SYNERGY BETWEEN CONSUMER POLICY AND COMPETITION POLICY

Eugene Buttigieg*

Abstract. This paper discusses why consumer interests should be a specific objective of competition policy. Competition policy is increasingly important for consumers but it cannot fully safeguard consumer interests where markets fail. Both the long-term and short-term impact of competition policies need to be taken into account. The paper argues that greater synergy between consumer and competition policies is also needed and that consumer organisations should be enabled to participate more fully in the enforcement of competition policy.

Introduction

It is generally held that there is a certain synergy between consumer policy and competition policy because consumers (of the end users, as opposed to industrial purchasers) are seen as the indirect beneficiaries of competition policy. This is because competition policy seeks to achieve a market that is as fully competitive and economically efficient as possible where competitors compete for custom by providing the lowest prices, the best quality products and services, the latest technology and the widest choice—and all this is to the benefit of consumers.

Competition Law and Policy

Competition law prohibits and prevents all forms of collusive behaviour by competitors on the market that might lead to the prevention or

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* Dr Eugene Buttigieg LL.D., LL.M. (Exon), Ph.D. (Lond) is Senior Lecturer in European and Comparative Law, University of Malta and Visiting Fellow in European Law, British Institute of International and Comparative Law, London.
restriction of effective competition. This is particularly so with regard to cartels, where competitors agree on prices and discounts or on output and sales or divide up and share markets between them rather than compete vigorously against each other to offer the most competitive prices independently of each other.

Competition law curbs the abusive behaviour of dominant or monopolist firms that exploit their market power to make monopoly profits through artificially high prices or to drive out or keep out more efficient rivals through tying and similar practices that reduce consumer choice. Competition law also prevents undertakings from acquiring market strength through mergers and acquisitions that would enable them to increase prices to the detriment of consumers.

In this way not only do consumers enjoy the most competitive prices, cutting edge innovation and widest choice but they can also exercise fully their right of ‘economic self-determination’ (Stuyck, 2000). They can, through their purchases, choose the products and services that best accord with their needs and thereby send a signal to the producer as to what they value and need most. In this way producers will supply the market with the products that are most valued and needed by consumers.

On the other hand, in markets where the prices and the output and choice of products is dictated by traders through their collusive behaviour and exercise of market power, producers need not ‘listen’ to consumers and so are insensitive to consumers’ wishes, leading to a wastage of resources and economic inefficiency.

Moreover, in recent years, competition policy, in most jurisdictions, has sought market liberalisation by opening up to competition certain sectors that were previously run by monopolies, such as in air transport, telecommunications and energy, thereby bringing in new competitors and resulting in more and better services at lower prices for consumers.

Thus competition policy, by regulating the behaviour of traders in the marketplace improves the working of markets for the benefit of consumers.
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However, competition policy alone will not fully safeguard consumer interests. It is useless having the lowest prices in the market and quality products if these products are unsafe and may harm consumers; or if having suffered personal injury or damage to property as a result of the product the consumer is unable to obtain adequate compensation and redress. It is also useless to have a wide choice for consumers if the consumer cannot make a properly informed choice because of lack of price information on the shelves or a lack of clear and adequate labelling on the products or because misleading advertising or claims by salesmen lead consumers to make the wrong choices.

Competition policy provides no safeguards against market failures or imperfections. Nor does it provide protection against unfair terms in standard consumer contracts accepted unknowingly or reluctantly by the consumer or against contracts concluded by consumers at a distance from the supplier such as through the Internet on the basis of incomplete information on the product and on the trustworthiness of the supplier. Similarly practices such as doorstep selling and aggressive timeshare selling which surprise and pressure consumers into making the wrong choices are not controlled by competition law and policy.

This is where consumer policy comes in. Through laws that more directly intervene and regulate the relationship between trader and consumer, they ensure that in a competitive market the consumer can make a well-informed choice, that his weaker position in the market vis-à-vis the supplier does not prejudice his interests and that effective remedies exist when his economic interests are prejudiced. Thus, various consumer laws impose safety, accountability, market transparency and information and fairness requirements on traders in their transactions with consumers such as the laws on product safety, product liability, labelling, unfair contract terms, unfair commercial practices and so forth.

Thus, in tandem, the application of competition law and consumer law can guarantee adequate protection for the consumer. And this complementariness is most manifest in countries such as the US, the UK, Italy and Malta where the same authority, albeit through different divisions, applies both competition law and consumer law. In the US the
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Federal Trade Commission (see Averitt and Lande, 1997), in the UK the Office of Fair Trading, in Italy the Autorità Garante della Concorrenza e Del Mercato and in Malta the Consumer and Competition Division\(^1\) are responsible not only for the enforcement of competition rules but also for the enforcement of some of the consumer laws.

**Consumer Interests as an Objective of Competition Policy**

As already explained that consumers are seen as the indirect beneficiaries of competition policy. But an emerging notion is that competition law should specifically take consumer interests into account as one of its underlying objectives rather than merely assume that such consumer benefit will be derived from the application of competition norms.

Sir John Vickers, Chairman of the Office of Fair Trading in the UK, recently wrote that ‘Competition is increasingly being recognised as a core consumer issue. ... [C]ompetition policy and consumer interest should, and indeed, must be seen as inextricably linked and interdependent’ (Vickers, 2002). However, this might not always have been the view in all jurisdictions worldwide or at least not been universally applied, even if given lip service.

There were times in the past when competition law, even in the US—the pioneer of antitrust legislation—was applied as a means to protect competitors, in particular small businesses against large more efficient companies, and to promote an array of other social and political interests other than consumer interests. This was the time of the so-called Warren Court era in the 1960s when the US Supreme Court presided by Chief Justice Warren applied antitrust law as an open ended means to advance various interests, some of which were directly at variance with consumer well being.

It must be said that in the EU some early European Commission decisions also manifested a similar zeal for using competition law to

\(^1\) In Malta although the Consumer Department and the Office for Fair Competition were initially two separate government departments, the complementariness of competition law and consumer law was appreciated from the very beginning when the two main laws were launched through one white paper on fair trading in 1993 (Government of Malta, 1993).
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protect less efficient competitors or SMEs, sometimes to the detriment of economic efficiency and consumer welfare in the market. Moreover, in the EU, the paramount political goal of market integration has at times obscured the judgment of the Commission and even the Community Courts. Applying a virtually *per se* prohibition of agreements and conduct that in any way could lead to the blocking of parallel imports to the detriment of the single market, they ignored the negative effects that such an excessive *per se* approach might have on consumer interests in certain circumstances. It was too readily assumed that by guaranteeing, through competition law, that parallel trading went by unhindered, consumers would always be the ultimate beneficiaries.

It is true that parallel imports generally exert a downward pressure on prices in the local market and so generally such trade benefits consumers but there can be circumstances where allowing free riders through parallel trading to ride on the distributor’s investment would dampen inter brand competition. In the pharmaceutical industry, for example, this could even lead to pharmaceutical companies deciding not to supply at all certain domestic markets or to dampen their incentive to innovate.

Fortunately, today, competition law both in the US and in the EU is increasingly being viewed and applied as having primarily the objective of safeguarding consumer interests. In the US there is renewed interest in the words of Senator Sherman and other US congressmen who spoke at the time of the enactment of the Sherman Act in 1890. The primary if not the sole concern of the US legislator in promulgating that law was the exploitation of consumers by the large trusts of the time that wielded massive market power.

As for the EU, the former European Commissioner responsible for Competition Policy, Mario Monti, repeatedly stated that ‘consumer interest [is] the central goal of competition policy’ (Monti, 2004a). Twice annually the Commission organises a European Competition Day to explain to the public the benefits of competition. Moreover, in December 2003 the European Commission appointed a Consumer Liaison Officer within its Directorate General for Competition Policy to ensure that the views of individual consumers and consumer organisations are heard during the investigations. In 2004, the Commission through its Directorate General on Health and Consumer Protection, DG Sanco, also set up a
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working group made up of experts from national consumer organisations to study ways in which the Community’s competition policy can best safeguard consumer interests (Byrne, 2004).

Consumer interests are being actively taken into account even to dispel long standing traditional views. Significantly, on 28th October 2004, an Advocate General delivered an opinion in a preliminary reference case where he asserted that restricting the supply of products does not automatically constitute an abuse of a dominant position merely because the dominant undertaking by doing so intended to restrict parallel trade. This was a preliminary reference from the Greek Competition Commission concerning a pharmaceutical company that was allegedly abusing its dominant position by refusing to meet in full the orders that it received from wholesalers in Greece because it knew that they would then export a large proportion of these supplies to Member States where prices were much higher.

One of the reasons given by the Advocate General to explain the assertion that this was not abusive was precisely that parallel trade does not always produce a benefit for the consumer.2 Unfortunately, the European Court of Justice did not give a ruling in this regard because it dismissed the reference as inadmissible on the grounds that the Greek Competition Commission was not a ‘court’ that was competent to make a preliminary reference to the European Court of Justice in terms of the EC Treaty. Therefore, it has yet to be established whether the unorthodox views expressed by the Advocate General are also shared by the Court.3

Even in its recent reform in the application and enforcement of Community competition rules, the Commission is showing a greater sensitivity to consumer interests and this is bound to leave its mark on the national competition authorities not only in their application of the Community competition law but also in the application of the national law when this is closely based on the Community provisions.

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Collusion and Merger Control

Article 81 of the EC Treaty envisages that an anti-competitive agreement would not be prohibited when it generates such economic benefits that its negative effects are outweighed by these efficiency gains. Such would be the case with exclusive distribution agreements or horizontal research and development agreements. However, Article 81 requires that for such an exemption to take effect the efficiency gains from this anti-competitive agreement must, to some extent, be passed on to consumers. If it were likely that the resulting benefits from the restrictive agreement will only be enjoyed by the undertakings concerned and the consumer would not benefit from lower prices or better quality, the agreement would not be exempt from the prohibition.

In the past the European Commission was criticised in that it had given scant attention to this condition for granting an exemption and that it generally assumed that all benefits would be passed on to consumers. However, in a Notice on Article 81(3) issued in 2004, the Commission has shown that it intends to test anti-competitive agreements that generate efficiencies and so qualify for exemption, more rigorously for this pass-on requirement (EC Commission, 2004a). Cost efficiencies generated by the restrictive agreement must result in lower prices for consumers. Thus, cost efficiencies leading to reductions in marginal costs are more likely to be considered relevant than cost efficiencies leading to reductions in fixed costs as the former are more likely to result in lower prices to consumers than the latter. Likewise, qualitative efficiencies must lead to new and improved products. This Notice, which is also intended to guide national competition authorities in their application of Article 81 and firms in their self-assessment, is bound to influence also the application of local laws based on Article 81.

The same consumer welfare approach is taken in merger control. In 2004, the European Commission issued Guidelines on the assessment of horizontal mergers under the Merger Regulation (EC Commission, 2004b). In these guidelines, the Commission announced for the first time that it would be ready to approve notified mergers even though they might have adverse effects on competition, if they generate substantial efficiencies with the important proviso that such efficiencies must be of benefit to consumers. The test for satisfying this pass-on requirement is
similar to, and as rigorous as, that laid down in the Notice on Article 81(3). This ensures that mergers that create a national champion but confer no concomitant benefits for consumers would not be approved on the basis of the so-called efficiencies defence. This pass-on requirement in the efficiencies defence is also to be found under US law and some other jurisdictions.4

Abuse of a Dominant Position

As for abuse of a dominant position, under EC law the charging of excessive prices by a dominant firm is considered as an abuse of dominance. This is based purely on consumer protection grounds as the charging of excessive prices generally does not give rise to any competition concerns as in the absence of barriers to entry high uncompetitive prices entice competitors into the market and so increase rather than decrease competition. So such pricing policies are condemned purely for their exploitative effect on consumers and not for any anti-competitive effect. Indeed, in this regard, one could term the abuse provisions of competition law as the most consumer-oriented provisions of the competition regime.

Although it is generally difficult for any competition authority to determine whether a price is ‘fair’ or not, especially when there are intellectual property rights involved, this power and duty of the competition enforcement agency to investigate unfair prices is indicative of the concern for consumer well being that competition policy directly displays.5

Another form of exploitative abuse recognised by EC law is where the dominant firm acts in a way as to limit production, markets or technical development to the prejudice of consumers. Thus, competition law can be applied in order to require a reluctant dominant firm to respond to

4 See Pitofsky, 1992 and Noël, 1997. For other jurisdictions see, for example, Malta’s Control of Concentrations Regulations, LN 294 of 2002, as amended by LN 299 of 2002.
5 Malta’s Competition Act 1994, Chapter 379 of the Laws of Malta in Article 9(4) even mentions some of the factors that are to be taken into account in the assessment of the fairness of a price such as the economic value of the product, the relation of the price to the cost of the product and even the importance of the product to consumers. Thus the degree of satisfaction that consumers expect from a product and the extent to which it meets their needs might determine whether the price is deemed to be excessive or not.
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consumer demand. In Magill⁶ three television stations that were in a dominant position in Ireland were refusing to make available their TV listings, over which they had copyright, to Magill who needed the information to publish a comprehensive weekly television guide that would contain information on the future programmes of all three stations. At the time, the only way a television viewer could know what was going to be shown on all three stations was by buying the three separate guides published by the stations.

Applying the abuse provision, the European Commission ordered the stations to make this information available to Magill, subject to payment of a reasonable fee, because their refusal to supply was denying consumers a new product for which there was a potential consumer demand. When challenged, this decision was upheld by the Community courts.⁷

On the other hand, other forms of conduct by dominant firms are condemned by the abuse provisions of competition regimes because of their anti-competitive or exclusionary effect rather than their exploitative effect. Indeed, most of these practices seem to be paradoxically beneficial to consumers. Pricing below cost or ‘predatory pricing’, selective price-cutting, fidelity rebates, bundling of products or services sold as a package for a lower price—all these when offered by dominant firms are invariably condemned as abusive by competition enforcement authorities and yet such practices mean lower prices and bargains for consumers.

However, in this regard, it is important to distinguish between the short-term and the long-term interests of consumers. In the short term it might appear that allowing predatory prices and rebates is beneficial for consumers as it sparks a downward spiral of prices. But in the long term it will mean that since the dominant firm can afford due to its market power to sustain a longer period of selling at a loss than its rivals, it would manage to drive out all its competitors, including more efficient ones, and thus consolidate its position in the market. The end result is that once it strengthens its position as the sole or main operator in the market, it raises its prices once again to make monopoly profits, as consumers are

left with fewer or no alternative suppliers. So, in the long run, allowing such practices would also be detrimental to consumers as it would lead to higher prices and lesser choice. Thus by also preventing anti-competitive abuses, competition policy would also be looking after consumers’ long-term interests.

However, the European Commission has been criticised that in some of its decisions it has taken an overly rigid approach to below cost prices, selective price-cutting and especially rebates, to the extent that it is seen as applying a *per se* approach to them. Thus, in some instances, the Commission has condemned such practices, even when firms were either justifiably following such policies in order to meet the competition or when firms were clearly unable to cause damage through these practices because of the absence of barriers to entry or the presence of other aggressive competitors so that anti-competitive effects were very unlikely.

The end result of this rigid approach of condemning such pricing practices *per se*, irrespective of their effects, has been that at times it has dampened price competition, as dominant firms are discouraged from competing on price. As a result, consumers may be denied bargains that would not have had any negative effect on competition.

However, even here the Commission is thinking of reforming its approach so as to instil more economic analysis in its application of the abuse of dominance provision. By focusing more on the actual or likely effects of rebates and discriminatory pricing by dominant firms on competition and consumer welfare, it would be able to distil the anti-competitive pricing practices from the beneficial ones so that consumers would not be denied low prices and bargains unnecessarily even when these are offered by dominant firms.

The discussion will involve the national competition authorities through a working group and therefore it is bound to affect also the way the national authorities apply local legislation that is modelled on the Community’s abuse provision.

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Short-Term vs Long-Term Consumer Benefits

The distinction between the long-term and the short-term interests of consumers in the context of the abuse provisions of competition law are not relevant only to abusive provisions. The same consideration is also important in the context of the other aspects of competition law particularly those relating to collusion and merger control. Only by keeping this distinction in mind can one understand why certain forms of collaboration and certain mergers that might lead to higher prices are allowed. A research and development agreement or a horizontal merger between competitors that might lead to a slight increase in price for present consumers might be allowed to enable the firms concerned to invest for the future and benefit future consumers from the resulting innovation. In this regard, a competition authority might set off the increase in price against the promised innovation, provided the increase in price is not substantial and the envisaged pay back in improved products is realistic and verifiable and not too long term. As the Notice on Article 81(3) states, in such circumstances the greater the time lag for the innovative efficiencies to materialize, the greater must be the efficiencies to compensate for the loss suffered by consumers during the period preceding the pass-on (EC Commission, 2004a: Para. 37).

Consumer Organisations’ Involvement in Enforcement

It appears therefore that competition policies are increasingly taking consumer interests more directly into account. However, national consumer associations should also do their part by bringing to the attention of the national competition authorities through their complaints any practices in the market that they deem to be harmful to consumer interests and use the mechanisms available such as the Consumer Liaison Officer in the EU to participate actively in the investigations. Consumer associations can provide useful information about the preferences of consumers in relation to different products and brands that would help the authority to define the market correctly and they can also provide an insight into the way seemingly innocuous agreements are being implemented in the market. This input from the consumer associations has become even more vital now that, under EC law and the law of several EU Member States, undertakings are no longer required to notify
agreements for exemption so that the competition authority might not be aware of the existence of harmful agreements.

A Court of First Instance ruling in 1994 shows that, at the EU level at least, the Commission is obliged to take consumer complaints seriously and that the complainant is entitled to a properly reasoned explanation if the Commission decides not to take up the complaint. In BEUC v Commission\(^9\) the Court of First Instance revoked a decision of the Commission to reject a complaint filed by the European Consumers’ Organisation, BEUC, because the Court felt that the Commission had not given enough reasons to show why it was rejecting the complaint. And in a recent case, Greek Ferries,\(^10\) the Commission acted upon the complaint of a single individual consumer and broke up a price fixing cartel among small Greek and Italian ferry operators. The individual had complained that ferry prices were very similar on routes between Greece and Italy.

In some countries the involvement of consumer associations is encouraged. Thus, in UK, a ‘super-complaints’ scheme was recently set up providing for a fast-track system for designated consumer bodies to make a complaint to the OFT that any feature or combination of features in a UK market is or appears to be significantly harming consumer interests.\(^11\) This would relate to a situation where the harmful effects are not caused merely by the conduct of a single firm.

As far as public enforcement of competition law is concerned, therefore, consumer organisations can and should play an important role. The system for lodging complaints should be user friendly for consumers and consumer associations. If the market information required from consumers and consumer organisations is too detailed, this may discourage potential complainants. At the same time, more should be done to involve the organisations in the investigation proceedings proper, whether or not these proceedings have been instigated by their complaints, by actively seeking their views on the competition concerns that might arise in major cases.

The consumer’s voice should be added to the producer’s voice. In some countries such as UK and Denmark this is already being done (BEUC,\(^9\) Case T-256/97 BEUC v Commission [1994] ECR II-285.
\(^11\) Enterprise Act 2002, Sections 11 and 205.
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2003). Of course the degree of involvement of the local consumer association in competition proceedings will also depend on the extent to which local consumer organisations enjoy popular and financial support.

On the other hand, it seems that so far consumer organisations in most Member States play no role in the private enforcement of competition law. As shown by a recent study commissioned by the European Commission (Waelbroeck *et al.*, 2004), so far the possibility of a class action or an action by an organisation on behalf of consumers for damages suffered by consumers as a result of anti-competitive practices by an undertaking is non-existent in most Member States. The Commission has issued a Green Paper on ways to encourage such private enforcement in the Member States (EC Commission, 2005).

**Conclusion**

Although there is still room for improvement, consumer interests are becoming ever more central in the competition authorities’ considerations—what is still lacking perhaps is more synergy in the enforcement of competition rules. Consumers individually, or through their organisations, should be allowed and encouraged to participate more in the public enforcement of competition law and empowered to play a role in private enforcement. This as yet quite rare in Europe compared to the US, not only through individual claims but also via representative actions and class actions, or collective claims for damages or injunction, albeit in clearly defined circumstances in order to avoid abuse of the system.

**References**


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