[19] Ibid, p 14.

[20] Consumer welfare is not only defined by reference to the price charged to consumers. Other non-price related elements are also important such as quality of information, reduced choice and innovation.

[21] Cases C-240/98 *Oceano Grupo Editorial SA v. Rocio Murciano Quintero and others* [2000] ECR I-4941.

[22] Consumer protection in this article, however, is used in a more restricted sense to refer to protection against practices which distort the manner in which consumers make decisions in the marketplace, practices that hinder honest and fair competition. TJ Muris, 'The Interface of Competition and Consumer Protection', at the Fordham Corporate Law Institute's 29th Annual Conference on International Antitrust Law and Policy, 31 October 2002.

Consumer protection violations therefore, impair the consumer's ability to *choose* among options. They rely on coercion, undue influence, deception, incomplete information, or confusing information.[23] Consumer protection therefore aims to address information failures that may eventually lead to the distortion of the market and inefficiency, rather than directly. It directly protects the consumer's economic interests from unfair business to consumer commercial practices though indirectly, it may also protect business from competitors who do not play by the rules.

Consumer protection policy is also more scattered both in terms of legislative regime and of enforcement.[24] In terms of legislation, it is scattered across national and European instruments in a way that has only recently begun to be harmonized. In the UK for example consumer law is grounded on, *inter alia*, the Consumer Credit Act 2006, the Unfair Contract Terms Act 1977, and Part 8 of the Enterprise Act 2002. Harmonization and convergence have only recently begun to take place, both on the European and international level. On the European level the Directive on Unfair Commercial Practices[25] requires States to introduce a general prohibition on traders trading unfairly when dealing with consumers, prohibiting, *inter alia*, misleading and aggressive practices. On the international level, the OECD Guidelines on Consumer Protection in the Context of Electronic Commerce issued in 1999, for example, provide that Member countries should:

> work toward building consensus, both at the national and international levels, on core consumer protections to further the goals of enhancing consumer confidence, ensuring predictability for businesses and protecting consumers.[26]

Enforcement is similarly scattered and may vest with the competition authorities, sector regulators or other designated agencies. In the UK, for example, the OFT shares enforcement competence with other UK or EU enforcement bodies, such as the local Trading Standards Services. As distinct from traditional competition enforcement, the OFT cannot under consumer law take binding enforcement action itself absent an enforcement order by the court,[27] however, competition infringement decisions are binding on civil courts in damages actions and enforcement orders are admissible evidence in actions in breach of contract or tort. Coordination at the European level is achieved by regulation (the Consumer Protection Co-ordination Regulation).[28]

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[23] NW Averitt & RH Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law' (1997) 65 Antitrust LJ 713 p 17.

[24] S Weber Waller, 'In search of economic justice: Considering competition and consumer protection law' (2005) 36 Loy U Chi LJ 631, p 633.

[25] Directive 2005/29 EC, OJ 2005, L149/22 (which must be implemented by 2007).

[26] OECD Guidelines, 1999 available at www.ftc.gov/opa/1999/9912/oecdguide.htm

[27] See Part 8 of the Enterprise Act 2002.

[28] Regulation 2006/2004/EC, OJ 2004, L364/1.

Consumer protection and enforcement can now be seen to be moving on the same trajectory as competition law, both in terms of cooperation and convergence, and is also seen to warrant the attention of the antitrust policy community:

> the consumer protection community can borrow heavily from antitrust enforcement experience with hard-core cartels in designing strategies for attaching cross-border fraud. Cooperation between competition policy and consumer protection officials and practitioners can accelerate the pursuit of effective international approaches to detecting and punishing fraud. … limiting cross-border fraud is important to the establishment of successful market regimes.[29]

Policy	**Competition policy & law**	**Consumer protection policy & law**
Aim	Protect competitive process/ supply of options	Protect ability to choose
Target group	Fairness between trading parties/ interests of consumers	Fairness between traders and consumers mostly/ empowering consumers
Practices covered	Cartels, abuse of dominance, anticompetitive mergers	Unfair and deceptive advertising, fraud etc
Legislative regime	On European level Articles 81 and 82 and Merger Regulation Corresponding provisions in national legislation	More scattered - Harmonization now taking off and national regimes vary
Enforcement	Separation between national and European level By competition authorities (and is some cases sector regulators)	Mostly national enforcement May vest with several bodies including competition authorities, sector regulators or designated agencies

[29] TJ Muris, 'The Interface of Competition and Consumer Protection', at the Fordham Corporate Law Institute's 29th Annual Conference on International Antitrust Law and Policy, 31 October 2002, p 24.

3. THE RELATIONSHIP BETWEEN CONSUMER PROTECTION LAW AND COMPETITION LAW

3.1 Separate and Overlapping Fields

As such, competition law and consumer protection law may be seen to have separate fields, one dealing with the production of options and the other with the ability to choose among them. In that respect, competition law cannot traditionally provide a remedy to a consumer that is harmed by virtue of misleading information, or by unfair contact terms imposed by a (non-dominant) company where that does not affect competition.

Respectively, consumer protection law cannot of itself prevent competing companies from merging and merging their competing products into one. Similarly, predatory pricing may only affect the supply of options rather than the choice among them, and fraud and deception may affect only the choice amongst options rather than their supply.

While this separation of fields is sustained in principle, however, in practice there is overlap between the two fields. Certain practices do not neatly fit in one of the two but rather may be seen to affect both the supply of options and the choice amongst them. Such is the case for example with tying and resale price maintenance.

Tying may not only involve an anticompetitive effect insofar as it may involve leveraging market power from one market into another, but it may also directly affect consumer choice by making it difficult for consumers to evaluate or price either of the two tied products separately.[30] Similarly, resale price maintenance can restrict the pricing options of dealers and raise anticompetitive concerns. It can also however distort consumer choice, insofar as it may be used to guarantee large retail margins, 'which will give salespeople an inventive to 'push' certain brands of products, even if those brands are not superior (and indeed may be inferior) to competing products in the same price range.'[31] Competition law and consumer protection law may therefore impact the same conduct, but in principle they have different agendas and reflect different values and priorities.

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[30] See for example the *National Society of Professional Engineers v. US* 435 US 679 (1978) which involved a group of restrictions on price-information options promulgated by the association of professional engineers, which when eliminated by the Supreme Court gave consumers a more effective ability to choose among available providers. Similarly in *Detroit Auto Dealers' Association* 955 F.2d 457 (6th Cir.), cert. denied, 506 US 973 (1992) the FTC eliminated a restraint on non-price options which increased consumer choice and in turn increased price competition. See also 4.3.3 below.

[31] NW Averitt & RH Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law' (1997) 65 Antitrust LJ 713, p 19.

3.2 Complementarity for Consumer Sovereignty

In sharing the common interest of protecting and promoting consumer welfare,[32] competition and consumer welfare can be seen to complement each other. In this respect, competition ensures that the market does not prevent choices from reaching the consumer, while consumer protection ensures that consumers can make well-informed decisions about their choices. Lande & Averitt have termed this notion 'consumer sovereignty' referring to the, 'state of affairs where the consumer has the power to define his or her own wants and the ability to satisfy these wants at competitive prices.'[33]

> There must be a range of consumer options made possible through competition, and consumers must be able to choose effectively among these options. The boundary between antitrust and consumer protection is best defined by reference to these two elements of consumer sovereignty. The antitrust laws are intended to ensure that the marketplace remains competitive, so that a meaningful range of options is made available to consumers, unimpaired by practices such as price fixing or anticompetitive mergers. The consumer protection laws are then intended to ensure that consumers can choose effectively from among those options, with their critical faculties unimpaired by such violations as deception or the withholding of material information.[34]

The complementarity between competition law and consumer protection law in relation to 'consumer sovereignty' may be seen in the case of switching. Competition law ensures that options that would otherwise reach the market are not impeded, and consumer law ensures that consumers are informed enough to be able to switch. Absent competition, there would be no products to which consumers would be able to switch. Absent sufficient information on the alternatives, however, so as to allow consumers to make an informed decision, despite the existence of competition, consumers may still perceive the costs of 'search and switch' (finding the best deal, overcoming transactions costs related to the change as well as the psychological costs of uncertainty) as being too high in relation to the benefits of switching.[35]

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[32] Consumer welfare refers to consumer wealth maximization. There is relative scarcity of study on the notion of consumer welfare and confusion as to what it is. It may traditionally focus on the prices charged to consumers, and lacks refinement as to other types of consumer detriment such as reduced choice, innovation or information. See e.g. HH Chang, DS Evans, R Schmalensee, 'Has the Consumer Harm Standard Lost its Teeth?' AEI- Brookings Joint Center Working Paper, MIT Sloan Working Paper No. 4263-02, August 2002. available at https://ssrn.com/abstract=332021; MC Grauer, 'The Use and Misuse of the term 'Consumer Welfare': Once more to the mat on the issue of single entity status for sports leagues under section 1 of the Sherman Act' (1989) 64 Tul LRev 71.

[33] RH Lande, 'Consumer choice as the ultimate goal of antitrust' (2001) 62 U Pitt LRev 503.

[34] NW Averitt & RH Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law' (1997) 65 Antitrust LJ 713.

[35] KJ Cseres, 'The Impact of Consumer Protection on Competition and Competition Law: The case of deregulated markets', Amsterdam Center for Law & Economics, Working Paper No. 2006-05 (2006) at http://ssrn.com/paper=903284, p 6.

As such, despite the existence of options consumers may opt to stay, for example, with the incumbent, due to their perception of the costs of switching as compared to the benefits. The lack of much switching in the case of British Gas consumers despite the existence of alternatives is an example of the interdependency of the two bodies:

> This means that a majority of British Gas consumers do not switch because they perceive search and switch costs higher than they are and therefore they tolerate the incumbent's prices being above the entrant's prices.[36]

In other industries, however, where there is more room for product differentiation, and where the 'added value' to consumers may be more apparent, switching may be more effective. In telecommunications for example, where competitors can differentiate their offerings more easily,[37] and where consumers can more readily appreciate the benefits or particularities of switching, consumers may be more inclined to switch.[38]

> … the conclusion is that liberalisation can actually lead to increased market power of producers and higher margins. Effective competition has to be restored and adequate regulation of the networks has to be maintained on the liberalised market in order to guarantee lower prices. It has to be acknowledged that liberalisation needs not only framework laws that specifically target competition issues of the sector but that help consumer to make efficient choices and accordingly to activate competition.[39]

3.3 Inter-Dependency: for better and for worse

As was seen, the two policies may at times be overlapping in that they impact on the same conduct; the separation of protecting choice and the ability to exercise it may not always be perfect. Accordingly, addressing issues from a competition point of view, may indirectly also benefit consumer protection, and vice versa; equally, however, market failures in one may eventually impact on the other. Despite the existence in competition, the absence of consumer protection or information may eventually affect the operation of competition as consumers may otherwise have been able to discipline providers. Consumers must be able to make efficient choices to activate competition.

> Competition rules can challenge established market players and make the entry of a greater number of suppliers possible. Consumer tools can assist consumers to make rational, well-informed choices on the market and subsequently intensify competition.[40]

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[36] Ibid.

[37] By means of example, telecommunication companies are now offering triple play services, being voice, data and internet together.

[38] Ibid. See also G Fischer, 'Consumer rights, consumer protection problems after the liberalisation of the telecommunications market', National Association of Consumer Protection. Conference on telecommunications liberalisation, Budapest 25 April 2005.

[39] Ibid, p 14.

[40] Ibid, p 19.

Conversely, however, in certain cases addressing one type of market failure may worsen the other type of failure. By means of example, advertising by dominant firms (particularly where associated with strong trademarks, serving to strengthen goodwill and brand loyalty) may give rise to significant barriers to entry for potential new entrants. Aggressive advertising campaigns that compare prices or stress advantages over such an operator could be needed to overcome such a barrier to entry. Consumer protection law may, however, absent an understanding of its implications on competition, prevent aggressive comparative advertising and impose strict measures with regard to the substantiation of claims in advertisements. While such consumer protection measures may thus protect consumers in respect of aggressiveness or substantiation of advertising, it may hamper competition by not allowing the barrier to entry to be easily overcome. Accordingly, consumer protection law may need to take into account the need to surmount advertising barriers of dominant firms, thereby allowing more leeway to new entrants as to their advertisements, as it may otherwise hamper competition. Eventually, entry by new firms would benefit consumers.[41] By the same token, however, an order ending maximum resale price maintenance may give unethical dealers more room to overcharge vulnerable customers, thereby potentially giving rise to more fraud and coercive sales practices.[42]

3.4 Complementarity in the Systems as Means of Enforcement

Apart from the complementarity of the two policies in respect of consumer welfare, and the interdependence in terms of result, the two policies may also be seen as complementing each other.

3.4.1 Consumer protection policy may complement competition law (externally)

Consumer protection may enhance competition by making it easier for honest sellers to compete in the market. Also, consumer protection may complement competition law by providing useful insights about how competition policy should be executed, and by improving our understanding of how markets operate. For example, information on advertising practices and consumer choice may affect the antitrust agenda:

> Some years ago, for example, we studied the role of advertising and commercial practice restrictions on the practice of optometry in our consumer protection mission. What we learned from this exercise resulted in a Trade Regulation Rule, and also generated several antitrust challenges to attempts by professions to restrict

[41] See also P Aghion & P Bolton, 'Contracts as Barrier to Entry', (1987) 77 American Economic Review 388; F Gomez Pomar, 'EC Consumer Protection Law and EC Competition Law: How related are they? A Law and Economic Perspective', Indret Working Paper No. 113, January 2003, at www.indret.com.

[42] See NW Averitt & RH Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law' (1997) 65 Antitrust LJ 713. The authors give the example of the hearing aids case in the US, where as a result of FTC orders ending maximum resale price maintenance, unethical dealers were able to more easily overcharge vulnerable consumers, thereby giving rise to more fraud and coercive sales practices.

> new ways of delivering services. … Moreover what we learned about quality of care issues in our consumer protection efforts influences our antitrust program.[43]

Consumer protection may also raise the possibility of new remedial strategies in competition enforcement.[44]

> The disgorgement of revenues obtained by fraud is a centrepiece of our consumer protection program. The experience with restitution and disgorgement in consumer protection laid the foundation for the Commission to use those remedies in antitrust.[45]

3.4.2 Competition law may complement consumer protection policy & law (externally)

On the other hand, competition principles may ensure that consumer protection does not actually work against the consumer interest rather than in its favour. Consumer protection may at times go to lengths in the interest of preventing consumers from being misled, thereby leading to over-regulation and to controls that ultimately diminish the very competition that increases consumer choice. Such measures can create barriers that limit sellers from selling what consumers want. By means of example, the FTC in the US recently participated in a challenge to state law that prevented anyone other than licensed funeral director from selling caskets to the public over the internet. While the interest behind this state policy was to protect consumers, it became questionable whether the law did more harm than good. The FTC noted that, 'rather than protecting consumers by exposing funeral directors to meaningful competition, the law protects funeral directors from facing any competition from third-party casket sellers'.[46] Similarly, the barring of non-attorneys from performing certain functions related to the settlement of residential real estate transactions was argued by the FTC to forward more the interests of the attorneys' economic interests than of the consumers.[47]

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[43] TJ Muris, 'The Interface of Competition and Consumer Protection', at the Fordham Corporate Law Institute's 29th Annual Conference on International Antitrust Law and Policy, 31 October 2002.

[44] Consumer protection may encourage the introduction or preference of remedial measures, both by highlighting the possibility for new remedies, and by encouraging their adoption in individual cases where the consumer interest would so precipitate. See below (4.3.1)

[45] TJ Muris, 'The Interface of Competition and Consumer Protection', at the Fordham Corporate Law Institute's 29th Annual Conference on International Antitrust Law and Policy, 31 October 2002.

[46] Memorandum of Law of Amicus Curiae the Federal Trade Commission, *P*owers v. *Harris*, No CIV-01-445-F, 1 (WD Okla filed Aug 29, 2002), online at www.ftic.gov/oz/2002/09/okamicus.pdf. The district court and the Tenth Circuit upheld the state law. But see *Casket Royale, Inc v Mississippi*, 124 F Supp 2d 434, 440 (SD Miss 2000) that overturned a state law limiting casket sales to licensed funeral directors.

[47] Brief Amici Curiae of the Federal Trade Commission and the US, *McMahon v Advanced Title Services of West Virginia*, No 31706, 10 (w Va filed May 25, 2004), online at www.ftc.gov/be/V040017.pdf. See also TJ Muris, 'Principles for a Successful Competition Agency' (2005) 72 U Chi LRev 165.

4. INTERNATIONAL STRENGTHENING OF CONSUMER PROTECTION (AS A MEANS OF ENFORCEMENT AND AN IDEAL) AND IMPLICATIONS FOR COMPETITION ENFORCEMENT

4.1 The Empowerment of the Consumer Within and Outside Competition Law

Initiatives are taken both on a European and a national level to strengthen consumers, and to empower consumers in the context of competitive markets, as well as to increase international cooperation and convergence on the matter.[48]

On a European level, Directive 2005/29/EC on Unfair Commercial Practices, and the Consumer Protection Cooperation Regulation 2004, as well as the Green Paper on actions for damages for breaches of competition law are examples of this strengthening of consumer protection policy and law, both through separate consumer protection laws, and through the enhancement of the consumers' rights within competition law, inter alia.

Similar initiatives can also be seen on the national level. By means of example, in the UK the Enterprise Act 2002 gave enforcement authorities extended powers to take swift and effective action against traders who do not comply with their legal obligations to consumers; enhanced the role of the OFT in encouraging and approving codes of practice for certain trade associations; and imposed on the OFT the obligation to respond to 'super complaints' brought by certain consumer bodies within a certain timetable. Likewise, Ofcom who is under the statutory obligation to further the interests of consumers, where appropriate by promoting competition (section 3(1) Communications Act 2003), recently published a consultation on its approach to the promotion of consumer interests. Ofcom's objective is to integrate consumer policy with competition policy so that account is taken of consumer preferences and priorities, and so that consumer protection is complemented by, 'well-designed rights and regulations; access to information about rights and risks; effective complaint-handling processes; and active monitoring and enforcement'.[49]

The DTI in 2005 also consulted on a new strategy for empowering consumers, whose basic underpinning is a strong competition regime. The document recognises that competition protects consumers and encourages business development, though also that consumers' being able to make informed choices is a precondition to competition: 'Empowering consumers drives competition'.[50]

4.2 Competition Called to Address Consumer Concerns More Explicitly

Within this spirit of strengthening and empowering consumers, competition law is increasingly being called to address consumer protection issues, and the role of the

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[48] See above (2.2)

[49] Ofcom, Consultation on consumer issues, published 8 February 2006.

[50] DTI, *Extending competitive markets: empowered consumers, successful business*, consultation July 2004, available at www.dti.gov.uk/ccp/topics1/consumer-strategy.htm.

consumer is increasingly brought into surface, not only implicitly and indirectly, but also explicitly and potentially directly. Neelie Kroes, Competition Commissioner, recently commented that consumer welfare is now well established as the standard applied by the Commission in assessing mergers and violations of Articles 81 and 82 EC.[51] An effects-based approach helps ensure consumers benefit from a competitive, dynamic market economy.

> Antitrust's goal is to protect consumers. Antitrust law should care intensely about sustaining the effectiveness of competition and display indifference about the identities or fortunes of individual market participants. A well-functioning market serves consumers because competition presses producers to offer lower prices or to improve product quality to succeed. Competition also motivates sellers to provide truthful information about their products and drives them to fulfil their promises to consumers. Through improved theoretical understanding and painful practical experience, antitrust now finally regards enhancing consumer welfare as its single unifying goal. Antitrust relies on sound economics, both theoretical and empirical.[52]

At times, the consumer interest within competition law and enforcement may be more explicit than in others. For example, the Community Courts have often recognised in the context of Article 82, that the consumer is in the heart of competition enforcement actions, '… the provision is not only aimed at practices which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on an effective competition structure.'[53] In the Italian railways case[54] the Commission found that by refusing to enter into an international grouping, by refusing to discuss terms for access to the track and by refusing to provide traction services, railway companies had deprived rail passengers of the benefits of price competition and customer choice.

> All the available evidence is that the introduction of competition, if properly regulated, delivers better rail services at less cost to the taxpayer than railway companies operating in closed markets. This decision opens up choice for consumers and will improve railways' attractiveness compared to other modes of transport.[55]

Similarly, in *GCB/French* banks the Commission was concerned about the possible prevention of new entrants from issuing cards at prices lower than those of the incumbent banks, thereby preserving the revenues and market shares of the latter to the

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[51] N Kroes, 'European competition policy – delivering better markets and better choices', speech delivered at the European Consumer and Competition day in London, 15 September 2005

[52] TJ Muris, 'Principles for a Successful Competition Agency' (2005) 72 U Chi LRev 165, p 3.

[53] Case 6/72 *Continental Can v. Commission* [1973] ECR 215, para 26.

[54] COMP 37.685 *Georg/ Ferrovia*, Commission press release IP/03/1182.

[55] Ibid.

detriment of the consumer.[56] In the *Bronner* case Advocate General Jacobs stated that the primary purpose of Article 82 is to, 'prevent distortion of competition – and in particular to safeguard the interests of the consumers – rather than to protect the position of particular competitors.'[57]

It should be noted, however, that the Commission often when referring to consumers refers not only to the ultimate consumers, but also to customers/competitors. For instance, the consumers of a bus were held to be the bus companies and tour operators rather than the commuters and tourists.[58] In this paper, however, references to consumers are limited to ultimate consumers and do not include entities acting in the pursuit of trade.

Certain cases make explicit reference to the optimal levels of consumer choice as the ultimate concern in antitrust enforcement. In *United States* v *Philadelphia National Bank*, the Court explained the fear that undue concentration would prevent the consumer from being able to choose freely on the basis of any price or non-price issue that was important to them.[59] Similarly, in the *Microsoft* decision, the concern that the practices were against consumers was central to the Commission's reasoning.[60] Microsoft's refusal to disclose interface information could result in the elimination of competitors and provide a disincentive for innovation, thereby generating less consumer choice and higher prices. Similarly, the requirement to unbundle the media player from Windows was deemed to have a positive effect on innovation and was considered to ultimately benefit consumers by levelling the playing field: 'Consumers should play the decisive role in the process [of determining the best product available] rather than a dominant company'.[61] In the US counterpart of the *Microsoft* case, Judge Jackson remarked that, 'the ultimate result of Microsoft's actions is that some innovations that would truly benefit consumers never occur for the sole reason that they do not coincide with Microsoft's self-interest.'[62]

As such, competition law may therefore be moving towards a more explicit and direct consideration of the ultimate consumer in competition enforcement.

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[56] On 8 July 2004 the Commission had announced that it had sent a statement of objection to Groupement des Cartes Bancaires (GCB) and to nine French banks in relation to a suspected infringement of Article 81(1) of the EC Treaty. On 20 July 2006 the Commission announced that it had sent a new statement of objections to GCB and closed its investigation into the nine banks. See Commission press release IP/04/876 and Commission press release MEMO/06/3000.

[57] Case C-7/97, [1998] ECR I-7817, para 58.

[58] *ACEC/ Berliet* (68/39/EEC) [1968] CMLR D35, para 15.

[59] 274 US 363 (1968)

[60] See also M Monti, 'The Commission's pro-active competition policy and the role of the consumer', speech at European competition day in Dublin, 29 April 2004, SPEECH/04/02, where he discusses the implications of the Microsoft decision and explains the Commission's finding that Microsoft's practices were against the interests of consumers.

[61] Ibid.

[62] *US v Microsoft* 84 F Supp. 2d (DDC 1999) at 112.

4.3 A More Direct Consumer Role in Competition Policy and Enforcement: consumer protection (as an ideal) within competition law and enforcement

What can be seen is that the role of the consumer is strengthened not only outside but also within competition law and consumer protection is increasingly imbedded into competition law, both procedurally and substantively. In this respect, the consumer interest may take the form of either a consumer benefit, or a consumer detriment.[63]

The empowerment of the consumer may therefore be reflected in competition enforcement, in terms of procedural rights such as the right to be heard, and in terms of substantive application, by turning, for example, 'harm to consumers' as compared to 'harm to competition' into a possibly alternative benchmark for competition enforcement: Could 'harm to consumers' justify a finding of anti-competitiveness? Could 'harm to consumers' constitute a sufficient condition for antitrust control? Is 'harm to consumers' a necessary precondition of a finding of anti-competitiveness?

4.3.1 Consumer empowerment in competition procedure

The consumer is increasingly used as a source of information in competition policy and enforcement. The Commission will customarily consult with consumer associations with respect to proposed legislative changes,[64] and under the modernised antitrust enforcement regime competition authorities are encouraged to take into account input from consumers. Under the new procedures for lodging complaints (Form C) and the procedures in the Procedural Regulation[65] the rights of complainants are formalised, and authorities are to use such information for the purposes of launching, inter alia, own initiative investigations. Similarly in merger review, the Commission gives weight to consumer concerns; under the Mergers Implementing Regulation[66] consumer organizations have new express rights to be heard in merger investigations. By means of example, in 2001 the Commission opened a special website to seek the views of consumers on two merging Swedish banks.[67]

Equally, the Consumer Liaison Officer (CLO)'s role is to ensure a permanent dialogue between the Commission and the European consumers. The CLO acts as the main contact point for consumer organisations, alerts consumer groups to cases that may benefit from their input and interacts with national authorities in relation to consumer protection matters. Within DG Competition, the CLO has also established a Group of Consumer Correspondents consisting of case handlers from each Unit, aimed at

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63 The two can be seen as the opposite sides of the coin.

64 See for example the recent consultation on the revision of Commission Regulation 1617/93/EEC, Block Exemption for agreements on passenger tariffs in the airline sector, OJ 1993, L155/18, where the Commission directly consulted with the Bureau Europeen des Unions des Consommateurs and the UK Air Transport User Council.

65 Regulation 773/2004/EC, OJ 2004, L123/18.

66 Regulation 802/2004/EC, OJ 2004, L133/1.

67 See *Forenings Sparebanken* merger (COMP/M.2380).

developing awareness on consumer issues; each case now assesses the impact on consumers.

Consumer protection also affects the enforcement mechanisms and implementation. What can be seen is a strengthening in the means of enforcement, and a resort to new enforcement mechanisms that may more efficiently address the consumer interest in question. Enforcement of competition law may therefore be seen to be following the trajectory of consumer empowerment.

Enforcement may range from negotiated settlements, to an amnesty approach (whereby the terms of the amnesty – including the proposed penalty - are published and any company may take part in the programme by accepting the terms), and public enforcement by means of a final infringement decision.

Negotiated settlements may ease progress case load and effectively reach proportionate outcomes. Resources are relevant in this respect.[68] Public and private enforcement, on the other hand, serve the aim of deterring anticompetitive practices and to protect firms and consumers from these practices. While public enforcement relies on the Commission and national competition authorities to adopt decisions finding the relevant violation, private enforcement refers to the application of antitrust law in civil disputes before national courts. In its recently published Green Paper on Damages for breaches of competition law, the Commission considers that, 'by being able effectively to bring a damages claim, individual firms or consumers in Europe are brought closer to competition rules and will be more actively involved in enforcement of the rules.'[69]

In certain cases public enforcement may also be coupled with private redress, such as where for example *ex gratia* payment is accepted in a trust fund. Depending on the consumer issue in question a remedy may be more or less acceptable and/or suitable. The settlement with the *ex gratia* payment into a charitable trust fund was recently accepted for example by the OFT in the independent schools case (for a payment of £3 million). Though in a bid rigging cartel the offer of compensation as part of a settlement may not be appropriate (and it is best to preserve the incentive for private actions for damages), in a sportswear cartel the offering of compensation into a fund may be a suitable remedy in view of the reduced incentive of individual consumers to sue.[70] Accordingly, the offering of compensation may be appropriate in a case like the recent one in France involving luxury perfumes. As a result of the anticompetitive practices, consumers had to pay an increased price for the products. While consumers

[68] See for example the settlement of the OFT with independent schools. OFT press release 88/06 of 19 May 2006.

[69] Para 1.1.

[70] See V Smith, 'Protecting the consumer: enforcing competition and consumer law', Speech to the Law Society's European Group, 11 July 2006

were therefore obviously (and possibly directly) harmed, the harm to consumers would be unlikely to trigger private actions for damages.[71]

Moreover, super-complaints are encouraged. In the UK, under section 11(1) of the Enterprise Act 2002, a super-complaint is a complaint lodged by a designated consumer body to the OFT, that a feature(s) of a market in the UK appears to be significantly harming consumers. Once received, the OFT then has 90 days to publish a response. In 2004 the DTI announced that the National Consumer Council, the Consumers Association and Citizens advice were to be the first consumer bodies designated as super-complainants under the Enterprise Act 2002.[72] Super-complaints have been lodged in several markets, including home collected credit, care homes, mail consolidation, private dentistry and doorstep selling.

Consumers may also affect the markets and levels of the market under investigation.[73] It is indicative, that the OFT in prioritizing casework, considers, *inter alia*, whether any vulnerable consumers are affected as well as the likely size of consumer detriment arising from the behaviour identified.[74] A strengthened consumer, particularly where the consumer is felt to have been harmed in specific industries, may shift competition's attention to those markets. This way, consumer interest may shift more attention to markets with a more obvious effect on consumers, and with an impact therefore on the retail rather than the wholesale level.

By means of example, in 2005 DG Competition's sector inquiry focused, *inter alia*, on payment system networks and whether cooperation within networks has an adverse effects on consumers, as well as on retail banking – an inquiry driven by consumer complaints. The latter inquiry's focus was on whether, *inter alia*, retail financial markets deal with information asymmetries in an efficient way, and also considered whether regulation and legislation may be limiting competition and consumer choice. Commissioner Kroes noted that the inquiry may, 'have to go beyond the classical area of antitrust law.'[75]

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[71] In a case where a port owner refuses access to its port thereby preventing a competitor from offering a competing ferry service, while harm to consumers may justify the payment of compensation into a fund, harm to competition/ competitors may also lead to private actions for damages by the alternative service provider/ access seeker, which should be encouraged.

[72] Now there are several such bodies. Amongst the bodies entitled to make super complaints in the UK are: the Consumer Council for Water, the Campaign for Real Ale Limited, the Consumers' Association, the Gas and Electricity Consumer Council, the General Consumer Council for Northern Ireland, the National Association of Citizens Advice Bureaux, the National Consumer Council, the Consumer Council for Postal Services.

[73] See OFT Guidelines on Market Studies and OFT Guidelines on Market Investigation References, accordingly to which the OFT seeks to make markets work well for consumers.

[74] V Smith, 'Protecting the consumer: enforcing competition and consumer law', Speech to the Law Society's European Group, 11 July 2006. Other such principles include the strength of the evidence at any stage, the type of the case and whether it involves a hardcore violation, policy considerations and whether the OFT is best placed to act.

[75] See N Kroes, 'European competition policy – delivering better markets and better choices', speech at the European Consumer and Competition day in London, 15 September 2005.

4.3.2 The strengthening of the consumer and substantive competition law

The consumer interest not only finds its way in competition enforcement in terms of procedure, but also in its substantive application. For example, a benefit to consumers may exempt a practice that would otherwise have been found to be anticompetitive.[76] The table below outlines certain direct references to the consumer in EC and UK competition law.

Table: Certain direct references to the consumer interest in EC and UK competition law

	EC Competition law		**UK competition law**	
Practice	**Provision**	**Notes**	**Provision**	**Notes**
Anti-competitive agreements	Art 81(3) EC: Exempts agreements that lead to benefits that are shared with consumers	European Commission Notice on Application of Article 81(3) para 84 – 'concept of consumer encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers, i.e. natural persons who area acting for purposes which can be regarded as outside their trade or profession.'	Section 9 UK Competition Act (CA) 1998 - Exemption procedure – condition 2 requires that consumers receive a fair share of the benefit	Consumer benefit can take the following forms: s 1(a) EA 2002: ▪ lower prices, higher quality or greater choice of goods or services in any market in the UK; or ▪ greater innovation in relation to such goods or services. See also Guidelines on Chapter I
Abuse of dominance	Article 82(b) - Condemns limiting markets to the prejudice of consumers.		Chapter II prohibition CA 1998 - Condemns limiting markets to the prejudice of consumers.	
	Article 82 – Guidelines on application of Article 82 on exclusionary abuses - Consideration of efficiencies			See also Guidelines on Chapter II
Merger control	Recital 29 ECMR - Efficiencies may counteract effects	Consumer includes intermediate and ultimate consumers.	s 33(2)(c) Enterprise Act (EA) 2002 - Consideration of	

[76] While the role of the consumer may be central to the definition of the relevant a market and the determination of dominance, for the purposes of this paper, the focus is on the direct consideration of consumer interests in relation to a finding of competition violation; the relation between the interests of the consumer and harm to competition; the *effects* of practices on the consumer.

	on competition and potential harm to consumers	Art. 2(1)(b) ECMR	customer benefits in relation to anticompetitive effects of proposed merger	
			s 41(5) EA 2002 - Consideration of consumer benefits in considering remedies.	
Fining policy and leniency	Guidelines on the Method of Setting Fines Imposed para 1.A - In assessing gravity of infringement and level of fine consider capacity to cause significant damage to other operators, in particular consumers.	See also European Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases (2002, Amended) Horizontal Merger Guidelines	OFT Guidance as to the appropriate amount of a penalty, OFT 423 para 2.5 - Consideration of direct and indirect harm to consumers in determining level of fines	
Referrals			Referral to the Competition Commission (CC) – s 22(2)(b) EA 2002 - OFT considers customer benefits and relation with adverse effects of substantial lessening of competition.	
			CC consideration – Part IV EA 2002 - CC consideration of any action needed to remedy adverse effect of competition or any detrimental effect on consumers arising from the adverse effect.	Detrimental effect can take the following forms: s 134(5) EA 2002 ▪ higher prices, lower quality or less choice of goods or services in any markets in the UK; or ▪ less innovation in relation to such goods or services.

Apart from direct references to the consumer within competition law, however, the strengthening of consumer protection policy and the perceived role of the consumer may also lead to *changes* to the substantive application of competition law. It may, for example, lead to competition law considering new factors that are not traditionally

competition considerations but more consumer considerations (e.g. fairness); to competition law being extended to apply to cases where ultimate consumers (rather than just competition/competitors) are harmed by unfair practices of dominant undertakings; and/or to a harsher application of competition law where the harm to consumers is perceived to be significant.

In the *Belgian Architects* case, the Commission condemned recommended prices as reducing competition by facilitating price coordination. The decision was justified on the grounds that it would give consumers more freedom to negotiate fees with the architects. Commissioner Mario Monti stated that, 'recommended prices can mislead consumers as to what is a reasonable price for the service they are receiving and as to whether this recommended price is negotiable.'[77] Harm to consumers may therefore be a significant factor in competition assessments, but is it a necessary condition? And is it sufficient to trigger a finding of abuse? Could pressure selling such as misleading marketing, bait and switch tactics and falsely claiming to adhere to a code of conduct constitute abusive practices where undertaken by a dominant undertaking? Could competition law account for timing concerns in relation to the interest to encourage the early introduction of a product on the market?

I turn next to the two sides of consumer interest within competition law: consumer benefits exempting conduct that might otherwise have been anticompetitive, and consumer detriment illegalising conduct that might otherwise have been legal.

4.3.2.1 Consumer benefits exempting conduct that would otherwise have been found to be anticompetitive

Certain practices that may otherwise violate competition law may sometimes be upheld because of the benefits they provide to the consumer. A consumer exemption can be found, for example, in Article 81(3). Article 81(3) EC makes the prohibition in Article 81(1) inapplicable to agreements or categories of agreements that contribute to the improvement of the production or distribution of goods, or promote technical or economic progress, that pass a *fair share of the benefits to the consumers*, and do not impose restrictions that are not indispensable for achieving these benefits or afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question. The consumer in this regard is not limited to the final end-user but extends to entities acquiring products or services in the course of business.

While the Commission has not quantified what share to consumers is fair, the Commission is likely to look at long-term effects of the agreement[78] and to consider whether there is a sufficiently high level of competition in the market to ensure that a reasonable proportion of the benefit is likely to be passed on to consumers. Exclusive distributorship agreements have been exempted on the ground that consumers benefit

[77] Commission condemns Belgian architects' fee system, Commission press release, IP/04/800

[78] In *Eurosport*, OJ 1991, L63/32, the Commission considered that the creation of a new sports channel was likely to restrict choice in the long term.

from the additional choice made possible through the existence of a firm charged with the promotion of the goods. Similarly, non-price vertical restraints, may be upheld as the market may otherwise be unable to supply the information absent restraints, for fear for example of free riding. For example a tie between television antennas and service contracts was justified as consumers might not know whether the TV's failure was due to a problem with the antenna or with its servicing.[79] Also, a practice that eliminates the option of negotiating prices after an exchange is closed, and could therefore otherwise be deemed to be anticompetitive, may be upheld on the basis that it protects sellers' ability to protect themselves from fraud or monopoly power, and therefore their ability to choose in the market.[80]

The interest of the consumer is also central to the consideration of efficiencies in merger control.[81] Merger control traditionally concentrated exclusively on the price effects of a merger: a merger would be condemned if likely to lead to higher prices. The recent reform of the EC Merger Regulation brought out a Commission intention to give merger-related efficiencies more emphasis as a mitigating factor, so that where a merger is likely to give the merged entity clear incentives to act pro-competitively for the benefit of the consumer, this will counteract adverse effects on competition.

Similarly, the Commission Discussion paper on the application of Article 82 to exclusionary abuses recognises the possibility of an efficiency defence in the context of an Article 82 abuse. Efficiencies that enhance the ability and incentive of a dominant firm to act pro-competitively for the benefit of consumers will justify conduct that would otherwise have been found to be abusive. The Commission notes, however, also that the more removed the efficiencies are in terms of the time they need to materialise, and the benefits they pass on to consumers the less weight will be attached to them. Accordingly, in considering whether the efficiencies outweigh the harm to consumers, other factors will also be relevant such as timeliness, the elasticity of demand and the likely elimination of competition.[82]

In *Hilti AG* v *Commission*[83] where Hilti attempted to defend its requirement that purchasers of nail guns also acquire nails from it on the grounds of product safety, the CFI held that safety was a matter for product safety laws and not to be used to justify anticompetitive practices. While entities will therefore not be allowed to hide behind a consumer protection justification where such is a mere pretext, the empowerment of consumer protection policy may lead to more practices being justified (or condemned)

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[79] See *United States v. Jerrod Elecs. Corp.* 187 F Supp. 546, (1960) and NW Averitt & RH Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law' (1997) 65 Antitrust LJ 713, p 22.

[80] See *Chicago Board of Trade v. US* 246 US 231 (1918) and ibid.

[81] Council Regulation 139/2004/EC, OJ 2004, L24/1, on the control of concentrations between undertakings (the EC Merger Regulation). See also Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ 2004, C31/3.

[82] See DG Competition Discussion Paper on the application of Article 82 to exclusionary abuses, December 2005.

[83] Case C-53/92P, [1994] ECR I-667 and Case T-30/89 *Eurofix Banco v. Hilti AG* [1991] ECR II-1439.

on the grounds of consumer protection, including product safety. One may well envisage a situation where a dominant company that manipulates product safety rules in order to be allowed to commercialize a product early, is found to have abused its dominance.[84]

It can be observed that passing a benefit to consumers is a necessary condition to the exemption. The closer the benefits are to consumers, the more likely it will be that a practice will be exempted, whereas the more far-removed the benefits are to consumers the less likely it is that they will be given weight. It therefore appears that the closer the benefits are to the retail market, the more likely it will be that they will be given gravity. Insofar as consumer efficiencies may justify otherwise anticompetitive conduct, and insofar as the benefit to consumers is a necessary precondition to the exemption, the interest of the consumers may be seen to be a necessary factor to the *lack* of antitrust control. Is it a necessary factor, however, to antitrust control? And is it sufficient?

4.3.2.2 Harm to consumers making conduct illegal?

Conversely, however, it may be that the prejudice to consumers will make a practice anticompetitive that would otherwise not have been found to be so.

What is harm to consumers and what is its standing in competition enforcement?

Competition violations traditionally rest on a finding of 'restriction of competition' or other 'harm to competition', such as foreclosure effect, which *ultimately* harms consumers. In *Michelin* v *Commission,*[85] abusive behaviour was defined as having, 'the effect of hindering the maintenance or development of the level of competition still existing on the market.' The 'harm to consumers' is often not considered: it may be direct or indirect, and at times it may also be presumed.[86] For example harm to interim buyers will be presumed to harm end consumers.

While the Commission may therefore at times refer more explicitly to the consumer as the ultimate benefactor, the consideration of the consumer interest is often merely vague, in terms of considering it to be a natural consequence of 'harm to competition', rather than as a direct 'harm to consumers'. It will typically make a vague statement about the impact on the consumer without considering what the exact 'harm to ultimate consumers' is.

> Article 82 does not require it to be demonstrated that the conduct in question had any actual or direct effect of consumers. Competition law concentrates upon protecting the market structure from artificial distortions because by doing so the interests of the consumer in the medium to long term are best protected.[87]

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[84] See, for example, below with the *AstraZeneca* example.

[85] Case 322/81 [1983] ECR 3461.

[86] See European Commission Discussion Paper on the application of Article 82 EC to exclusionary abuses, 19 December 2005.

[87] Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, [2004] CMLR 1008, para 264.

Accordingly, what consumer harm consists of is not clear.[88] In some cases the consumer may be harmed by virtue of higher prices. In other cases, however, the harm may relate to other non-price factors such as innovation, product variety and product quality. Harm to consumers may vary according to the market in question: the market for bullet proof vests, for example, gives more importance to product quality and reliability than to price; airlines at some point competed on scheduling and convenience and not price; the motion picture industry competed on product innovation rather than price.

In some cases, however, harm to consumers may be more *obvious* and *direct* than in other cases: for example in the case of increased retail prices, the consumer is directly harmed, whereas in the case of erection of artificial barriers to entry the effect on consumers is not immediately obvious, it is presumed. The same practice (e.g. discrimination, tying, and excessive prices) may involve more direct and obvious harm to consumers (as opposed to the competitive process) depending on who the conduct is targeted to and/or on what level of the market the conduct targets or affects (e.g. wholesale or retail).

For instance, a discriminatory practice may either involve competitors or the ultimate consumers. Systemic discrimination may foreclose smaller firms and make it harder for them to compete on the market.[89] Article 82(c) condemns applying dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage. In such a case, consumers are not directly harmed as the effect is neither targeted to nor directly affecting them. It is presumed however, that indirectly they are harmed. Equally, however, discrimination may involve price discrimination between consumers. Ofgas had issued three rulings on undue discrimination between consumers using different payment methods,[90] and while the regulator had found that on the facts the evidence was not sufficient to consider the discrimination unfair, it did consider that undue discrimination as between ultimate consumers was possible: 'If the tariffs do not cover the costs directly attributable to each category of customer, there is a clear case of discrimination … . However, in the context of a price controlled monopoly business, fairness in the recovery of 'joint' costs

[88] It is characteristic that there is little work on the issue of consumer detriment. See for example OFT, Consumer Detriment, 2000, HMSO. See for example s. 134(5) of the Enterprise Act 2002 that states that detrimental effect can take two forms: (a) higher prices, lower quality or less choice of goods or services in any market in the UK; or (b) less innovation in relation to such goods or services. See also the equivalent definition for consumer benefit in section 1(a) of the Enterprise Act.

It should also be noted discussions about harm to consumers tend to revolve around whether competition law protects the competitive process and/or competitors. See H.H. Change, D.S. Evans and R. Schmalensee, 'Has the Consumer Lost its Teeth?' AEI Brookings Joint Center Working Paper, MIT Sloan Working Paper No. 4263-02. available at SSRN.

[89] See for example United Brands 27/76 [1978] ECR 207.

[90] Ofgas, *Referral by the Gas Consumer Council Relating Discounts for Customers Paying by Direct Debit*, the Director General's Decision, 1995, Ofgas. Ofgas, *Gas Competition: Phase 1* – Research Study Conducted by MORI for Ofgas, 1996. Ofgas, *Review of British Gas Trading Domestic Supply Tariffs: A Decision Document*, Ofgas 1998.

is one of the main issues to be addressed.'[91] The dominant firm was required to not exercise any undue discrimination against any person or class of persons, nor set charges which were unduly onerous or predatory. Equally, discrimination on the grounds of nationality may be prohibited under Article 82,[92] a rationale that may reflect more the *direct* interests of the consumer rather than of competition itself.

Accordingly, the closer the practice in question is to the retail level, the more obvious and direct/actual the harm to consumers may be. Many cases of abuse involve the wholesale level with an indirect effect on consumers, rather than the retail level.[93] A few cases, however, have involved practices which more directly affect ultimate consumers. In the UK, for example, the OFT has prohibited various practices involving retail markets and direct harm to ultimate consumers. In *Napp Pharmaceutical Holdings* the OFT found that Napp had abused its dominance by, *inter alia*, charging, 'excessive prices to customers in the community segment of the market for the supply of sustained release morphine tables and capsules in the UK.'[94] In August 2003, the OFT imposed fines totalling £18.6 million for illegal price-fixing agreements for replica football kits between retailers.[95] In Hasbro the OFT fined the toy manufacturer £4.9 million for requiring its distributors not to sell the products other than at Hasbro wholesale list price.[96] In Lladro Comercial the OFT found the manufacturer of porcelain figurines to have entered into written selective distribution agreements with the aim of preventing them from selling at discount prices.[97] Also, in the Contact Lens Solutions case, the Competition Commission (then MMC) found that the pricing policy of a leading supplier exploited its position in a way that was against the public interest.[98]

Even in such cases, however, involving *direct* harm to consumers it is not clear what the gravity of this parameter is on a finding of abuse. Harm to consumers may in this respect neither be a necessary nor a sufficient condition to trigger antitrust control: 'While the OFT aims to use its powers to ensure that markets work well for consumers,

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[91] Ofgas, Referral by the Gas Consumer Council Relating Discounts for Customers Paying by Direct Debit, the Director General's Decision, 1995, Ofgas, p 8-9. See also M Harker and C Waddams Price, 'Consumers and antitrust in British deregulated energy markets', in, *The Pros and Cons of Antitrust in Deregulated Markets*, Konkurrensverket Swedish Competition Authority 2004, chapter 3.

[92] See Case 7/82 *GVL* [1983] ECR 483 where the collecting society in Germany for a type of copyright was prepared to collect royalties for artists outside the Republic only if they were of German nationality. The prohibition on discrimination on the grounds of nationality in Article 7 was given effect under Article 82.

[93] Refusal to supply, for instance, has been found abusive in respect of an existing customer where the dominant supplier wishes to enter the customer's market himself (Cases 6 & 7/73 *Commercial Solvents* [1974] ECR 223); refusal to supply spare parts to an independent maintenance firm (Case 22/79 *Hugin* AG [1979] ECR 1869); refusing to supply an existing customer except on unacceptable terms (*Napier Brown-British Sugar*, OJ 1988, L284/41); refusing to supply information that would allow other suppliers to compete in an upstream market (*Microsoft* COMP37.792, March 2004).

[94] OFT Decision CA98/2D/2001.

[95] OFT Press Release PN 107/03.

[96] OFT Decision CA98/19/2002.

[97] OFT Decision CA98/04/2003.

[98] *Contact Lens Solutions* Cm. 2242 (1993).

a finding of direct detriment to final consumers is not a condition of a finding of infringement of the Chapter I prohibition.'[99]

For example, Article 82(b) condemns, 'limiting production, markets or technical developments to the prejudice of consumers'. Accordingly, a refusal to license that prevents the creation of a *new product* or service for which there is potential consumer demand may constitute an abuse of dominance. In *Magill*[100] where the product suppressed (the comprehensive weekly TV guides) was a new product that did not exist on the market and for which there was consumer demand, the refusal to license was found to be abusive. On the other hand, in *Oscar Bronner*[101] where the delivery of newspapers to homes was not a new product and for which there were alternatives (post, shops, kiosks) the facts of the case did not justify a finding of abuse by refusal to grant access to competitors.

While the limitation of products, markets or technical development is to a large degree *presumed* to be to the prejudice of consumers, whether the latter is a determinative and/or a necessary condition is not in itself clear. Would the absence of consumer demand for a new product negate a finding of abuse? That would appear unlikely as abuse is meant to be objective, consumer preferences may change with time, and competition law is not traditionally concerned with the commercial attractiveness of a product (that is left to the market). Accordingly, while the harm to consumers may be actual and direct in this instance, the decisive element here does not appear to be the prejudice of consumers, but rather the suppression of a new product. The prejudice to consumers is thereafter presumed:[102] 'There is no requirement of proof of actual harm to consumers – beyond that of injury to competition … Proof of actual consumer harm is not required because it is inferred from injury to antitrust'.[103]

Competition law to address harm to consumers?

A more consumer-focused competition law may need to consider more *explicitly* harm to consumers, as compared to harm to competition.

As was seen above, the effect on consumer is an important factor in assessments of the anticompetitive effects of a practice: high benefits to consumer may justify otherwise anticompetitive conduct, and therefore the absence of harm to consumers may be a necessary factor to the absence of antitrust control. Equally, however, the absence of harm to consumers will not excuse anticompetitive conduct; a benefit is

[99] Notification by *Arena Leisure plc/Attheraces Holdings Limited/British Sky Broadcasting Group plc/Channel Four Television Corporation/The Racecourse Association Limited*, OFT Decision, 10 May 2004, para 303.

[100] [1995] ECR 743.

[101] Case C-7/97 [1998] ECR I-7791, [1999] 4 CMLR 112.

[102] There may also be other instances where the consumer interest precipitates and/or permits intervention. For example, under the public interest regime for media mergers introduced by the Communications Act 2003, the Secretary of State has the power to intervene in mergers between newspaper owners or broadcasting companies where certain public interest issues arise.

[103] SD Houck, 'Injury to Competition/Consumers in High Tech Cases' (2001) 75 St John's LRev 593, p 596.

required. Conversely, however, is harm to consumers a *sufficient* factor to trigger a finding of anti-competitiveness (absent other detriments) or does it require 'competition efficiencies'? And will 'competition efficiencies' stemming from control be assumed in cases where there is detriment to consumers?

The significance of this question lies in those cases whether there is no direct harm to competition such as to traditionally trigger a competition violation; cases where there may be harm to consumers by a dominant operator's practices, but not to competition or competitors.[104] In effect, competition law in this case, and specifically abuse, may be called to consider the effect on consumers (not just competition/competitors) more directly.

Withdrawal of a package from the market

Suppose for example, that in a recently liberalized country a telecommunications operator is the only one providing internet access. Competitors have not yet entered the market though there is no impediment to market entry. The incumbent operator offers several internet packages ranging from €30 to €100 flat rate per month with speeds that vary. The incumbent operator wishes to change the packages by introducing threshold packages, and by withdrawing the lowest priced package of €30, so that the lowest package is that of €60 per month. A certain percentage of consumers that previously had access to internet will no longer be able to afford the internet, and are therefore harmed. There is no harm to competition or competitors, however, as if anything this should attract new entrants and give them a segment of the market that might otherwise have remained with the incumbent.

Could competition law be used in this case to mandate the provision of the service to those consumers that would otherwise not be able to afford it? Could the harm to consumers be sufficient to trigger a finding of abuse of dominance, or would harm to competition also need to be established?[105] Could harm to competition be presumed from harm to consumers, or would competition efficiencies also need to stem from a finding of violation?

In the *AstraZeneca* case[106] misusing the patent system by failing to disclose all relevant information to the regulators was deemed to constitute an abuse of dominance. Could equivalently misusing the consumer protection system by misleading consumers, charging them high prices, or withholding products from them that used to be on the market also be deemed to constitute such an abuse? The *AstraZeneca* case may be distinguished on the grounds that by misusing the patent system to thereby extend the area of legal monopoly, competition was also affected, while by withholding a product

[104] It should be noted that in this paper I do not distinguish between harm to competition v. harm to competitors.

[105] It is assumed that regulation would not otherwise be able to afford a solution, whether on the basis of the provisions on tariff approval or universal service obligations.

[106] Commission press release IP/05/737 of 15 June 2005. Appeal brought on 25 August 2005, Case T-321/05, OJ 2005, C271/24.

to consumers if anything competition is encouraged. Equally, the existing caselaw on Article 82(b) in relation to refusals to deal, while relating, for example, to the restriction/suppression of a new product to the detriment of consumers, also involved an effect on competition.[107] It may be, however, that the requirement that the structure be affected is not a necessary one, at least not in all cases. It may be that it only applies to exclusionary practices. The court has on many cases reiterated that Article 82 is aimed not only at practices, 'which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competitive structure.'[108] So what happens in cases where damage to consumers is direct and there is no (direct) effect on the competitive structure?

Although untested, it appears that the ambit of Article 82 is sufficiently wide to allow for an interpretation that would cover for the situation where access to a product or service is restricted despite consumer demand and there is no apparent harm to competition; such a practice could be deemed to, 'limit production, markets or technical development to the prejudice of consumers'. But how many consumers would need to be harmed prior to a finding of abuse when there is no concomitant harm to competition/competitors? Also, what about other practices that are implemented directly against consumers that have no harmful effect on competition but may be unfair to consumers, such as arbitrarily discriminating against consumers or refusing to supply certain ultimate consumers? To what extent could unfairness to consumers justify a finding of anti-competitiveness where there is no other apparent effect on competition/competitors? Could a dominant company's fraud on consumers be deemed to constitute an abuse of that dominance? Could pressure selling such as misleading marketing, bait and switch tactics and falsely claiming to adhere to a code of conduct constitute abusive practices where undertaken by a dominant undertaking?

Fairness to consumers & consumer fraud

Unfair competition, i.e. practices involving *exploitative* abuses rather than exclusionary abuses, are included in the ambit of Article 82. Abusive exploitation under this Article, includes *inter alia*:

a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
c) applying dissimilar conditions to equivalent transaction with other trading parties, thereby placing them at a competitive disadvantage;
d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations …

It is therefore apparent that the scope of Article 82 is such as to include the consideration of fairness of practices, though this is mostly addressed to competitors/traders rather than ultimate consumers: 'In early decisions, it [the Commission] attempted to protect those dealing with dominant firms directly, by

[107] See for example *Magill*.

[108] *Continental Can v Commission* 6/72 [1973] ECR 215 para. 26.

reference to the practices listed in Article 82'.[109] So for example in *General Motors Continental*[110] the Court confirmed that charging excessive prices in relation to the economic value of a service is abusive. Similarly, unfair buying terms for services could be prohibited under Article 82: in *Eurofima*, the Commission persuaded a buyer of a railway stock to stop inviting tenders for development contracts which included terms that required patent licenses to be granted to it without further remuneration.[111]

While the notion of fairness is imbedded in Article 82, it appears that the Commission and the ECJ have become less inclined to consider fairness in dealing with the dominant operator as opposed to excluding competitors. Korah argued:

> The caselaw, however has transformed the prohibition from one forbidding unfair terms of dealing to one forbidding conduct that makes it more difficult for other firms to compete with the dominant firm, which may indirectly harm those dealing with the dominant firm.[112]

And continued:

> Now that anticompetitive conduct adopted by dominant firms is illegal, the Commission has avoided the difficulties of deciding when prices and other terms are fair.[113]

Also, it appears that the considerations of fairness were mostly in relation to buyers/competitors (other trading parties rather than ultimate consumers not acting in the scope of trade). Whilst defrauding a trading partner could therefore be deemed to be an abuse of dominance, consumer fraud is a new idea for competition law. It may be that with the strengthening of the role of the consumer, fairness in dealing with the dominant operator will be brought more directly to the surface, and that conduct directly targeted to (or affecting) ultimate consumers (with no immediately obvious effect on competition) will be covered within the ambit of competition law.

The Commission investigation into the 2006 World Cup tickets led to FIFA and the German Football Association taking measures to give consumers that were previously required to pay by bank transfer to a German bank account or by using a Mastercard product, reasonable access to tickets.[114] A similar approach was taken in respect of the 2004 ticket sales for the Athens Olympics.[115] The imposition of discriminatory tickets sales arrangements that unfairly favoured consumers based in France was found by the Commission to constitute an abuse of dominance.[116] Also, the OFT has referred a

[109] Ibid, pp 132-133.

[110] Case 26/75, [1975] ECR 1367, para 15.

[111] [1973] CMLR D217. The case did not proceed to a formal decision.

[112] See V Korah, *EC Competition Law and Practice*, 7th Edition, Oxford, Hart Publishing, 2000, p 81.

[113] Ibid, pp 132-133.

[114] Commission press release IP/05/519.

[115] Commission press release IP/03/738.

[116] Commission press release, IP/99/541.

complaint to the European Commission alleging that Apple's pricing policy through which online users in different European countries may face different prices for downloading the same music is anticompetitive.[117]

Accordingly, it appears there have been cases where the perceived consumer harm has led to competition findings of abuse and/or settlements by agreement (such as in relation to the 2006 World Cup tickets), though there did not appear to be an immediate harm to competition. It may be that such practices in markets where at the time of investigation there is no alternative operator/offeror/competitor will trigger an automatic consideration of harm to competition, even though the market may be open and the practices may lead to competitors entering the market (thereby enhancing competition). This may be so, as it might otherwise lead to the perverse result that operators in monopolistic market conditions are given the *carte blanche* as there is no competition to affect, and therefore consumers are left unprotected in the instance that they require protection the most - namely where there are no competing operators. But what about the same practices where there are alternatives but consumers are locked in with providers for a certain period of time? Could competition law provide a remedy to collective unfair (contractual or other) practices to ultimate consumers, and if so how many consumers' harm would justify competition control?

Table comparing 'harm to consumers' with 'harm to competition'

	Harm to competition	No harm to competition
Harm to consumers	Anticompetitive.	? Usually consumer protection policy or regulation – may be scope for competition law e.g. for Art 82 & then presume harm to competition in long-term.
No harm to consumers	Anticompetitive – harm to consumers presumed (e.g. long term).	Not anticompetitive.
Consumer benefits	Weigh both to see which stronger – significance of benefits. Passing-on less significant.	Not anticompetitive.

5. CONCLUSION

The role of the consumer has been strengthened across Europe, both outside and within antitrust law. Competition policy and law is increasingly called to address the relation of both the two systems of law (consumer protection policy and law and

[117] See OFT statement, 3 December 2004.

competition policy and law) and the role of the consumer within antitrust law – procedural and substantive.

While the role of the consumer may be central to the definition of the relevant a market and the determination of dominance, the *effect* of conduct on consumers is not traditionally directly considered in competition enforcement. Harm to consumers is not necessary to a finding of anti-competitive conduct; the absence of harm to consumers in itself will not exempt anticompetitive conduct, in the absence of a clear benefit. In most cases, harm to consumers is presumed from harm to the competitive process. While in some cases consumers are more obviously affected and directly considered, that has more to do with the nature of the conduct in question than with a belief that competition policy and enforcement should depend on an actual or potential harm to consumers.

As was seen in the introduction, competition law and enforcement does not necessarily and in all cases lead to a benefit to consumers or consumer welfare. It may be that competition enforcement will have to address more directly (and possibly become more conditional upon) harm to consumers: 'If it is indeed true that the abuse so clearly leads to consumer harm, then that evidence should be easy to provide, and would be preferable to a formalistic presumption with no regard for evidence of likely consumer welfare harm.'[118]

Moreover, it may be that the strengthening of the consumer will lead to substantive changes within antirust law: where retail markets are concerned and thereby the effect on consumer is more obvious, competition law may become more interventionist; equally, in cases that directly affect consumers, it may be that a harsher application of competition law is warranted; fairness may also assume a stronger role in competition enforcement particularly in relation to retail markets. It may be that consumer detriment in itself will trigger findings of competition violation, whereby harm to competition and/or efficiencies to competition will be presumed from harm to/ benefits to consumers correspondingly.

In Indonesia, the Competition Commission in the interest of protecting traditional local communities prevented a supermarket from expanding into venues of traditional small stores.[119] The social costs to people may have been greater than the gains from low prices and variety to consumers. European competition policy and enforcement may equally have to address more directly the role of consumers, both externally and internally.

> Competition is the basic rule of the game in the economy. Nevertheless, if the outcome of competition is to be accepted by the society at large, the process of

[118] 'The Reform of Article 82: Reactions to the DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses', prepared by the Competition Law Forum's Article 82 Review Group, available at www.competitionlawforum.org, para 5.

[119] Indomaret, Indomarco Prismatama, 03/KPPU-L-1/2000, referred to in E Fox, 'What is Harm to Competition, Exclusionary Practices and Anticompetitive Effect' (2002) 70 Antitr L Jnl 372.

> competition itself must not only be free but also conform to a social norm, explicit or implicit. In other words, it must also be fair. Otherwise, the freedom to compete loses its intrinsic value. Fair competition must go in tandem with free competition. These two concepts embody one and the same value. This may be the reason that competition laws of several countries such as Korea and Japan clearly specify 'fair and free competition' as their crown objective. … I believe that the abstract notion of fairness rests, inter alia, on equitable opportunities, impartial application of rules and redemption of past undue losses. … Fairness, then, does not imply absolute libertarianism but instead takes the form of socially redefined freedoms. Viewed from this perspective, the polemic whether competition laws should aim only at enhancing economic efficiency rather than at promoting some social policy goals such as fairness may appear to be irrelevant. After all, efficiency is intrinsically not a value-free concept.[120]

[120] Kyu-Uck Lee, A, "Fairness' Interpretation of Competition Policy with Special Reference to Korea's Laws', in The Symposium in Commemoration of the 50th Anniversary of the Founding of the Fair Trade Commission in Japan, Competition Policy for the 21st Century at 61 (KFTC 1997); referred to in EM Fox, 'What is harm to competition? Exclusionary practices and anticompetitive effect' (2002) 70 Antitr LJ 408.

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Representation of Consumer Interest by Consumer Associations – Salvation for the Masses?

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Recent reforms have been made in the UK and Europe with a view to creating new avenues for representation of consumer interest by consumer associations. These avenues include the UK super-complaint mechanism, the appointment of the Consumer Liaison Officer at the European Commission, and the introduction of new mechanisms for the participation of consumer associations in judicial proceedings. This article argues that, although the recent reforms should be considered as an important milestone in competition policy, they have not fully addressed the difficulties inherent in the representation of consumer interest by consumer associations. These difficulties include lack of legitimacy, shortage of resources and agency problems. Indeed, a reform that grants consumer associations such a central role in the representation of consumer interest should also consider these difficulties and ensure that consumer associations will have not only the opportunities but also the ability to represent consumer interest adequately. The article goes on to consider how such vital capabilities, which include proper funding and training and improving cooperation between consumer associations, can be enhanced. It is incumbent upon competition authorities to play a distinctive role in implementing these measures.

1. INTRODUCTION

> Consumer interests are presumably central to competition law, but as always, it is difficult to know who or what processes supply the concrete mechanism of such interests representation.[1]

Although recent reforms in the UK and in Europe which have created new avenues for consumer associations' participation in the competition arena should be considered as an important milestone, these reforms have not fully addressed the difficulties inherent in the representation of consumers by consumer associations.[2] A reform that grants consumer associations such a central role in the representation of consumer interest

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1 Doern & Wilks, 'Conclusions: International Convergence and National Contrasts', in Doern & Wilks (eds), *Comparative Competition Policy National Institutions in a Global Market*, Oxford, Clarendon Press, 1996, p 336.

2 For the importance of consumer participation in competition policy see: Dayagi-Epstein, 'Furnishing Consumers with a Voice in Competition Policy' (2005) 20 Latin America Competition Bulletin 120, http://europa.eu.int/comm/competition/international/others reprinted with permission in (2005) 16(3) *Loyola* Consumer Law Review available online at http://www.luc.edu/law/academics/special/center/antitrust/dayagi_epstein_consumers_voice.pdf.

should also consider these difficulties and ensure that consumer associations will have not only the opportunity but also the ability to represent consumer interest adequately.

It should be noted that the article does not analyse in detail any of the specific measures introduced by the recent reforms (opportunities), but rather concentrates on the institutional problems still inherent in representation by consumer associations (capabilities) which were not sufficiently addressed by the reforms. It should also be noted that although some of the reforms which will be reviewed in this article took place in the UK, the obstacles that these reforms address are not unique to the UK and are just as relevant in other countries.

Section Two of the article briefly discusses the obstacles faced by individual consumers in representing their interests in the competition arena. With a view to overcoming these obstacles, new avenues for the representation of consumer interest by consumer associations have been introduced recently in the UK and Europe. Section Two will then present the new avenues for consumer associations' participation: (i) ex-ante participation (participation occurring prior to an infringement) - the UK super-complaint and the appointment of the Consumer Liaison Officer at the European (EC) Commission; and (ii) ex-post participation (participation following an infringement) - enabling consumer associations to participate in judicial proceedings.[3]

The article will go on to argue in Section Three that although representation by consumer associations may overcome obstacles faced by the individual consumer in representing his interest, it is somewhat doubtful whether the reinforcement of the role of consumer associations in itself can solve all the problems inherent in the representation of consumer interest. This conclusion stems from the intrinsic difficulties, which consumer associations face such as lack of legitimacy, shortage of resources and agency problems.

In an attempt to solve some of the problems of representation by consumer associations in the competition arena, a number of suggestions will be made in Section Three with an emphasis on the distinctive role competition authorities should play in developing consumer associations' capabiliites. Finally, in light of the difficulties faced by consumer associations in the ex-post participation stage, the article will also advocate pursuing reforms that will enhance ex-ante participation by consumer associations, thereby enabling them also to participate in the determination of the 'rules of the game'.

2. NEW AVENUES FOR CONSUMER REPRESENTATION BY CONSUMER ASSOCIATIONS

The greater impact that an individual's producing activity (work) has over his life than that of consumption activity, together with the fact that production activity demands time and energy, explains consumers' greater involvement in their role as producers (of

[3] I thank Mr. David Bailey for this point.

income),[4] and the subsequent fact that consumers are unable to fully devote themselves to consumption activity or to seek redress when their rights have been impaired.[5]

Accordingly, in the overall balance of the damage incurred by each individual consumer as a result of anticompetitive behaviour when compared with the costs of seeking redress (including time and money), consumers will most likely conclude that the cost of seeking redress is higher than its likely benefits.[6] Indeed, this problem was recognised nearly forty years ago by the US Supreme Court in the case of *Hanover Shoe*:

> ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in lawsuit and little interest in attempting a class action.[7]

In view of the above, there has been an increasing recognition of the role consumer associations can play in the representation of consumer interest in the competition arena. This derives from the fact that consumer associations are likely to be better placed than individual consumers in respect to resources, access to evidence and expertise in competition matters. Consumer associations can also provide individual consumers with information and advice and represent consumer interest ex-ante (prior to an infringement) in front of the legislators and the administrative authorities, or ex-post (at the enforcement level after the damage has been incurred) by seeking collective redress. Furthermore, the fact that consumer activists, unlike individual consumers, are paid professionals also contributes to consumer activists' incentive to gain expertise and to devote time to this mission.

Accordingly, new avenues for participation by consumer associations have recently been created. (i) ex-ante participation - the UK super-complaint and the appointment of the Consumer Liaison Officer at the EC Commission; and (ii) ex-post participation - Sections 47 and 47B of the Competition Act of 1998 ('CA98') and suggestions raised in the EC Commission's Green Paper on 'Damages actions for breach of the EC Antitrust Rules' ('Green Paper').[8]

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[4] Tivey, 'The Politics of the Consumer', in Kimber & Richardson (eds), *Pressure Groups in Britain: a Reader*, Dent, London, 1974, p 206.

[5] Tivey, op cit, n 4, p 206. Nadel, *The Politics of Consumer Protection*, Indianapolis, Bobbs-Merrill, 1971, p xix, 235.

[6] Mayer, *The Consumer Movement: Guardians of the Marketplace*, Boston, Twayne Publishers, 1989, p 67. Mann, 'Antitrust and the Consumer: The Policy and Its Constituency' (1972) 5(3) Antitrust Law and Economics Review 37. Kroes, European Commissioner For Competition, 'More Private Antitrust Enforcement through Better Access to Damages: An Invitation for an Open Debate' - Opening Speech at the Conference *Private Enforcement in EC Competition Law: the Green Paper on Damages Actions* (Brussels, 9 March 2006), speech/ 06/158 http://europa.eu/rapid/pressReleases Action.do. Lopatka & Page, 'Indirect Purchaser Suits and the Consumer Interest' (2003) 48 Antitrust LJ 531, pp 554-556.

[7] *Hanover Shoe v. United Shoe Mach. Corp.,* 392 U.S.481, 494 (1968), p 494.

[8] European Commission, 'Green Paper Damages Actions for the breach of EC antitrust rules', COM (2005) 672 final, SEC(2005) 1732, (Brussels, 19 December 2005), http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/gp_en.pdf. European Commission, 'Commission Staff working Paper Annex to the Green Paper Damages Actions for breach of the EC Antitrust Rules' (Brussels, 19 December 2005), http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/sp.html. It should be noted that this is not an exhaustive list of the avenues for participation by consumer associations.

As will be discussed below, the various avenues for participation differ from each other not only in respect to the stage of the participation but also in the different outcomes and the different burdens that they impose on consumer associations.

2.1 Ex-Ante Participation Developments

2.1.1 The UK super-complaint

The super-complaint mechanism was created with a view to providing a formal route of communication between the Office of Fair Trading ('OFT'), sectoral regulators and consumer associations.[9] Under the super-complaint mechanism, designated consumer bodies are given the right to make a competition or consumer protection related complaint to the OFT or the appropriate relevant sectoral regulator.[10] The OFT or the regulator will then consider whether there are market features (such as market structure, selling practices, availability and transparency of pricing information or alleged anti-competitive conduct) that may significantly harm consumers. Consumer associations are also able to file a super-complaint regarding alleged infringements of Chapter 1 and Chapter 2 prohibitions of the CA98.[11] As opposed to 'ordinary' complaints which should be made regarding specific breaches of the competition rules (ex-post participation) the super-complaint widens consumers' participation (via consumer associations) to ex-ante[12] participation by granting consumer associations a statutory role in setting the authorities' agenda and in making markets work well for consumers (e.g., by enabling consumer associations to complain about general detrimental features or practices in the market beyond the scope of specific infringements including market features that are on the borderline of competition and consumer protection law).[13] The potential increased presence of consumer associations in front of administrative authorities entails within it greater responsibility and higher

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[9] Evans, 'Making Competition Real: EU Super-complaints' (2005) 15(5) CPR 187, p 191.

[10] Super-complaints can be submitted to the OFT or to regulators with concurrent competition powers: The Office of Gas and Electricity Markets (OFGEM), The Northern Ireland Authority for Energy Regulation (OFREGNI), The Office of Communications (OFCOM), Ofwat (water), ORR (railways), The Civil Aviation Authority (CAA), The Office of the Rail Regulator (ORR). However, The Financial Services Authority (FSA) and Postcomm (postal market) cannot deal with super-complaints. The Enterprise Act 2002 (super-complaints to regulators) Order 2003 (SI 1368).

[11] A feature of a market under Section 11 EA02 has the same meaning as in Section 131(2) of the EA02. OFT, 'Super-complaints: Guidance for Designated Consumer Bodies' (OFT 514, July 2003) http://www.oft.gov.uk. 'Designated Consumer Body' means a body designated by the Secretary of State by order. Department of Trade and Industry Consumer and Competition Policy Directorate 'Guidance for Prospective Designated Super Complaints Bodies', http://www.dti.gov.uk/files/file12743.pdf. DTI, 'Super-complaints Guidance for Bodies Seeking Designation as Super-complainants', (August 2006) http://www.dti.gov.uk/files/file32780.pdf. Allan Asher, 'Enhancing the Standing of Competition Authorities with Consumers' *ICN Conference* Korea, 15 April 2004, http://www.internationalcompetitionnetwork.org/capactbuildmemo_seoul.pdf, p 5.

[12] It should be noted that the super-complaint mechanism is not only limited to the ex-ante stage but can also be made use of at the ex-post stage once an infringement has occurred.

[13] Graham Winton, 'Super-complaints the UK Experience' (Brussels, 19 May 2005) (a copy is saved with the Author).

expectations that well-established and researched super-complaints will be brought forward. The submission of super-complaints is resource intensive in comparison to lodging 'ordinary' complaints but still cheaper than bringing a representative action. Within this framework, consumer associations with a research function, such as Which?, will be better situated than an individual consumer to lodge such a complaint.

Under Section 11 of the Enterprise Act of 2002 ('EA02'), the OFT is obliged to respond within 90 days to the complaint, stating whether and how it intends to deal with the complaint. The options open to it include rendering an enforcement order, commencing a market study or an official market investigation (by making a reference to the Competition Commission ('CC') or dismissing the complaint.[14] It seems that in comparison with other mechanisms (such as ordinary complaints and representative damages actions), the scope of the remedies, which may be introduced following a reference to the CC for market study or market investigation, is wider. The tight timeframe during which the OFT must reach a decision guarantees an official response to the concerns raised by consumer associations.[15] Hence, the super-complaint provides a speedy outcome for consumer associations unlike 'ordinary' complaints or an adversarial procedure which may take much longer. Nevertheless, one should not be dazzled by the time limitation of 90 days, since market investigations or market studies may take some time.

The designation process referred to above was designed to ensure that bodies, which claim to represent consumers, actually do so in practice. Accordingly, a body wishing to be considered as a 'designated consumer body' needs to operate independently, impartially and with complete integrity; it should demonstrate considerable experience and competence in representing the interests of consumers and the ability to put together reasoned super-complaints on a range of issues; the body should also be willing to cooperate with the relevant administrative authority. In situations where the consumer body has a trading arm, it should not have control over it.[16]

To date, eight consumer associations have already been recognised in the UK as designated consumer bodies: Consumers' Association (CA, also known as 'Which?'), the National Consumer Council (NCC), National Association of Citizens Advice Bureaux (NACAB), the Gas and Electricity Consumer Council (Energywatch), the Consumer Council for Postal Services (Postwatch), the Consumer Council for Water (Watervoice), General Consumer Council of Northern Ireland (GCCNI) and the Campaign for Real Ale (CAMRA).[17]

[14] Section 5 of the EA02.

[15] Winton, op cit, n 13.

[16] DTI, op cit, n 11.

[17] http://www.dti.gov.uk/consumers/enforcement/super-complaints/page17902.html

Also, up to now, nine super-complaints have been submitted in the UK: Private dentistry by Which? (October 2001),[18] Doorstep Selling by NACAB (September 2002),[19] Mail consolidation by Postwatch (March 2003),[20] Care Homes by Which? (December 2003),[21] Home Collected Credit by NCC (June 2004),[22] Northern Ireland Banking by Which? and GCCNI (November 2004),[23] Billing in the Energy market by Energywatch (March 2005),[24] Payment Protection Insurance by NACAB (September 2005),[25] and credit card interest calculation methods by Which? (April 2007).[26]

The UK experience with the super-complaint is, as a general rule, a positive one. The super-complaints led to several market studies and market investigation referrals to the CC. A report of the first completed CC market investigation on Home Credit, which has its origins in a super-complaint, was published in November 2006.[27] Therefore, it

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[18] Consumers' Association, 'Supercomplaint on Private Dentistry', (25 October 2001), http://www.which.co.uk/files/application/pdf/0110dentistry_scomplaint-445-55675.pdf http://www.which.co.uk/reports_and_campaigns/health_and_wellbeing/campaigns/dentistry/. During the period following the enactment of the Enterprise Act and before it came into force the OFT agreed to consider a super-complaint and respond within 90 days. The investigation was initiated under Section 2 of the Fair Trading Act of 1973. OFT, 'The Private Dentistry Market in the UK', OFT 630 available at: http://www.oft.gov.uk (March 2003) p 12.

[19] A Super-complaint was received from the National Association of Citizens Advice Bureaux (NACAB) on 3 September 2002, available at http://www.oft.gov.uk/Business/Super-complaints/doorstep+selling.htm.

[20] Postwatch Super-complaint, 'The Operation of the UK Market in Consolidation of Mail- A Super-complaint' (18 March 2003). A letter from Penny Boys Executive Director to Mr Gregor McGregor, 'Postwatch Super-complaint' (16 April 2003) http://www.oft.gov.uk Postcomm, 'Postcomm asks Royal Mail to work with Postwatch to improve communication with Mailsort customers' (11 November 2003) http://www.psc.gov.uk/news-and-events/news-releases/2003/postcomm-asks-royal-mail-to-work-with-postwatch-to-improve-communications-with-mailsort-customers.html

[21] Which?, 'Informal Super-complaint on Care Home Sector' (December, 2003), www.which.co.uk/files/application/pdf/0312carehomes_scomplaint-445-55754.pdf. OFT, 'Response to the super-complaint on care homes made by the Consumers' Association on December 2003' (OFT 703, March 2004), available at http://www.oft.gov.uk.

[22] Home credit - The OFT's reasons for making a reference to the Competition Commission (OFT 769, January 2005), available at http://www.oft.gov.uk/NR/rdonlyres/DA9F83CE-7BD8-4B90-B2AE-0D571DC4FBEF/0/oft769.pdf.

[23] Personal current account banking services in Northern Ireland - The OFT's reasons for making a reference to the Competition Commission (OFT 796, May 2005), available at http://www.oft.gov.uk/NR/rdonlyres/E87023AA-F397-4F86-BC76-C0E05EA5AD37/0/oft796.pdf

[24] Press Release, 'Energywatch makes £6.7 million difference' (20 July 2006) http://www.energywatch.org.uk/media/news/show_release.asp?article_id=976; 'Ofgem's response to the super-complaint on billing processes made by the Gas and Electricity Consumer Council (energywatch)', (Ref. No 163/05, July 2005) http://www.ofgem.gov.uk/temp/ofgem/cache/cmsattach/11828_16305.pdf

[25] OFT, 66/06, 'OFT launches study of payment protection insurance' (3 April 2006), http://www.oft.gov.uk/News/Press+releases/2006/66-06.htm, OFT Press Release 226/05 (8 December 2005).

[26] OFT, 57/07, 'Credit card interest calculation methods super-complaint' (2 April 2007), http://www.oft.gov.uk/news/press/2007/57-07.

[27] See Competition Commission's 'Home credit market investigation' dated 30 November 2006, http://www.competition-commission.org.uk/rep_pub/reports/2006/fulltext/517.pdf. Note that the OFT has recently held consultation on a proposed reference to the CC of the market for Payment Protection Insurance, which also has its origins in the super-complaint.

seems that any concern that consumer associations would misuse their extended powers to determine administrative authorities' priorities was premature. This is not surprising, since the credibility and legitimacy of consumer associations in the eyes of the legislators, administrative authorities and its constituents (the consumers), is essential for the association's reputation.[28]

According to Phil Evans, former senior policy adviser with Which?, the real potential incorporated in the super-complaint is the ability of consumer associations to use this mechanism to trigger a debate beyond consumer goods in the market sphere, by tackling competition issues in the public sphere such as the provision of education and health services by the state as part of its sovereign duty towards its citizens. Following this rationale, Which? lodged a super-complaint regarding the care home sector, maintaining that public authorities were abusing their market power (buyer power) by paying excessively low fees for the purchase of care home services. Which? claimed that these low fees were cross-subsidised by the imposition of higher rates on self-funded residents.[29] The OFT was reluctant to further investigate the allegation, arguing that:

> independent care home providers are not legally obliged to accept publicly funded residents … If they consider public authority rates to be too low, they can refuse to accept such residents and are likely to do so if the rates persist.[30]

Although the OFT decided in this case not to take on board the part of the complaint which referred to the competitive concerns in respect of public authorities' involvement in the home care sector, the complaint may well initiate a change in the OFT's willingness to deal with the delicate issue of the application of competition rules to the provision of public services by public authorities.[31]

On the other hand, it may be argued that not only were the Care Homes and the Private Dentistry super-complaints too wide and hence enabled the OFT to 'cherry pick' particular issues and to disregard others but also that they required the OFT to deal with social policy issues which it is not authorised to deal with. Arguably, such concerns are less likely to arise in well defined and purely economic super complaints, such as the case of the Northern Ireland Banking super-complaint.

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[28] Evans, op cit, n 9, p 190. OFT, 'OFT Response the super-complaint made by the National Association of Citizens Advice Bureau (3 September 2002)' (11 November 2002) http://www.oft.gov.uk/NR/rdonlyres/0CA9FCB4-8D43-406D-AC82-8BAE858C03BC/0/doorresponse.pdf. See also OFT PN 75/02. The OFT published a consultation paper 'Doorstep Selling & Cold Calling – a consultation on proposals to improve consumer protection when purchasing goods or services in their homes' (14 July 2004), the responses to the consultation were published in October 2005, http://www.oft.gov.uk/Business/Market+studies/doorstep.htm.

[29] Which?, op cit, n 21.

[30] OFT, op cit, n 21, pp 11-13.

[31] A telephone interview with Mr. Phil Evans, (1 September 2006).

2.1.2 The appointment of the Consumer Liaison Officer

The EC Commission's initiative to furnish consumers with a greater voice in competition policy is also evident in the appointment of Mr Juan Antonio Rivière y Martí as the Consumer Liaison Officer in the EC Commission in December 2003.[32] The task of the Consumer Liaison Officer, who is subordinate to the Directorate General of Competition ('DG Comp'), is to improve the relationship and increase the workflow between the EC Commission and consumers, with a special emphasis on consumer associations. The Consumer Liaison Officer's role is meant to be implemented, inter alia, by establishing more regular and intensive contacts with consumer associations, which will be used to alert them as to competition cases in which their input might be useful and also to advising them on useful ways to provide input and express their views.[33]

The Consumer Liaison Officer role is also intended to improve co-operation regarding consumer issues between DG Comp and other Directorate Generals (DGs) within the EC Commission, and between DG Comp and National Competition Authorities.[34]

The Consumer Liaison Officer has set-up a group of consumer case handlers for each unit or Directorate in the EC Commission. These case handlers meet regularly to develop awareness of consumer welfare in the cases examined by DG Comp. The Consumer Liaison Officer has also established a link to the co-operation network of consumer protection authorities set up by DG Health and Consumer Protection Directorate General ('DG SANCO')[35] and with the European Consumer Consultative Group (a group of consumer associations established by DG SANCO, 'ECCG').[36]

The appointment of the Consumer Liaison Officer reflects a vision according to which competition authorities should play a distinctive role in establishing regular and intensive contacts with consumer associations in the competition arena. However, despite the central role which has been assigned to him the Consumer Liaison Officer suffers from a severe shortage of resources which jeopardizes his ability to execute his important role. [37]

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[32] European Commission, 'A Pro- Competitive Competition Policy for a Competitive Europe', (April 2004) http://europa.eu.comm/comm/competition. Alasdair Murray, 'Consumers and EU Competition Policy' London, Centre for European Reform Policy 13 September 2005, www.cer.org.uk/pdf/policybrief_consumers.pdf at p 2.

[33] Wezenbeek, 'Consumers and Competition Policy: the Commission's Perspective and the Example of Transport' University of Groningen, 17 September 2004, http://ec.europa.eu/comm/competition/speeches/text/sp2004_011_en.pdf, p 7-8. Sánchez, 'Opinion of the Section for the Single Market Production and Consumption on Regulating Competition and Consumer Protection (own initiative opinion))' INT/280, (Brussels, 9 June 2006), INT/280 – CESE 309/2006 fin ES/DS/ET/ml at p 3.

[34] Murray & Johnstone, 'Consumers and EU competition policy' NCC, September 2005, http://www.ncc.org.uk/europe/EUcompetition1.pdf, at p 3.

[35] http://ec.europa.eu/dgs/health_consumer/index_en.htm

[36] Wezenbeek, op cit, n 33.

[37] Sánchez, op cit, n 33, p 1.

2.2 Ex-Post Participation Developments

Amendments to the CA98 implemented through the EA02 have introduced new procedures for representation of consumer interest by consumer associations at the ex-post stage. Consumer associations' distinctive role in the representation of consumer interest in the competition arena is also evident in the EC Commission's Green Paper.[38]

2.2.1 Appeals on OFT's decisions

According to Section 47 CA98 an interested third party has the right to appeal to the Competition Appeal Tribunal ('CAT') in respect of OFT decisions falling within paragraphs (a)-(f) of Section 46(3) of the CA98 provided that the interested party has sufficient interest in the underlying decision. These include decisions regarding infringements under the Chapter I and II prohibitions of the CA98 and Articles 81 and 82 EC.

Considering the difficulties faced by consumers (who are usually indirect purchasers and are constrained by inadequate resources and remoteness from the infringement) in initiating judicial procedures and shouldering the burden of proof, it is perhaps not surprising that to date no consumer association has made use of the right to appeal against an OFT decision set out in Section 47 CA98.

However, consumer associations have made use of the right to intervene (and have been given permission to intervene) in CAT proceedings under Rule 16 of the Competition Appeal Tribunal Rules 2003 ('CAT Rules') which states that: '[A]ny person who considers that he has sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings'.[39]

To date, Which? is the only consumer association to intervene in an existing procedure in front of the CAT under Rule 16 of the CAT Rules in the *Burgess* case.[40] In that case, a firm of funeral directors complained to the OFT regarding an alleged abuse of a dominant position by Austins, another firm of funeral directors in Hertfordshire, which had refused to grant Burgess access to the crematorium owned by the latter. The OFT ruled that Austins had not abused its dominant position. Burgess appealed to the CAT and Which? was granted permission to intervene. However, having made the application for intervention and although present at the procedures, Which? preferred to leave the litigation (shouldering the burden of proof) to the other parties (undertakings). Nevertheless, it is at least a possibility that Which?'s presence in the proceedings encouraged the CAT to pay special attention to the effect of the alleged abuse on the interests of the end-consumers and to deliver its landmark judgement in respect to the importance of consumer interest in competition law.[41]

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[38] Green Paper, op cit, n 8.

[39] Statutory Instrument 2003 No. 1372.

[40] Case 1044/2/1/ 04 *M.E. Burgess J J Burgess & S.J. Burgess v. Office of Fair Trading* (2005) CAT 25.

[41] *Burgess*, op cit, n 40, at para 344.

Intervention in existing procedures enables consumer associations to take on board a high profile case, without investing considerable time and resources on every such case, by relying on the efforts made by the appellant, who is most likely to be better placed than the consumer association to shoulder the burden of proof. Furthermore, the avenue of intervention imposes on consumer associations the lesser burden in comparison to other avenues of participation such as the super-complaint and representative action mechanisms. This derives from the fact that consumer associations wishing to intervene are not required to satisfy any designation/specification criteria. In addition, in contrast to representative actions, consumer associations are not required to name the individuals that they represent and can operate without their prior consent. Intervention also seems less expensive than lodging well-established super-complaints or filing representative damages claims that include the costs of seeking the consent of individual consumers to file a claim on their behalf, or of the costs involved in lengthy procedures and the risk of having to pay the other side's expenses.

2.2.2 Follow-on damages actions by consumer associations

According to Section 47B of the CA98 'specified bodies' (such as consumer associations)[42] can bring proceedings, comprising consumer claims for damages, made or continued on behalf of at least two specified individuals, before the CAT.[43] 'Consumer claim' in this context means a claim to which Section 47A CA98 (Monetary Claims before the Tribunal) applies and which an individual makes in respect to an infringement of competition rules affecting (directly or indirectly) goods or services.[44] When 'specified bodies' claim damages they can rely on the existing infringement decision of an administrative authority (OFT, EC Commission, sectoral regulators) once all appeals have been exhausted.[45]

This type of claim is known as a follow-on claim since it follows an infringement decision. It also demonstrates the link between public enforcement (the infringement decision) and private enforcement. The consumer association may rely on an infringement decision as prima facia evidence, which diverts the burden of proof from

[42] The criteria as to which bodies can be considered a 'specified body' are set out in the Department of Trade and Industry (DTI), 'Claims on Behalf of Consumers Guidance for Prospective Specified Bodies' http://www.dti.gov.uk/files/file11957.pdf.

[43] Section 19 of EA02 incorporated Section 47B CA98 into the CA98. For example, Which? became a specified body in 1 October 2005. OFT, 'Response to the European Commission's Green Paper, Damages Actions for breach of EC antitrust rules', (OFT 844, May 2006) http://www.oft.gov.uk, at p 16.

[44] DTI, Specified bodies, op cit, n 42.

[45] The CAT may grant permission to bring a claim for damages where the decision is still subject to an appeal. This may include an appeal to the CAT regarding OFT decisions or an appeal to the Court of Appeal regarding the CAT's decisions; or an appeal to the European Court of Justice regarding decisions made by the European Commission. DTI, Specified bodies, op cit, n 42.

the consumer association and therefore reduces its costs.[46] However, the specified body is still required to prove each individual consumer's entitlement to damages.[47]

The novelty of Section 47B CA98 is that it furnishes consumer associations with a locus standi despite the fact they haven't suffered any direct or indirect loss. However, the possibilities for initiating procedures are limited to follow-on claims and do not apply to stand-alone cases.[48] Hence, consumer associations' ability to bring claims on behalf of consumers under this avenue is dependent upon the existence of an infringement decision made by the competition authorities and consumer associations cannot file a representative damages claim on their own initiative.

In addition, because Section 47B CA98 adopted an opt-in model, consumer associations are entitled to bring a collective action on behalf of consumers only if consumers actively choose to join the claim.[49] Accordingly, the effectiveness of this collective action may be hindered by consumer passivity and lack of incentive to join a follow-on case, especially after calculating the expense of filing a claim together with the possible costs of the other party (should the claim be unsuccessful) in comparison to the possible compensation arising to the individual consumer in a given case. Consumers' reluctance to join a procedure may also limit the amount of compensation that consumer associations will be able to obtain.[50] Furthermore, consumer associations may find it difficult to communicate with the potentially large number of consumers who are eligible and need to opt in to the case. This is also partly because individual consumers may not realise that they are eligible to seek such damages and if consumer associations cannot reach them they may remain with no remedy.[51]

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[46] Lopatka & Page, op cit, n 6, p 560.

[47] Evans, op cit, n 9, p 190.

[48] I thank Margaret Bloom and David Bailey for highlighting this point. In respect to stand alone cases (independent private group actions) consider the Civil Procedure (Amendment) Rules 2000/221, (CPR) SI 1998/3132, Part 19, Rule 19.1 joinder of parties to the same claims; when more than one person has the same interest in the claim (CRP, part 19, Rule 19.6(1)) or a group action when there are multiple claimants and common issues of law or related facts under a Group Litigation Order (CRP Part 19, Rule 19.11). Although consumer associations which have not suffered loss themselves can not initiate claims on behalf of consumers for the infringement of the competition rules they may still support individual consumers in such actions (by collecting evidence and providing funding and legal advice). This is also the situation in the US and Canada, US American Bar Association ('ABA'), 'Comments of the Section of Antitrust Law and the Section of International Law of the American Bar Association in Response to the Request for Public Comment of the Commission of the European Communities On Damages Actions for Breaches of EU Antitrust Rules' (April 2006), www.abanet.org/antitrust/at-comments/2006/05-06/com-breaches-of-eu-at-rules.pdf, pp 71-72.

[49] Evans, op cit, n 9, p 189.

[50] Lopatka & Page, op cit, n 6, p 554. This stems from the fact that the damage is calculated according to the aggregate loss.

[51] Gubbay, 'Which? Consultation response, Green Paper on Damages Actins for Breaches of the EC Antitrust Rules' (12 April 2006), www.ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/021.pdf, p 12.

It should be noted that, to date, no claim has been brought by consumer associations under Section 47B CA98. However, the case of price-fixing of *Football Replica Kit*[52] is likely to be the first precedent Section 47B follow-on damages case. Arguably, should it be successful this may lead to a wider use of such a potentially useful mechanism. In this case the OFT found (August 2003) that a number of sportswear retailers including JJB Sports and Umbro Holdings Ltd. (a manufacturer of football replica shirts) were involved in price-fixing agreements in relation to football replica kit, infringing Section 2 CA98. The OFT imposed penalties on the parties. The CAT"s decision to dismiss the parties appeal regarding the liability findings[53] was upheld in October 2006 by the Court of Appeal.[54] The Court of Appeal also dismissed the appeals by each appellant in relation to the penalties imposed by the CAT. The appellants then sought leave to appeal to the House of Lords. In February 2007, the Appeal Committee of the House of Lords refused leave to appeal on the ground that none of the petitions raised an arguable point of law of general public importance.[55]

Following the Court of Appeal's ruling, Which? has already taken action to bring such a follow-on claim against JJB Sports including delivering a letter to JJB Sports informing them of its intention to bring an action against them and launching a campaign in which consumers who were overcharged can opt-in on-line. Which? announced on its website that if JJB fails to respond to its letter or fails to make a satisfactory offer of settlement, Which? will issue proceedings in the CAT. The reason for bringing a claim only against JJB Sports is that the two years time limit for bringing actions for damages against Manchester United, Umbro and the Football Association expired on August 1 2005, before Which? was granted its powers as a 'specified body' in October 2005. JJB Sports is the biggest retailer and the only solvent company, to have appealed, which brings it inside the time limit.[56] The latest development in this matter is that the first follow-on claim for damages under section 47B CA98, which has been brought by Which? on behalf of 130 individual consumers against JJB Sports. Which? is seeking compensatory damages in respect of each excessive price shirt, exemplary damages in the sum of 25 % of the defendant's turnover (net of VAT).[57]

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[52] OFT Decision, Price Fixing of Football Replica Kit, (1 August 2003). Case CP/ 0871/01, Decision of the Office of Fair Trading No. CA98/06/2003, http://www.oft.gov.uk/NR/rdonlyres/B8798974-E5B3-4106-9255-4DA315AE0935/0/replicakits.pdf

[53] Case 1021/1/03 *JJB Sports PLC v. OFT*, Judgment on Liability 1 October 2004, [2004] CAT 17. *Umbro Holdings PLC v. OFT*, Judgement on Penalty, [2005] CAT 22; *JJB Sports PCL v. OFT*, Ruling (Permission to Appeal) [2005] CAT 27, 15 July 2005. The CAT has not found any basis in the grounds of appeal advanced by JJB to give permission to appeal.

[54] *Argos Ltd & Anor v Office of Fair Trading* [2006] EWCA Civ 1318 (19 October 2006)

[55] The Appeal Committee also refused leave to appeal on ground that, in relation to the point of EC law raised in each of the applications, the provisions in question had already been interpreted by the European Court of Justice. OFT, 'House of Lords rejects appeal in price fixing of toys and games and replica football kit cases', Press Release 17/07 February 2007, available at http://www.oft.gov.uk/.

[56] Which? 'Campaign background' and Which?, 'Campaign explained', http://www.which.co.uk/reports_and_campaigns/consumer_rights/campaigns/Football %20shirts/index.jsp

[57] Case 1078/7/9/07, Notice of a Claim for Damages Under Section 47B of the Competition Act of 1998.

The advantages of bringing a claim under section 47B CA98 are especially evident in the *Replica Football Kit* case in light of the fact that it is unlikely that an individual consumer, who has purchased an overpriced replica kit, will rush to court to sue for damages (under Section 47A CA98) due to the relatively low level of damage incurred by him, especially compared to the expected high costs of litigation and the expertise required. Under the follow-on mechanism, the individual consumer is only required to provide Which? with the evidence and information on his own purchase and then Which? will be able to take procedures forward.[58] In addition, individual consumers participating in such action will not be charged for legal costs.

2.2.3 The EC Commission's Green Paper on Damages Actions for Breach of EC Antitrust Rules

In similar vein to Section 47B of the CA98, option 25 of the EC Commission's Green Paper also presents the possibility of bringing collective actions for damages via consumer associations, without depriving individual consumers of the possibility of bringing a claim. Consideration is also being given to the possibility of introducing a designation system that will ensure that the body claiming to represent consumers is capable of doing so and will indeed represent the interests of consumers and by means of the preferable model of such a mechanism, namely an opt-in or opt-out model. The difference between an opt-in model, which was adopted under Section 47B CA98 and an opt-out model, is that in an opt-in model consumers have actively joined the procedure by signing a power of attorney in favour of the group representative, whereas in an opt-out model consumers will be considered to be part of the procedure unless they have actively excluded themselves from the claim, for example, in order to pursue an individual claim.[59] The opt-out model was designed to address the possibility that, 'a defendant could rig a patsy class, arrange to have itself sued, plan to settle for a small amount and therefore be absolved of all liability at a very cheap price'.[60] It is likely however that concerns in respect to binding absent class members to the consequences of poor representation led to the adoption of an opt-in model in the UK. Arguably, these concerns could be addressed as part of the opt-out model by introducing substantive and procedural requirements that must be met before absent class members can be represented.[61]

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[58] The fact that the OFT referred to the overcharged amount may also assist Which? in proving the damage which was caused to consumers For example, the OFT found that before its investigation into price-fixing of football shirts, an England adult shirt retail price was at £39.99. Following the investigation, shirts were widely available for £25, C&AG's Report, The Office of Fair Trading: Enforcing Competition in Markets (HC 593, Session 2005-06), Executive Summary, http://www.publications.parliament.uk/pa/cm200506/cmselect/cmpubacc/841/841.pdf at para 1 cited in House of Commons Committee of Public Accounts, *Enforcing Competition in markets* (Forty-second Report of Session 2005-06), HC 841, 16 May 2006, p 12.

[59] BEUC, op cit, n 99, p 6.

[60] 'Class Action Reform: The Why and the Who', American Enterprise Institute (October, 2003), p 2, www.aei.org/include/event print.asp?eventID=655.

[61] ABA, op cit, n 48, pp 42-44.

The Green Paper also considers the best ways of allocating damages resulting from successful damages claims, to: (i) the consumer association (hence, benefiting the class members indirectly); or (ii) directly to the class members. In the former case, the amount of damages could be calculated on the basis of the illegal gain of the defendant (for example by subtracting the price of the product prior to the infringement from the price after the infringement took place and multiplying the overcharge by the number of goods that were sold). This route may be able to address possible evidentiary problems which may arise in proving direct harm to each individual consumer. This simplification of the procedure may not be possible in the latter case, where the compensation will be calculated on the basis of the damage suffered by each consumer.[62]

Consider the case of *SAS/Maersk* in which the EC Commission ordered Scandinavian Airlines (SAS) (June 2001) to pay a fine of €39,375,000 as a result of illegal price cooperation with the Danish airline Maersk. The Danish Consumer Council tried to build a case against SAS by gathering a group of consumers who had travelled on the route where prices were fixed (Copenhagen – Stockholm) and asking for compensation for the additional costs consumers paid as a result of the infringement. However, it was almost impossible to calculate the exact sum for each consumer.[63]

The *SAS/Maersk* case demonstrates that from an evidentiary point of view it is easier to shoulder the burden of proof when the damages are calculated on the basis of the defendant's illegal gain (as long as the relevant information is disclosed to the consumer association) rather than on individual consumers' losses. This will enable consumer associations to overcome obstacles deriving from absence of evidence on the actual purchase, such as the fact that not many consumers actually keep the receipts of their purchases.[64]

3. PROBLEMS OF REPRESENTATION BY CONSUMER ASSOCIATIONS

Furnishing consumer associations with further avenues to represent consumers is a significant step in overcoming obstacles faced by individual consumers regarding the representation of their interests in the competition arena. However, it is also important to ensure that consumer associations are capable of using these opportunities effectively and hence are able to fulfil the high expectations to deliver salvation to consumers.

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[62] Green Paper, op cit, n 8, option 25. Some argue that basing recovery on the claimant's loss rather than on illegal gains aligns incentives for bringing an action by the parties most affected by the violation. ABA, op cit, n 48, pp 22-23, 66-67. The American Antitrust Institute (AAI) 'Comments of the American Antitrust Institute Working Group on Civil Remedies' (10 July 2006) 4, http://www.antitrustinstitute.org/archives/files/519.pdf. On the other hand, it may be argued that the damage incurred exceeds the net profit of by the infringers. AAI, p 24.

[63] European Consumer Law Group, (ECLG), 'The need for group action for consumer redress' (ECLG/033/05) (February 2005), http://www.europeanconsumerlawgroup.org, p 8.

[64] Lopatka & Page, op cit, n 6, p 548. The possibility of striping the infringer from its illegal gain adds a restitution angle. In respect to restitution see the discussion in Gubbay, op cit, n 51, p 7.

The problems faced by consumer associations set out below, such as lack of funding, expertise, legitimacy and agency problems, raise questions as to the abilities of such associations to provide effective representation. Unfortunately, these questions and underlying problems have hardly been addressed or discussed in the recent developments.

3.1 Taking for Granted the Existence of Consumer Associations

Arguably, the recent reforms take for granted the existence of consumer associations. However, the mere existence of consumer associations should be considered an achievement in itself, for it is not at all obvious that unrelated individuals will cooperate on a moral basis, while having only a limited economic stake in the outcome.[65] In this context John Benson is correct in saying that, '[the] main difficulty is that there is no strong commonality of interests among consumers'.[66] This is especially the case when the collective identity of a group – 'we' - is defined by contrasting it to 'they'.[67] As pointed out by Loyns and Pursaga:

> Everyone must consume in order to survive … since all people are consumers … However, … most individuals must be gainfully employed … in order to … finance their consumption, implying that most people are also producers. … Therefore, while everyone is a consumer, it is also true that no one is solely a consumer.[68]

Indeed, while we are all consumers, we are not *only* consumers. Our identity is also composed of other attributes such as: our profession, ethnic origin, sex, religion, class, etc.[69] Since our other attributes might be more apparent than our consumer attribute, it is difficult to establish a distinctive consumer identity. Moreover, in contrast to the neoclassical model of economics, consumers do not construct their identity as members of the social group of 'consumers' simply by acquiring goods; this categorisation ignores other attributes that compose the individual identity, which may indicate why particular goods were chosen,[70] as, '[s]hopping is not merely the

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[65] Mayer, op cit, n 6, p 5.

[66] Gabriel & Lang, *The Unmanageable Consumer Contemporary Consumption and Its Fragmentation*, London, Sage Publications, 1995, pp 158-159, quoting Benson, *The Rise of Consumer Society in Britain 1880-1980*, London, Longman, 1994, p 5.

[67] Mueller, 'Recognition struggles and process theories of social movements' in Hobson (ed) *Recognition Struggles and Social Movements Contested Identities, Agency and Power,* Cambridge, Cambridge University Press 2003, p 279.

[68] Loyns & Pursaga, *Economic Dimensions of the Consumer Interest*, Winnipeg, Department of Agricultural Economics, University of Manitoba, 1973, p 5, quoted in Forbes, *The Consumer Interest: Dimensions and Policy Implications*, London, Croom Helm, American Council of Consumer Interests, 1988, pp 22-23.

[69] Each of these attributes is translated into variable degrees of recognition and distributive rewards. Mueller, op cit, n 67, p 285.

[70] Keat, Whiteley & Abercombie (eds), 'Introduction' in *The Authority of the Consumer*, London, Routledge, 1994, p 8. Warde, 'Consumers, Identity and Belonging, Reflections in Some theses of Zygmunt Bauman', ibid, pp 66-67.

acquisition of things: it is the buying of identity.'[71] Needless to say, in the absence of an ultimate consumer identity and in light of the multiplicity of individual's attributes it is very difficult to establish a consumer movement.

3.2 The Legitimacy of Consumer Associations

The newly introduced measures set out above confirm that consumer associations are considered as legitimate representatives of the consumer interest by legislators and administrative officials.[72] This recognition is, however, limited to bodies that satisfy the criteria which entitle them to be considered by the UK Department of Trade and Industry ('DTI') as 'designated' or 'specified' consumer bodies. Accordingly, caution should be exercised when setting the criteria to ensure that valuable voices (associations) are not excluded from the debate and from making use of these special measures. In order to avoid such a situation, consumer associations should participate in setting the criteria for designation.[73]

Recognition of a group or its representatives by people and institutions outside the group cannot replace the trust of the governed (the consumers) towards their representatives.[74] This matter is particularly important as in practice the vast majority of consumers are not members of any consumer association and hence have not delegated the power to represent their interests to any consumer association. As Michael Rines pointed out:

> There are, however, consumers and there is the consumer movement. The two are by no means the same thing and, indeed, there are times when one concludes that the one has never heard of the other.[75]

A consumer association will be considered legitimate when its constituents democratically participate in the decision-making within the association, even if the

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[71] Clammer, 'Aesthetics of the self: shopping and social being in contemporary Japan' in Shields (ed) *Lifestyle Shopping: The Subject of Consumption,* London: Routledge 1992, p 195 quoted in Gabriel & Lang, op cit, n 66, p 87.

[72] Legitimacy is defined as: 'a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs and definitions'. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20 Acad Mgmt Rev 571, p 574.

[73] Kristensen, 'Speech at the Annual Assembly of Consumer Associations – workshop on Definition and Criteria for Consumer Associations in the EU' (2005) http://ec.europa.eu/consumers/cons_org/assembly/8assembly2005/sp8_kristensen.pdf.

[74] Smismans, *Law, Legitimacy and European Governance Functional Participation in Social Regulation*, Oxford, Oxford University Press, 2004, p 72.

[75] Rines, *The Guardian,* (November 1973) quoted in Fulop, *The Consumer Movement and the Consumer*, London, The Advertising Association, 1977, p 109. Indeed, a report which was published by the Public Accounts Committee in respect to energywatch and postwatch has found that not many consumers are aware of the existence of these watchdogs. House of Commons, Committee of Public Accounts, Energywatch and Postwatch, Fourteen Report of Session 2005-06, (HC 654) 29 November 2005, http://www.publications.parliament.uk/pa/cm200506/cmselect/cmpubacc/654/654.pdf.

outcome is not always the one desired by these constituents. This type of legitimacy is known as input legitimacy or political legitimacy.[76]

Nevertheless, consumer associations that are not based on democratic participation, such as the UK National Consumer Council (NCC), can still be considered legitimate if consumers are satisfied with the policy-outcomes. This form of legitimacy is known as output legitimacy.[77] In this case, the representatives' legitimacy stems from their expertise in comparison to that of their constituents. Consumer associations' authority (expertise) in respect to policy and technical matters is dependent on the quality, accuracy and usefulness of the information provided to consumers and its existence may attract and retain a large number of members.[78] This type of expertise characterises, for example, associations that deal with comparative product testing such as Which?.[79] At the same time, consumer associations, which do not deal directly with the empowerment of the individual consumer, such as the NCC, may still be considered legitimate on the basis of their expertise in policy-making, including evaluating risks, economic or social impacts and the relative effectiveness of a range of solutions to a problem, based on research.[80]

In practice, however, input and output legitimacies are interlinked. As a result of the fact that only a very small percentage of consumers are actually members of a consumer association, its effectiveness is inherently impaired since it cannot compel consumers to participate in a boycott or in any other form of collective action. The low level of membership may well affect the ability of consumer associations to identify what constitutes the consumer interest and hence to represent the consumer interest effectively.[81] Thus a vicious circle is created in which consumers are disappointed with the performance of consumer associations (output legitimacy) and are reluctant to join them (input legitimacy). This makes sense, since the perceived effectiveness of collective action to achieve the public good (output legitimacy) is also an important feature in the vision of a movement.[82]

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[76] Smismans, op cit, n 74, p 73. Edwards, 'Accountability in the Consumer Movement' (2006) 16(1) CPR 20, pp 22-23.

[77] Smismans, op cit, n 74, p 73. Edwards, op cit, n 76, p 22.

[78] Edwards, op cit, n 76, pp 22-23. Abercrombie 'Authority and the Consumer Society' in Keat, Whiteley & Abercombie, op cit, n 70, p 47.

[79] Other consumer associations that deal with comparative testing include: Test-Achats in Belgium, Altroconsumo in Italy and Ocu in Spain.

[80] Edwards, op cit, n 76, pp 22-23. NCC, Scottish Consumer Council & Welsh Consumer Council, 'Strengthen and streamline consumer advocacy response to the Department of Trade and Industry consultation on consumer representation and redress', (PD 25/2006, April 2006) http://www.ncc.org.uk/protectingconsumers/consumer_voice.pdf.

[81] Tivey, op cit, n 4, p 203. Farber & Frickey, 'The Jurisprudence of Public Choice' (1987) 65 Tex LRev 873, p 874.

[82] Mitchell, 'National Environmental Lobbies and the Apparent Illogic of Collective Action' in Russell (ed) *Collective Decision Making Applications from Public Choice Theory*, Baltimore, London, Johns Hopkins University Press, 1979, p 104.

3.2.1 Problems regarding input legitimacy

The level of input legitimacy is affected by the ratio between members and potential members.[83] For example, the largest consumer association in Europe, Which?, that is considered to be *the* representative of British consumers, has only 700,000 members (subscribers)[84] constituting only (approximately) 1.2% of the population in the UK. However, this finding may not be as striking as it appears at first glance since one does not expect to find more than one membership for a household, and hence each membership is likely to affect more than one individual consumer. This is why some consumer associations that claim to represent consumers at large and not only their own members regularly carry out research or surveys, which also address non-members, thereby improving their input legitimacy.[85] For example, Which? carries out surveys based on representative social samples and part of the subscription fees received from its members is allocated to general campaigning.

Other consumer associations such as the European Consumers' Organisation ('BEUC') and the Consumers International ('CI')[86] benefit from democratic constitutions and direct involvement of their members in policy debates. For example, the CI has established an on-line consultation, which enables members that are interested in a particular issue to contribute to the discussion.[87] However, the members of these umbrella associations are consumer associations (usually national associations) rather than individual consumers. Therefore, it might be argued that it is not sufficient to have democratic participation upstream, when the associations involved do not themselves enjoy democratic participation.

In *The Logic of Collective Action* Mancur Olson provided an explanation as to why consumers do not participate to a large extent in consumer associations, arguing that individuals are self-interested in their own welfare and therefore will not make any sacrifices to help the group to attain its political objectives.[88] This is so because once the public good is achieved it is available to everyone regardless of who contributed to its provision. Accordingly, some individuals (consumers) will try to *free ride* on the efforts of others and will have no incentive to contribute to the provision of the public good, hoping that others will shoulder the burden. Needless to say, the problem

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[83] Finer, 'Groups and Political Participation' in Kimber & Richardson (eds), op cit, n 4, pp 263-264.

[84] http://www.which.co.uk/about_us/A/who_we_are/overview/Who_we_are_481_58509.jsp.

[85] Edwards, op cit, n 76, p 23.

[86] A global association which consists of 230 associations in 113 countries around the world, http://www.consumersinternational.org.

[87] Edwards, op cit, n 76, p 23. See also in respect to Which? http://www.which.co.uk/about_us/A/who_we_are/membership/Membership_481_58536.jsp.

[88] Olson, *The Logic of Collective Action Public Goods and the Theory of Groups*, USA, Harvard University Press, 1965, p 126. Russell, 'The Implications of Public Choice Theory: An Introduction' in Russell (ed), *Collective Decision Making Applications From Public Choice Theory* Baltimore, London, Johns Hopkins University Press, 1979, p 12.

becomes acute once everyone attempts to free ride and no one is left to take any action.[89]

The diversity of interests within the group of consumers and the large size of the group have an inverse effect on the incentive of the members to operate in an organised way.[90] This derives from the fact that the contribution of each member to the resources of a large organisation is likely to be greater than the benefits he might gain, from the inability of each individual to affect the outcome[91] and because the cost of organising large groups is usually incurred before any benefit is obtained.[92] Moreover, consumers have a tendency to discharge or underestimate the detriments resulting from anticompetitive practices even though the aggregate detriment is high because they prefer to consider their small stake in each product.[93]

In addition, unlike labour unions or professional associations (such as associations of doctors or lawyers that are established on the basis of obligatory membership), which provide their members with a combination of coercion alongside positive incentives, consumer groups do not usually offer such a combination to their members.[94]

Because input legitimacy is also affected by the degree of active participation of the members of the association in its activities,[95] it is pertinent to ask, 'what right or ability a body staffed by professional consumer advisers has to claim to be able to determine what is in the consumer interest'.[96] This is especially so since consumer associations are run by a small number of full-time professionals (sometimes self-appointed), who are rarely elected or subject to review.[97]

3.2.2 Problems regarding output legitimacy

Consumer associations' lack of output legitimacy derives not only from the lack of input legitimacy but also from a blend of shortage of resources, problems in the choice of goals, lack of collaboration between the various associations and agency problems.

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[89] Mayer, op cit, n 6, p 7. Russell, op cit, n 88, p 12. Farber & Frickey, op cit, n 81, p 892. Olson, op cit, n 88, pp 53-57. Easterbrook, 'The State of Madison's Vision of the State: A Public Choice Perspective' (1993-1994) 107 Harv L Rev 1328, p 1336; Becker, 'A Theory of Competition Among Pressure Groups For Political Influence' (1983) 98 Q J Econ 371, pp 385-86; Peltzman, 'Towards a More General Theory of Regulation' (1976) 19 J L Econ 211, pp 213-231.

[90] Posner, 'Economics, Politics and the Reading of Statues and Constitution' (1982) 49 U Chi L Rev 263, p 266; Farber & Frickey, op cit, n 81, pp 873-874, 892; Easterbrook, op cit, n 89, p 1336; Forbes, op cit, n 68, pp 22-24; Nadel, op cit, n 5, pp 99-100, pp 235, 240.

[91] Nadel, op cit, n 5, p 240; Seidenfeld, 'Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation' (2000) 41 WMLR 411, pp 431-432; Forbes, op cit, n 68, p 23.

[92] Mitchell, op cit, n 82, 89-90. Olson, op cit, n 88, pp 50-51, 129.

[93] Mitchell, op cit, n 82, pp 103, 113.

[94] Olson, op cit, n 88, pp 134-135; Mitchell, op cit, n 82, pp 90-91.

[95] Finer, op cit, n 83, pp 263-264.

[96] Howells, 'Opinion: Consumer Representation' (1993) Consum LJ 17, p 18.

[97] Mayer, op cit, n 6, p 5, 53; Howells, op cit, n 96, p 18.

3.2.2.1 Shortage of resources

One of the major obstacles standing in the way of consumer associations is their shortage of resources. This problem is especially apparent in light of the major disparity between consumer associations' financial resources and the resources of the parties which they need to confront – businesses. In the US, for example, the ratio between businesses' resources and consumer associations' resources stands at 300:1.[98]

The shortage of funding is especially detrimental due to the heavy reliance of competition proceedings on economic evidence, which leads to substantial costs incurred as a result of the necessity to instruct economic experts to collate and analyse information. Also, as in any other legal proceedings, when calculating costs consumer associations need to consider not only their direct costs but also the costs incurred by the other party to the proceedings, for which they could be liable should they lose the case. Based on this, BEUC supported the introduction of special rules in respect to the adjudication of costs. According to the proposed rules consumer associations and individual consumers would not be liable for the other parties' costs where their claim was unsuccessful, unless it was proved that they had acted unreasonably.[99]

3.2.2.2 Shouldering the burden of proof

Individual consumers may face difficulties in shouldering the burden of proof[100] in stand alone cases in respect to the actual infringement, the causation of damage and its quantification. The scarcity of information in the competition arena, which stems from the fact that undertakings wish to hide their anticompetitive behaviour, impairs consumers' attempts to tackle anticompetitive infringements. This is in contrast to the availability of evidence in the consumer protection arena, which, as in the case of deceptive advertisements, is in the public domain.

Consumer associations have complained in this context that the EC Commission expects them to shoulder a burden of proof which even the Commission itself, despite its wide investigative powers, failed to shoulder.[101] Inevitably, the lack of evidence can determine the result of an action.[102]

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[98] Mayer, op cit, n 6, p 55.

[99] The European Consumers' Organisation, (BEUC/190/2006, 21/04/2006), 'Damages Actions for breach of EC anti-trust rules BEUC position on the Commission's Green Paper', http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/129.pdf, p. 7.

[100] Crossick, 'Consumer Participation in the EC Competition Decision-Making Process' in Goyens (ed), *E.C. Competition Policy and Consumer Interest – Proceedings of the Third European Workshop on Consumer Law* held in Louvain –La- Neuve, May 10-11 1984 (Centre De Droit De La Consommation, Cabay Bruylant, 1985) p 356. Kristensen, op cit, n 73, p 2. In respect to concern of lack of technical expertise see: CC2003004, 'Consumer Committee (CC) Minutes of the meeting of 13 December 2002 Brussels' (16 January 2003), http://ec.europa.eu/consumers/cons_org/associations/committ/minutes/cc30_en.pdf, p 3; BEUC, op cit, n 99, 2.

[101] Murray, op cit, n 32, p 4; BEUC, op cit, n 99, p 2.

[102] Kroes, op cit, n 6.

In view of these difficulties, the EA02 and EC Regulation 1/2003[103] state respectively that infringement decisions of the OFT and the EC Commission are binding on the CAT and national courts. This diverts the burden of proof of the infringement in follow-on claims from individual consumers and consumer associations to the other side. However, in follow-on claims consumer associations are still required to prove causation, namely that the anticompetitive behaviour necessarily entails within it detrimental effects and that these were passed on to the end-consumers.[104]

Another problem which consumer associations face is the need to prove that the damage was passed on to consumers who were indirect purchasers when the infringement occurred in an upstream market or when consumers were not diligent enough in retaining the required evidence.[105]

3.2.2.3 The choice of goals

> 'no consumer association has been large enough, rich enough or even persuasive enough' to affect by itself the landscape of modern consumption their influence is always due to their ability to identify issues with mass political appeal.[106]

The difficulty in evaluating consumer associations' effectiveness in the competition arena derives from the fact that they often prefer to concentrate on consumer protection issues, such as product safety and consumer information with which they are more familiar, rather than operating in the competition arena.[107] This observation is supported by a recent survey conducted by the Competition Law Forum at the British Institute of International and Comparative Law ('BIICL') and CI which found that more than 40% of the European consumer associations participating in the survey had never brought a complaint to their national competition authorities.[108] The situation in the UK is somewhat different; UK consumer associations have a long track record of

[103] Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003, L1/1.

[104] Lopatka & Page, op cit, n 6.

[105] The fact that consumers are usually indirect purchasers may also affect their standing rights. Indirect purchasers' standing right and the application of 'the passing on defence' are debatable issues which are addressed in this Article. For a discussion of these issues see: Lopatka & Page, op cit, n 6, ABA op cit, n 48, pp 73-76.

[106] Gabriel & Lang, op cit, n 66, p 171, quoting Tiemstra, 'Theories of regulation and the history of consumerism' (1992) 19 International Journal of Social Economics 3, 8.

[107] Gabriel & Lang, op cit, n 66, p 159. NCC: 'NCC's Approach to Advocacy', (BP 14/06, March 2006), http://www.ncc.org.uk/about/march2006.pdfesponse.

[108] Consumer organisations from 14 different Member States were surveyed on various aspects of their competition law regime and the role of consumer organisations within these regimes. The results of the survey were presented by Peter Whelan at the British Institute of International and Comparative law, (London, 4 July 2006), cited in Michael Hutchings OBE and Peter Whelan, 'The Consumer Interest in Competition Law Cases' (2006) 16 (5) CPR 182, p 185.

activities in the competition arena which includes third party interventions in procedures before the CC and the submission of several super-complaints.[109]

A study, which was conducted by Ryan Kriger found that consumer associations in the US prefer to concentrate on mergers rather than on other anti-competitive behaviour and that they very rarely submit competition claims.[110] The decision to concentrate on mergers is based on the view that it is more effective to prevent the creation of a highly concentrated industry in the first place than to try to deal with a given situation. This policy choice can also be explained by the high-profile nature of mergers and the possibility of responding to a discreet event as opposed to ongoing corporate behaviour, such as cartels and abuse of dominant position, which might be very difficult to detect. Perhaps even more importantly, mergers also enable consumer associations to present their views to the administrative authorities without the necessity of taking a formal court action with its associated costs.[111]

Consumer associations' tendency to set their priorities according to a forthcoming merger, or a decision of a competition authority to deal or not to deal with a particular issue triggered a critique according to which consumer associations are more reactive than proactive, operating within an existing pool of issues, which they have usually not chosen themselves.[112]

Some consumer associations are also accused of being over protective. For example, consumer activists have argued that benefits acquired in the process of liberalisation and deregulation of markets will not be passed on to the end-consumers as consumer choice will be impaired.[113] Another example is that of consumer associations in France, which opposed the liberalisation of professions (such as lawyers) and the introduction of price competition because they feared that this would lead to a reduction in the quality of services to consumers.[114] In practice, however, this has not generally been the case.[115] However, it should be noted that other consumer associations, such as the NCC and Which? strongly advocated the liberalisation of the legal profession in England and Wales.[116]

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[109] See examples in CA (17.6.03) and the NCC's (dated from 28.7.03) applications for designation. Evans, PowerPoint presentation, 'Consumer Interest and Super-complaints' http://www.incsoc.net/conf-2ppt5.ppt.

[110] Kriger, 'The Use of Antitrust by the Consumer Protection Advocacy Community' (Draft 12.9.06) p 28 (a copy is saved with the author).

[111] In the UK, see for example the CA's submissions in respect to the various bids for Safeway and the Lloyds/TSB Abbey National proposal. Kriger, op cit, n 110, pp 27-28, 33-37.

[112] Kriger, op cit, n 110, p 41.

[113] For the vision of a consumer as a citizen in the context of the EC see: Sutcliffe, 'Consumers' Association Conference: Consumers at the Heart of Europe', The Institute of Directors, 5 July 2004, 4.

[114] Judge Jenny, 'Great Debate: Who Cares about Consumers', London, The Sixth Annual Transatlantic Dialogue, British Institute of Comparative and International Law (BIICL), 6 July 2006.

[115] Pertschuk, *Revolt against Revolution the Rise and the Pause of the Consumer Movement,* London, University of California Press, 1982, p 142.

[116] Which?, 'Consultation response – the future of legal services: putting consumers first', 9 January 2006, http://www.which.co.uk/files/application/pdf/0601legalserviceswp_cresp-445-59206.pdf, Citizen Advice

Furthermore, it might be argued that strict regulation and licensing regimes (for instance of estate agents and the car-repair market) may lead to a secondary unlicensed market, which would be harder to control and supervise and would be to the detriment of consumers.[117]

A conflict between environmental interests and consumer interests can be seen, for example, when environmental advocates correctly believe that the most effective way to achieve energy efficiency is by significantly increasing energy prices. On the assumption that consumer interest is to be equated simply with reduced prices, this price increase is detrimental to consumers.[118]

One should note however, that even when consumer associations represent only the interests of consumers they may still have problems in balancing the conflicting interests within the group of consumers. This includes striking a balance between different types of consumers, such as consumers from different social classes. Indeed, consumer associations are, at times, accused of representing only the interests of the average consumer and excluding the interests of disadvantaged consumers.[119] This may result from the fact that consumer activists belong to the middle class and therefore implement their own values and perceptions in their work and also from the fact that some associations, such as Which?, receive their funding from the provision of information to their members (subscribers) who are usually 'average consumers'.[120] However, in practice it seems that consumer associations campaign for issues which are relevant to every consumer regardless of their social class.

Bureau, 'watchdogs call for regulation shake up of legal profession' 21 March 2005, http://www.citizensadvice.org.uk/print/index/pressoffice/press_index/press-50322.htm

[117] Pertschuk, op cit, n 115, pp 139-140, 145-148.

[118] Brobeck, 'Defining the Consumer Interest: Challenges for Advocates' (2006) 40 JCA 177. The problem of balancing between conflicting interests is evident to a greater extent in the case of 'public interest' associations which advocate not only for consumer interest but also for other interests, such as environment employees and women's interests. Brobeck, Mayer & Hermann (eds), *Encyclopedia of the Consumer Movement*, Santa Barbara, California, 1997 p 6; for example, the US Public Interest Research Groups also address environmental issues and the National Consumers League and Citizen Action address workers issues, while the US Consumers Union is first of all a testing products organisation. For the difference between citizen interests and consumer interests see, Dayagi-Epstein, op cit, n 2, pp 128-129; Smismans, op cit, n 74, p 35. Crossick, op cit, n 100, p 355; Mayer, op cit, n 6, p 35.

[119] Gabriel & Lang, op cit, n 66, p 159. Mayer, op cit, n 6, p 6. Edwards, 'An Appeal to Tired Activists: A Radical Looks at the Consumer Movement' in Gardiner Jones & Gardner (eds), *Consumerism A new Force in Society*, US Canada, D.C. Heath and Company, 1976, pp 134-135. In respect to the lack of expertise in competition of US consumer associations see: Foer, 'Consumers and Antitrust in the US and EU' 26 February 2002, www.antitrustinstitute.org/recent2/175.cfm, Sidropoulus, 'The Role of Consumer Organizations & Relations with State Bodies' Thessaloniki, Greece, Seminar: Enforcement of Consumer Protection, 22-24 November 2004; Brobeck, op cit, n 118.

[120] The State has recognised the need of protecting the less privileged consumers and accordingly supports NCC and Citizens Advice Bureau which are concerned primarily with the interests of the disadvantaged consumers.

It has been pointed out that consumer associations tend to operate in the competition arena in high profile cases involving expensive consumer goods such as cars.[121] Arguably, the focus on expensive goods neglects a substantial part of consumption – inexpensive consumer goods, which affect lower-income consumers who cannot afford new cars. However, given consumer associations' scarce resources it might be a good idea to concentrate on products with significant detrimental effect on many consumers, while using the profile of the issue as a way of achieving greater exposure. Moreover, a reform in the market for new cars will most likely cause a decrease in prices in the market for second-hand cars and hence will benefit lower income consumers whose income is affected by car prices (in percentage terms) to a greater extent than high income consumers.

The problem of conflicting interests is also evident in the case of the watchdogs (such as Energywatch and Postwatch). This conflict derives from the fact that the goal of the various watchdogs is to represent customers' interests, regardless of whether they are end-consumers or intermediate customers (undertakings). In many cases, the interests of the end-consumer and intermediate customer converge, since in the long run anticompetitive detriments are usually passed on to the end-consumers. However, the fact that intermediate customers may have greater presence before the watchdogs,[122] can lead to the watchdogs being preoccupied with claims from intermediate customers and consequently not have the time to deal with the silent individual consumer.[123]

Consumer associations may also face difficulties in distinguishing between the interests of individuals as citizens and the interest of individuals as consumers. Accordingly, interests in privacy and choice may be in conflict with the consumers' economic interest to pay low prices.[124] For instance, the Israeli Consumer Council ('ICC')[125] vigorously opposed the inclusion of a scoring system within the Israeli Credit Reporting Act of 2002, due to the possible impairment of consumer privacy. Interestingly, the

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[121] Hutchings & Whelan, op cit, n 108, p 185. *Ford v. Commission* [1984] ECR 1129, where BEUC intervened. See also the input of consumer associations in the regulatory review of the motor vehicle sector led to the new Car Block Exemption 1400/02 which reflects an even greater consumer interest. Norberg, Director in Diroctorate General Competition, European Commission, 'Competition a Better Deal to Consumers?', Athens, 14 February 2003 http://europa.eu.int/comm/competition/speeches/text/sp2003_005_en.pdf, 7-8. For details on the campaign in the UK see: Which, 'Car Prices Campaign: Delivering Real Change for Consumers' http://www.which.net/campaigns/other/carprices/. Case T-37/92 *BEUC v. Commission* [1994] ECR II-285. Goyens, 'A Key Ruling from the ECJ' (1994) 4 CPR 221.

[122] As intermediate customers file complaints as part of their producing activity and hence have greater incentive to do so.

[123] For a critique of Energywatch and Postwatch activities see: House of Commons, Committee of Public Accounts, Energywatch and Postwatch, Fourteen Report of Session 2005-06, (HC 654) 29 November 2005, http://www.publications.parliament.uk/pa/cm200506/cmselect/cmpubacc/654/654.pdf. National Audit Office, Department of Trade and Industry and the Treasury, Enregywatch and Postwatch Benchmarking review of energywatch and postwatch, Final Report, March 2004, http://www.dti.gov.uk/files/file25231.pdf

[124] Brobeck, op cit, n 118; Mayer & Brobeck, the entry of 'consumer interest' in Brobeck, Mayer & Hermann, op cit, n 118.

[125] http://www.consumers.org.il. The Israeli Consumer Council is a publicly funded association and the sole consumer association in Israel.

three large banks in Israel joined the ICC in its battle for consumers' privacy against the Israeli Antitrust Authority which supported the introduction of credit scoring.[126] It is doubtful whether consumers' privacy was of real concern to the banks or whether they were motivated by a concern over increased competition and the removal of constraints from the credit market. The ICC and the banks were eventually victorious and consumers' privacy was saved but at the price of the continuous concentration of the credit market in Israel.

Consumer associations are at times also accused of envisioning information and other qualities of competition, such as choice, as an end rather than a means for the enhancement of the position of consumers in the market. This could be problematic, since bombarding consumers with information may worsen their situation leaving them confused.[127] Likewise, the protection of inefficient competitors for the sake of wider consumer choice may result in consumers paying higher prices.

Thus, consumer associations may advocate greater participation of consumers and consumer associations without clarifying even to themselves what they actually mean by that.[128] The vision of participation as an end in itself may at times impair consumer associations' credibility and legitimacy in the eyes of their constituents and the policy-makers. Postwatch's super-complaint in respect to the alleged abuse of a dominant position by the Royal Mail in the market for mail consolidation and mail sorting may be regarded as such an example. In this case Postwatch decided to lodge a complaint with the OFT since PostComm (the mail regulator) does not have concurrent powers under the EA02. The OFT decided to refer the complaint to PostComm arguing that this matter could have been adequately solved under the Royal Mail's license conditions.[129] PostComm, in turn, did not find sufficient evidence to determine that there were reasonable grounds for an infringement of Royal Mail's licence or to warrant further investigation under the CA98.[130] It may be argued that Postwatch's complaint was motivated primarily by a desire to by-pass PostComm, and approach the OFT directly because of Postwatch's poor relations with the regulators. This participation clearly did not contribute to the credibility and legitimacy of this body.

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[126] A credit score is a number that indicates the measure of a consumer's credit risk at a particular point in time. Credit scores are calculated based on information contained in a consumer's credit report using a standardized formula.

[127] Brobeck, op cit, n 118; Pertschuk, op cit, n 115, pp 148-149.

[128] Brown, 'Greater democracy, better decisions' (1997) 7(3) *CPR* 170, 172.

[129] A letter from Penny Boys Executive Director to Mr Gregor McGregor, 'Postwatch Super-complaint' (16 April 2003) http://www.oft.gov.uk.

[130] Postcomm, 'Postcomm asks Royal Mail to work with Postwatch to improve communication with Mailsort customers' (11 November 2003) http://www.psc.gov.uk/news-and-events/news-releases/2003/postcomm-asks-royal. See also House of Commons, 'Minutes of Evidence Taken before the Committee of Public Accounts' (19 January 2005) http://www.publications.parliament.uk/pa/cm200405/cmselect/cmpubacc/uc260-i/uc26002.htm

3.2.2.4 Problems of coordination between consumer associations

Consumer associations have different interests in different markets and they may differ from each other in their attitudes towards competition and regulation. For example, Which? is identified with average consumers, NCC is identified with disadvantaged consumers and the watchdogs (e.g. Energywatch and Postwatch) are concerned with specific problems faced by customers (end-consumers and intermediate customers - undertakings) in the utilities sector.[131] At the international level, BEUC tends to concentrate on the interests of consumers in the EU, while CI does not operate much in Europe but rather concentrates its activities in less developed countries outside the EU.[132]

Due to their different interests, consumer associations may decide to concentrate on distinctive characteristics, which could perhaps bring them more support from their constituents and justify their existence, rather than cooperating on general consumer interest issues such as the locus standi of the indirect purchaser and the required burden of proof.[133]

Following the establishment of sectoral regulators in the UK there has been a substantial increase in the number of consumer associations. To date, there are seven consumer associations in the UK operating in thirty offices nationwide, with an aggregate budget of £31.73m, employing over five hundred employees.[134] This multiplicity and the concentration of each association on its narrow area of expertise, together with legislative barriers that prevent consumer associations from sharing information, makes it very difficult for them to cooperate.[135] As a result, there is no one coherent consumer voice, which can be consulted on matters with wide implications for consumers and thus the regulators are forced to approach a large number of bodies in order to obtain the consumer input.[136]

This situation may also be confusing for the individual consumer, since when he encounters a problem and seeks advice he might find it difficult to ascertain which association he should approach. Indeed, the DTI has recognised this difficulty and established 'Consumer Direct', as a single point of contact for consumers. Consumer Direct, which is supported by the OFT, provides consumers with information and

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[131] http://www.energywatch.org.uk/about_us/aims_and_values/index.asp, Report by the Comptroller and Auditor General, 'Energywatch and Postwatch Helping and Protecting Consumers', (HC 1076) (Session 2003-2004) (15 October 2004) http://www.nao.org.uk/publications/nao_reports/03-04/03041076es.pdf.

[132] An interview with Mr Colin Brown (London, 14 July 2006). Evans, 2006, op cit, n 31.

[133] Gabriel & Lang, op cit, n 66, p 152;. Kriger, op cit, n 110, pp 31-32.

[134] DTI, 'Strengthen and Streamline Consumer Advocacy- Consultation on Consumer Representation and Redress' (January 2006) URN 06/682, p 7, http://www.dti.gov.uk/.

[135] DTI, Consumer Advocacy, op cit, n 134, p 8.

[136] DTI, Consumer Advocacy, op cit, n 134, p 9.

advice in respect to the various sectors and the consumer associations acting within them.[137]

3.2.2.5 Agency problem

Agency costs occur when group leaders (agents) are more concerned with maintaining monetary support for the group than with delivering benefits for the members of the group (principals).[138] Agency costs are more likely to occur within the group of consumers because the larger the group is (as in the case of consumer associations) the less able the members are to monitor the group's leaders. This is especially so when consumer leaders are rarely elected or subject to review.[139]

An example of the effect of the inability of consumers to monitor leaders is that of Ralph Nader, perhaps the most famous consumer advocate in the US, who was criticised for investing more than $1m of the association's retained funds in certificates of deposit instead of using the funds for consumer related activities.[140]

Consumer activists are more likely to concentrate on activities that will fund their prospective employment, such as finding paying members and patrons and selling publications rather than on any other activities.[141] Likewise, it could be argued that the UK watchdogs devote a large part of their funding to activities aimed only at attracting attention and justifying their existence.[142]

Collective actions by consumer associations (as suggested in the EC Commission's Green Paper) also give rise to concerns with respect to principal - agent problems. The danger is that collective actions may be abused by consumer associations in order to advance their own interests, which might be different from those of individuals who have suffered from an infringement of the competition rules. For instance, if consumer associations are awarded damages for their own benefit, consumer associations might have an incentive to settle the dispute, although this would not necessarily be in the best interest of the consumers, since they may gain more benefit should the procedure proceed. Consequently it is important to ensure that damages received are not used for the personal benefit of the representatives, but rather are designated to a particular project that will benefit consumers as a whole.

It is important to emphasise that these concerns are somewhat exaggerated. As a rule, consumer associations will not risk their long–standing reputation, legitimacy and credibility in the eyes of their constituents, the administrative authorities or the courts, for the sake of a one-off personal benefit. This is because they do not operate on the basis of a one-shot game but rather need to seek continuing legitimacy from their

[137] DTI, Consumer Advocacy, op cit, n 134, pp 12, 20-21. http://www.consumerdirect.gov.uk.

[138] Seidenfeld, op cit, n 91, p 426.

[139] Mayer, op cit, n 6, p 54.

[140] Mayer, op cit, n 6, p 55.

[141] Mayer, op cit, n 6, p 54.

[142] DTI, Consumer Advocacy, op cit, n 134, p 8.

members.[143] This is especially so in the media and internet era, when consumer activists are constantly under appraisal. Moreover, as a general rule, consumer activists see themselves as being on a mission and are not driven by financial rewards, otherwise they would surely have chosen to work in the business arena.

4. DEVELOPING CONSUMER ASSOCIATIONS' CAPABILITIES

Arguably, consumer representation by consumer associations should be considered as a means for ensuring that the market will work for the benefit of consumers, rather than as an end in itself. It follows, that the effectiveness of the recent reforms that grant consumer associations opportunities for representation should be assessed according to consumer associations' capabilities in practice to implement these new powers and represent the consumer interest adequately. It seems that the recent reforms have not fully addressed the ability factor.

Competition authorities should play a significant role within this framework. First, competition authorities should empower consumers by introducing new avenues for participation of consumers and consumer associations and by developing consumer associations and individual consumers' abilities to act in their own interests. Secondly, when consumers and their representatives are not able to protect their interests, it ought to be the responsibility of competition authorities to ensure that consumer interest will nevertheless be taken into account in the policy-making process and will be protected accordingly.[144] The recent reforms should be regarded as complementary to the existing public enforcement system, providing consumers with self-help mechanisms.[145] These self-help mechanisms should not signify in any way that competition authorities are less responsible for the enforcement of competition rules. It should be emphasised that consumer associations should participate in governance, not in government.[146]

Furthermore, the effectiveness of these self-help mechanisms is still dependent to some extent on public enforcement. For instance, consumer associations' (or individual consumers') follow-on claims under Sections 47A-47B CA98 can be brought only after the OFT has reached a decision that particular conduct constitutes an infringement of the competition rules and relevant judicial proceedings have been exhausted. Vigorous enforcement by competition authorities which will result in infringement decisions being upheld by the Courts will amount to prima facia evidence in follow-on claims which will enable consumer associations to devote more resources to ex-ante participation and improve their presence in ex-post participation.

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[143] Evans, op cit, n 9, p 190.

[144] Dayagi-Epstein, op cit, n 2.

[145] Oliver, *Common Values and Public –Private Divide*, London, Butterworths, 1999, pp 5-6.

[146] Hutton, 'What are consumer organisations for? Some issues from Europe and Elsewhere', Ruby Hutchinson Memorial Lecture, State of Victoria Consumer Law Conference, Melbourne, Australia (14 March 2004) www.ncc.org.uk/pressinfo/speeches.htm, p 19. The Commission's working paper Annex to the Green Paper on Damages actions for breach of EC antitrust rules, op cit, n 8.

The enhancement of consumer associations' abilities should be carried out simultaneously along the following three channels: (i) adjusting and improving the existing mechanisms for consumer associations' participation in competition policy, with a view to addressing the obstacles faced by consumer associations; (ii) improving consumer associations' input legitimacy; and (iii) enhancing consumer associations' output legitimacy.

4.1 Adjusting and Improving the Existing Mechanisms for Consumer Associations' Participation

This section will make some suggestions for overcoming problems inherent in representation by consumer associations, which were discussed above.

4.1.1 Implementing the super-complaint in the EC

Generally speaking, the super-complaint mechanism in the UK has been a success and has proved itself to be an effective tool for furnishing consumer associations with greater presence in the competition arena. The success of this mechanism has triggered suggestions that the super-complaint should be introduced in the EU.[147] At present, consumer associations in Europe can raise issues with the EC Commission only by filing a formal complaint notice (a 'Form C'). Consumer associations have pointed out that this form is too narrowly defined, since it can only be used to suggest evidence of a breach of the competition provisions or merger rules, rather than to report more widespread competition concerns. The super-complaint would make it possible for consumer associations to include complaints concerning detrimental market features rather than just targeting specific infringements and would also force the EC Commission to address the complaint within a limited timeframe.[148]

Still, a word of caution is necessary. It should be remembered that the success of this mechanism in the UK can, in part, be explained by the fact that the UK has mature consumer associations, which are capable of carrying out the extensive role created by the super-complaint mechanism. Other jurisdictions may not have consumer associations which have the necessary experience or ability to fulfil this role successfully.

Granting extensive powers to consumer associations which cannot use them effectively will not only waste public resources (for example investigating a 'bad' super-complaint), but also lessen the likelihood that consumer associations will use the super-complaint mechanism in the future (or participate in the competition arena in other ways) since the presumption of 'good opportunities' to participate is fundamental to the success of participation.[149] Empowering such associations may also operate as a self-fulfilling

[147] Evans, op cit, n 9, p 189; Winton, op cit, n 13; Murray, op cit, n 32, p 4.

[148] Winton, op cit, n 13; Murray, op cit, n 32, p 4.

[149] Birchall & Simmons, *User Power the Participation of Users in Public Services: A Report prepared for the National Consumer Council UK* (October 2004), National Consumer Council PD57/04, www.ncc.org.uk/publicservices/user_power.pdf, p 31.

prophecy, to the detriment of consumers, as it vindicates some existing paternalistic views according to which consumers do not know what is good for them and are therefore incapable of representing their own interests.

4.1.2 Consumer associations' participation in judicial proceedings

In most cases, consumer associations are reluctant to participate in judicial proceedings due to the high costs involved in such proceedings and the risk that they will incur substantial costs should they lose the case. These concerns may also have a detrimental effect on the incentive of individual consumers to join a collective action (under Section 47B CA98). One way to overcome this reluctance is by limiting the potential costs that consumer associations could incur in follow-on cases or in other judicial procedures to instances in which the consumer association's claim or intervention was manifestly unreasonable.[150] It seems that the procedural rules of the CAT were designed with a view to addressing this problem and accordingly the CAT enjoys broad powers of discretion, including rulings on the costs of the parties to a procedure.[151] In addition, Rule 17(3) specifically states that the CAT may not provide for costs or expenses to be awarded to or against an individual on whose behalf a claim was made or continued in proceedings under section 47B CA98.[152] Furthermore, in order to reduce consumer associations' direct legal costs, private lawyers can carry out legal proceedings for the consumer associations on the basis of contingency fees. This would also allow consumer associations to overcome the problem of lack of expertise and funding.

At the same time, tempting as this solution appears to be, it is important to bear in mind that consumer associations and lawyers may have different objectives in mind. While lawyers will probably be more interested in damages, consumers will often benefit more from injunctive relief.[153] Other problems may be the loss of independence of consumer associations or the need to compromise (against their will) and as a result lose the support of their constituents and the underlying justification for self-representation by consumers. One way to tackle this problem is to consider the allocation of legal aid for consumer associations. However, Which? believes that it is undesirable to utilise public monies for legal aid unless costs ordered by the court in favour of consumer associations can be paid to the State.[154]

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[150] According to point 27 of the Green Paper costs will be awarded only in stand-alone cases when 'manifest unreasonable' is proved. Green Paper, op cit, n 8.

[151] CAT Rule 55.

[152] Rule 17 of The Competition Appeal Tribunal Rules 2003, Statutory Instrument 2003 No. 1372.

[153] Lopatka & Page, op cit, n 6, p 552.

[154] Gubbay, op cit, n 51, p 10. For a different supportive view of this matter see: NCC & Scottish Consumer Council, Representative actions response to the DTI consultation, PD 50/06 October 2006, p 14. http://www.scotconsumer.org.uk/publications/responses/resp06/re09racl.pdf.

Another possible solution is to create a special fund which will assist in financing the costs of the proceedings of designated consumer associations.[155] For example, in Quebec, the court can decide that some of the damages should be paid into a 'class action fund'.[156] In this vein, the NCC, has suggested the establishment of a representative action fund which will act on a mutual insurance basis, whereby it will take a proportion of compensation received by successful consumer associations to cover the cost of unsuccessful claims by consumer associations. The advantages of this mechanism are that they limit the financial risk exposure and ensure that the monies paid into the fund are used for the public good.[157]

In an attempt to overcome the problem of the lack of incentive for the individual consumer to seek redress and actively join a collective action (as required in an opt-in model), the introduction of an opt-out model of collective action has been suggested. In such a model the action would benefit all victims without them having to adhere to the group, unless they actively exclude themselves from the claim.[158] This will also enable consumer associations to have greater presence in collective actions as representatives of a larger group and to overcome consumers' reluctance to seek redress in private enforcement procedures.[159] If the absent members of the class are to be bound by decisions of a court in a collective action, notice should be given to such class members of the proceeding and the right that they have either to participate or to opt-out. This can be done by publications in newspapers and other media devices or by mailing each class member, although this may be very costly in the case of a very large group of consumers. The court should play an active role in supervising the opt-out process including approval of the form of notice and the means by which it is published.[160]

When considering possible improvements in the existing avenues, special attention should be given to consumer associations' access to evidence. This matter has been addressed to some extent in follow-on claims under which consumer associations are not required to prove an infringement. However, the access to evidence is still a concern in respect of the quantification of the damages suffered by consumers.[161] This is especially problematic in light of the lengthy period of time between the infringement and the commencement of a follow-on damages claim, which will depend on the action taken by competition authorities and the appeal process. This could amount to a few

[155] BEUC, op cit, n 99, p 7.

[156] European Consumer Law Group, (ECLG), 'The need for group action for consumer redress' (ECLG/033/05 February 2005), http://www.europeanconsumerlawgroup.org, p 10.

[157] NCC & Scottish Consumer Council, Representative actions response to the DTI consultation, PD 50/06 October 2006, 15, http://www.scotconsumer.org.uk/publications/responses/resp06/re09racl.pdf.

[158] BEUC, op cit, n 99, p 6.

[159] ABA, op cit, n 48, p 45.

[160] ABA, op cit, n 48, p 51.

[161] BEUC, op cit, n 99, p 2.

years and by that time consumers may no longer have the relevant evidence, such as bank statements and receipts.[162]

A solution would be to give consumer associations greater access to the information which was gathered by competition authorities.[163] At present, consumer associations at the European level may have access to the non-confidential version of the Statement of Objections provided they have been acknowledged as an interested party in the proceedings. It is suggested that going beyond this minimum allowance should be considered and that clear criteria for deciding what information it is legitimate to withhold on grounds of commercial confidentiality should be established. In addition, a decision should be taken to make any other information accessible to consumer associations.[164]

In the case of *Lombard*,[165] the EC Commission refused to permit access to its files to the Austrian consumer association, Verein Fur Konsumenteninformation ('VKI'), despite the fact that this information was essential in order to gain compensation for Austrian consumers who were victims of a cartel. Since VKI could not collate the information in other ways the efforts to bring damages claims against Austrian banks were thwarted.[166] In April 2005 the Court of First Instance annulled the EC Commission's decision stating that as a general rule, where a request for access to documents is made under the relevant legislation,[167] the EC Commission is obliged to examine and reply to that request on a document-by-document basis.[168] In this case, had the Commission considered in advance the implication of its infringement decision on follow-on claims it could have provided more information in its decision in respect to the loss incurred by consumers and classified the extensive number of documents (47,000 pages in total!) in view of the expected further procedures, thereby saving the considerable additional costs of having to go through the documentation again.

Accordingly, competition authorities should also collate information regarding the quantum of damages factor when reaching infringement decisions with a view to prospective use of such information in follow-on claims.[169] This solution is

[162] Gubbay, op cit, n 51, p 3.

[163] Murray, op cit, n 32, p 4.

[164] Murray & Johnston, op cit, n 34, p 7. Green Paper, op cit, n 8, p 6, Option 6, relates to the possibility of imposing 'obligation on any party to a procedure before competition authority to turn over to litigation in civil procedures all documents which have been submitted to the authority'.

[165] Commission Decision 2004/138/EC of 11 June 2002 relating to a proceeding under Article 81 of the EC Treaty (in Case COMP/36.571/D-1: Austrian Banks – 'Lombard Club')(OJ 2004, L56/1).

[166] BEUC, op cit, n 99.

[167] Regulation 1049/2001/EC of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents OJ 2001, L145/43.

[168] Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121.

[169] Gubbay, op cit, n 51, pp 4, 10-11. Accordingly, it is suggested that competition authorities will keep evidence in respect to damages in their custody during follow-on proceedings and will release it for discovery purposes (there, p 5). The effect of public enforcement on damages actions should also be considered in respect to leniency programmes.

complicated, as in 'object' offences such as the case of price-fixing cartels or an abuse of a dominant position, competition authorities are not required to prove the effect of the conduct (consumer detriment) in order to impose fines. Accordingly, competition authorities may not always quantify consumer detriment as it may at times face difficulties in proving direct consumer harm, especially in respect to infringements of Articles 81 and 82 EC. It is unlikely in these situations that the consumer associations will be able to shoulder the burden of proof.[170]

Furthermore, it is also advisable to widen the scope of claims which can be brought by consumer associations so that it includes representative stand-alone damages claims and representative claims for injunctive relief. The remedy of an injunctive relief may enable consumer associations to stop an infringement as it occurs and not have to wait for the damage to be incurred or for competition authorities' ruling in respect to the infringement years later. The introduction of a stand-alone representative action mechanism is also of importance, despite the high burden of proof that it imposes on consumer associations, as it creates a self help mechanism for consumers and reflects the fact that consumer associations are considered active participants in the market.

4.2 Improving Input Legitimacy

Consumer associations' input legitimacy will be enhanced by increasing their membership. This can be achieved by raising consumers' awareness of the importance of belonging to a consumer association and by convincing consumers of the effectiveness of consumer associations (output legitimacy). Within this framework, public authorities can provide consumers with information regarding the most suitable association for each group of consumers.[171] In order to overcome the problem of free riding and lack of input legitimacy set out above, consumer associations should point out that they already have a large number of members. This may indirectly encourage further consumers to join the association, since many have already demonstrated their trust in the association.[172]

Consumer associations can further increase the support of their constituents by refraining from using economic jargon when communicating with the public and by constructing a more accessible narrative. They should also consider choosing targets with which consumers can identify.[173] The complaint filed by Which? to the EC Commission regarding Intra-EU price discrimination in the 2006 World-Cup ticket payment mechanism[174] is a good example of such a target, since football has a large following across the social spectrum.

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[170] I thank Ms Alena Kozokova for this point.

[171] For example, competition authorities can have links in their website to consumer associations with brief description of their activities.

[172] Mitchell, op cit, n 82, p 117. This strategy was employed in respect to environmental groups.

[173] Pertschuk, op cit, n 115, pp 142-143. Kriger, op cit, n 110, pp 52-53.

[174] Evans, op cit, n 9, p 189.

Finally, as noted above, consumer input and output legitimacies are linked to each other. Thus, the more an association is able to improve its output legitimacy, the more it will be able to improve its input legitimacy and vice versa.

4.3 Improving Output Legitimacy

Consumer associations' output legitimacy is dependent upon consumers' satisfaction with the results of their activities. In order to succeed in their task consumer associations need to: (i) be properly trained so that they have the necessary abilities and resources and consider competition law to be part of their agenda; (ii) be properly funded but at the same time retain political independence; and (iii) cooperate with fellow consumer associations.[175]

4.3.1 Training consumer associations

In order to ensure that consumer associations will have not only the opportunity to participate but also the ability to implement 'good representation' of the consumer interest in the competition arena, consumer associations need to understand the benefits of participation in that arena. Successful participation will not only enhance consumer associations' legitimacy but will also encourage consumer activists to increase their participation. Accordingly, there is an increasing recognition of the benefits of training consumer activists in the competition arena. A recent example is the International Competition Network (ICN) working group on 'Capacity Building and Policy Implementation'.[176] There are also training programmes organised by consumer associations (such as CI) and NGOs such as the Consumer Unity and Trust Society (CUTS).[177]

Administrative authorities organise similar training activity. For example, the EC Commission (DG SANCO) and BEUC have organised general training regarding the development of consumer associations' abilities, with a special emphasis on European consumer law. In light of the fact that DG SANCO is responsible for consumer protection it is perhaps not surprising that no special attention is given in this training to competition law.[178] This is unfortunate, since only when consumer associations are convinced that competition policy is a subset of consumer protection policy (with which they are familiar) and that competition is an important tool that can advance consumer interest, will they choose to operate in the competition arena.[179]

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[175] Sidropoulus, op cit, n 119.

[176] www.internationalcompetitionnetwork.org.

[177] http:www.cuts-international.org.

[178] http://ec.europa.eu/consumers/cons_org/associations/train_proj/index_en.htm. www.trace-beuc.org/ However, it should be noted that recently DG Sanco has been involved in funding of a special training programme for consumer associations on competition matters which is organised by BIICL and CI (see below).

[179] Evans powerpoint Presentation, op cit, n 109.

Some consumer associations (such as the NCC) have stated that consumer- education strategy in the competition arena should be led by competition authorities.[180] Following this line of thought, the OFT organised a seminar for consumer associations, which introduced the super-complaint mechanism and its implications for consumer associations.[181] However, it is questionable whether consumer associations should rely on training provided by administrative authorities. Some consumer associations, such as Which?, already have a proven record of activity in the competition arena and perhaps are better placed than competition authorities to train their fellow associations. A relevant example is the training programme for consumer associations run by CUTS, which attempts to explain the importance of competition and to convince consumer associations that they should place competition matters at the top of their agenda.[182]

Another training programme was launched by CI and BIICL and partly funded by DG SANCO, with a view to enhancing European consumer associations' ability to deal with competition matters. The project is of considerable importance not only because of its focus on developing basic capabilities in the competition arena, but also because it attempts to provide tailored solutions for problems faced by consumer associations in their home-countries.[183] This training programme also enables well established consumer associations and the OFT to share their experience with other European associations.[184]

4.3.2 Funding consumer associations

A straight-forward solution to the resources problem is for the State to fund consumer associations. Such a development would also indicate the importance allotted to consumer associations and their role in representing the consumer interest by the State. As for the scope of funding, a European Parliament and Council decision from December 2006 set the criteria for financial contributions for actions by consumer associations stating that the funding will not exceed 50% of the expenditure of the functioning of EU consumer associations.[185]

On the other hand, this could create an undesirable degree of dependency by consumer associations on their sponsors and the need to please those sponsors. Some sources suggest that this is true in the case of BEUC which receives some of its budget from

[180] Hutton, op cit, n 146, p 18.

[181] PN 148/03, 12 November 2003, http://www.oft.gov.uk/News/Press+releases/2003/PN+148-03.htm

[182] http:www.cuts-international.org

[183] In order to achieve that, a survey which identified the problems was conducted and accordingly the training was tailored according to their specific needs. http://www.consumersinternational.org.

[184] Alena Kozakova, 'Consumer Complaints to Competition Authorities (… in the UK)' London, British Institute of Advanced Legal Studies, 06 August 2006 (a copy is saved with the author).

[185] Article 4(1)(c) of Decision No 1926/2006/EC of the European Parliament and of the Council of 18 December 2006 establishing a programme of Community action in the field of consumer policy (2007-2013), OJ 2006, L404/39-45. Para 5 of Annex II.

DG SANCO. This could in turn lead to loss of support from their constituents (the consumers) and the loss of the social role of consumer associations.[186]

A relevant example is the case of the Israeli Consumer Council ('ICC') a public-funded consumer association. The impression was that as long as the Council kept a low profile in line with government policies there was no problem. This situation changed in 2004 when the Minister of Trade and Industry decided to cut the Council's budget by 40% for unknown reasons. This major cut in the budget, together with political appointments of unsuitable personnel to the Council's board and excessive intervention in the Council's discretion, has led to a paralysed council and to the resignation of its top personnel.[187]

The apparent drawbacks in relying on public funding, in contrast to the successful experiences of representation of consumer interest by self-funded independent bodies, such as Which? and CI, support the view that consumer associations must maintain their economic independence in order to sustain their sovereignty and credibility. However, one must weigh this up against a fact which is often overlooked: self-funded associations, especially those operating on a subscription fee basis, require a critical mass of members in order to operate, due to the low ratio of members (subscribers) vis a vis the overall population. Accordingly, self-funded associations will only be able to cover their operational costs in countries with large populations.[188]

Nevertheless, in this context, the UK NCC is considered to be a good example of a publicly funded association which preserves its independence by ensuring ideological and political integrity, sound strategy, a stable course and competence in political manoeuvring. The NCC achieves the above by implementing a more balanced fund raising strategy, based on a ratio of 80% public funding and 20% private independent funding.[189] Nevertheless, arguably, the fact that the DTI is the main sponsor of the NCC may at times moderate its critique of DTI's activities.

A creative funding solution for consumer associations is implemented in the UK utilities sector in which watchdogs are funded by grants from the DTI through monies raised from companies' licence fees and ultimately from consumers.[190] In this example the State (DTI) can be regarded as a coordinator between companies and consumers (and their representatives) thus assisting in reducing the problem of free riding.

Another funding solution is for competition authorities to allocate income from competition offences fines to consumer associations, instead of directing this income to

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[186] Sidropoulus, op cit, n 119. Edwards, op cit, n 76, p 24.

[187] Hen, 'The real story behind the resignation of Galit Avishai', Israel, Ynet, 18 January 2005, (in Hebrew) http://www.ynet.co.il/articles/1,7340,L-3033738,00.html; Sidropoulus, op cit, n 119.

[188] Brown 2006, op cit, n 132. Brown, 'Consumer Activism in Europe' (1998) 8(6) CPR 209, p 212.

[189] Sidropoulus, op cit, n 119.

[190] Energywatch, 'Application for designation as 'super-complainant' under Enterprise Act 2002' (5 February 2004).

the general budget of the relevant state or the EU.[191] However, it is not advisable to rely on these fines for the purpose of financing the operational costs of consumer associations since the amount of the fines that are imposed and the date of payment of the fines (after appeals etc) cannot be predicted. Therefore, it is suggested that fines be used as a source of complementary funding for defined projects in relation to competition law.[192] A similar concept exists in Australia, where the fines are directed to a trust fund which uses these monies to finance consumer education and law projects and for funding of consumer law centres.[193] Another example is that of the US Department of Justice (DOJ) cartel fines which are allocated to a fund which is run for the benefit of victims of crime.[194]

This funding solution was also adopted on a unique one-off basis by the EC Commission in the *Rover* case. Between the years 1986-1990 Rover entered into a series of price fixing agreements with its dealers. Rover ended the practice and notified its existence to the EC Commission and to the OFT. The Commission closed the case on condition that Rover donate £1m to compensate the consumers. Which? was given the bulk of the money to spend on an information project on safety issues for people planning to buy cars. Which?'s implementation of these initiatives was overseen by an independent committee.[195] Another example is that of the Independent Schools Fees case, which involved exchange of sensitive information between independent schools in the UK. A settlement was reached between the schools and the OFT according to which the schools admitted that they infringed the competition rules but did not admit that their actions resulted in higher fees (and hence, arguably, effectively blocking the possibility of a follow-on claim) and contributed £3m towards a fund to be used to benefit those children who attended the schools during the period of time during which the infringement occurred. In addition, a penalty of £10,000 was imposed on each of involved schools.[196]

Additional sources of funding for consumer associations could be settlement funds in class actions. In these cases, 'cy-près' settlement payments through consumer associations are considered as an alternative device for the performance of thousands of complex individual damages calculations and awards for the benefit of indirect

[191] Murray, op cit, n 32, p 2; Murray & Johnston, op cit, n 34, p 1. This obviously requires a change of the existing legislation.

[192] Sidropoulus, op cit, n 119.

[193] Gubbay, op cit, n 51, pp 8-9.

[194] Victims of Crime Act Crime Victims Fund (October 2005) http://www.ojp.gov/ovc/publications/factshts/vocacvf/welcome.html The Crime Victims Fund is administrated by the Office for Victims of Crimes (OVC). See in respect to the vitamin case: 'Canadian Vitamin company agrees to plead guilty for role in international vitamin cartel' (29 September 1999) http://www.usdoj.gov/atr/public/press_releases/1999/3726.htm.

[195] Evans Powerpoint Presentation, op cit, n 109.

[196] http://www.oft.gov.uk/advice_and_resources/resource_base/ca98/decisions/schools

purchasers.[197] For example, the US Antitrust Institute has received a grant of US$498,800 from the Vitamin Cases Consumer Settlement Fund in order to produce a documentary film and educational materials on competition.[198]

Based on the intrinsic problems of representation by consumer associations (especially problems of input and output legitimacies) it can be argued that consumers might be better off with other forms of cy-pres compensation (such as the US Crime Victims Fund) than by funding consumer associations directly.[199]

The decision as to the best way to compensate consumers for breaches of competition law should be determined according to one's vision of the goals of competition law and its enforcement mechanism (deterrence or compensation),[200] what constitutes the consumer interest and whether this includes a consumer right for participation via consumer associations. These interesting questions are beyond the scope of this article.

4.3.3 Improving cooperation

It is vital that consumer associations co-operate with competition authorities and fellow consumer associations and use other associations' experiences. This can be achieved by the development of common activities, which can be initiated by competition authorities or umbrella consumer associations such as CI and BEUC.[201]

One example of the need for this cooperation is the problem faced by administrative authorities in having to contact various consumer associations with respect to every single issue. In April 2004 a new 'Consumer Voice', the Consumer Action Network ('CAN') was established in the UK with the goal of promoting cooperation between consumer associations, sectoral watchdogs and administrative authorities and achieving a united consumer voice.[202]

Having recognised the advantages of cooperation between administrative authorities and consumer associations, the EC Commission has established the European Consumer Consultative Group ('ECCG') chaired by the Commissioner for Health and Consumers Affairs. The ECCG meets regularly to debate the EC Commission's

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[197] ABA, op cit, n 48, p 72, citing *Ford v. F. Hoffmann – La Roche Ltd.* (2005), 74 O.r. (3d) 758 (S.C.J.). *Carbon Fibber Cases* I, II and III, JCCP Nos. 4212, 4216, 4222, Order, Dec. 20, 2005 (Super.Ct.Cal., San Fran).

[198] See http://www.cypresfunds.net/vitamin. The American Antitrust Institute is an independent Washington-based non-profit education, research, and advocacy organisation. The organisation's 'mission is to increase the role of competition, assure that competition works in the interests of consumers, and challenge abuses of concentrated economic power in the American and world economy'. http://www.antitrustinstitute.org/about.cfm.

[199] For examples of cy-pres distributions to consumers in competition cases see: Lopatka & Page, op cit, n 6, pp 552-556.

[200] Lopatka & Page, op cit, n 6, p 557.

[201] Sidropoulus, op cit, n 119; Field, 'Building a Consumers' movement and Providing a Consumers' Voice' http://docep.wa.gov.au/cac/downloads/seminar_CField.pdf, p 5.

[202] DTI, Consumer Advocacy, op cit, n 134, pp 12-14, 26. DTI, Strengthen and Streamline Consumer Advocacy: Regulatory Impact Assessment for proposals on consumer representation and redress (URN 06/1631) October 2006, http://www.dti.gov.uk/files/file34656.pdf.

approach to consumer policies.[203] However, it seems that ECCG's role is limited to reactive-passive participation (following requests by the EC Commission) rather than determining the agenda and initiating changes.[204] This raises the concern that consumer associations will be asked for their opinion mainly on consumer protection matters, rather than on competition matters. However, this concern can be met by the Consumer Liaison Officer's initiative to establish a new sub-group designated to competition matters.[205] In this vein, the European Economic and Social Committee ('EESC') recommended that:

> the European Competition Network [('ECN')] could adapt its activities to incorporate any information and observations that national or Community consumer organisations wish to provide in order to make competition policy more efficient in the markets and to ensure that consumers' economic rights are recognised.[206]

Following these recommendations, the Consumer Liaison Officer has asked the ECN to appoint a consumer correspondent to each national competition authority.[207]

4.4 Competition Authorities Should be Prepared to Execute Their Distinctive Role

The consensus that greater participation by consumer associations is beneficial for enhancing the legitimacy of competition policy has led competition authorities to support the empowerment of consumer associations as representatives of the consumer voice.

However, the often unspoken fact is that it is quite likely that competition authorities will be reluctant to fulfil a distinctive role in developing the abilities of consumer associations and would rather preserve the status quo, according to which competition authorities determine competition policy and consumer associations confine themselves to consumer protection matters and 'mind their own business'. Competition authorities would not approve the notion that consumer associations could determine their agenda,[208] especially when consumer associations are at times unfortunately envisioned

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[203] Commission Decision 2003/709/EC of 9 October 2003 setting up a European Consumer Consultative Group, (ECCG), OJ 2003, L258/35-36, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003D0709:EN:NOT.

[204] ECCG, op cit, n 203, Article 7.

[205] 'Minutes of the European Consumer Consultative Group (ECCG) 29 March 2006', http://ec.europa.eu/consumers/cons_org/associations/committ/minutes/eccg_29_03_2006_en.pdf.

[206] Sánchez, op cit n 33, p 2, para 1.7.

[207] Juan Antonio y Marti Rivière y Marti, the Consumer Liaison Officer, 'Does competition policy enforcement really care about consumers interests?', The 8th CLaSF Workshop, (City University, London, 7 September 2006).

[208] Evans, op cit, n 9, p 187. Feldman, *Consumer Protection: Problems and Prospects* St. Paul, New-York, West Publishing Co, 1976, p 265.

(at least by some high-ranking officials) as organisations incapable of representing the consumer interest in the competition arena.

This perhaps also explains the insignificant resources, which are designated by the EC Commission to the Consumer Liaison Officer. It should be noted in this context that the EC Commission has admitted that the Consumer Liaison Officer indeed suffers from a severe shortage of resources.[209]

The EC Commission is required to invest extensively in this important new role, including the allocation of extensive resources, sufficient personnel, establishing a research function and funding educational activities and cooperation activities with consumer associations and with national competition authorities.

If the EC Commission and national competition authorities genuinely wish to fulfil their role in enhancing consumer associations' ability in the competition arena, radical reform needs to be carried out. Recognition of the distinctive role competition authorities can play in developing the capabilities of consumers requires more than public speeches. The Consumer Liaison Office should be transformed from a one-man show into a well funded branch in DG Comp. Alternatively, as has been recently recommended in the EU Consumer Policy for the years 2007-2013:

> [e]ach Commission department with a significant consumer interest will appoint a consumer liaison officer, as pioneered by the Department for Competition, in order to liaise with consumer stakeholders and ensure each policy area gathers the necessary evidence to monitor the necessary evidence to monitor the impact of its policies on consumers.[210]

National competition authorities should also follow this model and designate substantial resources to the empowerment of consumers.

Nevertheless, it is important to emphasise that competition authorities are not the only ones responsible for the current situation. The responsibility for creating a fruitful dialogue lies with both the competition authorities and consumer associations. This cooperation is also dependent upon consumer associations' belief that their representation will make a difference. Consumer associations are required to help competition authorities by advising them as to the best way to enhance cooperation and develop their abilities. A genuine dialogue between consumer associations and competition authorities which will improve the quality and the legitimacy of competition policy can only begin when the mutual benefits from such a dialogue between equal partners are recognised.

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[209] Sánchez, op cit, n 33, p 1.

[210] Commission of the European Communities, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee EU Consumer Policy Strategy 2007-2013, *Empowering consumers, enhancing their welfare, effectively protecting them* {SEC (2007) 321-323}, (Brussels, 13 March 2007, 99 Final) http://ec.europa.eu/consumers/overview/cons_policy/EN%2099.pdf, p 12 point 5.5.

5. A MINI SALVATION FOR THE MASSES

The recent reforms have contributed a great deal to the presence of consumer associations in the competition arena in the UK. The official recognition of the significant role consumer associations can play should not be underestimated. In general, UK consumer associations have exercised their power wisely, as demonstrated in their use of the super-complaint and Which?'s intervention in the *Burgess* case.[211]

At the same time, we should not be dazzled by the UK experience and think that the super-complaint mechanism, the introduction of damages actions in the EC and the appointment of the Consumer Liaison Officer in the EC, will afford magic relief from all the problems entailed in the representation of consumer interest in the competition arena. The creation of avenues allowing for the representation of the consumer interest by consumer associations could be insufficient, if the problems of input and output legitimacies are not addressed. It is at this junction that competition authorities can play a distinctive role, if they genuinely wish to do so. We should be aware that not all the problems inherent in representation by consumer associations can be solved. One such problem is that of free riding. Nevertheless, it is important to continue to develop new measures alongside the existing avenues for representation by consumer associations.

It is also advisable to consider further ways to increase the involvement of consumer associations, not only at the ex-post stage of tackling sporadic infringements after they have occurred, but also at the ex-ante stage by facilitating participation in the formulation of competition policy. It is important to enable consumer associations to achieve a greater presence in the competition arena, to have more influence in determining 'the rules of the game' and to allow them to make better use of their scarce resources.

So, can consumer associations bring 'salvation for the masses'? Not yet, but we are getting closer.

[211] *Burgess*, op cit, n 40.

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The Supermarket Sector in China and Hong Kong: A Tale of Two Systems

*Mark Williams**

The supermarket sectors in China and Hong Kong have different histories, structures and competition-related problems. In China, after 1949, all large-scale retail operations were nationalised. Local government control of supply chains and retailing meant there were no nationally organised chain stores. The retail sector was highly fragmented and faced little, if any, competitive pressure. Only in the 1980's did the system change with an abandonment of the formal state plan, the liberalisation of agriculture, and acceptance of small private retailers. By the mid 1990s, various local governments across China encouraged international grocery firms to establish retail chains and grocery hypermarkets. The massive investment by foreign retailers has had a dramatic effect on the sector in major cities and has caused alarm and despondency amongst local retailers who have agitated for protection against the alleged 'monopolistic' practices of the foreign giants. The national government has commissioned reports and new regulations are slated to address these issues. In Hong Kong, the traditional laissez-faire economic policy of the former colonial government has been continued by the post-1997 administration. This has allowed the creation, by market forces, of a supermarket duopoly that has in excess of 80 per cent of the local supermarket trade. The incumbents are both subsidiaries of local property conglomerates and given local conditions the ability of newcomers to enter the market is restricted by high barriers to entry. As Hong Kong has no general competition law complaints have not resulted in any government intervention in the sector. This complacent attitude is likely to change given the recent publication of a government-sponsored Competition Policy Review Committee report that recommended the enactment of a general competition statute which would include powers to investigate and sanction abuses of dominance.

INTRODUCTION

This paper will explore the history, development and regulation, both current and prospective, of the supermarket sector in China and Hong Kong. In order to undertake that analysis, it is necessary to understand the history and structure of grocery retailing in both jurisdictions, the respective roles of domestic and foreign-owned operators and certain demographic, geographic and cultural factors that distinguish grocery shopping behaviour in China and Hong Kong from those observed in Western countries.

The paper will first consider the position in mainland China, then proceed to explain the special features of the Hong Kong market, and conclude with some observations concerning the salient common features of both markets.

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SUPERMARKETS IN CHINA

History and Market Structure

Supermarket-type retailing in mainland China is a recent phenomenon and only started to develop in the early 1990s but has now captured about 30 per cent of grocery sales in the first tier developed eastern cities. China is a large country of 9.5 million square kilometers and a population of 1.3 billion. Economic inequality is very marked as between the urban elite and the ordinary urban residents and rural inhabitants. Despite these income inequalities average incomes have increased substantially over the last 25 years and now average US$1,100 per annum in the main urban areas but decline to only US$700 in rural areas. The continuing high economic growth rate of the last decade, which is expected to continue, means that the overall Chinese retail market is expected to double in size from US$628 billion in 2004 to US$1,209 billion in 2010.[1] The retail market is fragmented with no nationally organized dominant players. The top 10 retailers hold only 2 per cent of the national market, and the top 100 retailers have between them less than 6.4 per cent of the total market.[2] The supermarket sector is similarly atomized nationally but in local sub-markets, greater concentration is apparent, though at a level that is considerably less than in mature Western grocery markets.

As regards cultural habits and demographic factors, the vast majority of China's 1.3 billion consumers still purchase groceries from small local single store outlets and buy fresh meat, fish, fruit and vegetables from traditional street markets on a daily basis. Most rural residents do not have access to supermarkets at all. The percentage of car ownership is miniscule at about 2 per cent of Chinese households and so, of necessity, most grocery shopping is carried out within walking or cycling distance of home on a daily basis in urban areas, whilst in the countryside the local village grocery shop is likely to be the only retail outlet.

Traditionally, retailing in China has been very fragmented with few national distribution networks, save for strategic commodities such as rice and flour. Retailing was previously carried out via small single unit outlets or state-owned department stores on the Soviet model. Wholesale and logistic systems were antiquated, owned by local governments and geared to the needs of the local government catchment area or possibly that of the province, but rarely to the needs of a national market. Each locality produced and consumed their own foodstuffs and household essentials, partly as a result of weak infrastructure (poor road and rail networks) and the lack of national distribution channels, but also for political reasons, namely the Mao-inspired self-contained, cellular, economic structure, devised to ensure that in the event of war, every region of China could remain self sufficient. However, by the 1990s the authorities began to realise that existing arrangements were inadequate for the creation of a unified national market for goods and services, which was seen from foreign examples, to be a

[1] World Bank, IMF World Economic Database, Access ASIA, Chinese Statistics Bureau and A T Kearney analysis to be found in 2005 Global Retail Development Index: China, A T Kearney. See www.atkearney.com

[2] Ibid.

necessity to promote balanced and wide-spread wealth creation, as well as to achieve greater economic efficiency by exploiting the benefits of economies of scale.

In the 1990s, local governments in the developed southern and eastern cities of Shenzhen, Shanghai, Guangzhou began to promote greater market integration and the consolidation of retail outlets. Consequently, local chains developed rapidly. The main domestic grocery retailers – Lianhua, Hualian and Wumart – were all originally local government operated department stores. They were encouraged by their official sponsors to develop into chain stores in the 1990s, partly as a result of the need to modernise the retail sector and partly to compete with the impending arrival of foreign multinationals. In order to acquire modern management techniques - logistical systems, marketing, accounting, sourcing, operations management, stock control, computerisation, store location and layout, product mix - new foreign entrants were initially required to partner with domestic firms in joint venture arrangements. Not all these joint ventures have fared well. For example, a joint venture between Lianhua and Carrefour – Dai Lianhua – formed in 2003 with a registered capital of RMB90 million contributed as to 55 per cent by Lianhua and 45 per cent by Carrefour and operating a chain of 120 stores, has made an accumulated deficit over the last three years of over RMB50million; Lianhua is now likely to sell its stake to its joint venture partner.[3] Intense competition in the grocery market in first tier cities has also led to casualties. In May 2006 Hualian, a Shanghai based multiple, which had expanded to the capital city, announced it was withdrawing from the Beijing market due to mounting losses.[4] Local consolidation has also been a feature of the market in Beijing. Wumart's acquisition of MerryMart is one example as is its purchase of Xinhua in the southwest of China. However, over 40 local chain store operations remain in Beijing and it would seem that further consolidation is inevitable as many of the players are very weak financially.[5] However, not all amalgamations are sound business propositions and the grim reaper of market forces is thinning out the ranks of merged market operators. In early 2005, Shanghai Meiya Investments closed the 500 21st Century convenience stores it had purchased only 18 months previously. In July 2005, Yindu Supermarket Group in Hebei province collapsed. PriceMart, previously a leading chain store operator with 40 hypermarkets in 2003 and sales of US$741 million also failed in 2005.[6]

As regards the vast rural, second tier city and small town market far away from first tier cities, the national Ministry of Commerce announced, in 2004, a five year plan to develop a network chain of 250,000 'supermarkets' to service part of the two thirds of China's population that still rely on agriculture for their livelihood. Most of these stores will be very small, perhaps only 100 square metres.[7] Whilst farming families' incomes

[3] Lianhua may pull out of venture with Carrefour, South China Morning Post, 17 August 2006.

[4] Hualian woes highlight tough market, South China Morning Post, 18 May 2006.

[5] Wumart set its sights ongrowth, China Daily, 11 August 2006 and Retail giant swallows rival, China Daily, 3 February 2006.

[6] Supermarket sweep, China Daily, 12 December 2005.

[7] 70,000 supermarkets set up in rural areas in 2005, China Daily, 4 January 2006.

are often much lower than urban ones, consumption spending is problematic due to lack of retail outlets in rural communities and journeys to the nearest town being difficult. On the macro economic level, the national government is anxious to attempt to divert gross domestic product expansion away from over reliance on capital expenditure and to rebalance it more toward consumption. Expanding the opportunities for consumption spending in rural areas is part of that overall strategy. This market is likely only to be serviced by domestic retailers, backed by local governments, rather than by international operators, who will prefer to cherry-pick wealthier urban dwellers in the major cities that may be a more profitable segment of the consumer market.[8]

Foreign Investment in the Supermarket Sector

The development of foreign owned supermarket chains has been explosive, especially in the last five years, since China joined the World Trade Organisation (WTO) in December 2001. The nature and format of foreign direct investment (FDI) in the retail sector had been severely restricted by the national government prior to this date because of concerns about 'excessive competition'.[9] In the 1990s, Carrefour evaded national prohibitory rules that prevented sole ownership, or high equity stakes in ventures, by obtaining business approvals from various local governments, including the Beijing municipal government, that coveted the prestige of having a well-known foreign investor in their locality and who had delegated approval authority for *prima facie* smaller foreign investment projects. Carrefour's strategy was to lay the foundation of a national network by stealth. When the scale of the investment became too big to ignore, and as a result of domestic retailers complaints, the national authorities threatened sanctions and imposed a six month freeze on new investment in 2001. Carrefour was also required to reduce its per centage ownership of various outlets across the country to conform with FDI regulations but once China had joined the WTO it reaped considerable first-mover advantage and had stolen a march on its greatest global rival – Wal-Mart – that had played by the rules and only began investing in a national network in China after WTO accession.

As part of the WTO accession protocol, China agreed firstly to relax restrictions on foreign participation in the retail sector and then, by late 2004, to open the retail sector fully by removing all geographical and quantitative restrictions on FDI.[10] The result has been an avalanche of foreign capital investment in the sector with Carrefour, Wal-Mart, Makro, Metro, Tesco and Emart (South Korea) leading the charge and up to 35 other foreign retailers all becoming involved in one of the largest potential retail markets in the world.

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[8] China spurring consumption in rural areas, Xinhua, 28 December 2005.

[9] Carrefour revamps business to follow local rule, Business Weekly, 18 June 2002.

[10] To read the documents relating to China's accession see the WT web site at http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm. The services schedule contains China's detailed commitments on opening the retail sector, see document WT/ACC/CHN/49/Add.2.

At present, the share of grocery market held by the largest 100 retailers appears to be split as to 80 per cent to domestic operators and 20 per cent to foreign chains, according to the Chinese Chain Store Management Association. However, increasing foreign expansion in the domestic market is expected in the future with Carrefour intending to expand its current 70 hypermarkets by 20 per year and Wal-Mart increasing its 56 stores by a similar number. Tesco has 50 stores and plans an additional 15 more per year too.[11]

The large volume of FDI that has entered the Chinese market in the last decade, and will continue to pour in, appears to be reaching saturation point in several honey-pot destinations, especially Shanghai. This city of approximately 16 million inhabitants had 126 hypermarkets over 5,000 square metres in 2005, of which 36 were within 1 kilometre of each other with plans afoot for another one hundred similar size stores before 2010. AT Kearney, a major international management consultancy, recently opined that the Chinese retail market may soon suffer from over investment, given that average disposable incomes in most parts of China could not support profitable operations for international investors and that other developing markets might have better prospects.[12] Establishment in second tier cities is also a strategy being actively pursued by some foreign entrants. Initial partnering with local incumbents with a prospect of complete buyout, once the local market is better understood, is the strategy often pursued. This acquisition issue is discussed in more detail below in light of new regulatory controls.

A strategy of geographical expansion is not without difficulty. Infrastructure deteriorates as one ventures further into the central and western regions of China's vast hinterland. Average incomes decline from US$1,100 per annum in the main urban cities to only US$700 in rural areas. In food distribution, only 15 per cent of products that should be temperature controlled are carried by refrigerated transport, compared with 85 per cent in developed nations. Competent managerial talent is often in short supply in secondary or rural areas. All these factors complicate nationwide expansion plans of foreign investors.[13]

Additional market risks include widespread corruption amongst employees who accept or demand bribes from suppliers to place orders with them, and the pervasive presence of pirated products that can enter the supply chain by nefarious means and end up being offered for sale by the unsuspecting retailer. Substandard beer bottles that have a tendency to explode causing personal injury and fake brands of paint containing toxic chemicals that can prove lethal to unsuspecting consumers are relatively common. China has a surprisingly well developed consumer protection law system and such defective products can give rise to substantial liability claims. Domestic courts are willing to impose liability on foreign operators who do not have the same level of

[11] Hualian woes highlight tough market, South China Morning Post, 18 May 2006.

[12] The 2005 Global Retail Development Index: China, AT Kearney. See www.atkearney.com

[13] Ibid.

political protection as their better connected domestic counterparts, who may be owned by the same local government that controls the lower level court system.[14]

Despite these problems, foreign market players continue with expansion plans to open substantial numbers of new outlets in the coming years and also to buy-out existing domestic joint venture partners or local rivals to consolidate ownership, and increase market share, improve efficiency and maximize economies of scale. This strategy is now possible as a result of the implementation of China's WTO services commitments that allow *inter alia* 100 per cent foreign ownership of retail firms. For example, Carrefour has bought out its local partners in Kunming, Wenzhou, Haikou, Shenzhen and Beijing; Tesco has bought out its joint venturers in Beijing, Shanghai, Jiangsu and Guangdong; and Metro has acquired sole control of its joint venture with Jinjiang International for US$949 million.

The Effect of New Regulations on Future Foreign Investment and the Rise of 'Economic Patriotism'

Economic 'nationalism' or 'patriotism' is not a new phenomenon, nor one that is peculiar to China. In recent times, the United States, France, Germany, Spain and Italy have all exhibited this species of xenophobic paranoia. The Chinese state oil company (CNOOC's) bid for a US oil company (Unocal) caused a political storm in the US.[15] The possible take-over of a number of French firms, including casinos and a dairy products manufacturer, by a range of foreign bidders brought out French politicians innate repugnance of foreign ownership.[16] The acquisition of a German mobile telephone operator (Mannesmann) by the British operator (Vodaphone) caused the German government to attempt to block the deal.[17] A foreign bid for a Spanish electricity utility (Endessa)[18] and a Spanish firm's bid for an Italian motorway operator (Autostrada) similarly caused intra European controversy very recently.[19]

In China, such nationalist protectionism is often near to the surface of official pronouncements. For example, in May 2004 the State Administration of Industry and Commerce produced a report demonizing 'foreign domination' of various markets including retailing.[20] Xie Fuzhan of the State Council Development Commission urged government to take action to detect the early warning signals of foreign multi-national

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[14] For a discussion of consumer liability claims in China see Mark Williams, 'Foreign Business and Consumer Rights: A Survey of Consumer Protection Law in China' (2001) UCLA Pacific Basin Law Journal, Spring Vol 18, No 2, pp 252-272.

[15] China's Unocal Bid Raises Political Red Flags, 27 June 2005. http://www.foxnews.com/story/0,2933,160656,00.html

[16] Economic Brief: French Protectionism, PINR, 15 September 2005. http://www.pinr.com/index.php

[17] Vodafone seals Mannesmann deal, BBC News, 11 February 2000. http://news.bbc.co.uk/2/hi/business/630293.stm

[18] Antitrust and mistrust, Financial Times, 7 August 2006.

[19] Italy halts Autostrade merger, Financial Times, 7 August 2006.

[20] Laws necessary to counter monopoly by foreign giants, China Daily, 15 November 2005.

companies (MNC) attempts to corner markets in China.[21] One of the most strident voices on this topic has been the head of the National Bureau of Statistics, Li Deshui, who warned at the March 2006 meeting of the National People's Congress, that Chinese companies were in great danger from foreign capital's takeover of Chinese firms and that 'more than 80 per cent of large scale supermarkets have been purchased by MNCs by 2005'.[22]

This trio of high level interventions now appear to part of a co-ordinated campaign, rather than isolated, independent siren calls for a more protectionist stance. It has been suggested that several factors have contributed to the deteriorating climate for foreign-backed mergers including 'national pride, lingering resentment over Chinese oil giant CNOOC's failed US$18 billion bid for UNOCAL, and a nationalist resurgence, partly in response to growing protectionist sentiments in the United States and Europe against low-cost Chinese exports'.[23]

Prospective Regulatory Controls

By the summer of 2006, matters appeared to be coming to a head. Three new sets of regulations were either promulgated or were close to finalization.

On 6 June 2006, it was announced by the State Council that the enactment of China's long debated general 'anti-monopoly' law would be speeded up given the pressing need to deal with competition issues.[24] The draft law has now been submitted to China's highest legislative organ – the Standing Committee of the National People's Congress – for final scrutiny, amendment and enactment. This was debated in the session held between 24-29 June 2006.[25] Passage of the law and its detailed provisions remain controversial. A hint of the continuing difficulty that China has with a competition law in terms of its ambit and appropriate enforcement can be gleaned from official comments in the press. Early enactment seems unlikely and the view of the knowledgeable interlocutors appears to be that '[the draft law] will surely attract more attention in the following months, or even longer, before law makers can reach consensus on some of its more controversial articles and pass it'. In the same report, a member of the Committee was quoted as saying that 'there was no timetable for passing the law due to its complexity'. Some law-makers see the law as primarily a defence against 'aggressive foreign take-overs', although other officials have been at pains to point out that 'the draft law does not target any type of foreign-funded companies, so there is no discrimination at all'.[26] Doubts as to the veracity of this protestation exist, as will be seen when two other new regulations are considered later.

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[21] Foreign firms' monopolies in China cause Concern, China Daily, 8 December 2005.

[22] Foreign Companies M&A more aggressive, China Daily, 15 March 2006.

[23] Takeover hostility, China Daily, 12 April 2006.

[24] China okays draft anti-monopoly law, China Daily, 8 June 2006.

[25] China deliberates new law, Xinhua, 25 June 2006.

[26] State strives to boost market competition, China Daily, 21 July 2006.

The draft 'anti-monopoly' law contains provisions in relation to abuse of dominance, collusive agreements and a merger control regime, none of which, superficially, discriminate against foreign investors. The law also has provisions to attempt to more effectively deal with a particular Chinese mischief – 'administrative monopoly' – this may be defined as:

- the abuse of national or local government power to protect producers from competition (whether from other domestic products or imports) by differential taxes or administrative charges;
- the misuse of administrative powers to compel procurement from favoured local suppliers;
- the erection of physical and non-financial barriers to domestic trade or the abuse of administrative power to procure economically unjustified advantages such as soft bank loans for favoured local or national champions; and
- the abuse of licensing or administrative approval powers for the same purposes.

Tackling the decisive influence of governmental power over the internal market is essential if China is to be becoming a functioning market economy but, because of existing political arrangements, this is one of the most intractable issues to deal with.

As for foreign investors, many remain nervous that whilst the draft law is not overtly discriminatory, the implementation of its provisions might be skewed against their interests, especially given the chorus of official shroud-waving that preceded the submission of the draft law to the Standing Committee.

Probably the greatest obstacle to the swift passage of the law is the continuing bureaucratic turf war over which of three competing agencies should take the lead role in the administration and enforcement of this potentially potent economic management tool. The infighting between the Ministry of Commerce, the State Administration of Industry and Commerce and the National Development Reform Commission has been ongoing for at least four years and resolution has clearly not yet been achieved. As a result, the final enactment of the law could be impeded for a considerable time but the Chinese government also appreciates that as the five year transition phase of WTO accession expired in December 2006, enacting a new regulatory regime for the internal market is an urgent necessity. China's accession commitments regarding foreign access to its domestic markets became fully operational at the end of 2006 and there is a perceived need to have a competition law in place to discipline unacceptable market behaviour and to prevent new positions of dominance being achieved in markets that will become more open to foreign capital. The dilemma of how to manage FDI in such a way as to assuage domestic xenophobic fears but at the same time ensure continuing inflows of foreign capital to fuel economic growth and development, is an acute one to which there is no easy solution for the authorities.

There are two other legislative initiatives that will directly affect the retail sector. One is a new merger regime, in advance of the new general 'antimonopoly law', that

exclusively regulates foreign take-overs of domestic firms. The other is specifically aimed at new administrative arrangements to inhibit over provision of large format retail chains.

On 8 August 2006, the Ministry of Commerce issued the 'Provisions for Foreign Investors to Acquire Domestic Enterprises (2006)'. These regulations take effect on 8 September 2006 and supersede the Interim Provisions promulgated in 2003. These rules are discriminatory as they only apply to foreign related transactions; domestic-domestic mergers are not regulated. The triggers for administrative approval are contradictory and do not necessarily relate to the creation of market power. As such, they are not similar to most international systems that seek to control mergers only when there is the risk of a substantial lessening of competition created by the merged entity. These new rules clearly make foreign-related mergers more problematic by increasing regulatory risk. On the other hand, the new rules specifically permit the use of shares as consideration for the take-over transaction, so making foreign-related mergers easier to finance. The result is a curious type of compromise, on the one hand tightening the potential controls whilst on the other making merger transactions easier to fund. These new rules may be an attempt to reign in those mergers deemed 'unacceptable' in official eyes, rather than exhibiting a genuine concern over any potentially anticompetitive consequences that would result from a particular merger. Interestingly, the 2003 Interim Provisions were not actually implemented in practice but the new rules might be, especially given the official grandstanding that has taken place over the last few months about the dangers of foreign expansion and domination of markets. These new rules and the political climate could adversely impact foreign supermarket expansion and consolidation in China.

The third new set of regulations that might affect the supermarket sector directly are ones proposed to 'regulate large-scale shopping outlets, which could impede the expansion of foreign retailers such as Wal-Mart and Carrefour'.[27] They include provisions for an additional administrative approval before new large-scale stores and shopping malls could be constructed. They provide for the submission of detailed plans and impact assessments of any proposed store with a floor area in excess of 10,000 square metres and thereafter, public hearings as to the desirability and effect of the opening of the proposed store on the locality in which it would be situated. If adverse effects were found, the new store could be blocked. Alternatively the development might be allowed, subject to conditions such as better road or pedestrian access. The costs of the development would then inevitably rise. Superficially the rules would not discriminate between domestic and foreign firms but the suspicion remains that these proposed rules have been created as a result of lobbying by domestic firms. Local companies have alleged bias by local governments in favour of foreign firms due to the perceived greater prestige of having a foreign brand-name store in their locality. Domestic retailers see the proposed rules as favouring them as was candidly admitted by a representative of Lianhua who said, 'Foreign retailers are always enjoying special

[27] Chinese rules could tie up foreign retailers, China Daily, 17 July 2006.

favours and treatment from local governments. But the [central] government should protect the national companies if they want us to grow strong'.[28]

Exactly how these new rules will affect the development and structure of the supermarket sector in China is unclear but the government will be anxious to balance protectionist sentiment, for domestic political reasons, with the continuing need to advertise China as being a friendly destination for foreign investment, which has provided much of the impetus for the country's stellar economic growth over the last 25 years. Damaging the growth in GDP would have not only profound economic, but also political, consequences and might imperil the legitimacy of the ruling Communist Party of China.

SUPERMARKETS IN HONG KONG

Ideology and Market Regulation in Hong Kong

Hong Kong was founded as a British Crown Colony in 1842. A free port was established in the expectation of creating an entrepôt based on the China trade in tea, silk and porcelain. The prevailing economic philosophy was one of classical laissez faire and this has remained official government dogma ever since, even after the retrocession of Hong Kong to the People's Republic of China in 1997. The government's dogged adherence to a 'free market' economic policy has won it plaudits as the 'freest economy' in the world from various bodies[29] but pole position in terms of 'economic freedom' does not necessarily equate to economy-wide competitiveness; here Hong Kong's ranking is much more average in terms of the OECD economies.[30]

Hong Kong's government has maintained for decades that market forces provide optimal solutions to problems of economic management and that intervention in the form of a competition law is both unnecessary, given (allegedly) few competition problems, and that such a law would be potentially harmful to the unfettered operation of the market. The implicit government assumption has been that Hong Kong must *a priori* be subject to keen competitive forces in the domestic non-traded sector but, in reality, this is untrue for many domestic markets. As we will see in the supermarket sector, unregulated competition has in fact, as one might have predicted given rational profit-maximizing commercial behaviour, produced a highly concentrated market with an effective duopoly. Theoretical notions that competitive pressure can be exerted from unrestricted imports does not apply in service-related sectors such as retail. Whilst the establishment of new players in the Hong Kong grocery sector is a theoretical possibility, given that there is no regulatory impediment to foreign direct investment,

[28] Ibid.

[29] The Heritage Foundation of the USA and the Fraser Institute of Canada have both lauded Hong Kong as the freest economy in the world for over a decade. See http://www.brandhk.gov.hk/brandhk/e_pdf/efact3.pdf and http://www.hketo.ca/news/pages/September-8-2005_free.html

[30] The World Economic Forum concluded that Hong Kong was ranked No 28th in the world with regards to over all economic competitiveness in 2004/05. http://www.weforum.org/en/events/eastasia/EastAsiaCompetitiveness/index.htm

formidable barriers to entry do exist and when coupled with the market power of the two incumbents, entry into the grocery sector is very difficult, if not impossible.

History, Market Structure and Shopping Behaviour

Supermarkets were first established in Hong Kong in the 1950s. Until the 1970s the development of self-service stores was very slow with only about 30 stores in operation by the early 1970s. From the mid 1970s the development of the sector accelerated markedly, so that by 1980 there were over 200 outlets and by 1990 over 500 such stores. Market concentration intensified from the mid 1980s and through the 1990s with the elimination of small operators so that the market is now dominated by two chains – Wellcome and Park N'Shop.

A striking fact about supermarkets in Hong Kong is that they are, generally speaking, very small in size when compared to those found in Europe, North America and Australasia or indeed to other Asian jurisdictions such as Thailand, mainland China or even Singapore. Few stores in Hong Kong would reach the minimum efficient size suggested by the UK Competition Commission of 1,400 square metres.[31] They also supply a relatively limited range of grocery brands and do not sell (as a general rule) clothing, shoes, household or kitchen equipment or electrical goods as might be found in European or American outlets. They certainly do not sell insurance or financial products, branded credit cards, savings plans or internet services, as may be found in say, UK supermarkets. Neither do they retail petroleum. This is mainly due to small site sizes, high land prices and site scarcity, though there is a suspicion that the lack of diversity of products for sale may also be due to lethargy on the part of the incumbent duopolists given that they dominate perhaps 80 per cent of the local supermarket market with around 250 stores each; this is a very high number of outlets, given Hong Kong's small geographical size of 1104 square kilometers with a developed urban area of only 262 square kilometers[32] and a population density of 26,335 people per square kilometer[33] in urban areas but this phenomenon can be explained by specific local characteristics as explained below.

Cultural preferences and other particular, local conditions play a part in this proliferation of relatively small outlets. Firstly, ethnically Chinese people, who make up over 95 per cent[34] of the population, tend to prefer to purchase fruit, vegetables, meat, fish and seafood from traditional covered markets, known locally as 'wet markets', on a daily basis as traditionally food is bought, cooked and consumed on the same day. The retention of cooked food for later consumption or for freezing is little practiced as a result of cultural preference for fresh food and, in any case, the lack of space in most

[31] Competition Commission, 'Supermarkets: A report on the supply of groceries from multiple stores in the UK' (2000), p 78, para 6.16, http://www.competition-commission.org.uk/rep_pub/reports/2000/446super.htm

[32] Hong Kong Social and Economic Trends (2005).

[33] Ibid.

[34] 2001 Population Census, Hong Kong Census and Statistics Department.

kitchens precludes the accommodation of large refrigerators or freezers. Secondly, the vast majority of the population does not own a car[35] as most people live in flats with no, or scarce, car parking spaces, which are often sold separately to residential apartments and can be prohibitively expensive. Thus, groceries have to be carried home, so limiting individual purchases substantially. Thirdly, very little storage space exists in kitchens, due to their tiny dimensions, when compared to those typically found in other places. This combination of factors mean that a weekly shopping expedition to the supermarket to buy groceries, transport them home by car and then store them in bulk is impossible. As a result, 'supermarkets' in Hong Kong are not close comparators to those in other jurisdictions.

In his 1992 Policy Address, Hong Kong's last Colonial governor, Chris Patten, announced that:

> Hong Kong is proud of its free and competitive markets. But a more sophisticated and prosperous community has become increasingly unwilling to accept unfair and discriminatory business practices. The public has already begun to voice alarm at the use of market power by suppliers in areas of special importance to the ordinary family's wellbeing … I shall ask my Business Council to put at the top of its agenda the development of a comprehensive competition policy for Hong Kong.[36]

As a result of this policy initiative the government commissioned the Hong Kong Consumer Council to undertake several sectoral investigations including banking, supermarkets, gas supply, broadcasting, telecommunications and private residential property between 1993 and 1996. These reports were conducted without any legal power to demand evidence or to require the production of documents but most business operators did co-operate with the enquiries, to some extent at least.

The Consumer Council 'Report on the Supermarket Industry in Hong Kong'[37] was conducted in 1994 and adopted a government definition, used for the collection of statistics, of supermarkets as, 'establishments that engage in retail sales of general provisions including foodstuffs as one of the major items that use the self-service method'. Convenience stores and traditional wet-markets were therefore excluded from the market definition on the basis that they were not close enough substitute suppliers. It is a moot point as to whether this definition had a distorting effect on the Report's findings to the extent of invalidating them. As regards barriers to entry, there were at that time, and remain at present, no formal legal rules regulating entry into the supermarket sector, by either local or non-Hong Kong firms. But many observers

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[35] There were 351,000 private cars registered in Hong Kong in 2005. Given a population of 6.9 million, there is one private car for approximately 20 people or approximately only 5% of the population own a car but up to 20% of households have access to a car. By way of contrast, in the UK in 2003 over 75% of households had access to a car. For Hong Kong, see http://www.censtatd.gov.hk/FileManager/EN/Content_807/transport.pdf For UK, see Department for Transport http://www.dft.gov.uk/stellent/groups/dft_transstats/documents/page/dft_transstats_026282.hcsp.

[36] Hong Kong Legislative Council Official Record of Proceedings, 7 October 1992 at p 16.

[37] 'Report on the Supermarket Industry in Hong Kong', Hong Kong Consumer Council, November 1994.

suggest that non-legal, economic barriers to entry do exist and they help to maintain the dominance of the two incumbents. These alleged barriers will be considered later.

Given the somewhat narrow market definition utilized by the Consumer Council, the two operators – Wellcome and Park'N Shop – had, at the time, some 70 per cent of the market. But if a wider definition was adopted – Hong Kong government subsequently alleged that the supermarket sector accounts for only 35 per cent of foodstuff sales – their market share drops considerably. The government's methodology in undertaking market definition is, however, opaque and has not been explained, so leading to the conclusion that a proper economic assessment of the relevant market remains to be undertaken.

The two market leaders also grew significantly during the Report's study period 1985 to 1993, squeezing the market share of other operators. Access to prime store sites, most of which were situated within the development envelope of new residential housing estates, so giving an almost captive customer base of residents, was seen as a key advantage. Park N'Shop, with around 250 stores in Hong Kong, is part of the Hutchinson Whampoa/Cheung Kong[38] conglomerate controlled by the Li Ka-shing family and Wellcome, with 247 stores in the Territory, is controlled by Dairy Farm International Holdings, part of Jardine Matheson[39] group of companies, that is ultimately controlled by the British based Keswick family.

Hutchinson Whampoa is a diversified conglomerate that also controls the largest electrical retailer in Hong Kong – Fortress with over 60 stores – and a large retail drug-store operation – Watsons – some of whose products overlap with cosmetics, personal care and toiletry goods sold by Park N'Shop.

Similarly, the Jardine Matheson Group, through Dairy Farm International Holdings, also has other substantial retail interests in Hong Kong including over 700 7-Eleven convenience stores, and over 220 Manning drug stores that compete directly with Watsons and also partially with Wellcome in relation to personal care products. Interestingly, Jardines also operate in the supermarket/hypermarket sector in several other Asian countries – namely in Malaysia, Indonesia and Singapore. Hutchinson has expanded the Park N'Shop brand into mainland China where it has 37 stores in the southern region of the country and has ambitious expansion plans to have a total of over 100 stores by 2008.[40] Jardine Matheson also control Hong Kong Land, one of Hong Kong's largest property development companies, which owns much of the central district of Hong Kong and also builds high-end residential developments. Cheung Kong/Hutchinson is fundamentally a property development entity, though it has diversified into the ports, telecommunications and energy sectors. Cheung Kong

[38] See 2005 Annual Report Hutchinson Whampoa Limited http://202.66.146.82/listco/hk/hutchison/annual/2005/retail.pdf

[39] See 2005 Annual Report Jardine Matheson Group Limited http://202.66.146.82/listco/sg/jm/annual/2005/ar2005.pdf

[40] Park N'shop plans mainland stores, China Daily, 27 April 2005.

remains one of Hong Kong's largest commercial and residential developers and this fact may well have a direct impact on the structure of the supermarket sector and distribution and location of stores.

The understandable commercial desire to prefer group companies was highlighted in a competition-related telecommunications case where a large residential development – Banyan Gardens – was constructed by Cheung Kong. The developer awarded the post-completion management of the estate to another group company which in turn gave an exclusive contract to supply telecommunication services and internet broad band services to two other group companies. Residents were obliged, by the terms of the lease, to pay a fixed fee for management services provided by the agent that included the cost of the bundled telecommunication and broadband services, from which residents could not opt out. They could continue to use other providers so long as they paid the full management fee. Complaint was made to the Hong Kong Telecommunication Authority (OFTA) about a potential breach of the sector-specific competition rules but OFTA ruled that as the relevant anti-competitive conduct had been action of the estate management company in offering the exclusive contract to the telecommunication company, and as the law only regulated telecommunication licencees, there was a lack of jurisdiction.[41] This example tends to suggest that close commercial co-ordination between members of group companies is normal business practice amongst Cheung Kong subsidiaries and so, by extension, the fact that most residential estates developed by the group also include an incumbent Park N'shop within the estate complex is unsurprising.

In the 1994 Consumer Council Report, it was discovered that all new residential housing developments at that time, owned by Cheung Kong and many properties developed by Jardines, included of a supermarket operated by their respective grocery subsidiary. The Consumer Council saw this close relationship as a significant barrier to entry.

The Report also thought that dominant position of the two incumbents gave them significant bargaining power over suppliers, including demands for exclusivity agreements. Choice of products within stores was relatively restricted, thus preventing inter brand competition. Further, the prices of many similar or identical items were very similar, if not identical, in the stores of either firm that were in close geographical proximity to each other but varied noticeably across the Hong Kong territory. As a result, the Report noted that price competition was minimal during the period of study, but whether this was due to intense competition, covert collusion or an oligopolistic market structure could not be determined due to lack of information; the Consumer Council had no power to require disclosure or to scrutinize internal documents. The 1994 Report recommended monitoring of the supermarket sector, adoption of effective powers giving the ability to investigate anti-competitive complaints against incumbents and the open tendering by developers of new supermarket sites to prevent the 'tying'.

[41] OFTA Concluded Investigation into Complaints on the Provision of Telecommunications Services at Banyan Garden Estate http://www.ofta.gov.hk/en/press_rel/2004/Aug_2004_r1.html

However, the government has not acted upon any of the recommendations in the decade since the Report was published.

In the last 12 years the industry has become even more concentrated. Two new entrants have entered, and then exited, the market and a competing chain has collapsed. As a result between 1993 and 2003, the two groups grew by 29 per cent.

The French Carrefour hypermarket retailer entered the Hong Kong market in 1996 and operated four large supermarkets in Hong Kong until September 2000 when it closed down citing an inability to access large enough sites to accommodate its 'hypermarket' style of operation. The failure of a new entrant in a novel market is not unknown but for one of the largest and most sophisticated international grocery retailers to make such a drastic miscalculation is odd, especially as it had been expanding at breakneck speed in mainland China at the same time. After it left the Hong Kong market, Carrefour supplied the Consumer Council with the names of 22 companies it claimed had applied pressure to it not to discount retail prices. Of these, seven admitted that they would take action to enforce resale price maintenance. Carrefour had used a low price strategy to build market share but this had upset suppliers. The Council concluded that pressure had been applied by suppliers to maintain price levels, failing which supplies of goods would have been withheld. Clearly, such a pricing system also benefited the two dominant incumbents, who would have every reason to support the suppliers' action.

In June 1999, a new entrant to the food retail market, adMart, operated a no-store, telephone and internet purchasing service with free home delivery. The two dominant firms responded offering competing free delivery services and by reducing prices on selected goods. The new entrant failed within 18 months. The two incumbents then reduced the scale of the home delivery service and subsequently started to charge for the service. Allegations of abuse of dominance and predatory practices were made at the time but no hard evidence emerged and, in any event, even if they could be substantiated, such practices would not have been unlawful. Allegations of refusal to supply were also made against grocery producers but nothing was substantiated.

To further concentrate the market, in June 2001 the 34 branch GD Supermarket chain collapsed, probably as a result of management incompetence and employee fraud. As a result of these structural changes, the combined market shares of the two principal incumbents has increased to approximately 80 per cent of supermarket sales up from 70 per cent a decade earlier.[42]

In 2003, the Economist Intelligence Unit (EIU) conducted a survey[43] of the supermarket sector to investigate claims that the market was an effective duopoly, that the incumbents attempted to increase their dominance by abusing their position by below-cost selling and used intimidatory tactics to pressurize suppliers not to deal with

[42] Supermarket giants 'will continue unchallenged', South China Morning Post, 21 June 2001.

[43] *Closed Shop?* Business Asia, Economist Intelligence Unit, 19 May 2003 Vol. XXXV, No.10.

competitors, such as the now defunct adMart. The EIU concluded that, whether or not the allegations were true was a matter for a competent competition authority to judge and that Hong Kong lacked the means to assess competition problems optimally.

In August 2003, the Consumer Council published another report into the supermarket sector as claims were made that despite over five years of deflation in the consumer price index, the standard sample of foodstuffs from supermarkets had increased substantially in price during the same period.[44] The two chains attempted to discredit the survey, saying its methodology was flawed. Needless to say, Hong Kong consumers were unimpressed by the firms' protestations but the operators claimed there was no foul play and maintained that there was vigorous competition in the sector between the two of them and with other foodstuff suppliers. They denied that their profit margins were excessive but declined to produce any evidence to support this contention; there is no publicly available data to ascertain profit margins as neither Wellcome nor Park N'Shop are listed entities and their financial results are consolidated with other subsidiaries into the published results of their respective parents. Thus, their true profitability is opaque and there exists no legal means to compel disclosure of internal financial information.

The Hong Kong government has not taken any steps to implement the 1994 Consumer Council recommendations concerning this sector, nor has it taken any action to ascertain the true facts concerning the business practices or profitability of these two chains. The sector is highly concentrated and, at present, there are no merger control rules that would prevent the sale of one of the chains to the other, thereby creating a super-dominant grocery retailer which would all but eliminate competition from this sector in Hong Kong.

The Potential Impact of the Proposed General Competition Law

In November 1996, the Consumer Council recommended the swift enactment of a general competition law for Hong Kong.[45] The government issued a response to the Final Report a year later entitled Competition Policy for Hong Kong.[46] In this document the government rejected the principle recommendations of the Consumer Council but did set up an interdepartmental committee to oversee competition policy, know by the acronym COMPAG. This body produced a Statement on Competition Policy in May 1998 which did not have the force of law, did not clearly identify anti-competitive conduct and provided no dedicated mechanism of implementation or any powers of investigation or enforcement. This has remained the position until recently. However, soon after the assumption of office as Chief Executive of Hong Kong by Donald Tsang Yam-kuen in March 2005, the establishment of a new committee was

[44] 'Report on Competition in the Foodstuffs and Household Necessities Retail Sector', Hong Kong Consumer Council, 11 August 2003.

[45] Competition Policy: The Key to Hong Kong's Future Economic Success, Hong Kong Consumer Council, November 1996.

[46] Competition Policy for Hong Kong, Trade and Industry Bureau, November 1997.

announced to look again at competition policy and law. In June 2006, the committee produced a report that, surprisingly, recommended the enactment of a general competition law for Hong Kong save that only anticompetitive behaviour – abuse of dominance and overly restrictive agreements – would be subject to penalty but 'natural' monopolies, mergers and existing market structures would not be regulated.[47] The government issued a consultation document in October 2006 and hopes to legislate before the end of the current term of the Legislative Council that expires in August 2008. It is therefore likely that Hong Kong will have a new general competition statute and an enforcement agency in the foreseeable future. The interesting question then arises as to what effect the new law will have on the supermarket sector, assuming that mergers are not subject to control and structural remedies are not available. From the above description of market conditions in Hong Kong, it would seem that, at minimum, the new law would be able to attack any collusive activity between market operators and may even be able to deal with non-collusive parallelism. Abuse of market power would also be regulated, so that new market entrants might have a somewhat easier ride than their predecessors. But the spectre of a merger between the two incumbents would remain a real threat with the creation of a single super-dominant firm with an unassailable market share. Further, one might speculate that market structure is at the root of the of the competition problems in the supermarket sector in Hong Kong and the absence of structural divestiture powers is a grievous weakness in any attempt to create a more open market structure. At present the legislation has not been drafted nor has the public consultation been conducted, so there remains the possibility that these two issues may be satisfactorily attended to in the final legislative package.

CONCLUSION

The supermarket sectors in China and Hong Kong exhibit profound differences, in terms of scale, concentration, barriers to entry and foreign participation, thus it is difficult to make precise comparisons. Hong Kong is, effectively (though not legally or politically), a small city state, the equivalent of an island or an isolated market economy, that has excellent external trade facilitation characteristics but a fortress-like and concentrated internal market, whereas China is an entity of continental proportions, with a huge population and an economy that is expanding rapidly. Paradoxically, it is communist China, not capitalist, free market, Hong Kong that has the more open domestic market. Hong Kong's mature, saturated grocery market is characterised by high, almost impregnable, invisible barriers to entry that ensure the continued joint dominance of the two local incumbents. China's huge, and surprisingly open, grocery sector is fragmented and ripe for consolidation that would benefit from economies of scale with the establishment national distribution systems.

[47] Report on the review of Hong Kong's competition policy, Competition Policy Review Committee, June 2006.

Observations by economists[48] that larger markets tend to have a less concentrated structure as higher profits will attract more market entrants, so reducing concentration ratios, might not apply in the supermarket sector in China even though entry barriers are not significant, at least at the moment. A study by Sutton showed that this is only correct in industries in which advertising and R&D does not play a significant role. [49] Thus, Sutton's hypothesis would postulate's that as the supermarket sector relies heavily on R&D in developing logistic systems and on mass advertising, one would expect to find that in a large market, such as China, supermarket ownership would over the long run tend to become highly concentrated. However, given the special factors discussed here – administrative monopoly, increasing protectionism, and significant state ownership – the market might not consolidate as much as it might in a mature open market economy.

As far as regulatory barriers are concerned, Hong Kong has none but China may be about to erect new ones, though the rigour with which they will be enforced is debatable, given China's overriding need not to scare away foreign investors, notwithstanding occasional outbursts of nationalistic fervour. The incipient introduction of new competition law regimes in both jurisdictions will have interesting but potentially divergent and unpredictable consequences. The only observation that can be made with any certainty is that the current markets for groceries, in both China and Hong Kong, will not be the same in five years time as they are now.

[48] Philips, *Effects of Industrial Concentration: A Cross-Section Analysis for the Common Market*, Amsterdam North Holland Press, 1971; Kenneth George & TS Ward, *The Structure of Industry in the EEC,* Cambridge, Cambridge University Press, 1975; Richard Schmalensee, 'Inter-Industry Differences of Structure and Performance' in Richard Schmalensee & Robert Willig (eds), *Handbook of Industrial Organisation*, Amsterdam, North Holland Press, 1989.

[49] John Sutton, *Sunk Costs and Market Structure: Price Competition, Advertising, and the Evolution of Concentration*, Cambridge, Mass, Massachusetts Institute of Technology Press, 1991.