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

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

1. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[6] COM(2005) 672.

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

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

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

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

2. COMPETITION LAW AND CONSUMER PROTECTION LAW DEFINED

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

2.1 Competition Policy & Law and the Consumer

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.2 Consumer Protection Policy & Law

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

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

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

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[19] Ibid, p 14.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. THE RELATIONSHIP BETWEEN CONSUMER PROTECTION LAW AND COMPETITION LAW

3.1 Separate and Overlapping Fields

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

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

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

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

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

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

3.2 Complementarity for Consumer Sovereignty

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

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

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

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

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

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

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

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

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

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

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

3.3 Inter-Dependency: for better and for worse

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

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

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[36] Ibid.

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

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

[39] Ibid, p 14.

[40] Ibid, p 19.

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

3.4 Complementarity in the Systems as Means of Enforcement

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

3.4.1 Consumer protection policy may complement competition law (externally)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.1 The Empowerment of the Consumer Within and Outside Competition Law

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

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

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

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

4.2 Competition Called to Address Consumer Concerns More Explicitly

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

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[48] See above (2.2)

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

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

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

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

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

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

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

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

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

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

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

[55] Ibid.

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

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

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

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

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

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

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

[59] 274 US 363 (1968)

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

[61] Ibid.

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

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

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

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

4.3.1 Consumer empowerment in competition procedure

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

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

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

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

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

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

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

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

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

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

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

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

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

[69] Para 1.1.

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

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

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

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

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

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

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

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

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

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

4.3.2 The strengthening of the consumer and substantive competition law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.3.2.2 Harm to consumers making conduct illegal?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[95] OFT Press Release PN 107/03.

[96] OFT Decision CA98/19/2002.

[97] OFT Decision CA98/04/2003.

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

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

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

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

Competition law to address harm to consumers?

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

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

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

[100] [1995] ECR 743.

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

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

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

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

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

Withdrawal of a package from the market

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

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

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

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

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

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

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

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

Fairness to consumers & consumer fraud

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

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

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

[107] See for example *Magill*.

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

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

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

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

And continued:

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

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

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

[109] Ibid, pp 132-133.

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

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

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

[113] Ibid, pp 132-133.

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

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

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

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

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

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

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

5. CONCLUSION

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

[117] See OFT statement, 3 December 2004.

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

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

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

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

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

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

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

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

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

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