
THE COMPETITION LAW REVIEW

Volume 3 Issue 2 pp 209-249**March 2007****Representation of Consumer Interest by Consumer Associations – Salvation for the Masses?***Orit Dayagi-Epstein**

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' capabilities. 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

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-ante¹² 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

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.offt.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>. D’TI, ‘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

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.offt.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.offt.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.offt.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.offt.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.offt.gov.uk/NR/rdonlyres/DA9F83CE-7BD8-4B90-B2AE-0D571DC4FBEF/0/offt769.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.offt.gov.uk/NR/rdonlyres/E87023AA-F397-4F86-BC76-C0E05EA5AD37/0/offt796.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.offt.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.offt.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.

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.of.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.of.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 Rivi re y Mart  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

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. S nchez, '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 S nchez, *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

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 facie 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.of.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

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-antitrust-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 Actions 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 findings⁵³ 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

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.offt.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.offt.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

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/compubacc/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.

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 stripping 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

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

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

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 & Abercrombie, 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

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 outcome⁹¹ 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.

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 proof¹⁰⁰ 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

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 1/2003¹⁰³ 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

¹⁰³Council 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.

¹⁰⁴Lopatka & Page, *op cit*, n 6.

¹⁰⁵The 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.

¹⁰⁶Gabriel & 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.

¹⁰⁷Gabriel & 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.pdf>response.

¹⁰⁸Consumer 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

¹⁰⁹See 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>.

¹¹⁰Kriger, 'The Use of Antitrust by the Consumer Protection Advocacy Community' (Draft 12.9.06) p 28 (a copy is saved with the author).

¹¹¹In 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.

¹¹²Kriger, op cit, n 110, p 41.

¹¹³For 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.

¹¹⁴Judge Jenny, 'Great Debate: Who Cares about Consumers', London, The Sixth Annual Transatlantic Dialogue, British Institute of Comparative and International Law (BIICL), 6 July 2006.

¹¹⁵Pertschuk, *Revolt against Revolution the Rise and the Pause of the Consumer Movement*, London, University of California Press, 1982, p 142.

¹¹⁶Which?, '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

¹¹⁷Pertschuk, op cit, n 115, pp 139-140, 145-148.

¹¹⁸Brobeck, '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, Davagi-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.

¹¹⁹Gabriel & 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, Sidropoulos, '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.

¹²⁰The 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

¹²¹Hutchings & 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 Directorate 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.

¹²²As intermediate customers file complaints as part of their producing activity and hence have greater incentive to do so.

¹²³For 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, Energywatch and Postwatch Benchmarking review of energywatch and postwatch, Final Report, March 2004, <http://www.dti.gov.uk/files/file25231.pdf>

¹²⁴Brobeck, 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.

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/cmsselect/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

¹³¹http://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.

¹³²An interview with Mr Colin Brown (London, 14 July 2006). Evans, 2006, op cit, n 31.

¹³³Gabriel & Lang, op cit, n 66, p 152; Kriger, op cit, n 110, pp 31-32.

¹³⁴DTI, 'Strengthen and Streamline Consumer Advocacy- Consultation on Consumer Representation and Redress' (January 2006) URN 06/682, p 7, <http://www.dti.gov.uk/>.

¹³⁵DTI, Consumer Advocacy, op cit, n 134, p 8.

¹³⁶DTI, 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

¹³⁷DTI, Consumer Advocacy, op cit, n 134, pp 12, 20-21. <http://www.consumerdirect.gov.uk>.

¹³⁸Seidenfeld, op cit, n 91, p 426.

¹³⁹Mayer, op cit, n 6, p 54.

¹⁴⁰Mayer, op cit, n 6, p 55.

¹⁴¹Mayer, op cit, n 6, p 54.

¹⁴²DTI, 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 facie 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.

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

¹⁴⁷Evans, op cit, n 9, p 189; Winton, op cit, n 13; Murray, op cit, n 32, p 4.

¹⁴⁸Winton, op cit, n 13; Murray, op cit, n 32, p 4.

¹⁴⁹Birchall & 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

¹⁵⁰According 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.

¹⁵¹CAT Rule 55.

¹⁵²Rule 17 of The Competition Appeal Tribunal Rules 2003, Statutory Instrument 2003 No. 1372.

¹⁵³Lopatka & Page, op cit, n 6, p 552.

¹⁵⁴Gubbay, 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 Für 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

¹⁶²Gubbay, op cit, n 51, p 3.

¹⁶³Murray, op cit, n 32, p 4.

¹⁶⁴Murray & 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'.

¹⁶⁵Commission 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).

¹⁶⁶BEUC, op cit, n 99.

¹⁶⁷Regulation 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.

¹⁶⁸Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121.

¹⁶⁹Gubbay, 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 mechanism¹⁷⁴ is a good example of such a target, since football has a large following across the social spectrum.

¹⁷⁰I thank Ms Alena Kozokova for this point.

¹⁷¹For example, competition authorities can have links in their website to consumer associations with brief description of their activities.

¹⁷²Mitchell, *op cit*, n 82, p 117. This strategy was employed in respect to environmental groups.

¹⁷³Pertschuk, *op cit*, n 115, pp 142-143. Kriger, *op cit*, n 110, pp 52-53.

¹⁷⁴Evans, *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

¹⁷⁵Sidropoulos, *op cit*, n 119.

¹⁷⁶www.internationalcompetitionnetwork.org.

¹⁷⁷<http://www.cuts-international.org>.

¹⁷⁸http://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).

¹⁷⁹Evans 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

¹⁸⁰Hutton, *op cit*, n 146, p 18.

¹⁸¹PN 148/03, 12 November 2003, <http://www.of.gov.uk/News/Press+releases/2003/PN+148-03.htm>

¹⁸²<http://www.cuts-international.org>

¹⁸³In 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>.

¹⁸⁴Alena 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).

¹⁸⁵Article 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

¹⁸⁶Sidropoulos, *op cit*, n 119. Edwards, *op cit*, n 76, p 24.

¹⁸⁷Hen, '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>; Sidropoulos, *op cit*, n 119.

¹⁸⁸Brown 2006, *op cit*, n 132. Brown, 'Consumer Activism in Europe' (1998) 8(6) CPR 209, p 212.

¹⁸⁹Sidropoulos, *op cit*, n 119.

¹⁹⁰Energywatch, '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 Sidropoulos, 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.offt.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

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 Sidropoulos, 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

²⁰³Commission 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>.

²⁰⁴ECCG, 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.

²⁰⁶Sánchez, op cit n 33, p 2, para 1.7.

²⁰⁷Juan 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).

²⁰⁸Evans, 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.

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.