POLICY ROUNDTABLES

The Interface between Competition and Consumer Policies

2008

Introduction

The OECD Competition Committee debated The Interface between Competition and Consumer Policies in February 2008. This document includes an executive summary and the documents from the meeting: written submissions from Argentina, Australia, Canada, Chile, Costa Rica, El Salvador, European Commission, France, India, Japan, Jordan, Korea, Malta, Papua New Guinea, Poland, Portugal, Russian Federation, Singapore, Slovak Republic, Switzerland, Suisse, Chinese Taipei, Tunisia, the United Kingdom, the United States, Uzbekistan as well as an aide-memoire of the discussion.

Overview

The two policies share a common goal: the enhancement of consumer welfare. In this way they are highly complementary. Applied properly, they reinforce one another. Aside from their different approaches to markets, however, there are other differences between competition and consumer policies.

These differences present both opportunities and challenges. Applied consistently, each policy will each make the other more effective, especially in situations of evolving markets. The challenge comes in co-ordinating them, and in ensuring that they do not work at cross purposes.

Institutional design is an important factor in providing effective public policy. With the increasing recognition of the importance of integrating competition policy and consumer policy, there is debate about how to design the most effective institutions for that purpose. Housing the two functions in a single agency offers several advantages, including more centralised control, operational efficiencies and cross-fertilisation between the two disciplines. There could be disadvantages as well, however.

Related Topics

Competition Restrictions in Legal Professions (2007)
Competition and Legal Restrictions in Retail Banking (2006)
Competition and Efficient Usage of Payment Cards (2006)
Competition in the Provision of Hospital Services (2005)
Loyalty and Fidelity Discounts and Rebates (2003)

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THE INTERFACE BETWEEN COMPETITION AND CONSUMER POLICIES

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on the Interface between Competition and Consumer Policies, which was held at the Global Forum on Competition in February 2008.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur l'interface entre la politique de la concurrence et la politique des consommateurs, qui a eu lieu en février 2008 dans le cadre du Forum Mondial sur la Concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

OTHER TITLES
SERIES ROUNDTABLES ON COMPETITION POLICY

1.	Competition Policy and Environment	OCDE/GD(96)22
2.	Failing Firm Defence	OCDE/GD(96)23
3.	Competition Policy and Film Distribution	OCDE/GD(96)60
4.	Competition Policy and Efficiency Claims in Horizontal Agreements	OCDE/GD(96)65
5.	The Essential Facilities Concept	OCDE/GD(96)113
6.	Competition in Telecommunications	OCDE/GD(96)114
7.	The Reform of International Satellite Organisations	OCDE/GD(96)123
8.	Abuse of Dominance and Monopolisation	OCDE/GD(96)131
9.	Application of Competition Policy to High Tech Markets	OCDE/GD(97)44
10.	General Cartel Bans: Criteria for Exemption for Small and Medium-sized Enterprises	OCDE/GD(97)53
11.	Competition Issues related to Sports	OCDE/GD(97)128
12.	Application of Competition Policy to the Electricity Sector	OCDE/GD(97)132
13.	Judicial Enforcement of Competition Law	OCDE/GD(97)200
14.	Resale Price Maintenance	OCDE/GD(97)229
15.	Railways: Structure, Regulation and Competition Policy	DAFFE/CLP(98)1
16.	Competition Policy and International Airport Services	DAFFE/CLP(98)3
17.	Enhancing the Role of Competition in the Regulation of Banks	DAFFE/CLP(98)16
18.	Competition Policy and Intellectual Property Rights	DAFFE/CLP(98)18
19.	Competition and Related Regulation Issues in the Insurance Industry	DAFFE/CLP(98)20
20.	Competition Policy and Procurement Markets	DAFFE/CLP(99)3
21.	Regulation and Competition Issues in Broadcasting in the light of Convergence	DAFFE/CLP(99)1
22.	Relationship between Regulators and Competition Authorities	DAFFE/CLP(99)8
23.	Buying Power of Multiproduct Retailers	DAFFE/CLP(99)21
24.	Promoting Competition in Postal Services	DAFFE/CLP(99)22
25.	Oligopoly	DAFFE/CLP(99)25
26.	Airline Mergers and Alliances	DAFFE/CLP(2000)1
27.	Competition in Professional Services	DAFFE/CLP(2000)2
28.	Competition in Local Services	DAFFE/CLP(2000)13
29.	Mergers in Financial Services	DAFFE/CLP(2000)17
30.	Promoting Competition in the Natural Gas Industry	DAFFE/CLP(2000)18
31.	Competition Issues in Electronic Commerce	DAFFE/CLP(2000)32
32.	Competition and Regulation Issues in the Pharmaceutical Industry	DAFFE/CLP(2000)29
33.	Competition Issues in Joint Ventures	DAFFE/CLP(2000)33
34.	Competition Issues in Road Transport	DAFFE/CLP(2001)10

35.	Price Transparency	DAFFE/CLP(2001)22
36.	Competition Policy in Subsidies and State Aid	DAFFE/CLP(2001)24
37.	Portfolio Effects in Conglomerate Mergers	DAFFE/COMP(2002)5
38.	Competition and Regulation Issues in Telecommunications	DAFFE/COMP(2002)6
39.	Merger Review in Emerging High Innovation Markets	DAFFE/COMP(2002)20
40.	Loyalty and Fidelity Discounts and Rebates	DAFFE/COMP(2002)21
41.	Communication by Competition Authorities	DAFFE/COMP(2003)4
42.	Substantive Criteria used for the Assessment of Mergers	DAFFE/COMP(2003)5
43.	Competition Issues in the Electricity Sector	DAFFE/COMP(2003)14
44.	Media Mergers	DAFFE/COMP(2003)16
45.	Non Commercial Services Obligations and Liberalisation	DAFFE/COMP(2004)19
46.	Competition and Regulation in the Water Sector	DAFFE/COMP(2004)20
47.	Regulating Market Activities by Public Sector	DAF/COMP(2004)36
48.	Merger Remedies	DAF/COMP(2004)21
49.	Cartels: Sanctions against Individuals	DAF/COMP(2004)39
50.	Intellectual Property Rights	DAF/COMP(2004)24
51.	Predatory Foreclosure	DAF/COMP(2005)14
52.	Competition and Regulation in Agriculture: Monopsony Buying and Joint Selling	DAF/COMP(2005)44
53.	Enhancing Beneficial Competition in the Health Professions	DAF/COMP(2005)45
54.	Evaluation of the Actions and Resources of Competition Authorities	DAF/COMP(2005)30
55.	Structural Reform in the Rail Industry	DAF/COMP(2005)46
56.	Competition on the Merits	DAF/COMP(2005)27
57.	Resale Below Cost Laws and Regulations	DAF/COMP(2005)43
58.	Barriers to Entry	DAF/COMP(2005)42
59.	Prosecuting Cartels without Direct Evidence of Agreement	DAF/COMP/GF(2006)7
60.	The Impact of Substitute Services on Regulation	DAF/COMP(2006)18
61.	Competition in the Provision of Hospital Services	DAF/COMP(2006)20
62.	Access to key Transport Facilities	DAF/COMP(2006)29
63.	Environmental Regulation and Competition	DAF/COMP(2006)30
64.	Concessions	DAF/COMP/GF(2006)6
65.	Remedies and Sanctions	DAF/COMP(2006)19
66.	Competition in Bidding Markets	DAF/COMP(2006)31
67.	Competition and Efficient Usage of Payment cards	DAF/COMP(2006)32
68.	Vertical mergers	DAF/COMP(2007)21
69.	Competition and Regulation in Retail Banking	DAF/COMP(2007)33
70.	Improving Competition in Real Estate Transactions	DAF/COMP(2007)36
71.	Public Procurement – The Role of Competition Authorities in Promoting Competition	DAF/COMP(2007)34
72.	Competition, Patents and Innovation	DAF/COMP(2007)40
73.	Private Remedies	DAF/COMP(2006)34

74.	Energy Security and Competition Policy	DAF/COMP(2007)35
75.	Plea Bargaining Settlement of Cartel Cases	DAF/COMP(2007)38
76.	Competitive Restrictions in Legal Professions	DAF/COMP(2007)39
77.	Dynamic Effiencies in merger Analysis	DAF/COMP(2007)41
78.	Guidance to Business on Monopolisation and abuse of Dominance	DAF/COMP(2007)43

TABLE OF CONTENTS

EXECUTIVE SUMMARY

by the Secretariat

In the Seventh Global Forum on Competition a roundtable discussion was held on the interaction between competition policy and consumer protection policy. There were two main topics in the discussion, one focusing on substance – how the two policies share common goals and how they complement one another – and one on procedure – institutional arrangements for enforcement of the two policies. The results are summarised below, based upon the several written submissions from delegations, the remarks of lead speakers and the discussions that followed, and the Secretariat's background note.

The substantive interaction of competition policy and consumer protection

(1) The two policies share a common goal: the enhancement of consumer welfare. In this way they are highly complementary. Applied properly, they reinforce one another.

The evolution in competition policy in the past few decades has been well documented. Once, competition policy was based on diverse rationales, such as protection of small competitors against large ones, or as part of a broader industrial policy. Now it is widely understood to have a single purpose: the enhancement of consumer welfare. Thus, competition policy and consumer policy now speak the same language; they have a common, overarching goal.

The two policies address this goal from different perspectives, however. Competition policy approaches a market from the supply side; its purpose is to ensure that through competition, consumers have the widest possible range of choice of goods and services at the lowest possible prices. Thus, competition policy undertakes to prevent certain types of conduct that interfere with competition, notably restrictive agreements, especially cartels, harmful conduct by a monopolist or dominant firm and anticompetitive mergers. Consumer policy approaches markets from the demand side: to ensure that consumers are able to exercise intelligently and efficiently the choices that competition provides. Consumer policy addresses, among other things, information asymmetry as between sellers and buyers, false and misleading advertising, and contract terms that are not understandable or disproportionate.

Competition policy and consumer policy reinforce one another. In markets that are effectively competitive, producers have internal incentives to further consumer policy objectives, for example, to develop a relationship for quality or to attract customers away from rivals by providing the necessary information to minimise switching costs. At the same time, when consumers are able to exercise their choices effectively, they can act as a competitive discipline upon producers. Thus, there is a strong case to be made for the co-ordination of these two policy areas.

(2) Aside from their different approaches to markets, however, there are other differences between competition and consumer policies.

Consumer policy is more diverse than competition policy. It is more than just making markets work; it includes, for example, preventing and redressing fraudulent conduct, and protecting consumers from unsafe products. Enforcement of consumer policy is typically more dispersed as well. Enforcement of competition policy tends to be concentrated in a single competition agency, though others may have some role, such as sector regulators and, in some countries, private parties through lawsuits. There also may be a single agency charged with enforcing a consumer protection law, but other government bodies – ministries of commerce or industry, sector regulators and in some countries regional and local governments – are also active. And often NGO consumer organisations are involved in forming consumer policy.

Competition cases are typically fewer in number and broader in scope, affecting entire markets. Consumer cases are more numerous and more narrowly focused, sometimes involving a specific practice by a single business. Competition and consumer agencies also have different tools at their disposal for dealing with violations of their respective laws. The instruments available to competition agencies are more blunt: fines, or prohibition of anticompetitive conduct, for example. The remedies available to consumer agencies can be more targeted and specific: measures designed to improve information flows to consumers, for example.

(3) These differences present both opportunities and challenges. Applied consistently, each policy will each make the other more effective, especially in situations of evolving markets. The challenge comes in co-ordinating them, and in ensuring that they do not work at cross purposes.

Co-ordinating the two policies has obvious benefits, even at the level of a single case. Because they use different approaches, employing different tools, applying them together adds flexibility, especially in cases where market problems can be analysed before choosing which tools to deploy. The prime focus ought to be the market and what can make it work better. An equally important reason for co-ordination is to ensure that the application of one does not interfere with the other. The imposition of anticompetitive restrictions on behaviour – unnecessary restrictions on price advertising, for example – will harm competition and consumers.

There are new developments that offer opportunities for integrating the two policies. Advances in the field of behavioural economics have contributed to new understanding of how consumers react in situations of imperfect information, which has implications for both consumer and competition policies. There is a steady trend toward deregulation across countries; more sectors are being exposed to competition, notable among them the professions, financial services, retail energy and mobile telephony. In these newly competitive markets there tends to be information asymmetry as between sellers and buyers, which can be addressed most efficiently through co-ordination of competition and consumer policies. Electronic commerce is another field that offers great promise in promoting competition, but again there exists the concern that consumers, or some segment of them, will lack sufficient information to use this medium effectively.

Institutional design

(4) Institutional design is an important factor in providing effective public policy. With the increasing recognition of the importance of integrating competition policy and consumer policy, there is debate about how to design the most effective institutions for that purpose.

Public policies do not operate in a vacuum; they are implemented by institutions, and the quality of institutions determines in many ways the capacity of the system to deliver good policy products to individual citizens. In the case of competition and consumer policies, the central question is whether to combine the two functions in a single agency. There are advantages and disadvantages to this approach, and countries have made different decisions on this question.

(5) Housing the two functions in a single agency offers several advantages, including more centralised control, operational efficiencies and cross-fertilisation between the two disciplines. There could be disadvantages as well, however.

As noted above, co-ordination of the two policies is important, and placing them within a single agency should make it easier to do that. A few countries have gone to great lengths to integrate the two, even at the case level. A case team may include experts from both disciplines, and it may be decided whether to consider the matter as a competition case or a consumer case only after some inquiry. The full range of competition and consumer remedies is available in such an arrangement. More broadly, the consumer and competition sides may undertake a comprehensive evaluation of competition in an entire sector. Where there are deficiencies, appropriate remedies from both disciplines can be applied. Whether or not there is integration at the case level, there can be sharing of information and intelligence between the two sides, and policy making can be more coherent.

Also, consumer policy and competition policy require similar, though not identical, expertise, the supply of which is limited. Combining the two policy functions may allow this expertise to be used more efficiently. Several small economies have found these efficiency arguments important and have combined the two functions for that reason, though not all small countries have done so.

In countries where competition policy is relatively new, the public tends to be more familiar with consumer policy and to view it more favourably. Combining the two could help to transfer this good will to competition policy. Conversely, within government consumer policy sometimes has fewer supporters than competition policy, resulting in an inadequate budget for consumer policy. Again, combining them could help to remedy that problem.

But joining the two functions in one agency could also introduce problems. Competition policy and consumer policy are far from identical, after all. Although not cited by joint agencies as having occurred, in theory co-ordinating their disparate procedures, cases and objectives could be difficult. The two sides may compete for resources, with the outcome being less than optimal. Also there is the view, though perhaps a minority one, that if the two policies operating separately can be adequately co-ordinated, then two voices in unison, for example in public advocacy, can be more effective than one.

(6) Some countries may elect to maintain separate agencies, and the two policies probably cannot be completely integrated in a single agency in any event. It is still possible to co-ordinate them, however, in a way that benefits consumers.

As noted above, neither competition policy nor consumer policy can be fully contained within one agency, and this is especially true for consumer policy. Co-ordination should be possible,

however. In some countries this is done by means of a central commission within government, usually having advisory powers only, on which sit representatives of the various consumer constituencies, including, in some cases, NGO consumer organisations. A representative of the competition community, usually the head of the competition agency, may also be a member. In some countries the competition and consumer agencies have entered into a co-operation agreement, much like co-operation agreements between competition agencies and sector regulators, which ensure that the two agencies will consult and will share information. The two agencies might even jointly participate in a case, which has been successfully demonstrated in at least one country.

The outcome of any such co-ordination should be that their policies operate to the ultimate benefit of consumers. To this end, it would seem that policy makers should understand that market-based solutions are preferable to regulatory ones. Nevertheless, there will be instances where consumer policy intervention is necessary, especially in situations of information imperfection or switching costs. Care should be taken in these instances that the interventions do not unnecessarily restrict competition.

SYNTHÈSE

Le Septième Forum mondial sur la concurrence a organisé une table ronde sur le thème de l'interaction entre politique de la concurrence et politique de protection des consommateurs. Deux thèmes majeurs y ont été abordés : le premier relatif au fond, à savoir aux objectifs communs aux deux politiques et à leur complémentarité, et le second concernant les procédures, c'est-à-dire les mécanismes institutionnels de mise en œuvre des deux politiques. Les conclusions de ces débats sont présentées ci-après et s'appuient sur les contributions écrites soumises par les délégations, sur les commentaires des principaux intervenants, sur les discussions qui ont suivi et, enfin, sur la note de référence du Secrétariat.

Interaction entre politique de la concurrence et protection du consommateur

(1) Les deux politiques ont un objectif en commun : améliorer le bien-être du consommateur. À ce titre, elles sont donc très complémentaires et se renforcent mutuellement si elles sont mises en œuvre de manière judicieuse.

L'évolution de la politique de la concurrence au cours des dernières décennies est connue : si elle s'inscrivait auparavant dans le cadre de stratégies diverses, comme la protection des entreprises de petite taille contre leurs concurrents plus importants ou le soutien à une politique industrielle plus vaste, elle repose désormais sur un seul principe faisant l'unanimité à l'échelle internationale, à savoir l'amélioration du bien-être du consommateur. Politique de la concurrence et politique à l'égard des consommateurs parlent donc désormais le même langage en partageant un même objectif prioritaire.

Néanmoins, les démarches adoptées pour atteindre cet objectif sont différentes. La politique de la concurrence aborde le marché sous l'angle de l'offre : elle vise à garantir que la concurrence offre aux consommateurs le choix le plus large possible de biens et services aux prix les plus bas. Dans cette optique, elle a pour mission d'empêcher certains types de pratique néfastes pour la concurrence, notamment les accords restrictifs et plus particulièrement les ententes, les pratiques préjudiciables mises en œuvre par les sociétés en situation de monopole ou de domination sur un marché et les fusions anticoncurrentielles. La politique à l'égard des consommateurs aborde quant à elle le marché sous l'angle de la demande, en veillant à ce que les consommateurs soient en mesure de tirer profit de manière intelligente et efficace du choix offert par la concurrence. À cet effet, la politique de la protection des consommateurs s'intéresse notamment à l'asymétrie de l'information entre vendeurs et acheteurs, à la publicité mensongère et aux clauses contractuelles incompréhensibles ou excessives.

La politique de la concurrence et la politique à l'égard des consommateurs se renforcent mutuellement. Sur les marchés ouverts à la concurrence, les entreprises sont incitées à œuvrer en faveur des objectifs de la politique de la consommation, par exemple pour se distinguer par la qualité de leur offre ou pour attirer les clients de leurs concurrents en leur fournissant les informations nécessaires pour réduire au minimum les coûts de transfert. Parallèlement, la capacité des consommateurs à faire des choix peut imposer une véritable discipline aux entreprises. Les arguments en faveur de la coordination de ces deux politiques sont donc solides.

(2) Outre leur approche différente du marché, la politique de la concurrence et la politique à l'égard des consommateurs se distinguent par d'autres caractéristiques spécifiques.

La politique à l'égard des consommateurs est plus éclectique que la politique de la concurrence. Elle ne se borne pas seulement à garantir le bon fonctionnement du marché : elle vise notamment à empêcher et corriger les pratiques frauduleuses et à protéger les consommateurs contre les produits dangereux. Sa mise en œuvre est également plus variée en règle générale. L'application de la politique de la concurrence tend à être concentrée au sein d'une seule autorité, même si d'autres parties prenantes sont aussi impliquées comme les autorités de tutelle sectorielles et, dans certains pays, les personnes privées par le biais des poursuites judiciaires. S'il peut exister une seule autorité responsable de l'application du droit de la protection des consommateurs, d'autres organismes peuvent y contribuer (ministère du commerce ou de l'industrie, autorités de tutelle sectorielles et, dans certains pays, administrations locales et régionales). Par ailleurs, les associations de consommateurs participent fréquemment à la formulation de la politique de la consommation.

Les affaires de concurrence sont généralement moins nombreuses et de plus grande envergure, puisqu'elles peuvent concerner des marchés entiers. Dans le domaine de la consommation, les affaires sont plus nombreuses et plus ciblées et peuvent parfois porter sur une pratique spécifique adoptée par une seule entreprise. Les autorités en charge de la concurrence et de la protection des consommateurs ont en outre recours à des outils différents pour traiter les infractions à leur droit respectif. Les instruments utilisés par les autorités de la concurrence sont moins nuancés : amendes ou interdiction de pratiques anticoncurrentielles par exemple. En revanche, les solutions mises à la disposition des autorités en charge de la protection des consommateurs sont plus ciblées et spécifiques, à l'instar des mesures visant à améliorer les informations fournies aux consommateurs.

(3) Ces différences présentent à la fois des aspects positifs et des aspects négatifs. Si elles sont correctement appliquées, chaque politique renforcera l'efficacité de l'autre, plus particulièrement sur les marchés en mutation. Le défi consiste à garantir leur coordination et à veiller à ce qu'elles ne visent pas des objectifs contradictoires.

La coordination de ces deux politiques présente des avantages évidents, même au niveau des affaires individuelles. Leur application conjuguée offre en effet de la souplesse, puisqu'elles sont fondées sur des démarches et des outils différents. Il en est particulièrement ainsi lorsque les problèmes posés par le marché concerné peuvent être étudiés avant de décider des mesures à mettre en œuvre. Le marché et les solutions à apporter pour en améliorer le fonctionnement sont les cibles prioritaires. Autre point essentiel : la coordination garantit que l'application d'une des politiques ne nuise pas à l'efficacité de l'autre. L'application de restrictions anticoncurrentielles (restrictions superflues sur la publicité sur les prix par exemple) est néfaste à la fois pour la concurrence et pour les consommateurs.

Certaines tendances récentes offrent des opportunités d'intégration des deux politiques. Les progrès accomplis dans le domaine de l'économie comportementale ont permis de mieux comprendre la réaction des consommateurs en situation d'information imparfaite, ce qui a des implications à la fois pour la politique de la concurrence et pour la politique à l'égard des consommateurs. La tendance en faveur de la déréglementation se généralise à l'échelle mondiale : de plus en plus de secteurs se sont ouverts à la concurrence, parmi lesquels les professions libérales, les services financiers, la distribution d'énergie et la téléphonie mobile. Sur ces nouveaux marchés concurrentiels, il existe en général une asymétrie de l'information entre vendeurs et acheteurs, qui peut être résolue de manière efficace grâce à la coordination des

politiques de la concurrence et de la consommation. Si le commerce électronique se révèle également très prometteur du point de vue de la concurrence, il suscite la crainte que les consommateurs, ou du moins certains d'entre eux, ne soient pas suffisamment informés pour en tirer le meilleur profit.

Mécanismes institutionnels

(4) La conception des institutions est un facteur essentiel pour garantir l'efficacité des politiques publiques. Face à la prise de conscience croissante de la nécessité d'intégrer politique de la concurrence et politique à l'égard des consommateurs, la question de la conception des institutions en charge de cette intégration fait actuellement débat.

Les politiques publiques n'opèrent pas en vase clos : elles sont mises en œuvre par des institutions dont la qualité détermine à bien des égards la capacité du système à élaborer des politiques efficaces pour les citoyens. S'agissant des politiques de la concurrence et de la consommation, la principale question qui se pose est de savoir s'il convient de les réunir au sein d'une même entité. Cette approche présente des avantages et des inconvénients et les solutions retenues divergent.

(5) Le regroupement de ces deux fonctions au sein d'une même autorité présente plusieurs avantages : contrôle centralisé, gains de productivité et enrichissement mutuel. Néanmoins, il n'est pas exempt d'inconvénients.

Comme indiqué précédemment, la coordination des deux politiques est essentielle et devrait être facilitée si elles sont réunies au sein d'une même autorité. Quelques pays ont déployé beaucoup d'efforts pour intégrer les deux politiques, et ce même au niveau des affaires individuelles. Ainsi, l'équipe en charge d'une affaire peut être composée d'experts des deux disciplines et il n'est décidé de la traiter comme une affaire de concurrence ou comme une affaire de consommation qu'après une procédure d'enquête. Dans ce cas, l'équipe a accès à l'ensemble des outils utilisés dans le domaine de la concurrence et dans celui de la consommation. D'une manière plus générale, les experts de la consommation et les experts de la concurrence peuvent entreprendre un examen exhaustif de la concurrence au sein d'un secteur donné. En cas de défaillance, les solutions appropriées sont appliquées. Que l'intégration ait été mise en œuvre ou non au niveau des affaires, il peut y avoir un échange d'informations et de connaissances entre les deux communautés, de manière à améliorer la cohérence de la formulation de l'action publique.

Par ailleurs, politique de la consommation et politique de la concurrence nécessitent des compétences similaires, quoique distinctes, qui sont plutôt difficiles à trouver. L'intégration des deux politiques pourrait donc permettre de faire un meilleur usage de ces compétences. Plusieurs économies de petite envergure ont été convaincues par ces arguments et ont regroupé les deux fonctions pour gagner en efficacité et en productivité, mais tous les petits pays n'ont pas suivi cette voie.

Dans les pays où la politique de la concurrence est relativement récente, l'opinion publique tend à être plus familiarisée avec la politique de la consommation et à la considérer de manière plus favorable. L'intégration des deux politiques pourrait donc permettre de faire bénéficier la politique de la concurrence de cette bienveillance. A l'inverse, la politique à l'égard des consommateurs est parfois moins bien perçue par les pouvoirs publics, qui lui allouent alors des budgets insuffisants. Là encore, l'intégration des deux politiques pourrait pallier ce problème.

Cependant, le regroupement des deux fonctions au sein d'une même autorité peut susciter des problèmes. Après tout, il existe des différences importantes entre les deux politiques. En théorie, la coordination de leurs procédures, affaires et objectifs propres pourrait donc s'avérer un véritable défi. Toutefois, les agences intégrées n'ont pas indiqué y avoir été confrontées en pratique. Par ailleurs, les deux disciplines pourraient entrer en concurrence pour obtenir des ressources, ce qui nuirait à leur efficacité. Peut être minoritaires, certains ont aussi fait valoir que si les deux politiques peuvent être efficacement coordonnées tout en restant soumises à des autorités distinctes, alors deux voix s'exprimant à l'unisson, notamment lors de campagnes à l'intention du public, peuvent se révéler plus efficaces qu'une seule.

(6) Certains pays peuvent choisir de conserver deux autorités distinctes : les deux politiques ne peuvent probablement pas être intégrées totalement quoi qu'il en soit. Il est néanmoins possible de garantir leur coordination, de manière à ce qu'elles aient des effets bénéfiques pour le consommateur.

Ni la politique de la concurrence ni la politique de la consommation ne peuvent être complètement intégrées au sein d'une même autorité, ce qui est plus particulièrement vrai pour la politique de la consommation. En revanche, leur coordination doit être possible. Certains pays garantissent cette coordination au moyen d'une commission centrale intégrée au gouvernement, qui n'a généralement que des pouvoirs consultatifs, et au sein de laquelle siègent des représentants des différentes organisations en charge de la protection des consommateurs, notamment dans certains cas des organisations non gouvernementales. Un représentant de la communauté de la concurrence, en général le chef de l'autorité de la concurrence, peut également siéger au sein de cette commission. Dans certains pays, les deux autorités ont conclu un accord de coopération, à l'instar des accords de coopération signés entre l'autorité de la concurrence et l'autorité de tutelle d'un secteur, afin de faciliter les consultations et partages d'informations. Les deux autorités peuvent également participer conjointement à une même affaire, procédure qui a fait ses preuves dans au moins un pays.

Une telle coordination devrait aboutir à ce que les deux politiques œuvrent en faveur du consommateur. Pour y parvenir, les responsables de la formulation de l'action publique doivent prendre conscience que les solutions fondées sur le marché sont préférables aux mesures réglementaires. Néanmoins, l'intervention de la politique de la consommation sera nécessaire dans certains cas, notamment en situation d'information imparfaite ou de coûts de transfert. Dans ce cas, il faudra veiller à ce que ces interventions n'imposent pas de restrictions indues à la concurrence.

BACKGROUND NOTE

THE INTERACTION AND COORDINATION OF COMPETITION POLICY AND CONSUMER POLICY: CHALLENGES AND POSSIBILITIES[(*)]

1. Introduction

That consumer protection policy and competition policy are largely interdependent instruments of economic policy, both aimed at serving a common purpose of enhancing the efficiency with which markets work, has been stated on many occasions and is widely accepted. It is also widely recognised that there can be, and at times are, tensions between those policies. Moreover, as a practical matter, there are differences in how those policies work, and in the nature of the process by which decisions are taken and implemented. Recognition of these interdependencies and of the differences leads naturally to a consideration of the institutional arrangements for these policies and specifically, of how they should be coordinated.

This paper explores these themes, setting out the main issues as a basis for discussion without seeking to be comprehensive in their treatment. It makes the following main points:

- Competition policy and consumer policy generally share a common purpose while relying on differing instruments to achieve that purpose. Usually, they reinforce one another; however, it is not uncommon for them to clash, for example, when consumer policy is used in ways that unnecessarily restrict competition**.** Also, the introduction of competition may occur without sufficient regard to consequential consumer protection issues (section 2);

- While these issues about the balance and coordination between competition policy on the one hand and consumer policy on the other are hardly new, they have attracted increased attention in recent years for a number of reasons, including

  - Advances in behavioural economics, which have highlighted the cognitive limitations affecting consumer behaviour (section 3.1); and

  - The extension of competition to new and difficult areas (section 3.2), including the professions and markets for public utilities and services.

  While these developments do not alter the appropriate role of, or respective balance between, competition policy and consumer policy, they do strengthen the case for a coordinated approach to these policy areas;

- This naturally raises the issue of how that coordination is best achieved (section 4):

  - While there can be benefits to integrating responsibility for the enforcement of competition policy and consumer policy within a single institution, the reality is that there will always be limits to the extent and effectiveness of that integration;

(*) This paper was drafted as a Background Note by Henry Ergas (Regional Head, Asia Pacific, CRA International; Professor, Faculty of Business and Economics, Monash University, Australia) and Professor Allan Fels (Dean, The Australia and New Zealand School of Government – ANZSOG).

- Thus, the nature of these tasks associated with these policy areas differs in important respects; moreover, consumer policy inherently involves a very wide range of instruments, many of which are sector- or industry-specific, and which are not readily brought under a single umbrella;
- As a result, whatever view is taken of the appropriate degree, if any, of institutional integration of competition and consumer law enforcement, an important goal should be as a minimum to ensure that the competition policy authority has the expertise required to monitor developments in the design and administration of consumer policy and to act as an advocate for competition in the consumer policy process; similarly, consumer agencies should arguably, have the skills to monitor and assess competition issues.
- It is also likely to be important to ensure that there is within government, an entity that has "whole of government" oversight of consumer protection, and that exercises that oversight in a manner mindful of competition concerns;
- Periodic surveys of particular instruments – such as occupational licensing, or restrictions on advertising – aimed at reviewing whether they were consistent with efficient competition, may play a useful and important role in giving structure to this coordination process.

2. The Interrelation of Competition and Consumer Policy

As a general matter, competition policy aims at protecting, and where appropriate and efficient extending, the range of choices available to consumers. At the same time, consumer policy seeks to protect, and where appropriate enhance, the quality of that choice, and to ensure that consumers can exercise choice effectively and with confidence in the fairness and integrity of market processes.[1]

That each of these policies largely promotes the goals of the other is readily exemplified.

Thus, as a general matter, the risk of displacement that bears on firms in effectively competitive markets creates incentives for those firms to develop and protect a reputation for being good quality suppliers, since this allows them to secure repeat business and reducing marketing costs. This reduces the burden that would otherwise fall on consumer policy in terms of enforcing product and service standards, as firms will have incentives of their own to meet and exceed customer expectations. In that sense, ensuring that a market is effectively competitive can help meet one of the central concerns of consumer policy.[2]

Equally, firms that operate in effectively competitive markets, and hence can hope to attract customers away from rivals, will have incentives to reduce those customers' switching costs, both by informing them of the gains from shifting and by helping them to bear any once-off costs shifting involves. The result of firms investing in reducing the switching costs incurred by each other's customers can be both to make competition more vigorous and to diminish the need for consumer policy interventions aimed at reducing switching costs. Here too, ensuring a competitive supply structure may be an effective way of dealing with what, in some circumstances, would otherwise be a consumer policy problem – that is, switching costs.

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1 See Muris, T. (2002), 'The interface of competition and consumer protection', Prepared remarks at the Fordham Corporate Law Institute's 29th Annual Conference on International Antitrust Law and Policy; and Sylvan, L. (2004), 'Activating competition: The consumer-competition interface', 12 *Competition and Consumer Law Journal*.

2 OECD (2004), *Identifying and tackling dysfunctional markets*, p. 3.

The same applies to many consumer policy interventions. For example, policies that ensure that advertising and product descriptions are honest and reasonably informative, that contract terms and the obligations they involve are understandable and not disproportionate, and that consumers can reasonably expect products to be safe and fit-for-purpose, will both make consumer choice a more effective discipline (thus directly strengthening competition) and will force firms to compete on the merits (rather than on the basis of fraudulent or misleading claims or of unfair contract terms).[3] Equally, product standards, by facilitating comparisons between products, increasing the ease with which products from one supplier can be replaced by products from another, and concentrating competition on performance rather than on features that are inessential to it, can directly improve both consumer choice and the competitive process.

In short, each of these policy instruments can be used to advance the goals also pursued by the other: competition policy, by keeping markets effectively competitive, can reduce the work that needs to be done by consumer policy; consumer policy, by enhancing the ability of consumers to exercise choice, can help make markets more effectively competitive and force firms to compete on the merits, thereby supporting the ends of competition policy.

At the same time, each of these instruments can create challenges for the other.

For example, opening a previously highly regulated market to competition may well raise new issues for consumer protection:

- Many OECD countries faced new consumer protection issues as a result of the liberalisation of financial markets, which, however beneficial it may have been, exposed consumers to new risks and difficulties.[4]

- Equally, the introduction of competition into some public utility markets (such as electricity and telecommunications) has created challenges in terms of regulation of service quality and of issues such as the management of churn, of customer complaints and of disconnection for non-payment.[5] It has also raised questions about the ability of consumers to understand what are often complex pricing schemes and exercise choice between them.

- Finally, liberalisation of professional services poses complex questions about balancing competitive pressures (for example, in terms of pricing and marketing, including advertising) with the protection of consumers in situations characterised by potentially large information asymmetries and substantial error costs.

Moreover, when a market becomes more exposed to competition than it was previously (say, because of the removal of trade barriers), the incentives of market participants may change in ways that raise consumer protection concerns:

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3 European Commission (2004), 'Identifying and tackling dysfunctional markets', Note submitted to OECD for discussion at the joint meeting of the Competition Committee and the Committee on Consumer Policy, 13 October 2004, at pp. 2-3

4 These challenges are discussed by Australia's Secretary to the Treasury at Henry. K. (2007), 'Connecting consumers and the economy: The big picture', Closing address to the National Consumer Congress, at pp. 7-8, available at http://www.treasury.gov.au/ncc/content/download/Presentations/Transcripts/connecting_consumers_and_the_economy.rtf

5 Some of these problems are discussed in Waddams, C. 'Reality bites - The problems of choice' and other papers following, in OECD (2006) *Roundtable on demand-side economics for consumer policy: Summary report*'.

- For example, incumbent firms, faced with customers that are more mobile, may seek ways of locking customers in, including by building termination penalties into customer contracts. While those arrangements can be fully reasonable in some instances, they may raise both competition and consumer protection concerns in others.

- Additionally, to the extent to which an inefficient dominant firm realises that it will lose market share and perhaps even be entirely displaced, it may have less of an incentive to invest in long-term assets such as reputation, and therefore be more willing to take advantage of any customers it has that are locked in or otherwise vulnerable.

- Moreover, where the dominant firm was previously a monopolist operating in a highly regulated environment, it may well have very little experience with consumer-oriented marketing. Especially in the initial stages of competition, where the incumbent is seeking to slow and deflect competitive entry and clear consumer protection measures have not yet been put in place, this can result in a temptation to resort to tactics that are not fully consistent with accepted business practices.

- At the same time, the liberalised market may attract "fly by night" operators, whose unscrupulous practices undermine consumer confidence in the market as a whole, reduce consumers' willingness to rely on information firms in that market provide, and thereby erode the incentives for all firms to act honestly. Moreover, those firms that do act honestly will be forced to bear additional costs in so doing (as they seek to signal to consumers the higher quality of the information they provide), increasing prices and reducing both consumer and producer surplus.[6]

In the same way, consumer protection policies, however well-intentioned they may be, can have adverse consequences for competition, with the ultimate outcomes being contrary to the goals that both consumer and competition policy should seek. Classic cases include prohibitions on comparative advertising, mandatory product standards that exclude low-cost entrants and products, and transparency and posted price requirements that facilitate collusion.[7]

In summary, the relation between competition policy on the one hand, and consumer policy on the other, is relatively complex. In most instances, the one supports the other; but there are cases where, in practice, they are in tension or conflict.

3. Emerging Challenges

The issues associated the appropriate mix of competition and consumer policy have recently attracted increased attention partly as a result of developments in our understanding of consumer behaviour (discussed below at 3.1) and partly as a result of changes in the extent and functioning of markets (discussed at 3.2).

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6 In the extreme case, this results in the so-called 'lemons' problem discussed in Akerlof, G. (1970), "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism". *Quarterly Journal of Economics* 84 (3): 488–500

7 A case study of inappropriate interventions can be found in the legal services market. See OECD (2004), Identifying and tackling dysfunctional markets at pp. 6-10.

3.1 Developments in understanding of consumer behaviour

The economics of consumer protection have received a considerable boost in recent years as a result of advances in "behavioural economics". Those advances have stressed the impact that cognitive limitations have on consumer choice. The area of behavioural economics is very large indeed, and it is not possible or desirable to survey that area at all systematically here. However, a consideration of some important aspects of the results found in the literature on behavioural economics is helpful in illustrating how competition and consumer policy considerations interact.

Thus, economists have long recognised that information is costly and imperfect, so that consumers may not be able to allocate their budgets in ways that always secure the products they prefer, at the lowest prices available and hence from the most efficient supplier. That standard model of rational choice under conditions of costly and imperfect information remains an extremely powerful tool for understanding consumer and competition policy issues, and framing appropriate policy responses. What "behavioural economics" adds, relative to that model, is an emphasis on what appear to be departures from rational decision-making, at least as that is defined in conventional decision analysis. Those deviations from "rational actor" conduct could cause consumers to take decisions that appear inconsistent with welfare maximisation even when markets are reasonably competitive and search and information costs are not especially high. Indeed, some of these results suggest that increased competition, to the extent to which it leads to a proliferation of choices available to consumers, could yield only small, or in some instances even negative, welfare gains.[8]

While many of these findings are robust in experimental terms[9], their interpretation is understandably controversial.[10] Even more importantly, it is by no means clear that they amount to a case for a more interventionist – "paternalist" – stance in respect of consumer protection policy generally. Nor is it clear that these findings diminish the value of, or weight that should be given to, protecting (and where appropriate, promoting) competition. In effect, a move away from primary reliance on competitive markets as the means of empowering consumers and/or to a more interventionist approach to consumer policy could involve substantial costs. These include the costs of the regulatory errors that are inevitable under a paternalist approach, especially one that involves limiting consumer choice.

Moreover, those costs need to be weighed against the fact that if cognitive limitations lead to potential gains from trade not being realised, then firms themselves may have incentives to seek ways of achieving those gains. There may, in other words, be market solutions to some of the welfare losses that would otherwise arise from constraints on individual rationality. Put slightly differently, competition and market forces may themselves be important ways of addressing concerns about the efficacy with which consumers take complex choices, because firms in competitive markets have incentives to offer consumers "solutions" that allow potential gains from trade to be more fully realised.

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8 See Ergas, H (2007) "Policy Implications of behavioural economics: the case of consumer protection", *Productivity Commission Round Table on Behavioral Economics*, Melbourne, Australia.

9 See generally Guala, F. (2005) *The Methodology of Experimental Economics*. Cambridge University Press.

10 For example, Plott and Zeiller, "Exchange Asymmetries Incorrectly Interpreted as Evidence of Endowment Effect Theory and Prospect Theory?, *American Economic Review*, September 2007, and Plott and Zeiller, "The Willingness to Pay–Willingness to Accept Gap, the 'Endowment Effect," Subject Misconceptions, and Experimental Procedures for Eliciting Valuation," *American Economic Review*, June 2005, suggest that results that seem consistent with behavioural models of choice may also be fully capable of being explained by conventional rational choice models.

To take but one case, where the basic difficulty lies in frailty of will – for instance, with respect to commitments to save – products can develop that seek to at least reduce that difficulty through various forms of pre-commitment. For example, a successful voluntary superannuation scheme in Australia, offered by a number of major employers to new employees, relies on the lower likelihood of consumers "opting out" from a default position than "opting in" – that is, on an endowment effect. If employees do not choose to "opt out", the scheme commits them to paying a higher than mandatory rate of superannuation contribution.

Equally, "confusopoly" – apparently deliberate attempts by firms to offer consumers choices that are confusing, for example, in terms of having prices that are difficult to compare with other offers in the market – may well be a serious problem for some consumers. However, just as some firms can seek to gain customers by making offers difficult to analyse or compare, other may compete by cutting through the confusion and offering simple pricing that consumers find attractive. Attempts by incumbents at "muddying the waters" create incentives for one or more suppliers to differentiate themselves by introducing a price structure that is simpler and hence more attractive. Experience highlights how powerful this mechanism can be.

Thus, in many countries, the initial stages of telecommunications deregulation saw a proliferation of complex pricing plans, especially for long distance service, making it very difficult for consumers to evaluate "value for money". More recently, however, there has been a trend to simpler, clearer pricing, with "all you can eat" schemes bundled across multiple services coming into widespread use.

Equally, in aviation, competition between traditional full service airlines involved complex price discrimination, structured around restrictions on the date, day and time of travel, including through minimum stay and Saturday night requirements. The relatively high margins this permitted created opportunities for competitive entry, with Value Based Airlines (such as SouthWest in the United States, RyanAir in Europe and Virgin Blue in Australia) introducing a far simpler pricing scheme, in which there are no minimum stay restrictions and prices are set mainly according to time of purchase. Faced with this form of competition, full service airlines have responded by greatly simplifying their own pricing, facilitating effective consumer choice.

In retailing too, sales and other specials serve as useful forms of price discrimination, but also increase consumer search costs (indeed, that is an important part of how the price discrimination works). Walmart in the United States broke this pattern and adopted an "Everyday Low Prices" model, in which prices are set on the basis of low, but stable, mark-ups. That model has been widely taken up internationally, and studies find that those firms adopting this model have seen a significant increase in their market share and generally in their relative profitability, while competition in retailing has become more intense.[11]

The crucial point in all of these cases is that decision-making technologies are not merely the work of consumers – they also depend on the action of firms. Profit-maximising firms have incentives to exploit otherwise foregone gains from trade, including by improving the ability of consumers to act on their preferences. These incentives are likely to be strongest for the most efficient firms, as they have more to gain by reducing search costs. As a result, these firms can and in many cases do undertake actions that

[11] Hoch, Stephen J. and Dreze, Xavier and Purk, Mary E. (Oct 1994), *EDLP, Hi-Lo, and Margin Arithmetic*, Journal of Marketing, 58; Lal, Rajiv and Rao, Ram (1997), *Supermarket Competition: The Case of Every Day Low Pricing*, Marketing Science, 16 (1); Ortmeyer, Gwen and Quelch, John A. and Salmon, Walter (Fall 1991), *Restoring Credibility to Retail Pricing*, Sloan Management Review, 55 (12); and Tang, Christopher S. and Bell, David R. and Ho, Teck-Hua (Winter 2001) Store Choice and Shopping Behaviour: How Price Format Works, California Management Review, 43 (2).

"internalise", and thereby offset, the costs (in terms of foregone gains from trade) that would otherwise arise from cognitive constraints on consumer decision-making. This aspect of competitive dynamics is typically absent both from the laboratory settings in which much behavioural economics research has been undertaken.[12]

The response of firms to cognitive limitations affecting consumers is also largely absent from models of markets characterised by "shrouded attributes" – that is, situations in which some consumers, but not others, are unaware of hidden costs associated with certain products (such as cartridges for ink-jet printers and broadband charges in hotel rooms).[13] In these situations, it may not be profitable for producers to disclose the hidden costs, so long as sophisticated consumers have the ability to avoid them while still buying the products, which are cheaper because of the "subsidy" naïve consumers provide.

While these "shrouded attributes" models are elegant and at times suggestive,[14] they rest on strong assumptions. More specifically, as well as the conventional – and demanding – individual rationality assumptions required to solve games of this type, there is the assumption that no firm would gain a significant first-mover advantage by deviating from the "hidden costs" strategy.[15] This assumption seems quite inconsistent with the experience summarised above, where firms have derived significant innovators' rents by being the first to exploit previously unrealised gains from trade.[16]

To suggest that market forces can, at least in part, correct some of the biases and limitations associated with consumer choice is not to say that businesses do not seek to exploit those very biases and limitations. Indeed, the opposite is likely to be case, most obviously in consumer marketing and advertising, which relies on an increasingly sophisticated understanding of how consumers choose. This makes it important for regulators to take account of those biases and limitations in assessing consumer marketing and advertising, especially in respect of products with direct consequences for health and safety. However, the point remains that to the extent to which cognitive biases and limitations prevent consumers from actually choosing in line with their preferences – whatever those preferences may be, and regardless of how well founded they are – one of the ways in which firms can seek to secure a competitive advantage

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12 One of the few attempts to mimic the effects of this kind of innovation is the paper by Chu, Y. P and R. L. Chu (1990) "The Subsistence of Preference Reversals in Simplified and Market like Experimental Settings" *The American Economic Review*, vol 80, pp. 902-911. The authors introduce arbitrage into a money-pump game. Interestingly, they find that while subjects display preference reversals absent arbitrage, once they are exposed to arbitrage their preferences converge towards consistency with "rational actor" norms.

13 See Ellison, G. (2005) "A Model of Add-On Pricing" *Quarterly Journal of Economics*, vol. 120, pp. 585-638 and Gabaix, X. and D. Laibson (2006) "Shrouded Attributes, Consumer Myopia and Information Suppression in Competitive Markets" *Quarterly Journal of Economics*, vol. 121, pp. 505-540.

14 See for example, the application of such a model to residential mortgages in Campbell, J. Y. (2006) "Household Finance" *The Journal of Finance*, vol. 61, pp. 1553-1603.

15 Campbell, for example, assumes that firms have no form of intellectual property protection, or that that protection is so weak that there are no innovator's rents. Additionally, this type of model tends to be highly sensitive to the precise population shares of "sophisticated" and "naïve" consumers, to the willingness to pay of these respective groups of consumers and to search costs.

16 Interestingly, economists very often assume that firms cannot make durable unilateral gains by deviating from a coordinated pricing strategy because pricing strategies are readily copied. (This underpins the concept of a "quick response equilibrium", such as that embodied in the kinked demand curve.) In commercial reality, however, devising and implementing pricing strategies is often extremely complicated, and involves changes in systems, in training and billing, accounting and auditing arrangements. As a result, major changes in price structures are often very difficult to copy, and especially to copy well and quickly.

(and profit from the fuller realisation of gains from trade) will be by assisting consumers to improve on the choices they make.

In short, while the results of the behavioural economics may suggest a need for a consumer policy response – in the direction of greater paternalism – it may be that at least some of the issues it raises are best addressed through the competitive process: that is, by ensuring competitive forces are effective.

While it is important to recognise these limits of the policy inferences properly drawn from findings in behavioural economics, it would be a mistake to suggest that market incentives will cure all cognitive limitations.

This has long been recognised by economists with respect to that markets that are distorted by misrepresentation, which in its extreme forms amounts to fraud. As with all information asymmetries, misrepresentation can give rise to allocative inefficiencies (as trades will not reflect accurate valuations of the goods being traded), as well as to productive inefficiencies (because consumer search costs are increased, production may be allocated to less rather than more efficient firms, and firms may waste resources either in lying or in trying to establish a reputation for telling the truth). Of course, in the extreme (and even in conventional models of rational choice), bad information drives out good, no firm has the ability or incentive to disclose truthfully, and the market disappears.[17]

The same issues about the efficacy of the self-remedying properties of markets can arise, albeit likely in significantly less extreme form, in some of the cases that have been discussed in the consumer policy literature arising from behavioural economics.

For example, even when market solutions do emerge to problems such as "confusopoly" or to the pricing of "shrouded attributes", those solutions may be directed at the more sophisticated consumers (who in any event would have likely suffered the least harm), leaving other consumers still exposed.

Indeed, it could be argued that the rise of the Internet as a marketing channel has aggravated the problem of vulnerable consumers. In effect, Internet marketing channels provide firms with considerable scope to differentiate their offers as between customer segments, and most obviously and immediately, as between consumers who are frequent and confident users of the Internet and those who are not. This reduces the extent to which sophisticated consumers "price protect" those consumers who are unsophisticated. While this problem may be merely transitory for some classes of consumers – who over time will become more adept at using the Internet and hence will benefit from the marketing features it provides – they will persist for others, such as the intellectually disabled, the very elderly and (at least in countries such as Australia) important parts of the indigenous population. The policy issue this raises is whether those more vulnerable consumers are best protected through the general instruments of consumer policy, or by more targeted interventions.

Moreover, for some of cognitive limitations highlighted in the behavioural research, market solutions may simply not emerge. "Addiction goods" are potentially a case in point, as consumers, prior to addiction, may not value "non-addictive" variants sufficiently to allow them to drive more harmful varieties out of

[17] This is the extreme case of adverse selection, in which the market collapses, so that all the potential gains from trade are lost. See Akerlof. G. (1970) "The Market for Lemons: Quality Uncertainty and the Market Mechanism", Quarterly *Journal of Economics*, vol. 84, pp. 488-500 and Hillier, B (1997) *The Economics of Asymmetric Information.* St. Martins' Press, Inc., New York, N.Y., pp. 46-49. The other way of stating matters is to note that complete distrust is a self-enforcing equilibrium: see for example, Gambetta, D. (1998) "Concatenations of Mechanisms" in Hedstrom, P. and R. Swedberg (1998) *Social Mechanisms*, Cambridge University Press, Cambridge, UK, pp. 102-124.

the market.[18] Here too, the greatest risks are likely to fall on vulnerable consumers, such as young people who are vulnerable to the lure of advertisements for cigarettes, alcohol and other potentially addictive goods.

That said, care needs to be taken, in protecting those consumers who are most vulnerable and/or poorly informed, not to unduly undermine the rewards to those consumers who invest in information gathering.

It is true that there are cases where the nature of information as a pure public good means that duplicated search amounts to nothing but waste[19]; but there are also many cases where private investment in information is socially valuable, because it helps guide the price discovery process to ever changing fundamental values. In these latter instances, efforts at improving the position of less-informed consumers can reduce the return other consumers make by investing in information, and hence erode the quality of price discovery and welfare overall.

This trade-off has been extensively studied in the context of consumer protection issues in securities markets; suffice it to say most economists would place considerable weight on the need to ensure disclosure requirements do not eliminate incentives for costly information acquisition, while still encouraging widespread participation in the relevant markets.[20] This does not mean that vulnerable consumers should not be protected; rather, it means that the protection should be designed in a way that avoids unnecessary harm to the incentives that those consumers who are able to invest in information face to do so.

In short, there is a need for caution in drawing from the findings of "behavioural economics" generalised inferences about the stance of consumer and competition policies, all the more so given the fact that regulators too, suffer from cognitive limitations, imperfect information and other constraints on decision-making. Moreover, there will generally remain an issue about which instruments are most appropriate for dealing with the market imperfections arising from cognitive limitations on consumers' ability to make complex choices.

This is important because the findings of behavioural economics do seem of obvious relevance to the *design* of consumer policy interventions, if not to the determination of the optimal extent of those interventions. [21]

Behavioural economics may, in other words, be even more valuable in helping shape *how* consumer policy agencies intervene than in determining *whether* to intervene. For example, labelling requirements need to take account of the way "information overload" can degrade the quality of consumer decision-making. Equally, an awareness of the biases associated with endowment or default positions may be useful

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18 Although for a contrary view with respect to narcotics, see O'Flaherty, Brendan (2005) *City Economics*, Harvard University Press, Cambridge, Mass., at Chapter 17.

19 See Barzel, Y. (1982) "Measurement costs and the organisation of markets" *Journal of Law and Economics*, vol. 25, pp. 27-48 discusses these instances but concludes that when the relevant conditions apply, producers will take measures to avoid wasteful duplication of search.

20 See O'Hara, M. (1995) *Market Microstructure Theory*, Blackwell Publishing and Harris, L. (2003) *Trading and Exchanges*, Oxford University Press, Oxford, UK. The need to protect the returns on investment in information, and the importance of maintaining a mix of investor types in the market, can justify limitations on disclosure requirements, such as allowing reduced transparency (i.e. somewhat reduced pre- and post-trade disclosure) for block trades.

21 See especially Mulholland, J (2007), "Behavioral Economics and the Federal Trade Commission", *Paper for the Productivity Commission Round Table on Behavioral Economics*, Melbourne, Australia.

in deciding how schemes that involve opt-outs (for example, for liability) should be structured. Similarly, framing effects may be relevant to the design of regulations affecting advertising material, for instance with respect to the fat and sugar content of foods. Finally, the reliance that research in behavioural economics places on experimental trials has resulted in significant improvements in the practice and methodology of experimental economics; given those improvements, there is considerable scope for consumer protection agencies to use experiments in the design of policy instruments (such as labelling standards) and perhaps even in examining individual cases (for example, in assessing whether a particular advertisement is indeed misleading).

3.2 Expanding role of markets

Bringing the insights and methods of behavioural economics to bear on the design of consumer policy interventions may be especially important in the areas that are currently at the frontier of competition policy.

The last fifteen years have seen a far-reaching process of liberalisation in both the OECD countries and in many developing countries.

A forthcoming paper, for example, finds that taking the world's 57 largest economies from 1970 onwards, *56 out of these 57 countries have become less regulated over the period*: the only exception to the general trend is Venezuela.[22] Within the 21 countries in the OECD group, the greatest decreases in market-limiting interventions occurred in Portugal, followed by New Zealand, the UK and Sweden. Among the other advanced countries, Israel stands out. As for the developing countries, countries which significantly decreased the extent of market-limiting interventions include Mexico, Egypt, Turkey, India, Brazil, Argentina, Chile and Peru. Additionally and importantly, the difference in the extent of reliance on markets between the OECD group and the other 'advanced economies', on the one hand, and the developing countries and former communist countries on the other, has narrowed appreciably since 1970.

This change, which in many countries reflects a greater appreciation of the merits of competition as a means of allocating society's resources, has also created significant new challenges for competition policy and for consumer policy. Those challenges have been most acute in areas such as the traditional public utilities, where issues include the difficulties of preventing nascent competition from being eliminated and the difficulties consumers face in exercising choice in areas which have long been monopolies. There have also been significant difficulties in liberalised finance markets, especially in protecting consumers who are taking choices that are often highly complex.

More recently, there has been discussion of the scope to introduce, and in numerous instances moves to actually introduce, greater competition in the professions and in social services (which include education, health and aged care). These are markets that are often complex for consumers to operate in, all the more so as they are relatively new or rapidly changing. Moreover, in some instances, the decisions consumers take in these markets can have very serious consequences – as is obviously true for education, retirement savings and health care – but product quality and "value for money" are difficult to observe and assess. All of these difficulties are again more acute, and potentially more laden with severe consequences, for consumers who are poorly educated or otherwise especially vulnerable, such as the elderly, the sick and the frail.

The issues this poses for the interaction of competition policy and consumer protection can be illustrated by considering two cases: occupational licensing, especially of the professions; and the introduction of competition into markets for social services.

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22 Henderson P. D. (2007) "The Uneasy Trend to Greater Economic Freedom" mimeo.

3.2.1 Occupational licensing of the professions

The term "professions" embraces a wide range of services in the modern economy including accounting, architecture, legal, medical, paramedical, engineering, perhaps estate agents and other categories which shade into skilled occupations such as electricians, plumbers, and many others. In most if not all countries, entry into these occupations is regulated, as is the conduct of those who are licensed to engage in them.

The primary justification for these regulations lies in information imperfections.

Thus, a person purchasing goods or services needs to make an assessment of the quality of the goods or services. The consequences of making incorrect judgments (i.e. the risk) for a relatively simple good with few characteristics are likely to be small, especially when consumers can form a reasonably accurate estimate of the value of the good.

However, professional services are significantly more difficult for consumers to assess. Five key characteristics of professional services will tend to magnify the information asymmetry and its consequences. First, services are generally not observable before they are purchased as the consumer cannot inspect a service before purchase in the same direct way as can be done with most goods. Second, professional services are by their nature complex and often require considerable skill to deliver and tailor to the consumer's needs. It can therefore be difficult for the consumer to assess the quality of the service before it is purchased. Third, the quality of many professional services can be difficult to assess even *after* the service has been purchased. For example, if a person hires a lawyer to undertake litigation which is ultimately unsuccessful, it can be difficult for the consumer to know whether the legal services were poorly delivered or that the case was inherently difficult to win. Fourth, many consumers are very infrequent consumers of professional services. Therefore, they do not have repeat purchases from which to assess quality. Fifth, the consequences of purchasing poor professional services can be significant. For example, the service may represent a large expenditure for the consumer and a defective service (e.g. a heart by-pass operation) can cause serious and irreversible harm. [23]

These characteristics can be used to justify regulation aimed at quality assurance. Such schemes are intended to provide a guaranteed level of service quality to consumers and therefore reduce risks associated with purchasing professional services. To some extent these schemes substitute search and information gathering by individuals with information gathering and assessment through some regulatory mechanism. These arrangements can reduce the transactions cost for consumers and help the market to function efficiently.

However, experience also shows that these regulations often have impacts that go far beyond assuring or seeking to assure the quality of the services consumers receive. Those impacts can include:

- The *creation of a monopoly* by the exclusive reservation of work and activity to the profession. Associated with that there may be a further division of work by the exclusive reservation of work to certain categories of that profession e.g. cosmetic surgery to be done only by "cosmetic surgeons";

[23] See Allan Fels, David Parker, Blair Comley and Vishal Beri (2001) "Occupational Regulation", in the *Anticompetitive Impact of Regulation*, eds Guiliano Amato, Laraine L. Laudati, Edgar Elgar, pp 104 to 115.

- The establishment of *anticompetitive restrictions on entry* to a profession by a licensing or accreditation arrangement or by restrictions on entry by a foreigner or by a person from another region in that country;

- The imposition of *anticompetitive restrictions on behaviour* e.g. regarding prices or advertising or ethics; and

- There may also be *particular forms of anticompetitive conduct* e.g. price-fixing agreements and collective boycotts which, were they undertaken in other markets, would be in clear breach of the competition laws.

Faced with these consequences, the central challenge for policy is to find ways of addressing the legitimate concerns associated with the need for quality assurance, while creating scope for competitive forces to operate far more fully that they traditionally have. This will, by necessity, involve a tightly coordinated combination of competition policy and consumer protection tools:

- The consumer policy tools should seek approaches that are effective in protecting consumers, while not being unduly or unnecessarily restrictive of competition; while

- Competition policy should be brought to bear to ensure that subject to appropriate consumer protection safeguards being in place, competition is allowed to work where it can, including by the elimination of unjustified restrictions on entry and on competitive conduct.[24]

3.2.2 Competition in social services

A similar need for close coordination between competition policy and consumer policy also arises in moves to introduce market or market-like forces into the traditional social services.

Thus, as noted above, steps are being taken in a number of OECD countries to expand consumer choice in the social services traditionally provided by governments.[25] Similar moves have also been made in a number of developing economies, including Colombia (which recently ran a program that provided vouchers to students to attend private schools)[26], Chile[27] and Indonesia[28]. Moreover, the World Bank has highlighted the contribution competition in the supply of services such as education and health can make to ensuring efficient use of the limited resources developing countries have for investment in social infrastructure.[29]

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24 The Australian experience in this respect is discussed in Allan Fels (2006) "The Australian Experience Concerning Law and the Professions" in Ehlermann (ed.) *Competition Law and the Professions*, European University Institute, Florence.

25 For an overview see Lundsgaard, J. 2002, 'Competition and efficiency in publicly funded services', OECD Economic Studies, available at http://www.oecd.org/dataoecd/42/36/22027701.pdf

26 Angrist, J. et al 2002, 'Vouchers for private schooling in Colombia: Evidence from a randomized natural experiment', American Economic Review 92(5).

27 Hsieh, Chang-Tai and Urquiola, Miguel S., "When Schools Compete, How Do They Compete? An Assessment of Chile's Nationwide School Voucher Program" (October 2003). NBER Working Paper No. W10008

28 Bedi, A. and A. Garg 2000, 'The effectiveness of private versus public schools: The case of Indonesia', Journal of Development Economics 61(2).

29 Hanushek, E. and L. Wolfsmann 2007, *Education quality and economic growth,* World Bank, pp. 20-21.

Although these moves have great potential to improve the efficiency with which those services are provided,[30] they also raise very challenging issues for both competition and consumer policy.

For example, while most countries have long had non-government schools, parents' ability to exercise choice within the public system has often been limited by rules that allocate children to particular schools (usually on the basis of place of residence). At the same time, funding rules have limited the extent to which public subsidies to schools follow the flow of students, distorting competition both within the public system (to the extent to which schools that gain students do not similarly gain in funding) and between the public system and the non-government sector. Allowing greater parent choice, and making the income stream to schools more dependent on that choice, can be a powerful way of increasing the responsiveness of the education system to parental preferences.[31]

However, securing those gains, and ensuring that they are to the ultimate benefit of students and society, involves myriad issues of policy design. To the extent to which schools move into the competitive arena, difficult questions need to be addressed about information disclosure (which is vital to the exercise of choice, but may distort the incentives facing teachers and school administrators),[32] about information sharing and cooperation between schools, and about how desirable information sharing can be reconciled with effective competition.[33]

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30 Hanushek, E. and L. Wolfsmann 2007, *Education quality and economic growth,* World Bank, pp. 20-21; M Harrison 2004, *Education Matters: Government, Markets and NZ Schools*, NZBR, Wellington; C. Hoxby 1994, 'Do Private Schools Provide Competition for Public Schools?', NBER Working Paper No. W4978. S Bradley and J. Taylor 2002, 'The Effect of the Quasi-market on the Efficiency-equity Trade-off in the Secondary School Sector', 54, *Bulletin of Economic Research* p. 295-314; E Hanushek, and S. Rivkin 2003, 'Does Public School Competition Affect Teacher Quality?', *The Economics of School Choice* ; G Holmes, J. DeSimone and N. Rupp 2003,'Does School Choice Increase School Quality?' NBER Working Paper No. W9683 May; and P Bayer and R. McMillan 2005, 'Choice and Competition in Local Education Markets', NBER Working Paper No. W11802..

31 See Burgess, S., C. Propper and D. Wilson 2004, 'The impact of choice in education and health: a review of the economic literature', Centre for Market and Public Organisation, particularly on pp. 15-23. Such considerations are equally relevant to developing economies where as noted previously there has been a wealth of policy experiments – see for instance Patrinos, H. 2006, 'Public-Private Partnerships: Contracting Education in Latin America', World Bank; Barrera-Osorio, F. 2007, 'The Impact of Private Provision of Public Education: Empirical Evidence from Bogota's Concession Schools', World Bank; and Patrinos, H. and S. Sosale (eds) 2007,' Mobilizing the Private Sector for Public Education : A View from the Trenches', World Bank.

32 In reviewing the economic literature, Burgess, S., C. Propper and D. Wilson 2004, 'The impact of choice in education and health: a review of the economic literature', Centre for Market and Public Organisation conclude that (p. 16): "For choice to work, the supply side must be responsive to (changes in) demand. But the form that these responses take depends on the type of performance measure used and the incentives therefore created.. If parental choice is based on the information contained in performance measures, schools have the incentive to improve measured performance.This does not necessarily mean an improvement in actual outcomes…Different performance measures may be suited to the different objectives of accountability and facilitating a choice programme.". The influence of target setting and information disclosure on providers (and the unintended consequences that can result in) are discussed in Hood, C. (2006) "Gaming in Targetworld", *Public Administration Review*, 66(4), 515.

33 This is illustrated by cases in the UK and US where private schools and colleges have come under investigation or lawsuits for alleged anti-competitive conduct because of information sharing and cooperative practices. In the UK, private schools came under investigation in late 2006 for exchanging information on future fees – see Decision of the Office of Fair Trading No. CA98/05/2006, 'Exchange of information on future fees by certain independent fee-paying schools', 20 November 2006. In the US, in 1993 the federal government successfully challenged an agreement between universities limiting

Similar issues arise in health care. Particularly for countries that are experiencing rapid population aging,[34] the issues that are central to ensuring efficient provision of health care services are changing. While the provision of care for acute conditions remains of obvious importance, there is a growing emphasis on (and allocation of resources to) the treatment of chronic conditions, such as the various impairments associated with age (for instance, dementia), as well as those associated with obesity and other "life-style" diseases.[35] These are forms of care where choice by consumers (or their families) can be especially important, both because the care itself can involve a *de facto* choice of living conditions (as is the case, for example, for residential aged care), and/or because patient incentives and motivation matter greatly to the efficacy of treatment (as in the treatment of life-style conditions).

However, making choice work well in these areas is no easy matter; as with schools, it involves difficult questions about information disclosure and consumer rights and obligations, as well as difficult issues about how competition between providers can be reconciled with the wider social objectives that are also being pursued. Here too, different forms of expertise – of health practitioners and specialists, of competition authorities and of experts in consumer protection – need to be brought to bear in the design of market (or "market-like") instruments.[36]

3.3 Conclusions

In summary, issues associated with the interaction between consumer protection and competition policy have received considerable attention in recent years, with some of that increased attention coming from research findings about inherent limitations on the quality and efficacy of consumer choice. It would be premature and likely incorrect to conclude from those studies that less reliance should be placed on consumer choice in a competitive market-place as the best means for promoting efficiency and social wellbeing. However, they do have important implications for policy design, most obviously of consumer protection measures. As competition and consumer policy are extended into new areas – such as emerging markets for the social services traditionally provided by governments – the lessons of that research need to be brought fully to bear.

4. Institutional design and institutional challenges

The discussion above has highlighted the interdependence between competition policy on the one hand, and consumer policy on the other, and the shared nature of the objectives they pursue. It has also highlighted the way they come together in policy design, most obviously when competition is being extended to new areas. This leads naturally to a consideration of the institutional arrangements for competition policy and consumer policy, including the question of whether they should be "housed" within a single institution.

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competition in the distribution of financial aid through an agreement to award aid solely on the basis of need through a common formula – see United States v Brown Univ. 5 F.3d 658.

34 The Australian case is illustrative of the wider OECD trend. Thus, on current demographic projections, the number of Australians aged 85 and over will increase from 330,000 in 2006 to 580,000 in 2021 and then to over 1.6 million in 2051 – see generally Ergas, Henry and David Cullen (2007) *Providing and Financing Aged Care in An Aging Society*, (in press) available at www.greenwhiskers.com.au.

35 Extrapolating from similar trends in the US – see Reynolds, S. L., Y. Saito and E. M. Crimmins, 2005, 'The Impact of Obesity on Active Life Expectancy in Older American Men and Women', *The Gerontologist*, vol. 45, pp. 438-444. See Ergas, Henry and David Cullen, ibid, for a discussion of trends in chronic disease and their implications for provision and choice in aged care.

36 For a good survey of the impact of consumer choice in health markets see Burgess, S., C. Propper and D. Wilson 2004, 'The impact of choice in education and health: a review of the economic literature', Centre for Market and Public Organisation, pp. 25-33.

There are both benefits and costs to placing competition policy and consumer policy within a single institution. We consider first the benefits and then turn to an assessment of the costs.

4.1 Benefits of integration

There are three major advantages to integrating the primary responsibility for competition policy and consumer policy within a single institution. These are:

- Gains from treating competition and consumer policy as instruments that can be flexibly combined and more generally managed within a single portfolio of policy instruments;
- Gains from developing and sharing expertise across these two areas; and
- Gains in terms of the wider visibility to the community, and understanding in the community, of competition and consumer issues.

4.1.1 The portfolio of policy instruments

By keeping markets effectively competitive, competition policy can reduce the work that needs to be done by consumer policy; equally, consumer policy, by enhancing the ability of consumers to exercise choice, can help make markets more effectively competitive and force firms to compete on the merits, thereby supporting the ends of competition policy. This interdependence is important because it means that there may be scope for substitution between these instruments. As a result, joining the instruments within a single armoury may allow both objectives to be pursued at lower net cost (or equivalently, with greater net gain), as the least cost instrument is used in each fact situation.

For example, as a general matter, competition policy, other than by prohibiting anti-competitive conduct, has relatively little scope to make markets more structurally competitive than they would otherwise be; moreover, policies that seek to "de-concentrate" oligopolistic markets, either through forced divestments or by subsidising or otherwise assisting entry, are often contentious and often seem likely to impose costs that are considerably greater than the benefits. In that sense, competition authorities may have few means to alter the supply side of markets so as to make rivalry a more effective discipline. However, in those cases, action on the demand side of the market may provide an effective alternative: for example, if better consumer information, or reduced switching costs, make the demand each firm faces more elastic, that will usually create incentives for each firm to price more aggressively for any given market structure.[37]

The value of seeing these instruments as being within a common portfolio of tools is accentuated by the fact that consumer policy can often be tailored to the needs of particular markets in ways that would be impossible and/or inappropriate for competition policy. For example, it would not be desirable to have a specific set of competition policy instruments that applied to (say) electricity retailing; however, the particular issues associated with improving customer information in that market may well be properly dealt with through consumer policy instruments (such as information campaigns) that are specific to the market at issue. In that sense, while competition policy is by its nature a relatively blunt instrument, interventions

[37] This is not always the case. For example, in a market that is growing rapidly, switching costs may induce firms to bid more aggressively for customers so as to benefit from subsequent lock-in effects. Artificially lowering switching costs in such a market may attenuate price competition, at least in the growth phase. However, the reduced competition in the growth phase may be offset by more intense competition once the market size has stabilised. As a result, even in those cases, there is a trade-off between switching costs and competition.

on the demand side of markets may be capable of addressing industry specificities in a more finely honed way.

At the same time, managing these instruments within a common portfolio may be an effective way of identifying, and thus avoiding or reducing, inconsistencies in policy settings. For example, mandatory product standards can limit competition by restricting low cost, low quality producers from entering markets. That harmful consequence is more likely to be revealed, and to cause corrective action, in an institution that is also attuned to the goal of promoting competition, and whose functions lead it to undertake competition investigations across a wide range of markets, than in one that is not. More generally, by ensuring that each market and the instruments brought to bear on it are seen as a whole – in terms of the functioning of both that market's supply side and of its demand side – the risk of one set of policies being used to undermine the other can be better controlled.

4.1.2 Shared expertise

Particularly but not solely in smaller economies, the stock of expertise available to the public sector for analysing complex policy issues to do with the structure and functioning of markets is likely to be very limited. As both consumer and competition policy draw on similar types of expertise, managing what expertise there is within the framework of a single institution may allow it to be used more efficiently.

At the same time, such integrated management may provide opportunities for professional development in which individuals are exposed to, and develop a detailed understanding of, to both competition policy issues and consumer protection issues. This is especially important when analyses are required that take full account of both the supply and the demand side of markets.

For example, it can be difficult to understand what (seen from the supply side) may seem to be unduly restrictive agreements without an understanding of the way the demand side of a market works. Agreements whereby insurers "steer" consumers to particular suppliers of smash repair services – by requiring consumers to only use designated repairers – are a case in point. Those agreements may seem to restrict competition for smash repair services. However, their primary justification lies in the way they limit the moral hazard problems that would otherwise arise in the market for smash repair services. Those moral hazard problems arise because consumers do not bear the full costs of the repair services, while the quality of repairs is often difficult to fully observe. By seeming to limit consumer choice, the insurer can both reduce costs and increase quality directly and provide incentives for smash repairers to compete on the basis of cost and quality, rather than by exploiting consumers and insurers. A detailed knowledge of how consumers behave in situations such as these is obviously helpful to a proper analysis of what may seem an undue restriction on competition.

Equally, an understanding of consumer policy issues and instruments can be important in assessing possible changes in market structure, such as those associated with proposed mergers. At the simplest, knowing that an industry is one in which consumers have experienced persistent problems with the terms and conditions of service may assist in examining claims about how the relevant markets have operated in the past and might operate in future. For instance, if consumers typically face high information costs, the post-merger market structure may offer more scope for consumers to be exploited, particularly if post-merger competition would depend heavily on new entry or on the expansion of relatively small and perhaps little-known suppliers. At the same time, a close awareness of those consumer issues may help shape remedies, which could, for example, include information disclosure or product unbundling requirements.

4.1.3 Community support and public accountability

Finally, there may be benefits in terms of community support and public accountability.

As far as support is concerned, there is a natural appreciation in the community of the value and importance of consumer protection. By linking its competition policy activities to the consumer protection agenda, and explaining the linkages between its competition policy decisions and the promotion of the consumer interest, a competition authority can enhance public acceptance of competition policy. This may be especially important in countries where competition policy is a relatively recent development, and where there is little understanding of the importance, role and substance of competition policy. Potentially highly controversial decisions – such as those involved in opposing mergers between powerful domestic firms – may prove easier to make and sustain if they can be clearly explained as part of a broader mission aimed at protecting and promoting the interests of consumers.

At the same time, at least in some countries, consumer protection has found it difficult to obtain a high degree of political priority and indeed, of support within administrative and bureaucratic elites. This has compromised both its access to ongoing funding and its ability to attract the more ambitious elements in the public service. In contrast, having well-resourced competition policy authorities is broadly seen as an important component of sound economic management. Moreover, a stint working in a competition authority may be an attractive career move for talented young professionals. Competition authorities' resulting greater access to human and financial resources may more readily spill over to consumer protection in countries where the two areas of policy share a common home.

As well as these gains in sustainability, integrating the missions may lead to improved public accountability. Competition policy tends to be economy-wide in its reach, and the individual actions and decisions of competition policy authorities are of broad interest to the business, legal and academic communities, as they are seen as precedents that may be extended beyond the firms and industries directly at issue in those actions and decisions. As a result, the conduct of competition authorities in respect of their competition functions is subject to quite careful and effective monitoring, which helps ensure that those agencies operate to reasonable quality levels.

In contrast, consumer policy is at times highly-industry specific and additionally involves many decisions that individually, have quite low stakes in absolute, economy-wide, terms. This can lead to a situation in which relatively few social actors have the incentive or ability to carefully monitor decision-making by specialised consumer policy agencies. This absence of close monitoring can lead to regulatory failure, with the agency at issue being captured either by the ideology of consumer protection – without a proper appreciation of the costs regulation imposes – or by the regulated firms, which have an interest in using consumer protection to create barriers to the entry and expansion of new players. These risks are likely to be smaller in an entity that also has the competition policy functions, both because of the internal culture of such an entity and because of the close scrutiny that entity will naturally attract.

4.2 Costs of integration

Although integration of competition policy and consumer policy institutions can have benefits, it also has costs. Those costs arise from the inherent differences in the substance and implementation of these instruments, and the obstacles those differences create in practice to achieving full policy integration.

4.2.1 Differences in substance and implementation

Although consumer policy and competition policy share common goals, the specific instruments on which they rely differ, as does the context in which policy implementation occurs.

Thus, by and large, competition policy is implemented through the enforcement of the competition laws, which involves a mix of administrative proceedings (such as those used in merger clearance and in the authorisation (administrative approval) of agreements) and of litigation in courts and tribunals. Typically, the case load involves relatively small numbers of cases, with individual cases that are often very large in absolute terms. Additionally, direct interaction with the public is often quite limited, with much of the information flow occurring through highly formalised processes, such as information filings and document discovery. These characteristics of the work flow have a significant influence on the structure and conduct of the agencies, including in terms of the training of staff, the types of skills and career paths that make for advancement, and the allocation of the time and attention of senior personnel.

In contrast, consumer policy is inherently more varied in its instruments, form and substance. As regards the instruments, while consumer policy has a conventional enforcement element (that is most marked in respect of misleading and deceptive conduct), it also covers weights and measures, product quality and safety standards, industry codes of conduct, the regulation of behaviour in individual professions and consumer ombudsman and dispute resolution mechanisms. While there are some important instruments that are economy-wide, they are usually paralleled by an extensive assortment of sector- or market-specific instruments. These rely on a broad range of enforcement instruments and in some cases (such as information and consumer education) are very "soft" forms of regulation. Moreover, the process of policy formation and implementation tends to be itself very varied and in many respects porous, with significant direct involvement with the public, a case load that involves many individually small cases, and considerable industry input into policy design. In turn, these features map into a policy process that is far more decentralised – in terms of the range of players involved – and far more geographically localised than is the formation and enforcement of competition policy.

One result of these differences is that consumer policy, when it is integrated within an agency that also has responsibility for competition policy, may find it difficult to attract the attention it deserves. The highly varied nature of the consumer policy case load, and the fact that many consumer policy cases are relatively small and have low stakes in absolute terms (though they may be of great significance to individual consumers), can lead to consumer policy receiving less top management attention and support than it should. The fact that much of consumer policy involves decentralised interaction with other agencies and territorial levels of government can induce a tendency to delegate the work to relatively junior levels and not to give it the funding, resources and profile that competition policy – with its ongoing stream of high visibility, large scale, litigation – invariably secures.

These issues arise from differences in the nature of instruments and tasks these respective policy instruments involve. In theory, of course, that could change.

In particular, there could be gains to consolidating consumer policy, in terms of giving it a more unified statutory and institutional basis, and in that respect making it somewhat more similar to competition policy. Indeed, in a very recent review of Australian consumer policy, the Productivity Commission (which advises the Australian Government on issues that affect economic efficiency) has recommended that it would be preferable to rely on the generic law, rather than resorting to industry-specific regulation, in dealing with many consumer problems.[38] In effect, such reliance on generic law:

- Facilitates consistency in approach across consumers and markets;
- Allows regulators to deal with emerging problems without the need for new statutes — an especially important feature given that many consumer markets are evolving rapidly;

[38] Productivity Commission (2007) *Review of Australia's Consumer Policy Framework: Draft Report*, Canberra.

- Generally avoids boundary line problems and the gaps in regulatory coverage that can ensue; and

- Imposes relatively few costs on the overwhelming majority of suppliers who do the right thing by consumers.

Set against those benefits, industry-specific consumer regulation explicitly seeks to prevent certain behaviours rather than rely on the deterrent effect of the threat of prosecution for breaches of general law and possible liability for compensation. Its use, the Productivity Commission notes, is most likely to be desirable when:

- The risk of consumer detriment is high and/or the detriment suffered if things go wrong is potentially significant and possibly irremediable. (Such considerations are the primary reason why specific regulation is employed in the medical and consumer credit areas);

- The suitability and quality of services is hard to gauge before or even after purchase (the ostensible rationale for many other professional licensing regimes); and/or

- The technical nature of a product or service makes it easier for a regulator to assess breaches of appropriate behaviour against some 'objective' standards.

These considerations are well made and, at least as far as Australia is concerned, they do suggest gains in placing somewhat greater weight on achieving consumer protection objectives through economy-wide statutory instruments. Nonetheless, even with such a move, the major differences noted above between the nature of the tasks, skills and processes involved in competition policy on the one hand, and consumer policy on the other, seem highly likely to remain.

This, in turn, creates practical difficulties to seeking to manage both of these functions within a single agency of government. While these difficulties need not be insuperable, they limit the economies of scope between the functions and may make for their separate administration.

4.2.2 Limits on integration in practice

Largely as a result of the characteristics noted above, it is an inherent feature of any effective regime of consumer protection that it will involve a number of quite distinct agencies of government. Moreover, those agencies may well span separate territorial levels of administration, especially in countries with a federal structure. This multi-agency character is especially marked when consumer protection issues arise in industries that are subject to extensive industry-specific regulation, such as financial services and health care. In those instances, the industry-specific regulators naturally play a substantial role in consumer protection issues, and indeed, often bear the primary responsibility in that respect.

As a result, it is not generally feasible to centralise responsibility for consumer policy to the same extent and in the same way that occurs as regards responsibility for the enforcement of competition policy. Even when aspects of the functions are combined in a single institution (as is the case with the ACCC in Australia), many important aspects of consumer protection fall outside its remit, and will likely continue to do so.

This implies that, in practice, the degree of integration between these policy instruments will never be complete. Rather, any integration will be selective, and hence will need to focus on those aspects of the policies which are most tightly interdependent and where the economies of scope in policy design and implementation are greatest.

4.3 Conclusions on institutional design issues

Overall, there are a number of respects in which gains can be achieved by locating responsibility for both competition policy and consumer policy in a single institution. Those gains include:

- Benefits in terms of better policy coordination, and in particular, in the selection of policy instruments to meet the needs of particular fact-situations;
- A better understanding by policy-makers and enforcers in each area of the role and limitations of the other; and
- The ability to secure economies of scope in access to resources and in the efficacy of monitoring and accountability processes.

However, there are also inherent limits to the possibilities for integration:

- The nature of the tasks involved in implementing consumer policy differs greatly from those involved in the administration of competition policy, reducing the economies of scope achievable through their integration; and
- It is an inherent feature of any effective policy of consumer protection that it will involve a range of agencies, and (especially in Federal countries) span several territorial levels of administration.

These conflicting pressures can obviously be addressed through a range of quite differing approaches. In practice, what appears most important is:

- To ensure that the competition authority has in-house access to the skills involved in the formulation of consumer policy, and at the very least a watching brief with respect to consumer policy, as well as scope to intervene in consumer policy decisions that have material competition implications; and
- That there be within government, an entity that has "whole of government" oversight of consumer protection, and that exercises that oversight in a manner mindful of competition concerns.

Periodic surveys of particular instruments – such as occupational licensing, or restrictions on advertising – aimed at reviewing whether they are consistent with efficient competition, could play a useful and important role in this respect. These surveys would provide a regular opportunity to review whether the objectives pursued through whatever restrictions are imposed using these instruments could be achieved in less restrictive, or more efficient, ways. Developing a program of such reviews, starting with those instruments that are most likely to be unnecessarily restrictive, could be an effective approach to giving such a process a structure and clear time-line.

5. Conclusions

It has recently been emphasised that consumer policy can "activate" competition policy – that is, can help bring competitive processes to life, giving them the vitality they need to achieve the objective of making markets efficient and effective.[39]

[39] Sylvan, L. 2004, "Activating competition: The consumer – competition interface", *Competition & Consumer Law Journal*, pp. 191-206.

This is so even though there is also on occasions a risk that the instruments of consumer policy, rather than serving the interests of consumer, will be used to restrict otherwise desirable competition. As world markets become ever more integrated, this danger also becomes more pressing. Paternalistic justifications can be deployed for many purposes, and not all of them are socially desirable.

This is not to suggest, however, that there should be any doubt about the importance of consumer policy. Long-standing concerns about the need to protect consumers, and especially the most vulnerable among them, not only retain their validity but are even more significant as market mechanisms are introduced into ever more parts of our economies and societies. The introduction of competition into these areas needs to be closely coordinated with the development of effective consumer safeguards, which is a challenge which largely remains to be met. The imperative of policy coordination is therefore as pressing as ever.

There may, however, be no "magic bullets" that can fully meet that imperative. The reality is that competition policy and consumer policy will always differ in the range of instruments on which they rely, key features of the tasks involved in their implementation and the levels of government that they involve. This, as well as history, may limit the extent to which there can be institutional integration**.** As a result, what may matter most is that competition policy authorities have the expertise needed to be effective advocates in the many dimensions of the consumer policy process whilst consumer agencies likewise have competencies in competition policy; and that there is, in central government, ongoing attention to the need for consistency between these policy instruments. Periodic surveys of particular instruments – such as occupational licensing, or restrictions on advertising – aimed at reviewing whether they are consistent with efficient competition, could play a useful and important role in this respect.

NOTE DE RÉFÉRENCE

INTERACTION ET COORDINATION DE LA POLITIQUE DE LA CONCURRENCE ET DE LA POLITIQUE À L'ÉGARD DES CONSOMMATEURS : DIFFICULTÉS ET POSSIBILITÉS[(*)]

1. Introduction

On a souvent pu constater et on admet généralement que la politique de protection des consommateurs et la politique de la concurrence sont des instruments très interdépendants de la politique économique, visant toutes deux à rendre le fonctionnement des marchés plus efficace. On observe aussi généralement qu'il peut exister, et qu'il existe parfois, des tensions entre ces deux politiques. À cela s'ajoutent, dans la pratique, des différences dans la manière dont elles fonctionnent l'une et l'autre et dans la nature du processus de décision et de mise en œuvre qui leur est propre. Admettre l'existence de ces tensions et de ces différences conduit naturellement à examiner les dispositifs institutionnels à l'œuvre pour chacune d'entre elle et, particulièrement, ce qu'il convient de faire pour les coordonner.

Cette note analyse ces questions, mettant en relief les principaux thèmes essentiels à cet égard, sans tenter toutefois de les traiter de manière exhaustive. Elle dresse les principaux constats suivants :

- Politique de la concurrence et politique à l'égard des consommateurs partagent généralement un même objectif tout en reposant sur des instruments dissemblables pour y parvenir. En règle générale, elles se renforcent mutuellement, mais il n'est pas rare qu'elles entrent en conflit comme c'est le cas, par exemple, quand on utilise la politique à l'égard des consommateurs d'une manière qui a pour effet de restreindre inutilement la concurrence**.** À l'inverse, l'ouverture à la concurrence peut avoir lieu sans que soient suffisamment prises en compte les questions relatives à la protection des consommateurs (section 2).

- Si ces problèmes d'équilibre et de coordination de la politique de la concurrence d'une part et de la politique à l'égard des consommateurs d'autre part ne sont guère nouveaux, ils suscitent, depuis ces dernières années, un intérêt croissant pour un certain nombre de raisons et notamment :

  - les avancées de l'économie comportementale, qui ont mis en évidence les limitations cognitives ayant une incidence sur le comportement des consommateurs (section 3.1) ; et

  - l'extension de la concurrence à de nouveaux domaines complexes, (section 3.2), notamment les professions libérales et les marchés des services aux collectivités et des services plus généralement.

(*) Ce document a été préparé en tant que Note du Secrétariat par Henry Ergas (Directeur Régional, Asie Pacifique, CRA International; Professeur, Département d'Économie, Faculté de Gestion et d'Économie, Monash University, Australie) et Professeur Allan Fels (Doyen, The Australia and New Zealand School of Government – ANZSOG).

Si ces évolutions n'ont pas d'effet sur le rôle dévolu à la politique de la concurrence et à la politique à l'égard des consommateurs et sur leur poids respectif, elles appellent d'autant plus une coordination de ces deux volets de l'action publique.

- Cela conduit logiquement à se demander comment on peut réussir à articuler au mieux ces politiques (section 4) :

  – S'il peut être avantageux d'intégrer au sein d'une seule et même institution la responsabilité de la mise en œuvre de la politique de la concurrence et de la politique à l'égard des consommateurs, il n'en demeure pas moins que l'étendue et l'efficacité de cette intégration ne sauraient être que limitées.

  – Ainsi, la nature des missions attachées à ces deux domaines de l'action publique diffère à plusieurs titres et non des moindres ; de plus, la politique à l'égard des consommateurs met en jeu, par essence, un éventail d'instruments très divers, qui sont pour beaucoup propres à un secteur ou à une branche d'activité donnés et qui ne peuvent être aisément regroupés sous un seul étendard.

- De ce fait, quel que soit le degré jugé approprié d'intégration institutionnelle de la mise en œuvre du droit de la concurrence et du droit des consommateurs, il importe que cette intégration vise, à tout le moins, à assurer que l'autorité de la concurrence dispose des compétences requises pour pouvoir garder un œil sur les évolutions qui interviennent dans la définition et l'administration de la politique à l'égard des consommateurs et promouvoir la concurrence dans le cadre de ce processus. De même, on est en droit de penser que les organismes compétents en matière de consommation doivent être en mesure de surveiller et d'évaluer les problèmes de concurrence.

  – En outre, il convient sans doute de s'assurer qu'il existe, au sein de l'appareil d'État, une entité qui exercera, au nom de l'État dans son ensemble, un suivi en matière de protection des consommateurs, sans perdre de vue les préoccupations relatives à la concurrence.

  – L'examen régulier de certains instruments – comme les agréments professionnels ou les restrictions à l'encontre de la publicité – afin de vérifier qu'ils ne nuisent pas à l'efficacité de la concurrence, est susceptible de jouer un rôle utile et important pour structurer ce processus de coordination.

2. Les Liens entre Politique de la Concurrence et Politique à l'égard des consommateurs

Généralement, la politique de la concurrence vise à protéger et, chaque fois que cela est utile et nécessaire, à élargir la palette de choix des consommateurs. Parallèlement, la politique à l'égard des consommateurs s'attache à protéger et, chaque fois que cela est nécessaire, à améliorer la qualité de ce choix tout en assurant que les consommateurs peuvent réellement l'exercer, confiants en l'équité et l'intégrité des mécanismes du marché[1].

Il n'est pas difficile de démontrer que chacune de ces politiques contribue largement à promouvoir les objectifs visés par l'autre.

[1] Voir Muris, T. (2002), 'The interface of competition and consumer protection', notes préparées lors de la 29e conférence annuelle sur le droit et la politique de la concurrence du Fordham Corporate Law Institute et Sylvan, L. (2004), 'Activating competition: The consumer-competition interface', 12 *Competition and Consumer Law Journal*.

Ainsi, en général, le risque de disparition encouru par les entreprises sur les marchés réellement concurrentiels les incite à améliorer et à protéger leur réputation de fournisseurs fiables, car elles peuvent de ce fait tabler sur une répétition des transactions et une réduction de leur frais de commercialisation. Dans la mesure où les entreprises sont d'elles-mêmes incitées à satisfaire les attentes des consommateurs, voire à aller au-delà, la charge que représenterait la mise en œuvre de normes de produits et de services – charge qui retomberait, dans le cas contraire, sur la politique à l'égard des consommateurs – s'en trouve allégée d'autant. En ce sens, assurer qu'un marché est réellement concurrentiel peut permettre de résoudre l'une des préoccupations fondamentales de la politique à l'égard des consommateurs[2].

Dans le même ordre d'idée, les entreprises exerçant leur activité sur des marchés réellement concurrentiels et qui peuvent de ce fait espérer enlever des clients à leurs concurrents, seront incitées à réduire les coûts de changement de fournisseur pour lesdits clients, à la fois en les informant des avantages que leur procureront ce changement et en les aidant à assumer les coûts ponctuels qu'il induit. Or, si les entreprises investissent pour réduire les coûts de changement de fournisseur à la charge de leurs clients mutuels, cela peut avoir pour effet de dynamiser la concurrence tout en rendant moins nécessaires les interventions de la politique de protection des consommateurs pour les faire baisser. Là encore, la mise en place d'une structure de l'offre concurrentielle peut être un moyen efficace de résoudre ce qui serait parfois sinon un problème relevant de la politique à l'égard des consommateurs – en l'occurrence, les coûts de changement de fournisseur.

Cet exemple vaut aussi pour bien d'autres domaines d'intervention de la politique à l'égard des consommateurs. Ainsi les mesures visant à assurer que la publicité et les descriptions de produits sont honnêtes et raisonnablement informatives, que les conditions contractuelles qui y sont mentionnées sont compréhensibles et ne sont pas abusives et que les consommateurs peuvent raisonnablement escompter que les produits seront sûrs et conviendront à l'usage prévu, permettront aux consommateurs d'exercer leur choix plus efficacement (ce qui renforcera directement la concurrence) et obligera les entreprises à se faire concurrence sur leurs réels mérites (et non par des proclamations frauduleuses ou trompeuses ou en recourant à des conditions contractuelles déloyales)[3]. De la même façon, les normes de produits, peuvent renforcer à la fois le choix des consommateurs et le jeu de la concurrence en facilitant les comparaisons entre les produits, en leur permettant de remplacer facilement les produits d'un fournisseur par ceux d'un autre et en polarisant la concurrence sur l'utilité réelle d'emploi des produits plutôt que sur leurs aspects superfétatoires.

En somme, chacun de ces deux instruments de l'action publique peut être utilisé pour promouvoir les objectifs également visés par l'autre : la politique de la concurrence, en préservant la concurrence réelle des marchés, peut alléger la tâche dévolue à la politique à l'égard des consommateurs ; à l'inverse, la politique à l'égard des consommateurs, en renforçant la faculté des consommateurs à exercer leur choix, peut contribuer à rendre la concurrence des marchés plus efficace et contraindre les entreprises à se livrer concurrence sur leurs mérites respectifs, ce qui sert les visées de la politique de la concurrence.

Dans le même temps, chacun de ces deux instruments est susceptible de créer pour l'autre des difficultés.

Ainsi, l'ouverture à la concurrence d'un marché auparavant très réglementé peut fort bien susciter de nouveaux problèmes du point de vue de la protection des consommateurs :

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2 OCDE (2004), *Identifier et surmonter les dysfonctionnements du marché*, p. 3.

3 Commission européenne (2004), 'Identifier et surmonter les dysfonctionnements du marché', Note présentée à l'OCDE pour examen lors de la réunion conjointe du Comité de la concurrence et du Comité de la politique à l'égard des consommateurs, le 13 octobre 2004, pp. 2-3

- De nombreux pays de l'OCDE se sont trouvés confrontés à de nouveaux problèmes en matière de protection des consommateurs à la suite de la libéralisation des marchés de capitaux, qui, pour bénéfique qu'elle ait été, a placé les consommateurs face à de nouveaux risques et de nouvelles difficultés[4].

- De même, l'introduction de la concurrence sur certains marchés de services collectifs (comme l'électricité et les télécommunications) a suscité des difficultés du point de vue de la réglementation de la qualité des services et des problèmes tels que la gestion des résiliations d'abonnements, des plaintes des consommateurs et des interruptions de service en cas de non-paiement[5]. Elle a également suscité des interrogations quant à l'aptitude des consommateurs à comprendre des dispositifs tarifaires souvent complexes et à exercer leur choix en conséquence.

- Enfin, la libéralisation des services professionnels pose des questions complexes liées à l'équilibre entre la pression concurrentielle (en termes de prix et de marketing, de publicité notamment) d'une part et la protection des consommateurs d'autre part, dans des situations se caractérisant par des asymétries de l'information et des coûts d'erreur qui peuvent être importants.

De plus, lorsqu'un marché est plus exposé à la concurrence qu'il ne l'a été (par exemple du fait de la suppression d'obstacles aux échanges), les incitations des acteurs du marché peuvent évoluer, ce qui peut susciter des préoccupations quant à la protection des consommateurs :

- Ainsi, les entreprises en place, confrontées à des consommateurs plus volages, peuvent tenter de retenir leurs clients par divers moyens, notamment en leur imposant contractuellement des pénalités de résiliation. Si de tels dispositifs peuvent être tout à fait raisonnables dans certains cas, ils peuvent aussi, dans d'autres, poser des problèmes tant du point de vue de la concurrence que de la protection des consommateurs.

- De plus, une entreprise en position dominante qui se rend compte qu'elle risque de perdre des parts de marché, voire d'être complètement évincée, sera d'autant moins incitée à investir dans des actifs à long terme comme sa réputation et d'autant plus déterminée à tirer profit de chaque client captif, ou vulnérable de toute autre façon.

- En outre, une entreprise dominante, qui opérait auparavant en position de monopole dans des conditions très réglementées, n'aura que très peu axé sa politique commerciale sur le consommateur. Aux premiers stades de l'ouverture à la concurrence tout particulièrement, lorsqu'elle s'emploiera à freiner et à décourager l'arrivée de nouveaux concurrents et que des mesures claires de protection des consommateurs n'auront pas encore été mises en place, cette entreprise pourra être tentée de recourir à des méthodes qui ne sont pas pleinement conformes aux pratiques commerciales de rigueur.

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4 Ces problèmes sont examinés par le Secrétaire australien au Trésor dans Henry. K. (2007), 'Connecting consumers and the economy: The big picture', allocution de clôture du congrès national des consommateurs, pp. 7-8, disponible à l'adresse Internet suivante : http://www.treasury.gov.au/ncc/content/download/Presentations/Transcripts/connecting_consumers_and_the_economy.rtf

5 Certains de ces problèmes sont analysés dans Waddams, C. 'Reality bites - The problems of choice' et d'autres notes consécutives, dans OCDE (2006) *Table ronde : L'économie de la demande et la politique à l'égard des consommateurs'*.

- Dans le même temps, le marché libéralisé peut attirer des opérateurs qui « disparaissent du jour au lendemain », dont les pratiques sans scrupules peuvent saper la confiance des consommateurs dans l'ensemble du marché, amoindrir leur propension à se fier aux informations que leur fournissent les entreprises exerçant sur ce marché et émousser, de ce fait, les incitations à agir honnêtement de l'ensemble des entreprises qui y opèrent. De plus, les entreprises qui agiront loyalement seront par là même contraintes de supporter des coûts supplémentaires (car elles tenteront de convaincre les consommateurs de la meilleure qualité des informations qu'elles leur procurent), ce qui aura pour effet d'augmenter les prix et de réduire à la fois le surplus du consommateur et le surplus du producteur[6].

De la même façon, certaines évolutions de la politique de protection des consommateurs peuvent avoir des conséquences défavorables sur la concurrence, et produiront, en dernier ressort, des résultats contraires aux buts communs de la politique à l'égard des consommateurs et de la politique de la concurrence. Il s'agit classiquement, entre autres, de l'interdiction de la publicité comparative, des normes de produits obligatoires qui excluent les nouveaux entrants et produits à faible coût ou encore des obligations de transparence et d'affichage des prix qui favorisent la collusion[7].

En somme, la relation entre la politique de la concurrence d'une part et la politique à l'égard des consommateurs d'autre part est relativement complexe. Généralement, elles se confortent mutuellement, mais des tensions ou des conflits entre elles peuvent survenir.

3. Difficultés émergentes

Les problèmes liés au juste dosage entre politique de la concurrence et politique à l'égard des consommateurs suscitent, depuis peu, de plus en plus d'intérêt, en partie en raison de l'amélioration de nos connaissances du comportement des consommateurs (examiné plus loin, en section 3.1) et en partie en raison de l'évolution de l'étendue et du fonctionnement des marchés (examinée en section 3.2).

3.1 L'amélioration de nos connaissances du comportement des consommateurs

L'économie de la protection des consommateurs a été considérablement stimulée ces dernières années par les avancées de « l'économie comportementale » qui ont mis en évidence l'incidence des limitations cognitives sur le choix des consommateurs. L'économie comportementale est en réalité un domaine très vaste et il n'est pas possible, ni souhaitable, d'en faire le tour ici. Cela étant, il est utile de prendre en compte certains des aspects importants des enseignements présentés dans les publications qui y sont consacrées pour illustrer comment les préoccupations de la politique de la concurrence et celles de la politique à l'égard des consommateurs interagissent.

Ainsi, les économistes n'ont pas manqué de constater depuis longtemps que l'information est coûteuse et imparfaite, de sorte que les consommateurs peuvent être dans l'incapacité d'allouer leur budget pour se procurer à tout coup les produits qu'ils préfèrent, au meilleur prix et donc auprès du fournisseur le plus efficient. Ce modèle standard du choix rationnel dans des conditions d'information coûteuse et imparfaite reste un moyen très utile de comprendre les problèmes de politique de concurrence et de politique à l'égard des consommateurs et, pour les pouvoirs publics, d'élaborer les réponses qui s'imposent. L'apport de l'économie comportementale par rapport à ce modèle est de mettre l'accent sur les

6 À l'extrême, on aboutit au problème d'antisélection examiné dans Akerlof, G. (1970), « The Market for 'Lemons': Quality Uncertainty and the Market Mechanism ». *Quarterly Journal of Economics* 84 (3): 488–500

7 On peut trouver une étude de cas traitant des interventions inappropriées sur le marché des services juridiques. Voir OCDE (2004), Identifier et surmonter les dysfonctionnements du marché, pp. 6-10.

comportements qui s'écartent apparemment d'un processus rationnel de décision, du moins tel que l'entend l'analyse classique. Ces biais par rapport au comportement de « l'acteur rationnel » pourraient amener les consommateurs à prendre des décisions apparemment contraires à la maximisation de leur bien-être, même lorsque les marchés sont raisonnablement concurrentiels et que les coûts de recherche et d'information ne sont pas particulièrement élevés. De fait, certaines conclusions de l'économie comportementale donnent à penser qu'une concurrence accrue, dès lors qu'elle induit une prolifération des choix pour les consommateurs, peut ne produire que des gains de bien-être limités, sinon négatifs[8].

Si nombre de ces observations sont expérimentalement confirmées[9], on peut aussi comprendre que leur interprétation puisse prêter à controverse[10]. Mais surtout, on ne saurait en conclure qu'elles plaident en faveur d'une orientation plus interventionniste ou « paternaliste » de la politique de protection des consommateurs en général ou encore diminuent en quoi que ce soit la nécessité – ou l'intérêt – de protéger et (le cas échéant) de promouvoir la concurrence. De fait, ne plus compter essentiellement sur la concurrence des marchés pour donner plus de pouvoir aux consommateurs voire adopter une approche plus interventionniste de la politique de protection des consommateurs pourrait coûter très cher. Il n'est besoin que de citer en exemple les coûts qui résulteront des erreurs de réglementation, inhérents à toute approche paternaliste, surtout si celle-ci a pour corollaire de limiter le choix des consommateurs.

De plus, ces coûts doivent être mis en regard du fait que, si certains gains des échanges peuvent ne pas être réalisés en raison de ces limitations cognitives, les entreprises peuvent alors être incitées à rechercher d'elles-mêmes des moyens de les réaliser. En d'autres termes, le marché peut trouver lui même des solutions à certaines pertes de bien-être que pourraient causer, s'il s'en dispensait, les limitations de la rationalité des individus. Pour dire les choses un peu différemment, la concurrence et les mécanismes de marché peuvent être, en eux-mêmes, un moyen de remédier aux préoccupations relatives à l'efficacité des choix complexes auxquels sont confrontés les consommateurs. En effet, les entreprises opérant sur des marchés concurrentiels peuvent être incitées à proposer aux consommateurs des « solutions » qui leur permettront de profiter plus pleinement l'ensemble des gains des échanges éventuels.

Pour ne prendre qu'un seul cas de figure, lorsque la versatilité du consommateur – concernant, par exemple, ses engagements d'épargne – constitue par exemple la principale difficulté, des produits peuvent être mis au point pour tenter à tout le moins de réduire cette difficulté en y associant diverses formes de pré-engagement. Ainsi, un plan épargne retraite facultatif mis en place avec succès en Australie, proposé par un certain nombre de gros employeurs du pays à leurs nouveaux salariés, repose sur le fait que les salariés choisiront moins probablement de sortir d'une situation par défaut que d'y entrer – autrement dit, le produit repose sur un effet de dotation. S'ils ne choisissent pas de « sortir » de cette situation par défaut, le système les oblige alors à verser des cotisations de retraite supérieures au taux obligatoire.

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8 Voir Ergas, H (2007) "Policy Implications of behavioural economics: the case of consumer protection", *Productivity Commission Round Table on Behavioral Economics*, Melbourne, Australie.

9 Voir de manière générale, Guala, F. (2005) *The Methodology of Experimental Economics*. Cambridge University Press.

10 Par exemple, Plott et Zeiller, « Exchange Asymmetries Incorrectly Interpreted as Evidence of Endowment Effect Theory and Prospect Theory? », *American Economic Review*, septembre 2007, et Plott et Zeiller, « The Willingness to Pay–Willingness to Accept Gap, the 'Endowment Effect', Subject Misconceptions, and Experimental Procedures for Eliciting Valuation », *American Economic Review*, juin 2005, donnent à penser que les résultats qui paraissent se conformer aux modèles comportementaux du choix peuvent aussi parfaitement être explicités par les modèles classiques du choix rationnel.

De même, l'existence d'un « confusopole » – à savoir, les tentatives apparemment délibérées de certaines entreprises pour proposer aux consommateurs des choix de nature à créer une certaine confusion, par exemple en affichant des prix qu'ils auront du mal à comparer aux autres offres présentes sur le marché – peut parfois représenter un problème sérieux pour certains consommateurs. Cela étant, de même que certaines entreprises cherchent à gagner des clients en rendant leurs offres difficiles à étudier ou à comparer, d'autres peuvent tenter au contraire de gagner des clients en se démarquant de la confusion ambiante et en adoptant une grille de prix simple que les consommateurs trouvent attrayante. Les tentatives de certaines entreprises en place pour « créer de la confusion » peuvent ainsi inciter un ou plusieurs nouveaux fournisseurs à se différencier en introduisant une grille de prix plus simple et de ce fait plus attrayante. On a pu constater, sur plusieurs marchés en Australie, combien ce mécanisme peut être efficace.

Ainsi, dans de nombreux pays, les premiers stades de la déréglementation du secteur ont vu proliférer les offres tarifaires complexes, notamment pour les services longue distance, ne permettant que très difficilement aux consommateurs de se faire une idée du rapport qualité-prix. Récemment, cependant, on a pu observer une tendance à la simplification et à lisibilité de la tarification avec la généralisation d'offres proposant un accès illimité à travers le groupage de multiples services.

De même, dans le secteur aérien australien, la concurrence entre les compagnies « classiques » impliquait une discrimination par les prix complexe, s'articulant autour de restrictions sur la date, le jour et l'heure d'arrivée, assorties notamment d'obligations de durée minimale du séjour et de nuitée sur place du samedi au dimanche. Les marges relativement élevées qui s'en sont suivies ont créé des conditions propices à l'entrée de nouveaux concurrents à bas coûts. Ces compagnies aériennes (comme South West in aux États-Unis, RyanAir en Europe et Virgin Blue en Australie) ont introduit une structure tarifaire bien plus simple, sans obligation de durée de séjour minimum, reposant sur des prix principalement fixés en fonction de la date d'achat du billet. Face à cette forme de concurrence, les compagnies *full service* ont réagi en simplifiant leur propre tarification, favorisant ainsi l'efficacité du choix des consommateurs.

Dans la grande distribution aussi, les soldes et autres promotions sont utilisées comme des formes de discrimination par les prix, mais elles augmentent les coûts de recherche pour les consommateurs (ce qui est, en pratique un facteur important du fonctionnement de la discrimination par les prix). Aux États-Unis Walmart a brisé ce schéma en adoptant un modèle fondé sur des « prix bas tous les jours », reposant sur des marges commerciales faibles mais constantes. Ce modèle a été repris dans le monde entier. Les études menées ont démontré que les enseignes qui l'ont adopté ont, en général, bénéficié d'une augmentation importante de leur part de marché et de leur rentabilité relative alors même que la concurrence dans le secteur de la distribution s'est intensifiée[11].

Il ressort essentiellement de tous ces exemples que les modes de décision ne sont pas le seul fait des consommateurs, mais qu'ils dépendent aussi de l'action des entreprises. Les entreprises qui maximisent leurs bénéfices sont incitées à mettre à profit les gains des échanges, dont elles seraient privées dans le cas contraire, notamment en renforçant la faculté des consommateurs à agir selon leurs préférences. Ces incitations seront sans doute plus fortes pour les entreprises les plus efficientes, qui ont davantage à gagner de la réduction des coûts de recherche qu'elles assurent au consommateur. Par conséquent, les entreprises peuvent prendre, et prennent souvent, des mesures en vue « d'internaliser » et par conséquent de compenser le manque à gagner (autrement dit les gains des échanges dont elles seraient privées)

[11] Hoch, Stephen J. et Dreze, Xavier et Purk, Mary E. (Oct 1994), *EDLP, Hi-Lo, and Margin Arithmetic*, Journal of Marketing, 58 ; Lal, Rajiv et Rao, Ram (1997), *Supermarket Competition: The Case of Every Day Low Pricing*, Marketing Science, 16 (1) ; Ortmeyer, Gwen et Quelch, John A. et Salmon, Walter (Automne 1991), *Restoring Credibility to Retail Pricing*, Sloan Management Review, 55 (12) ; et Tang, Christopher S. et Bell, David R. et Ho, Teck-Hua (Hiver 2001) Store Choice and Shopping Behaviour: How Price Format Works, California Management Review, 43 (2).

qu'induiraient, si elles s'en dispensaient, les limitations cognitives aux décisions prises par les clients. Cet aspect de la dynamique de la concurrence est généralement absent des conditions de la plupart des études menées en laboratoire dans le domaine de l'économie comportementale[12].

La réaction des entreprises face aux limitations cognitives qui ont un effet sur les consommateurs est aussi largement absente des modèles de marché se caractérisant par des « attributs dissimulés » – ce qui est le cas lorsque certains consommateurs, et d'autres non, n'ont pas connaissance des coûts cachés de certains produits (comme ceux des cartouches pour imprimantes à jet d'encre ou encore la facturation des connexions à haut débit dans les chambres d'hôtel)[13]. Dans ce cas, les producteurs peuvent ne pas avoir intérêt à divulguer les coûts cachés, tant que les consommateurs les mieux informés ont la possibilité de les éviter tout en continuant à acheter les produits les moins onéreux grâce à la « subvention » que leur procurent les consommateurs naïfs.

Ces modèles, fondés sur des « attributs dissimulés », sont séduisants et peuvent donner matière à réflexion[14], mais ils sont largement théoriques. Plus précisément, tout comme les théories classiques – et complexes – de la rationalité individuelle exigeaient de résoudre des problèmes du même type, on peut toujours présupposer qu'aucune entreprise n'aurait vraiment avantage à être la première à s'écarter de la stratégie des « coûts cachés »[15]. Cette hypothèse semble cependant quelque peu contredire les enseignements présentés brièvement plus haut, qui montraient que certaines entreprises ont pu tirer d'importantes rentes d'innovation en étant les premières à tirer profit de gains des échanges jusque là non réalisés[16].

Donner à penser que les mécanismes de marché peuvent, du moins en partie, corriger certains biais et certaines limitations du choix des consommateurs ne signifie pas que les entreprises ne tenteront pas d'exploiter ces biais et limitations. De fait, l'inverse sera sans doute vrai, surtout dans le domaine du marketing et de la publicité, qui s'appuie de plus en plus sur une compréhension fine de la manière dont les

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12 L'une des rares tentatives de reproduire les effets de ce genre d'innovation est exposée dans la note de Chu, Y. P et R. L. Chu (1990) « The Subsistence of Preference Reversals in Simplified and Market like Experimental Settings » *The American Economic Review*, vol 80, pp. 902-911. Les auteurs introduisent l'arbitrage dans un jeu de pompe monétaire. Il est intéressant de noter qu'ils arrivent à la conclusion que, si les sujets affichent des renversements de préférences en l'absence d'arbitrage, en revanche, une fois placés face à un arbitrage, leurs préférences se rapprochent des normes de « l'acteur rationnel ».

13 Voir Ellison, G. (2005) « A Model of Add-On Pricing » *Quarterly Journal of Economics*, vol. 120, pp. 585-638 et Gabaix, X. et D. Laibson (2006) « Shrouded Attributes, Consumer Myopia and Information Suppression in Competitive Markets » *Quarterly Journal of Economics*, vol. 121, pp. 505-540.

14 Voir par exemple, l'application d'un tel modèle aux prêts immobiliers résidentiels dans Campbell, J. Y. (2006) « Household Finance » *The Journal of Finance*, vol. 61, pp. 1553-1603.

15 Campbell part ainsi de l'hypothèse que les entreprises ne sont dotées d'aucune forme de protection de la propriété intellectuelle ou que cette protection est si faible qu'il n'existe pas de rentes d'innovation. De plus, ce type de modèle est généralement très sensible à la répartition précise de la population des consommateurs « avisés » et des consommateurs « naïfs », à la propension à payer de chacun de ces groupes et aux coûts de recherche.

16 Il est intéressant de noter que les économistes supposent très souvent que les entreprises ne peuvent réaliser sur la durée de gains unilatéraux en s'écartant d'une stratégie de prix concertée, car ces stratégies sont faciles à reproduire. (Ce constat sous-tend le concept « d'équilibre de la réponse rapide », tel qu'il est matérialisé dans la courbe de demande coudée.) Dans la réalité commerciale cependant, il est généralement extrêmement compliqué de définir et d'appliquer des stratégies tarifaires et cela implique de modifier les différents systèmes, les dispositifs de formation et de facturation, de comptabilité et de vérification des comptes. En conséquence, il est souvent très difficile de reproduire les changements importants d'une structure de prix, et surtout de le faire à bon escient et rapidement.

consommateurs exercent leur choix. Il importe donc que les autorités de tutelle prennent en compte ces biais et limitations pour évaluer les pratiques en la matière, notamment lorsqu'elles concernent des produits ayant des conséquences directes sur la santé et la sécurité. Il n'en demeure pas moins que dans la mesure où les biais et limitations cognitifs empêchent les consommateurs d'exercer un choix réellement conforme à leurs préférences – quel qu'en soit la nature ou le bien fondé – l'un des moyens par lesquels les entreprises peuvent tenter de s'assurer un avantage concurrentiel (et tirer profit d'une meilleure réalisation des gains des échanges) sera d'aider les consommateurs à améliorer leurs choix.

En somme, si les conclusions de l'économie comportementale peuvent donner à penser qu'une réponse de la politique à l'égard des consommateurs – allant dans le sens d'un plus grand paternalisme – peut être nécessaire, il n'empêche que certains des problèmes qu'elles soulèvent peuvent parfois être mieux résolus par le jeu de la concurrence, autrement dit, en assurant l'efficacité des mécanismes du marché.

Même s'il importe d'admettre ces limites des interférences entre les politiques, que les observations de l'économie comportementale ont mises au jour à raison, on aurait cependant tort de laisser entendre que les incitations du marché pourront remédier d'elles-mêmes à toutes les limitations cognitives.

Les économistes admettent ce fait depuis longtemps pour les marchés dont le fonctionnement est faussé par des allégations trompeuses, qui peuvent être, sous leurs formes extrêmes, assimilées à des fraudes. Comme toutes les asymétries de l'information, la tromperie peut induire des inefficiences allocatives, (puisque les échanges ne reflèteront pas la valeur exacte des biens échangés) et des inefficiences de production (du fait de l'augmentation des coûts de recherche pour les consommateurs, la production pourra être affectée aux entreprises les moins efficientes et non à celles qui le sont le plus, et les entreprises peuvent être amenées à gaspiller leurs ressources soit à mentir, soit à tenter de se démarquer en prêchant la vérité). À l'extrême naturellement (et même dans les modèles classiques du choix rationnel), la mauvaise information chasse la bonne, aucune entreprise n'est en mesure de dire la vérité ou n'y est incitée et le marché disparaît de lui-même[17].

Des questions similaires, concernant l'efficacité des propriétés des marchés à remédier d'eux-mêmes aux problèmes, peuvent se poser, bien que sans doute sous une forme nettement moins extrême, dans certaines des situations étudiées dans les publications traitant de la politique à l'égard des consommateurs sous l'angle de l'économie comportementale.

Par exemple, même lorsque le marché propose de lui-même des solutions aux problèmes – à l'existence d'un « confusopole » ou aux prix des « attributs dissimulés », par exemple – il peut arriver que ces solutions ne ciblent que les consommateurs les plus avisés (qui auront, en tout état de cause, été le moins lésés), laissant toujours les autres sans protection.

De fait, on pourrait faire valoir que la montée en puissance de l'Internet comme circuit de commercialisation a aggravé le problème des consommateurs vulnérables. Dans la pratique, les circuits de distribution en ligne fournissent aux entreprises des possibilités considérables de différencier leurs offres selon les segments de clientèle et, de manière plus évidente et immédiate, en distinguant les consommateurs qui utilisent l'Internet le plus fréquemment et avec le plus de confiance de ceux qui ne le font pas. De ce fait, cela réduit d'autant la capacité des consommateurs avisés « à protéger sur la question

[17] Il s'agit là d'un cas extrême d'antisélection où le marché s'effondre, de sorte que tous les éventuels gains des échanges sont perdus. Voir Akerlof. G. (1970) « The Market for Lemons: Quality Uncertainty and the Market Mechanism », *Quarterly Journal of Economics*, vol. 84, pp. 488-500 et Hillier, B (1997) *The Economics of Asymmetric Information.* St. Martins' Press, Inc., New York, N.Y., pp. 46-49. On peut aussi aboutir à ce constat en notant que la défiance absolue impose son propre équilibre : voir par exemple, Gambetta, D. (1998) « Concatenations of Mechanisms » dans Hedstrom, P. et R. Swedberg (1998) *Social Mechanisms*, Cambridge University Press, Cambridge, Royaume-Uni, pp. 102-124.

des prix » les consommateurs qui ne le sont pas. Si ces problèmes ne sont sans doute pas appelés à perdurer pour certaines catégories de consommateurs – qui auront de plus en plus recours à l'Internet et bénéficieront de ce fait à leur tour des avantages commerciaux qu'il procure – ils subsisteront pour d'autres, comme les personnes intellectuellement diminuées, les personnes très âgées et (du moins dans des pays comme l'Australie) des pans importants de la population indigène. Du point de vue de l'action publique, il convient donc de se demander si les consommateurs les plus vulnérables seront mieux protégés par des instruments généraux de protection des consommateurs, ou par des interventions plus ciblées.

De plus, en ce qui concerne certaines limitations cognitives mises en évidence par la recherche comportementale, il peut simplement arriver que le marché lui-même n'apporte aucune solution. Un exemple en ce sens peut être celui des produits suscitant une dépendance puisque, avant la dépendance, les consommateurs n'ont pas toujours la possibilité de se faire une opinion suffisante sur les variantes non addictives pour leur permettre d'éliminer du marché les produits les plus préjudiciables[18]. Là encore, il est probable que les risques les plus lourds retomberont sur les consommateurs vulnérables, comme les jeunes très exposés à la séduction des publicités pour les cigarettes, l'alcool et autres produits susceptibles de créer une dépendance.

Cela dit, il faut veiller, en protégeant les consommateurs les plus vulnérables ou les moins bien informés, à ne pas indûment porter préjudice aux rétributions des consommateurs qui investissent pour collecter des informations.

Dans certains cas, la nature des informations, devenues un véritable bien public, signifie incontestablement que la duplication des efforts de recherche n'est que pure perte de temps et d'argent[19] ; mais dans de nombreux autres cas, l'investissement consenti, à titre privé, pour s'informer est souhaitable pour la collectivité, car il contribue à guider le processus de découverte du prix de sorte qu'il tienne compte de l'évolution constante des valeurs fondamentales. Si tel est le cas, les efforts menés pour améliorer la situation des consommateurs moins bien informés peuvent minorer la rémunération que retirent d'autres consommateurs de l'investissement qu'ils ont consenti pour s'informer et donc amoindrir la qualité du processus de découverte du prix et le bien-être dans son ensemble.

Cet arbitrage a été étudié en détail dans le contexte des problèmes de protection des consommateurs sur les marchés de titres ; rappelons juste que la plupart des économistes accorde une importance considérable au fait qu'il est indispensable de veiller à ce que les obligations d'information n'éliminent pas les incitations à acquérir des informations à grand prix, tout en favorisant une large participation sur les marchés concernés[20]. Cela ne signifie pas que les consommateurs vulnérables ne doivent pas être protégés, mais plutôt que les mesures de protection doivent être conçues de façon à ne pas porter inutilement préjudice aux incitations des consommateurs qui sont en mesure d'investir pour s'informer.

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18 Cependant, pour avoir une opinion contraire concernant les stupéfiants, voir O'Flaherty, Brendan (2005) *City Economics*, Harvard University Press, Cambridge, Mass., chapitre 17.

19 Voir Barzel, Y. (1982) « Measurement costs and the organisation of markets » *Journal of Law and Economics*, vol. 25, pp. 27-48 qui étudie ces cas, mais conclut que, lorsque les conditions nécessaires sont réunies, les producteurs prennent des mesures pour éviter une vaine duplication de la recherche d'informations.

20 Voir O'Hara, M. (1995) *Market Microstructure Theory*, Blackwell Publishing et Harris, L. (2003) *Trading and Exchanges*, Oxford University Press, Oxford, Royaume-Uni. La nécessité de protéger le retour sur investissement dans le domaine de l'information et de maintenir sur le marché une juste répartition des différentes catégories d'investisseurs, peut justifier certaines limitations des obligations d'information, comme l'allègement des règles de transparence pour les négociations de bloc (diffusion réduite d'informations avant et après l'opération).

En somme, on ne peut conclure avec certitude, à partir des observations de l'économie comportementale, à des interférences généralisées de la politique à l'égard des consommateurs et de la politique de la concurrence, d'autant que les autorités de tutelle ne sont pas épargnées, elles non plus, par les limitations cognitives, l'imperfection de l'information et autres restrictions à la prise de décision. En revanche, il importera de se demander, en tout état de cause, quel instrument il convient d'utiliser pour corriger les imperfections du marché dues aux limitations cognitives qui entravent la faculté des consommateurs à exercer des choix complexes.

Cette question est importante parce que les observations de l'économie comportementale semblent objectivement utiles pour *définir* ce que seront les interventions de la politique de protection des consommateurs, sinon pour en déterminer le périmètre idéal[21].

En d'autres termes, le rôle de l'économie comportementale peut être bien plus de contribuer à formuler *comment* les organismes de protection des consommateurs doivent intervenir que de déterminer s'ils doivent intervenir. Ainsi, les obligations d'étiquetage doivent tenir compte du fait que « l'excès d'information » peut dégrader la qualité des décisions prises par les consommateurs. De même, il peut être utile de connaître les biais liés à une situation de dotation ou de défaut pour décider comment doivent être structurés les plans comportant une option de sortie (par exemple, en ce qui concerne la responsabilité). De même, il peut être utile de tenir compte des effets de cadrage pour élaborer les réglementations relatives au matériel publicitaire, en ce qui concerne, par exemple, la teneur en graisse et en sucre des aliments. Enfin, le recours de l'économie comportementale aux essais expérimentaux a entraîné une amélioration considérable de la pratique et de la méthodologie de l'économie expérimentale ; les organismes de protection des consommateurs ont ainsi désormais très largement la possibilité de mettre à profit ces expérimentations pour mettre au point les instruments de l'action publique (comme les normes d'étiquetage) et peut-être aussi pour examiner certaines situations (pour déterminer, par exemple, si une publicité donnée est effectivement trompeuse).

3.2 Extension du rôle des marchés

Il peut être surtout essentiel d'assurer que les apports et les méthodes de l'économie comportementale sont mis à profit pour définir quelles seront les interventions de la politique à l'égard des consommateurs dans les domaines situés à l'intersection de la politique de la concurrence.

Ces quinze dernières années ont été marquées par un vaste processus de libéralisation à la fois dans les pays de l'OCDE et dans de nombreux pays en développement.

Une étude à paraître, conclut ainsi que dans un échantillon composé des 57 plus grandes économies mondiales examinées depuis 1970, *56 d'entre elles sont devenues moins réglementées au cours de cette période*, seul le Venezuela faisant exception à cette tendance générale[22]. En ce qui concerne les 21 pays de l'OCDE représentés dans l'échantillon, c'est le Portugal qui a connu le plus fort reflux des interventions ayant un effet restrictif sur le marché, suivi de la Nouvelle-Zélande, du Royaume-Uni et de la Suède. Au nombre des pays avancés, Israël se classe en tête. En ce qui concerne les pays en développement, le Mexique, l'Égypte, la Turquie, l'Inde, le Brésil, l'Argentine, le Chili et le Pérou font partie de ceux qui ont fortement réduit l'ampleur des interventions publiques ayant un effet restrictif sur le marché. De plus, il importe de noter qu'en ce qui concerne le recours aux mécanismes du marché, l'écart entre le groupe des pays de l'OCDE et les autres « économies avancées » d'une part et les pays en développement et les anciens pays communistes d'autre part, s'est sensiblement réduit depuis1970 .

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21 Voir en particulier Mulholland, J (2007), « Behavioral Economics and the Federal Trade Commission », *Paper for the Productivity Commission Round Table on Behavioral Economics*, Melbourne, Australie.

22 Henderson P. D. (2007) « The Uneasy Trend to Greater Economic Freedom » document non publié.

Cette évolution qui témoigne, dans bien des pays, d'une meilleure appréciation des mérites de la concurrence en tant que moyen d'affecter les ressources de la collectivité, a aussi créé d'importantes difficultés du point de vue de la politique de la concurrence et de la politique à l'égard des consommateurs. Ces difficultés se posent avec le plus d'acuité dans des secteurs comme celui des services aux collectivités classiques où les problèmes sont notamment les difficultés pour empêcher une élimination de la concurrence naissante ou celles auxquelles se heurtent les consommateurs pour exercer un choix dans des secteurs qui ont été longtemps monopolistiques. Des difficultés importantes ont également été rencontrées sur les marchés de capitaux déréglementés, notamment du point de vue de la protection des consommateurs appelés à exercer des choix souvent très complexes.

Récemment, l'ampleur de l'ouverture à la concurrence et, dans des biens des cas, le mouvement même d'ouverture à la concurrence, des professions libérales et des services sociaux (que sont par exemple l'éducation, la santé et la prise en charge des personnes âgées) ont suscité des débats. Il s'agit là de marchés souvent complexes pour les consommateurs, d'autant plus qu'ils sont relativement nouveaux ou évoluent rapidement. De plus, les décisions que prennent les consommateurs sur ces marchés peuvent parfois avoir des conséquences très graves – comme c'est le cas, à l'évidence, de l'éducation, de l'épargne retraite et des soins de santé – alors même que la qualité et le « rapport qualité-prix » y sont difficiles à appréhender et à évaluer. Là encore, ces difficultés se posent toutes avec plus d'acuité, et peuvent avoir de plus graves conséquences, pour les consommateurs à faible niveau d'éducation ou particulièrement vulnérables pour toute autre raison, comme les personnes âgées, malades ou fragiles.

Les problèmes que cela pose en termes d'interaction de la politique de la concurrence et de la protection des consommateurs peuvent être illustrés au moyen de deux exemples que sont l'agrément professionnel, des professions libérales notamment, et l'introduction de la concurrence sur les marchés des services sociaux.

3.2.1 Agrément professionnel des professions libérales

Dans l'économie moderne, le terme de « professions libérales » recouvre une grande variété de services, englobant aussi bien les comptables, les architectes, les avocats, les professions médicales et paramédicales, les ingénieurs-experts, peut-être les agents immobiliers et d'autres catégories professionnelles exerçant diverses activités qualifiées comme les électriciens, les plombiers et bien d'autres. Dans la majorité, sinon dans tous les pays, l'accès à ces professions est réglementé, de même que les comportements des personnes qui sont agréées pour les exercer.

L'imperfection de l'information est la principale justification de ces réglementations.

Ainsi, une personne qui achète des biens et des services a besoin d'en évaluer la qualité. Les conséquences d'une erreur d'appréciation (à savoir le risque) pour un bien relativement simple, présentant peu de spécificités, seront assurément limitées, notamment dès lors que les consommateurs peuvent en estimer la valeur avec suffisamment de précision.

En revanche, les consommateurs ont nettement plus de mal à évaluer les services professionnels. Cinq de leurs caractéristiques fondamentales amplifient l'asymétrie de l'information et ses conséquences. Premièrement, les consommateurs ne peuvent examiner la qualité de ces services qu'après l'acquisition, car ils ne sont pas en mesure de les inspecter avant l'achat aussi directement qu'ils peuvent le faire avec la plupart des produits. Deuxièmement, les services professionnels sont par nature complexes et il faut souvent être doté de compétences considérables pour les fournir et les adapter aux besoins des consommateurs. De ce fait, ceux-ci peuvent avoir du mal à évaluer la qualité du service avant l'achat. Troisièmement, la qualité de nombreux services peut être difficile à évaluer même *après* l'achat. Par exemple, si une personne fait appel à un avocat dans le but d'intenter un procès, et qu'elle le perd au bout

du compte, elle peut avoir du mal à savoir si cela tient à la piètre qualité des services juridiques fournis ou au fait que l'affaire était en soi difficile à gagner. Quatrièmement, de nombreux consommateurs ne consomment que très occasionnellement ce type de services. Ils n'effectuent donc pas d'achats répétés qui les aideraient à en évaluer la qualité. Cinquièmement, les conséquences de l'achat de services professionnels de mauvaise qualité peuvent être lourdes. Le service peut ainsi entraîner une grosse dépense pour le consommateur et un service (un pontage coronarien, par exemple) défectueux peut occasionner des dommages graves et irréversibles[23].

Ces caractéristiques peuvent servir à justifier la mise en place d'une réglementation visant à assurer la qualité des prestations. De tels dispositifs sont destinés à garantir aux consommateurs une certaine qualité de service et par conséquent, à réduire les risques associés à l'achat de services professionnels. Dans une certaine mesure, ils se substituent aux efforts de recherche et de collecte de l'information menés par les particuliers car la collecte de l'information et l'évaluation du service s'effectuent par le biais d'un quelconque mécanisme réglementaire. Ils peuvent réduire les coûts de transaction pour les consommateurs et permettre au marché de fonctionner efficacement.

Cela étant, l'expérience montre aussi que ces réglementations ont généralement des effets qui vont au-delà d'une assurance de la qualité, ou de la recherche d'une assurance de la qualité, des services que les consommateurs acquièrent. Au nombre de ces effets, citons notamment :

- La *création d'un monopole* du fait que la pratique et l'activité sont exclusivement réservées aux membres de la profession. À cela peut s'ajouter une nouvelle subdivision du travail, certaines prestations étant à leur tour exclusivement réservées à des sous-catégories précises de ladite profession, comme c'est le cas de la chirurgie esthétique qui ne peut être réalisée que par des « chirurgiens esthétiques ».

- La mise en place de *restrictions anticoncurrentielles à l'accès* à une profession, par des dispositifs d'agrément ou d'accréditation ou par des restrictions à l'accès des étrangers ou des personnes venues d'une autre région d'un pays.

- L'imposition de *restrictions anticoncurrentielles aux comportements*, par exemple en matière de prix, de publicité ou d'éthique.

- Des *formes particulières de comportements anticoncurrentiels* peuvent également exister, comme des ententes sur les prix ou des boycottages collectifs qui, sur d'autres marchés, seraient sans conteste en infraction au droit de la concurrence.

Face à ces conséquences, le plus difficile, du point de vue de l'action publique, est de trouver comment tenir compte des préoccupations légitimes liées à la nécessité d'une assurance de la qualité, tout en permettant aux mécanismes concurrentiels de s'exercer bien plus pleinement que cela n'est généralement le cas. À cette fin, il faudra réussir à combiner et à articuler les instruments de la politique de la concurrence et ceux de la politique de protection des consommateurs :

- Les instruments de la politique à l'égard des consommateurs doivent rechercher des moyens efficaces de protéger les consommateurs, sans pour autant restreindre indûment ou inutilement la concurrence ; alors que

[23] Voir Allan Fels, David Parker, Blair Comley et Vishal Beri (2001) « Occupational Regulation », dans *Anticompetitive Impact of Regulation*, resp. pub. Guiliano Amato, Laraine L. Laudati, Edgar Elgar, pp. 104-115.

- La politique de la concurrence doit faire en sorte, sous réserve que les indispensables mesures de protection des consommateurs sont en place, que la concurrence est autorisée à s'exercer là où elle le peut, notamment en éliminant les restrictions injustifiées à l'entrée et aux comportements concurrentiels[24]

3.2.2 Concurrence dans le secteur des services sociaux

Un même besoin de coordination étroite de la politique de la concurrence et de la politique à l'égard des consommateurs se fait aussi sentir au regard des évolutions visant à introduire des mécanismes de marché ou assimilables au marché dans le secteur des services sociaux classiques.

Ainsi, comme on l'a vu, de nombreux pays de l'OCDE prennent des mesures pour élargir la palette de choix des consommateurs dans le secteur des services sociaux traditionnellement fournis par les pouvoirs publics[25]. Un certain nombre d'économies en développement sont elles aussi allées dans ce sens, notamment la Colombie (qui a récemment lancé un programme de chèques-éducation, donnant aux élèves la possibilité de choisir une école privée)[26], le Chili[27] et l'Indonésie[28]. De plus, la Banque mondiale a mis en évidence la manière dont la concurrence peut venir étoffer l'offre de services tels que l'enseignement et la santé de façon à assurer une utilisation efficiente des ressources limitées dont les pays en développement disposent pour investir dans l'infrastructure sociale[29].

Bien que ces évolutions soient de nature à renforcer considérablement l'efficience de la prestation de tels services[30], elles soulèvent également des problèmes très difficiles du point de vue à la fois de la politique de la concurrence et de la politique à l'égard des consommateurs.

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24 L'expérience australienne à cet égard est analysée dans Allan Fels (2006) « The Australian Experience Concerning Law and the Professions » chez Ehlermann (éd.) *Competition Law and the Professions*, European University Institute, Florence.

25 Pour une vue d'ensemble de la question, voir Lundsgaard, J. 2002, 'Ouverture à la concurrence et efficacité des services à financement public', Revues économiques de l'OCDE, disponible à l'adresse Internet suivante : http://www.oecd.org/dataoecd/42/36/22027701.pdf

26 Angrist, J. et al 2002, 'Vouchers for private schooling in Colombia: Evidence from a randomized natural experiment', American Economic Review 92(5).

27 Hsieh, Chang-Tai et Urquiola, Miguel S., « When Schools Compete, How Do They Compete? An Assessment of Chile's Nationwide School Voucher Program » (octobre 2003). NBER Working Paper No. W10008

28 Bedi, A. et A. Garg 2000, 'The effectiveness of private versus public schools: The case of Indonesia', Journal of Development Economics 61(2).

29 Hanushek, E. et L. Wolfsmann 2007, *Education quality and economic growth,* Banque mondiale, pp. 20-21.

30 Hanushek, E. et L. Wolfsmann 2007, *Education quality and economic growth,* Banque mondiale, pp. 20-21; M Harrison 2004, *Education Matters: Government, Markets and NZ Schools*, NZBR, Wellington ; C. Hoxby 1994, 'Do Private Schools Provide Competition for Public Schools?', NBER Working Paper No. W4978. S Bradley et J. Taylor 2002, 'The Effect of the Quasi-market on the Efficiency-equity Trade-off in the Secondary School Sector', 54, *Bulletin of Economic Research* p. 295-314 ; E Hanushek, et S. Rivkin 2003, 'Does Public School Competition Affect Teacher Quality?', *The Economics of School Choice* ; G Holmes, J. DeSimone et N. Rupp 2003,'Does School Choice Increase School Quality?' NBER Working Paper No. W9683 May ; et P Bayer et R. McMillan 2005, 'Choice and Competition in Local Education Markets', NBER Working Paper No. W11802..

Ainsi, alors que la plupart des pays sont depuis longtemps dotés d'un secteur scolaire privé, la faculté des parents à exercer un choix au sein du système public est souvent limitée par les règles d'affectation des enfants à certains établissements (généralement en fonction de leur lieu de résidence). Parallèlement, les règles de financement limitent les possibilités d'ajustement des aides publiques allouées aux établissements scolaires suivant les flux d'élèves, ce qui fausse la concurrence à la fois au sein du système public (dans la mesure où les établissements qui attirent davantage d'élèves ne sont pas proportionnellement mieux financés) et entre le secteur public et le secteur privé. Donner une plus grande liberté de choix aux parents et faire davantage dépendre de ce choix les flux de revenus des établissements peut être une manière très efficace de renforcer la réactivité du système éducatif aux préférences des parents[31].

Cela étant, préserver ces gains, et assurer qu'ils profitent bien, au bout du compte, aux élèves et à la collectivité pose une multitude de problèmes pour la conception des politiques publiques. Dès lors que les établissements scolaires entrent dans la sphère concurrentielle, il devient indispensable de traiter certains problèmes difficiles relatifs à la diffusion des informations (qui sont essentielles à l'exercice du choix, mais qui peuvent aussi fausser les incitations du personnel enseignant et administratif)[32], au partage de l'information, à la coopération entre les établissements et à la façon de concilier des échanges souhaitables d'informations et une concurrence efficace[33].

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31 Voir Burgess, S., C. Propper et D. Wilson 2004, 'The impact of choice in education and health: a review of the economic literature', Centre for Market and Public Organisation, notamment les pp. 15-23. Ces considérations valent tout autant pour les pays en développement dans lesquels, comme on l'a vu, les pouvoirs publics se sont livrés à un très grand nombre d'expérimentations – voir, par exemple, Patrinos, H. 2006, 'Public-Private Partnerships: Contracting Education in Latin America', Banque mondiale ; Barrera-Osorio, F. 2007, 'The Impact of Private Provision of Public Education: Empirical Evidence from Bogota's Concession Schools', Banque mondiale ; et Patrinos, H. et S. Sosale (resp. pub.) 2007,' Mobilizing the Private Sector for Public Education: A View from the Trenches', Banque mondiale.

32 Passant en revue la littérature économique, Burgess, S., C. Propper et D. Wilson 2004, 'The impact of choice in education and health: a review of the economic literature', Centre for Market and Public Organisation, concluent (p. 16) que : « Pour que le choix s'exerce, le côté de l'offre doit répondre aux (évolutions de) la demande. Mais la forme que prennent ces réponses dépend du type d'indicateurs de performance utilisé et des incitations ainsi créées. Si le choix des parents repose sur les informations que contiennent les indicateurs de performance, les établissements scolaires sont incités à améliorer les performances ainsi mesurées. Cela ne signifie pas nécessairement qu'il s'ensuit une amélioration des résultats réels… Il peut être justifié d'utiliser différents indicateurs de performance pour servir différents objectifs de responsabilisation et simplifier l'éventail de choix ». Les effets d'une définition d'objectifs et de la divulgation d'information sur les prestataires (et les conséquences inattendues qu'ils peuvent avoir) sont examinés dans Hood, C. (2006) « Gaming in Targetworld », *Public Administration Review*, 66(4), 515.

33 Ce point trouve une illustration dans certaines affaires survenues au Royaume-Uni et aux États-Unis où des établissements scolaires et universitaires ont fait l'objet d'enquêtes et de poursuites à la suite d'allégations de comportement anticoncurrentiel ayant trait au partage d'information et à des pratiques de concertation. Au Royaume-Uni, une enquête a été ouverte, fin 2006, à l'encontre d'écoles privées qui s'étaient échangé des informations sur leurs futurs frais de scolarité – voir Decision of the Office of Fair Trading No. CA98/05/2006, 'Exchange of information on future fees by certain independent fee-paying schools', 20 novembre 2006. Aux États-Unis, en 1993, l'État fédéral a réussi à engager un recours pour contester une entente entre plusieurs universités limitant la concurrence dans le domaine de l'allocation des bourses universitaires, par le biais d'un contrat au terme duquel l'aide financière ne devait être accordée que sous conditions de nécessité, établies selon un mode de calcul commun – voir United States v Brown Univ. 5 F.3d 658.

Des problèmes de même nature se posent dans le secteur de la santé. Dans des pays comme l'Australie particulièrement, caractérisés par un vieillissement rapide de la population[34], les questions que l'on doit se poser pour assurer l'efficacité de la prestation des services de santé sont en train de changer. Si la prestation de soins pour les pathologies aiguës conserve à l'évidence toute son importance, la priorité est de plus en plus accordée (et les ressources sont de plus en plus allouées) au traitement des maladies chroniques, comme les diverses pathologies du vieillissement (comme la démence sénile), ou de l'obésité ou encore de celles liées aux modes de vie[35]. Il s'agit là de formes de prise en charge pour lesquelles le choix des consommateurs (ou de leur famille) peut être particulièrement important, du fait que la nature même de la prise en charge implique en tout état de cause un choix de mode de vie (comme c'est le cas pour les résidences médicalisées pour personnes âgées), ou du fait que les incitations et la motivation des patients sont déterminantes pour l'efficacité du traitement (comme dans le cas des pathologies liées aux modes de vie).

Cela étant, faire en sorte que le choix puisse s'exercer efficacement dans ces domaines n'est pas aisé ; comme pour le secteur scolaire, il s'ensuit des questions difficiles tant en termes de diffusion de l'information qu'en ce qui concerne les droits et obligations des consommateurs. En résultent également des problèmes complexes concernant la façon de concilier la concurrence entre les prestataires et les objectifs sociaux plus généraux qui doivent aussi être poursuivis. Là encore, différentes sortes de compétences – celles des praticiens et des spécialistes de la santé, celles des autorités de la concurrence et celles des spécialistes de la protection des consommateurs – doivent être mises à profit pour concevoir des instruments de marché (ou assimilables au marché)[36].

3.3 Conclusions

En somme, les problèmes liés à l'interaction entre la protection des consommateurs et la politique de la concurrence ont suscité un intérêt considérable ces dernières années, notamment à la suite des observations des chercheurs concernant les limitations inévitables de la qualité et de l'efficacité du choix des consommateurs. Il est cependant trop tôt et on aurait probablement tort d'en conclure pour autant qu'il faille moins s'en remettre au choix des consommateurs, sur un marché concurrentiel, pour promouvoir au mieux l'efficacité et le bien-être collectif. Cela étant, ces études sont importantes pour définir l'action publique et, de toute évidence, les mesures de protection des consommateurs. Dès lors que la politique de la concurrence et la politique à l'égard des consommateurs gagnent de nouveaux domaines – comme les marchés émergents des services sociaux qui étaient jusque là fournis par les pouvoirs publics – il convient de mettre pleinement à profit les enseignements qui en sont tirés.

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34 L'exemple de l'Australie illustre bien la tendance générale observée dans les pays de l'OCDE. Ainsi, l'après les projections démographiques actuelles, le nombre d'Australiens âgés de 85 ans et plus va passer de 330 000 en 2006 à 580 000 en 2021 et à plus de 1.6 million en 2051 – voir en général sur cette question Ergas, Henry et David Cullen (2007) *Providing and Financing Aged Care in An Aging Society*, (en cours d'impression) disponible à l'adresse Internet suivante : www.greenwhiskers.com.au.

35 En extrapolant à partir de tendances similaires observées aux États-Unis – Voir Reynolds, S. L., Y. Saito et E. M. Crimmins, 2005, 'The Impact of Obesity on Active Life Expectancy in Older American Men and Women', *The Gerontologist*, vol. 45, pp. 438-444. Voir Ergas, Henry et David Cullen, ibid., pour l'analyse des tendances observées en matière de pathologies chroniques et de leurs implications sur la prestation de services aux personnes âgées et sur le choix de la prise en charge dans ce domaine.

36 Pour une étude de bonne qualité sur l'impact du choix des consommateurs dans les marchés de la santé, voir Burgess, S., C. Propper et D. Wilson 2004, 'The impact of choice in education and health: a review of the economic literature', Centre for Market and Public Organisation, pp. 25-33.

4. Conception des institutions et difficultés institutionnelles

L'analyse qui précède a mis en évidence l'interdépendance de la politique de la concurrence d'une part et de la politique à l'égard des consommateurs d'autre part, et la nature commune des objectifs qu'elles poursuivent. Elle montre aussi la manière dont elles doivent aller de pair lors de la définition de l'action publique, notamment lorsque la concurrence gagne de nouveaux domaines. Cela conduit tout naturellement à s'intéresser au cadre institutionnel de la politique de la concurrence et de la politique à l'égard des consommateurs, et notamment à se demander si elles doivent toutes deux être « logées » au sein d'une unique institution, ce qui présenterait à la fois des avantages et des coûts.

Nous analyserons d'abord ces avantages, avant d'évaluer les coûts.

4.1 Avantages de l'intégration

Intégrer la responsabilité première de la politique de la concurrence et de la politique à l'égard des consommateurs au sein d'une institution unique présente trois grands avantages :

- les gains tirés du traitement de la politique de la concurrence et de la politique à l'égard des consommateurs en tant qu'instruments que l'on peut articuler avec souplesse et gérer, plus généralement, au sein d'un seul et même portefeuille d'instruments à la disposition des pouvoirs publics,

- les gains tirés du renforcement et du partage des expériences dans ces deux domaines,

- les gains tirés du fait que la collectivité a une vue plus claire de ces politiques et comprend mieux les préoccupations relatives à la concurrence et à la protection des consommateurs.

4.1.1 Le portefeuille d'instruments à la disposition des pouvoirs publics

En préservant une réelle concurrence sur les marchés, la politique de la concurrence peut alléger la charge de travail de la politique de protection des consommateurs ; de la même façon, cette dernière peut renforcer l'aptitude des consommateurs à exercer un choix, peut aider les marchés à être plus efficacement concurrentiels et obliger les entreprises à se livrer concurrence sur leurs mérites respectifs, contribuant ainsi aux visées de la politique de la concurrence. Cette interdépendance est importante car elle signifie qu'il existe des possibilités de substitution mutuelle de ces divers instruments. Par conséquent, regrouper lesdits instruments au sein d'un même arsenal peut permettre de réaliser à la fois ces deux objectifs pour un coût net moins élevé (ou pour un gain net plus élevé), puisque cela permettra d'utiliser l'instrument le moins onéreux pour chaque situation à régler.

Ainsi, mise à part l'interdiction des pratiques anticoncurrentielles, la politique de la concurrence n'a en général guère de moyens pour rendre les marchés structurellement plus concurrentiels qu'ils ne le seraient autrement ; en outre, les politiques visant une déconcentration des marchés oligopolistiques, soit en contraignant les entreprises à procéder à des cessions, soit en subventionnant les nouveaux entrants ou en les aidant de toute autre manière à s'implanter, sont souvent contestables et semblent en général de nature à occasionner des coûts bien plus importants que les avantages qui en découlent. En ce sens, les autorités de la concurrence n'ont parfois guère de moyens pour influer sur le côté de l'offre, en vue de discipliner la concurrence et de la rendre ainsi plus efficace. En revanche, dans ces cas là, les mesures portant sur le côté de la demande peuvent constituer une solution efficace. Par exemple, si une meilleure information des consommateurs ou une réduction des coûts de changement de fournisseur accroît

l'élasticité de la demande pour chaque entreprise, cela l'incitera généralement à adopter une stratégie de prix plus agressive, quelle que soit la structure du marché[37].

L'intérêt de voir ces instruments regroupés au sein d'un portefeuille commun est amplifié par le fait que la politique à l'égard des consommateurs peut s'ajuster aux besoins de certains marchés donnés, ce que la politique de la concurrence ne pourrait ou ne saurait faire. Il ne serait ainsi pas souhaitable qu'une série d'instruments de la politique de la concurrence vise spécifiquement (à titre d'exemple) le secteur de la distribution d'équipements électriques ; en revanche, les problèmes particuliers que posent, sur ce marché, la nécessité d'une meilleure information des consommateurs peuvent être correctement traités par les instruments de la politique à l'égard des consommateurs (par des campagnes d'information, par exemple) s'adressant spécifiquement à ce marché. Si, de ce point de vue, la politique de la concurrence est, par nature, un instrument assez peu incisif, les interventions du côté de la demande permettent, quant à elles, de s'attaquer de manière bien plus pointue aux spécificités de chaque secteur.

Dans le même temps, gérer ces instruments au sein d'un seul et même portefeuille peut être une manière efficace d'identifier, et donc de supprimer ou de réduire, les incohérences de l'action publique. Ainsi, les normes de produits obligatoires peuvent restreindre la concurrence en entravant l'entrée sur les marchés de producteurs à bas coûts et de moindre qualité. Cet effet préjudiciable aura plus de chance d'être mis au jour et de donner lieu à des mesures correctrices au sein d'une institution qui aura été accoutumée à promouvoir la concurrence et qui sera amenée, de par ses fonctions, à effectuer des enquêtes de concurrence sur des marchés très divers, que si tel n'était pas le cas. Plus généralement, en assurant que chaque marché, et que les instruments utilisés pour agir sur ce marché, sont pris comme un tout – et concernent le fonctionnement de ce marché à la fois du côté de l'offre et du côté de la demande – il sera possible de mieux maîtriser le risque que l'un des volets de l'action publique ne soit utilisé pour saper les effets de l'autre.

4.1.2 Partage des compétences

Dans les économies de petite taille notamment, mais pas uniquement, il est probable que le gisement de compétences dont dispose le secteur public pour analyser les problèmes complexes relevant de l'action publique qui ont trait à la structure et au fonctionnement des marchés sera très limité. Comme la politique à l'égard des consommateurs et la politique de la concurrence s'appuient l'une et l'autre sur un même genre de compétences, gérer, au sein d'une institution unique, celles qui sont disponibles permettra de les utiliser de façon plus efficiente.

Parallèlement, cette gestion intégrée peut offrir des opportunités de promotion professionnelle des individus concernés qui seront appelés à traiter à la fois de questions relevant de la politique de la concurrence et de questions relevant de la politique à l'égard des consommateurs, et approfondiront leurs connaissances dans ces deux domaines. Cet aspect est particulièrement important lorsqu'il est indispensable de recourir à des analyses couvrant à la fois le côté de l'offre et le côté de la demande.

Par exemple, il peut être difficile de comprendre (vu du côté de l'offre) certains accords qui peuvent sembler indûment restrictifs, si l'on ne comprend pas la manière dont fonctionne le côté de la demande d'un marché donné. Les accords permettant aux assureurs de « diriger » les consommateurs vers certains

[37] Tel n'est pas toujours le cas. Ainsi, sur un marché en croissance rapide, les coûts de changement de fournisseur peuvent inciter les entreprises à démarcher plus agressivement les clients de façon à bénéficier d'effets de captivité ultérieurs. Diminuer artificiellement ces coûts sur un tel marché peut réduire la concurrence sur les prix, du moins durant la phase de croissance. Cela étant, la réduction de la concurrence durant cette phase peut être contrebalancée par une intensification de la concurrence, une fois que la taille du marché s'est stabilisée. En conséquence, même dans ces cas là, il faut trouver un compromis entre les coûts de changement de fournisseur et la concurrence.

prestataires de services de carrosserie – en les obligeant à ne recourir qu'à leur seul carrossier attitré – constituent un bon exemple. De tels accords semblent restreindre la concurrence sur le marché de la carrosserie. Cela étant, ils se justifient essentiellement par le fait qu'ils limitent les problèmes d'aléa moral qui, dans le cas contraire, se feraient jour sur ce marché. Les problèmes d'aléa moral se posent du fait les consommateurs n'assument pas la totalité du coût des services de réparation et qu'il est difficile d'en évaluer pleinement la qualité. Alors même qu'il semble limiter le choix des consommateurs, l'assureur est, en fait, directement en mesure de réduire les coûts et d'améliorer la qualité de la prestation, tout en incitant les carrossiers à se livrer concurrence sur les prix et la qualité, et non en exploitant consommateurs et assureurs. De toute évidence, dans ce genre de situation, bien comprendre le comportement des consommateurs permet d'évaluer correctement ce qui peut passer, à première vue, pour une restriction indue de la concurrence.

De la même façon, il peut être important de bien comprendre la politique à l'égard des consommateurs, et les instruments de cette politique, pour évaluer les mutations éventuelles – comme celles induites par des projets de fusion – de la structure d'un marché. Au niveau le plus simple, savoir que dans un secteur d'activité donné, les consommateurs sont confrontés en permanence à des problèmes concernant les conditions générales de service peut aider à analyser les plaintes relatives au fonctionnement passé des marchés concernés et à déterminer comment ils pourraient fonctionner dans l'avenir. En effet, si les consommateurs se sont heurtés à des coûts d'information élevés, la structure du marché qui sera issue de la fusion pourra offrir encore plus de possibilités de les exploiter, surtout si, après l'opération, la concurrence dépend fortement de l'arrivée de nouveaux entrants ou du développement de fournisseurs plus petits et peu connus. Dès lors, une bonne connaissance des problèmes rencontrés par les consommateurs peut aider à mettre au point les mesures correctrices qui s'imposent – obligations d'information ou de dégroupage des produits, par exemple.

4.1.3 Soutien de la collectivité et responsabilité vis-à-vis du grand public

Enfin, l'intégration peut produire des avantages en matière de soutien de la collectivité et de responsabilité vis-à-vis du grand public.

En ce qui concerne la question du soutien qu'elle peut apporter, la collectivité reconnaît tout naturellement l'intérêt et l'importance de la protection des consommateurs. En reliant les activités relevant de la politique de la concurrence avec les priorités de la protection des consommateurs d'une part, et en expliquant les liens existant entre les décisions prises en matière de politique de la concurrence et la promotion de l'intérêt des consommateurs d'autre part, les autorités de la concurrence peuvent renforcer l'adhésion du grand public à la politique qu'elles poursuivent. Cela peut être particulièrement important dans les pays où cette politique est un élément relativement récent dont l'importance, le rôle et la nature ne sont pas bien compris. Il peut s'avérer plus facile de prendre des décisions qui pourront être très controversées – comme le rejet d'une fusion entre de puissantes entreprises nationales – et de s'y tenir si on peut expliquer sans équivoque qu'elles s'inscrivent dans le cadre d'une mission plus générale de protection et de promotion des intérêts des consommateurs.

Pareillement, du moins dans certains pays, la question de la protection des consommateurs a eu du mal à se hisser au niveau des grandes priorités politiques et donc à obtenir le soutien des plus hauts responsables du gouvernement et de l'administration. Par voie de conséquence, cet état de fait lui a compromis l'accès à des financements permanents et a amoindri son aptitude à attirer les éléments les plus ambitieux du secteur public. Au contraire, le fait qu'il existe une autorité de la concurrence bien dotée passe généralement pour l'un des aspects importants d'une saine gestion économique. En outre, les jeunes talents peuvent considérer comme un choix de carrière séduisant le fait de travailler pour une autorité de la concurrence. L'autorité de la concurrence a ainsi un meilleur accès aux ressources humaines et financières,

dont la politique de protection des consommateurs pourra bénéficier plus facilement dans les pays où ces deux volets de l'action publique seront regroupés au sein d'une seule institution.

De même qu'elle apporte des gains en termes de soutien de la collectivité, l'intégration des missions de ces deux politiques peut aussi renforcer leur responsabilité vis-à-vis du grand public. Le champ d'application de la politique de la concurrence couvre généralement l'ensemble de l'économie. Telle ou telle action ou décision prise par les autorités de la concurrence aura un intérêt général pour les milieux d'affaires, juridiques et universitaires, qui la considèreront comme un précédent dont la portée pourrait s'étendre au-delà des entreprises et des secteurs qu'elle a directement visés. De ce fait, le comportement des autorités de la concurrence, dans leur domaine d'action, fait l'objet d'un suivi plutôt attentif et efficace, qui permet de garantir un fonctionnement raisonnablement satisfaisant de ces organismes.

Au contraire, la politique à l'égard des consommateurs est parfois très spécifique à un secteur donné, et impose en outre de prendre de nombreuses décisions dont chacune n'aura que d'assez faibles retombées dans l'absolu, autrement dit pour l'économie dans son ensemble. Il peut s'ensuivre que seul un assez petit nombre d'acteurs sociaux sera incité à garder l'œil sur les décisions prises par les organismes de protection des consommateurs ou sera en mesure de le faire. Cette absence de suivi attentif peut entraîner des lacunes de la réglementation. En outre, l'organisme concerné pourra, de ce fait, s'enfermer dans une stricte idéologie de la protection des consommateurs – qui ne lui permettra pas d'apprécier correctement les coûts induits par la réglementation – ou devenir l'otage d'entreprises réglementées qui auront intérêt à utiliser la politique de protection des consommateurs pour ériger des barrières à l'entrée et entraver le développement de nouveaux acteurs. Ces risques seront sans doute moindres au sein d'une entité qui sera aussi dotée de responsabilités en matière de politique de la concurrence, à la fois en raison de la culture interne qui prévaudra en son sein et de l'étroit suivi dont elle sera naturellement l'objet.

4.2 Coûts de l'intégration

Si l'intégration de la politique de la concurrence et de la politique à l'égard des consommateurs présente certains avantages, elle induit aussi des coûts. Ces coûts résultent des différences inhérentes à la nature et aux conditions de la mise en œuvre de ces instruments mais aussi aux obstacles à l'intégration totale que ces différences induisent dans la pratique.

4.2.1 Différences de nature et des conditions de mise en œuvre

Même si ces politiques peuvent viser des objectifs communs, les instruments spécifiques sur lesquels elles reposent sont dissemblables, de même que les conditions dans lesquelles elles sont mises en œuvre.

Ainsi, généralement, la politique de la concurrence est mise en œuvre par le biais de l'application du droit de la concurrence, et mêle donc procédures administratives (comme celles utilisées pour autoriser une fusion et pour autoriser -et approuver administrativement- des accords) et procédures judicaires. Le plus souvent, le nombre d'affaires traitées est relativement faible, chacune d'entre elle ayant en revanche souvent des retombées très importantes dans l'absolu. De plus, l'interaction directe avec le grand public est généralement plutôt limitée, la plupart des informations n'étant communiquée qu'au travers de procédures très formelles, comme la remise de rapports et la recherche documentaire par exemple. Ces caractéristiques de leur travail influent fortement sur la structure et le comportement des organismes concernés, notamment du point de vue de la formation du personnel, du type de compétences requises, des perspectives de carrière et de la façon dont les salariés expérimentés affectent leur temps et mobilisent leur attention.

Au contraire, la politique à l'égard des consommateurs est en soi plus variée, de par ses instruments, sa forme et sa nature. En ce qui concerne les instruments à sa disposition, si elle est aussi dotée d'une composante classique de mise en œuvre du droit (plus marquée dans les cas de comportements mensongers

ou trompeurs), son périmètre d'action couvre aussi les poids et mesures, les normes de qualité et de sécurité des produits, les codes de conduite sectoriels, la réglementation des pratiques professionnelles et les mécanismes de médiation avec les consommateurs et de règlement des différends. Si certains de ses instruments importants couvrent l'économie dans son ensemble, ils sont souvent parallèlement assortis d'un arsenal important d'instruments spécifiques à un secteur ou à un marché donné. Il s'agit d'instruments très divers qui peuvent dans certains cas (comme en matière d'information et d'éducation des consommateurs par exemple) prendre la forme d'une réglementation très « allégée ». De plus, généralement le processus de formulation et de mise en œuvre de la politique est lui aussi par nature très varié et, à bien des égards, poreux, puisqu'il se nourrit d'une grande implication directe du grand public, du flux des nombreuses petites affaires traitées et de l'apport considérable des différents secteurs à la définition de l'action publique. Ces caractéristiques aboutissent à un processus bien plus décentralisé – de par la diversité des intervenants concernés – mais géographiquement bien plus circonscrit que ne le sont la formulation et la mise en œuvre de la politique de la concurrence.

Il découle notamment de ces différences que la politique à l'égard des consommateurs, lorsqu'elle est intégrée au sein d'un organisme exerçant aussi des responsabilités en matière de politique de la concurrence, peut avoir du mal à susciter l'attention qu'elle mérite. Compte tenu de la nature très variée des affaires qui en relèvent et du fait que nombre d'entre elles sont relativement petites et ont de faibles retombées dans l'absolu (même si chacune d'entre peut avoir une grande importance pour les consommateurs), cette politique peut donc retenir moins qu'elle ne le devrait l'intérêt et l'adhésion des hauts responsables. Du fait de la décentralisation de ses liens avec d'autres organismes et d'autres échelons territoriaux de l'État, il peut s'ensuivre que les missions soient confiées à des collaborateurs relativement jeunes et inexpérimentés et que cette politique ne dispose pas des financements, des ressources et de la visibilité qu'obtient invariablement la politique de la concurrence – avec son lot incessant de différends très médiatisés et de grande envergure.

Ces problèmes sont liés à la nature dissemblable des instruments et des missions respectifs que ces deux types de politiques impliquent. Théoriquement, bien sûr, cela pourrait changer.

En particulier, il pourrait être avantageux de centraliser la politique à l'égard des consommateurs, en la dotant d'une assise juridique et institutionnelle plus unifiée, et, en l'assimilant de cette façon un peu plus à la politique de la concurrence. De fait, dans une étude très récente consacrée à la politique australienne de protection des consommateurs, la Productivity Commission (qui conseille les pouvoirs publics australiens sur les questions ayant un effet sur l'efficience économique) a déclaré qu'il serait préférable de s'appuyer sur un droit générique, plutôt que de recourir à des réglementations sectorielles, pour traiter de nombreux problèmes concernant les consommateurs[38]. En effet, faire appel à un droit générique :

- favorise la cohérence de l'approche adoptée pour l'ensemble des consommateurs et des marchés,
- permet aux autorités de tutelle de s'attaquer aux problèmes émergents sans avoir besoin de nouvelles législations – ce qui est un aspect très important du fait de l'évolution rapide des marchés de consommation,
- permet, de manière générale, d'éviter les problèmes de délimitation des responsabilités et les lacunes de la réglementation qui peuvent s'ensuivre,
- impose des coûts relativement faibles à la très grande majorité des fournisseurs qui agissent correctement vis-à-vis des consommateurs.

[38] Productivity Commission (2007) *Review of Australia's Consumer Policy Framework: Draft Report*, Canberra.

Au regard de ces avantages, les réglementations sectorielles de protection des consommateurs visent, quant à elles, expressément à empêcher certains agissements précis et non l'effet dissuasif général que peut avoir, en cas d'infraction au droit général, la menace de poursuites pénales ou civiles. Dès lors, y recourir serait, de l'avis de la Productivity Commission, sans doute souhaitable lorsque :

- le risque de préjudice pour les consommateurs est élevé ou que le préjudice subi si la situation tourne mal est important et sans doute irrémédiable. (Ces aspects justifient principalement le recours à des réglementations spécifiques dans le domaine de la médecine ou du crédit à la consommation),

- le caractère adéquat et la qualité des services est difficile à évaluer avant, ou même après, l'achat (c'est l'argument utilisé pour justifier de nombreux régimes d'agrément professionnel), ou

- du fait de la nature technique du produit ou service, l'autorité de tutelle sectorielle peut plus facilement déterminer les infractions au comportement de rigueur par rapport à certaines normes « objectives ».

Ces arguments sont fondés, et du moins en ce qui concerne l'Australie, donnent à penser qu'il peut être avantageux de recourir un peu plus à des instruments juridiques qui soient applicables à l'économie dans son ensemble pour réaliser des objectifs de protection des consommateurs. Néanmoins, même si l'on va dans ce sens, les principales différences évoquées précédemment, entre la nature des missions, des compétences et des processus à l'œuvre dans le cadre de la politique de la concurrence d'une part et de la politique à l'égard des consommateurs d'autre part subsisteront sans doute.

Dans ces conditions, lorsque l'on tentera d'administrer ces deux fonctions au sein d'un seul et même organisme public, des difficultés pratiques se poseront immanquablement. Ces difficultés ne sont certes pas insurmontables, mais elles limitent les économies d'échelle entre ces fonctions et peuvent plaider en faveur de leur administration distincte.

4.2.2 Limites pratiques à l'intégration

Du fait en grande partie des caractéristiques déjà citées, il s'ensuit que tout régime efficace de protection des consommateurs impliquera nécessairement l'intervention d'un certain nombre d'organismes publics assez divers. En outre, il peut arriver que ces organismes couvrent plusieurs régions administratives, surtout dans les pays dotés d'une structure fédérale. L'intervention de multiples organismes est particulièrement prononcée lorsque des problèmes de protection des consommateurs se font jour dans des secteurs d'activité soumis à une réglementation sectorielle exhaustive, comme les services financiers et la santé. Les autorités de tutelle sectorielles jouent alors naturellement un rôle essentiel en ce qui concerne les problèmes de protection des consommateurs et en assument de ce fait généralement la principale responsabilité.

En règle générale, il n'est donc n'est pas possible de centraliser la responsabilité de la politique à l'égard des consommateurs comme on peut le faire de la responsabilité de la mise en œuvre de la politique de la concurrence. Même lorsque certains aspects de ces fonctions sont regroupés au sein d'une institution unique (comme c'est le cas de l'ACCC en Australie), de nombreuses facettes de la politique de protection des consommateurs n'entrent pas dans ses attributions et il n'y a pas vraiment de raison que cela change.

Dans la pratique, l'intégration de ces instruments de l'action publique ne sera donc jamais totale. Au lieu de cela, toute intégration sera sélective et de ce fait ne devra porter que sur les aspects les plus imbriqués de ces politiques, ceux où les économies d'échelle en matière de définition et de mise en œuvre des politiques sont les plus importantes.

4.3 Conclusions relatives aux questions de conception des institutions

Dans l'ensemble, l'intégration, au sein d'une institution unique, de la responsabilité de la politique de la concurrence et de la protection des consommateurs peut présenter des avantages à de nombreux égards et notamment :

- des avantages liés à une meilleure coordination de l'action publique, particulièrement en ce qui concerne le choix des instruments disponibles à utiliser pour faire face aux exigences de telle ou telle situation,

- une meilleure compréhension par les pouvoirs publics et les instances répressives intervenant dans l'un de ces deux domaines du rôle et des limites de l'autre domaine,

- la possibilité de réaliser des économies d'échelle en ce qui concerne l'accès aux ressources et l'efficacité du suivi et des processus de responsabilisation.

Cela étant, les possibilités d'intégration sont en elles-mêmes limitées :

- La nature des missions requises pour mettre en œuvre la politique à l'égard des consommateurs diffère largement de celle des missions requises pour administrer la politique de la concurrence, ce qui réduit les économies d'échelle qui découleraient de l'intégration,

- toute politique efficace de protection des consommateurs impliquera nécessairement des organismes très divers et (surtout dans les États fédéraux) couvrira plusieurs régions administratives.

À l'évidence, des approches assez diverses peuvent être adoptées pour régler ces contradictions. Dans la pratique, il importe surtout :

- d'assurer que l'autorité de la concurrence dispose, en interne, des compétences nécessaires à la formulation de la politique à l'égard des consommateurs ou ait, à tout le moins, une vue d'ensemble des questions qui s'y rapportent, ainsi que de la possibilité d'influer sur les décisions relevant de cette politique qui sont susceptibles d'avoir des conséquences importantes du point de vue de la concurrence,

- de s'assurer qu'il existe, au sein de l'appareil d'État, un organisme qui puisse exercer, au nom de l'État dans son ensemble, un suivi des questions en matière de protection des consommateurs, sans perdre de vue les préoccupations relatives à la concurrence.

À cet égard, l'examen régulier de certains instruments – tels les agréments professionnels ou les restrictions à l'encontre de la publicité – afin de vérifier qu'ils ne minent pas l'efficacité de la concurrence, pourrait jouer un rôle utile et important. Ces enquêtes pourraient donner régulièrement l'occasion de déterminer si les objectifs visés par les éventuelles restrictions qui sont imposées par le biais de ces instruments ne pourraient être atteints de manière moins restrictive ou plus efficiente. Il pourrait être utile d'arrêter un calendrier, commençant par l'examen des instruments susceptibles d'être le plus inutilement restrictifs, afin de structurer ce processus et de lui imposer une échéance précise.

5. Conclusions

Une étude a récemment mis en évidence la manière dont la politique à l'égard des consommateurs peut « dynamiser » la politique de la concurrence, contribuer à donner naissance à des mécanismes

concurrentiels et leur donner le souffle dont ils ont besoin pour réaliser l'objectif de fonctionnement efficient et efficace des marchés[39].

Ce constat vaut même s'il se peut que les instruments de la politique à l'égard des consommateurs soient utilisés pour restreindre une concurrence par ailleurs souhaitable et non pour servir les intérêts des consommateurs. Avec l'intégration croissante des marchés mondiaux, ce risque est de plus en plus présent d'autant que certaines justifications paternalistes sont parfois avancées pour défendre divers objectifs qui ne sont pas tous souhaitables pour la collectivité.

On ne saurait cependant en conclure qu'il y a lieu de remettre en cause le rôle de la politique à l'égard des consommateurs. Les préoccupations de longue date quant à la nécessité de protéger les consommateurs, surtout les plus vulnérables, conservent toute leur validité, et sont d'autant plus importantes que les mécanismes de marché gagnent toujours plus de pans de nos économies et de nos sociétés. L'introduction de la concurrence dans ces nouveaux domaines doit être étroitement coordonnée avec la mise au point de mesures efficaces de protection des consommateurs. Cette difficulté est encore loin d'être surmontée. Il est donc plus impératif que jamais de coordonner ces politiques.

Il se pourrait bien toutefois qu'il n'existe pas de « formule magique » pour y parvenir. Politique de la concurrence et politique à l'égard des consommateurs diffèreront toujours, de par la diversité des instruments sur lesquels elles reposent, les principaux aspects des missions à accomplir pour les mettre en œuvre et les différents échelons de l'État impliqués. De même que les usages passés, c'est un facteur qui peut limiter l'ampleur de l'intégration institutionnelle**.** Par conséquent, il importe surtout que les autorités de la concurrence soient dotées des compétences nécessaires pour assurer que la cause qu'elles défendent est prise en compte dans les nombreuses dimensions de la politique à l'égard des consommateurs et que de leur côté, les organismes de protection des consommateurs ont aussi des compétences en matière de politique de la concurrence. Il faudrait également qu'au niveau central de l'État, on accorde une attention constante à l'indispensable cohérence de ces deux instruments de l'action publique. L'examen régulier de certains instruments – comme les agréments professionnels et les restrictions à la publicité – destiné à vérifier qu'ils ne portent pas atteinte à l'efficacité de la concurrence pourrait jouer un rôle utile et important à cet égard.

[39] Sylvan, L. 2004, « Activating competition: The consumer – competition interface », *Competition & Consumer Law Journal*, pp. 191-206.

ARGENTINA

1. General aspects of the Competition and Consumer Policies.

The first aspect to explain how competition and consumer policies are developed in Argentina is normative. There exist both Law Nº 25156 of Competition Defence and Law Nº 24240 of Consumer Defence.

The Competition Defence Law protects consumers indirectly, sanctioning anticompetitive practices and assessing changes in markets structures due to economic mergers. In this way, the "general economic interest" is protected, which in case of final assets, it is identified with consumer interest.

In this way, it is possible to highlight that markets with high competition levels and in which anticompetitive practices are prosecuted will create benefits for consumers related to lower prices and higher number of products offered regarding situations where competition is restricted.

The Consumer Defence Law, in general terms, is complementary to the Competition Defence Law, to the extent that the consumer protection is direct and it answers individual complaints that not necessarily arise from the lack of competition within the market.

Following, examples of prosecutable practices under enforcement of this law: non – compliance of contracts, defectuous warranties, ineffective technical services and repairments, omission of budget presentation, requirement related to information provision in credit card operations, among many others. In these and other cases, it is considered that the consumers are the weaker party in the consumption relation due to their lack of enough knowledge about the product they are buying and the conditions of the contract with the provider, either there is or not a written contract.

To sum up, it can be affirmed that competition defence and consumer defence are complementary policies to the extent that broader competition favours consumers in terms of prices they pay, access to market of higher demand and a better quality and variation of products. On its behalf, consumer policy has a tendency to assure that, whatever be the level of competition in the market, the consumers will not be prejudiced by their weak position in the consumption relation with the supplier.

We can take as an example the case of the mobile phone market in Argentina, which structure was analysed within the framework of economic mergers where, during the last years, an important increase in the number of consumers that could reach these services and a level of competition quite intense in aspects such as the cost of the telephones, sales through promotion, publicity investment, etc. despite the number of providers was not large. At the same time, mobile telephone services are within the main markets receiving complaints through arbitration -595 during 2007- and complaints. It is also within the more sanctioned markets for non compliance with the Law for Defence of Consumers in Argentina.

Another important distinction that can be arose between competition and consumer laws is that the first results relevant in any market under consideration, while the second is more relevant in those markets where the knowledge the consumers has about the product they are about to acquire is important to avoid a prejudice.

The latter is more probable to happen in certain markets such as financial markets, where the consumers are asked to sign contracts with predisposed clauses which scope they are not aware of.

In the same sense, consumers are more vulnerable in situations of pressure through aggressive publicity or with insufficient or distorted information, so they are not in the proper conditions for a reasonable choice or simply, due to the proper complexity of the good, they do not have enough information to assess the quality or possible defects.

Sanction statistics in Argentina show that it is precisely in those types of markets where the consumer policy is more necessary. In this way, in the case of complaints through consumption arbitrage, historically, the markets with more complaints have been: mobile phone companies (16.74%), banks (12.13%), timeshare (11.45%), appliances (8.78%) and automobile (7.83%).

As regards this fact, it can be mentioned that within the period 2006/2007, in the Secretariat of Domestic Commerce, there have been 400 sanctions fines for infraction of Law Nº 24240 of Consumer Defence, for a total amount of AR$13,438,100, i.e. €2,951,955, and a sanction for summons.

2. Institutional aspects in the enforcement of competition and consumer policies.

This regards the institutional structure under which the competition and consumer policies are enforced. In the first case, the law provides the creation of an independent tribunal, whose members would be elected through competitive examination (one president and six commissioners) but, up to now, it has not been constituted, so the National Commission for Defence of Competition (CNDC) is still working. Its President and commissioners write opinions that suggest the decision that the Secretary of Domestic Commerce should take (for example, to approve an economic merger or to sanction a company).

In the case of consumer policy, the enforcement authority is also the Secretariat of Domestic Commerce, which delegates in the National Director of Domestic Commerce the final decision about possible infractions to the Law and the eventual enforcement of a sanction. In the same sense, the Directions of Domestic Commerce or equivalent agencies in the provinces of Argentina are also enforcement authorities and can deal with any of the complaints presented.

It is also worth to mention that, from 1998, Argentina has its National System of Consumption Arbitrage, as a mechanism designed exclusively to solve conflicts originated by the final consumption of goods and services. Up to date, this System has received almost 20000 consumer's complaints.

From the point of view of the contents of the complaints for possible infractions to one or the other law, it can happens that a file opened in the area of competition defence is sent later to consumer defence, given that the complaint fits its law. It can also happen the other way around, that a complaint opened in the Consumer defence area, ultimately is a possible infraction to the competition law, so it is sent to the CNDC.

In the latter case, it is interesting to mention that, from the point of view of the enforcement of both laws, some of the complaints presented in the Directions of Commerce of the Provinces as infractions to the consumer law are actually actions that can be framed within the competition law, being finally sent to the area of consumer defence of the federal government and in last instance received by the CNDC. Here lays an important difference because the competition law does not have dispositions allowing delegation of reception and resolution of complaints to the provinces, so all the files opened in the country must be conducted by the CNDC.

3. Possible Conflicts between Competition and Consumer Policies.

About possible conflicts between competition and consumer policies, as in any other legislation for consumer protection, in our system, there are standards that, to ensure health or safety to consumers or to compensate eventual asymmetries of information between the provider and the consumer, can eventually create or increase the barrier of the entrance in certain markets or to restrict the competition in them.

As it probable happens with most of the legislations, Argentina has specific standards related to safety in consumption (food; chemical, agrochemical and pharmaceutical products, electronic devices, etc.). These standards, in some cases, could have implications in the competition processes of the markets involved, especially if its effective enforcement implies some kind of barrier for the entrance of new competitors (for example, if the entrance requirements to be approved by the public authority go beyond reasonable parameters). However, we also have to bear in mind that these standards ensure other legal items, not less important than competition, as consumer health and safety.

Besides the mentioned standards, the proper legislation about consumption can present cases of trade off between competition in the market and prevention in other deficiencies of it.

This could be the case when there is, legally, a general assurance for certain kind of goods due to deficiencies or vices. If consumers could not internalise the difference between the technical services of each product at the moment of the purchase, it is possible that entrance barrier could be generated in some markets of "technical services and of “spare parts and replacements”.

In fact, the CNDC has had several complaints of abuse of dominant position on behalf of agents or franchisers or the same manufacturers that deny selling original spare parts to other providers of technical services or of repairs that do not belong to their own net of official agents. There are cases in the industries of elevators, automobiles and others.

We estimate that this type of legislation can also restrict in some way the competition in the import market of this type of products, to the extent that this kind of legislation promotes exclusive franchising and representations.

However, we understand that the existence of a legislation on guaranties, that protects consumers against hidden vices in the differed consumer products, in general justifies the restriction over competition that the standard fixes, besides, in many of these cases the mentioned restriction is compensated by a strong competition “inter-brand” in the involved markets.

On the other hand, there is in Argentina a legislation that regulates market activity developed in competition conditions. This can be the case of Law Nº 25065, which regulates the operation of credit cards in aspects that, generically, the Consumer Defence Law considers as the information that must be provided to the client in the monthly report of operations or in the conditions of the contract. It also regulates other aspects related to the system costs, such as fixation of limits to the financing interests of credit cards and “higher” the established limits to the fee that the issuing bank charges to the different shops involved, avoiding their dispersion.

4. Price fixation policies in certain markets

From a perspective exceeding the scope of the consumer protection legislation, we can mention those governmental interventions in certain markets of massive consumption items or their devices, many of which can be internationally tradable (corn, bread, milk, petroleum), where the government has promoted price stability agreements or has fixed export taxes, in a way that, for those products, prices paid in the domestic market are lower than the prices in international markets.

The pursued aim with these policies is to avoid the exclusion of an important range of domestic consumers from the complete or lower demand of these goods. Beyond pursued aims, the truth is that price fixation of these products is conducted with mechanisms different from the competition ones.

These policies have also been verified in Argentina for some services, which are offered partially in private and which consumption includes relatively important population sectors. The most significant examples are education and medical services.

AUSTRALIA

Australia's competition and consumer policy framework is designed to promote the wellbeing of the Australian people by fostering and developing competitive, efficient, well-informed and safe markets. Australia considers competition and consumer policy in an integrated way, reflecting the mutually reinforcing role of competition and consumer policies in driving market efficiency and achieving wider economic benefits.

Australia's competition policy approach serves to foster and promote well-functioning markets, both through structural reform and, more specifically, dealing with anti-competitive practices. Effective competition lets consumers benefit from lower prices and greater choice. Consumer policy empowers consumers to operate more effectively in markets and addresses conduct designed to exploit or harm consumers. Appropriately applied, it enhances competition by enabling consumers to drive competition through the exercise of effective choice.

In respect of competition and consumer policy, Australia's preference is for generic, economy-wide regulation. However, there are a small number of market sectors where specific regulation applies, to a greater or lesser degree.

1. Competition and consumer policy in Australia's federal system

The Australian Government does not have exclusive responsibility for competition and consumer issues under Australia's constitutional arrangements and in some respects powers are shared with the States and Territories. Almost all competition regulation is national, structural reform is a shared responsibility and significant areas of consumer regulation are the responsibility of the States and Territories.

Australia's national competition and consumer policy framework has four basic elements:

- the policy framework – the *Trade Practices Act 1974* (TPA) and associated regulations;
- policy development – the Minster for Competition Policy and Consumer Affairs and the Department of the Treasury (Treasury);
- enforcement – the Australian Competition and Consumer Commission (ACCC); and
- redress – through federal courts, principally the Federal Court of Australia.

Responsibility for structural reform, designed to create and foster well-functioning markets, is shared by the Australian Government and the States and Territories. Policy development and implementation is led by the Council of Australian Governments (CoAG), which is made up of the Prime Minister, State Premiers and Territory Chief Ministers.

Significant aspects of consumer regulation and enforcement are also the responsibility of the individual States and Territories, which have their own consumer policy and enforcement bodies. State consumer laws are enforced through state courts and tribunals. There is increasing national coordination in

many areas through the Ministerial Council on Consumer Affairs. The States and Territories are generally responsible for the regulation of conduct affecting consumers by traders operating within State and Territory borders, and their functions typically include trades and professional regulation and licensing, product standards, product safety and fair trading.

1.1 Policy Framework: Trade Practices Act 1974

The TPA regulates competition and consumer issues at the national level. The nature of Australia's integrated approach to competition and consumer policy is reflected in section 2 of the TPA, which says "*the object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and the provision of consumer protection.*" Central to the function of the TPA is its concern with the welfare of Australians, and it serves to promote economic efficiency by fostering and protecting competitive markets.

The TPA covers three broad areas:

- **competition regulation:** the TPA prohibits anti-competitive conduct, which includes the formation of cartels and other anti-competitive agreements, mergers and acquisitions that substantially lessen competition and the misuse of market power. The competition provisions of the TPA apply to all businesses in Australia, including financial services providers. The TPA also provides that the ACCC may monitor prices in a market.

- **economic regulation of infrastructure:** the TPA sets out a regime for the regulation of access to economic infrastructure of national significance and also specific access regulation for telecommunications networks; and

- **consumer regulation:** the TPA prohibits businesses from engaging in misleading or deceptive conduct and from unconscionably taking advantage of consumers, both of which can provide traders with an unfair advantage. They also set out a range of basic protections for consumers in their dealings with businesses and cover product safety. They apply to any business that trades across domestic and/or international borders, except financial services providers.

- [1]

1.2 Policy development: Minister for Competition Policy and Consumer Affairs and Treasury

The Minister for Competition Policy and Consumer Affairs is responsible for national policy and is supported by the Treasury. The Minister operates within the Treasurer's portfolio. Treasury's policy making capability is split into three streams: competition policy, economic regulation of infrastructure and consumer policy.

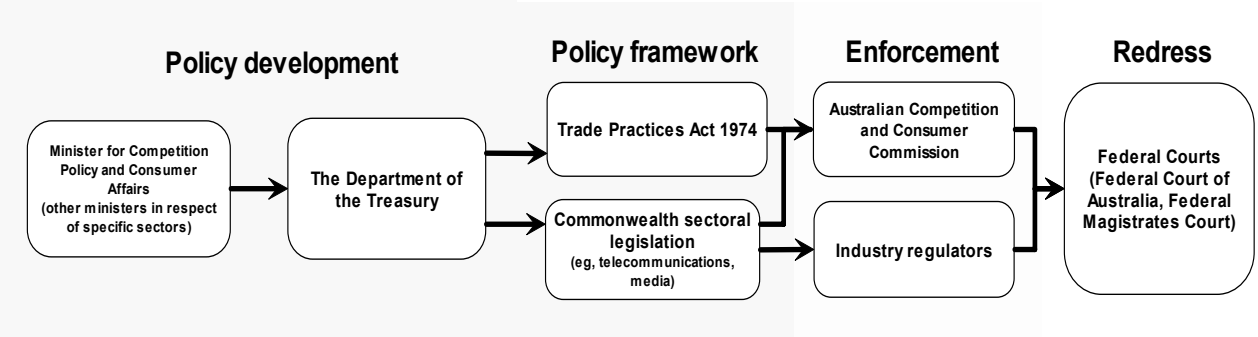
1.1.1 Competition policy

Australia's general competition policy aims to ensure and (where necessary) develop well-functioning markets. This is achieved through targeting anti-competitive practices and structural reform.

The TPA prohibits cartel conduct, agreements that substantially lessen competition, secondary boycotts, misuse of substantial market power, mergers or acquisitions that may substantially lessen competition and resale price maintenance. In 2003 the Australian Government conducted a review of the

[1] The *Australian Securities and Investments Commission Act 2001* regulates financial services nationally.

effectiveness of the anti-competitive conduct provisions of the TPA, chaired by Sir Daryl Dawson, a retired High Court judge (the Dawson Review). The Dawson Review concluded that the TPA was largely effective and worked well but that improvements were needed in some areas, including, improving the administration and accountability of the ACCC, improving the ACCC's regulatory processes, specifically through a new merger clearance process and changes to the collective bargaining provisions, and also recommending increases to penalties and the introduction of criminal sanctions for cartel conduct.



In response to the review's recommendations, and widespread publicity about recent cartel cases, the Australian Government proposes to criminalise cartel conduct by allowing for the gaoling of persons who make, or give effect to, agreements between competitors that aim to fix prices, restrict output, divide markets or rig bids. The Australian Government intends put this legislation before the Australian Parliament in 2008 and is presently consulting on it.

Australia embarked on extensive structural reform from the mid-1990s with the implementation of the National Competition Policy (NCP) by the Australian Government and the States and Territories. NCP was focussed on reforming Australia's institutional and regulatory frameworks to create new markets and introduce competition into existing markets. NCP included the extension of competition regulation to cover all businesses, the disaggregation of previously vertically-integrated monopoly service sectors, such as publicly owned utilities, to create competitive markets, the introduction of competitive neutrality between public and private sector businesses and the introduction of a regime for access to essential facilities (see below).

A second wave of structural reform commenced in 2005, with the introduction of the National Reform Agenda (NRA) under the auspices of CoAG. The NRA covered reforms in the areas of human capital, competition and regulatory reform, aimed at further raising living standards and improving services by lifting national productivity and workforce participation. A key element of the NRA is the introduction of regulatory best practice by all Australian Governments, including the requirement to consider at an early stage the impact of proposed reforms on markets.

1.1.2 Economic regulation of infrastructure

The TPA provides for a national access regime for infrastructure (under Part IIIA TPA). Access regulation in Australia seeks to promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in markets and overall economic efficiency.

Part IIIA of the TPA provides for the regulation of third-party access to nationally significant infrastructure on reasonable terms and conditions where commercial negotiations with the infrastructure owner have failed. In such instances, a party wanting access to a particular infrastructure service may apply to have the service 'declared' to be an essential service. In addition, the regime provides a

framework and guiding principles to encourage a consistent approach to access regulation in each industry. The regime therefore provides for the designated Australian Government Minister to 'certify' a state or territory access regime as an 'effective' access regime. Where an effective access regime is found to exist, declaration is not available and an access seeker must use the effective regime.

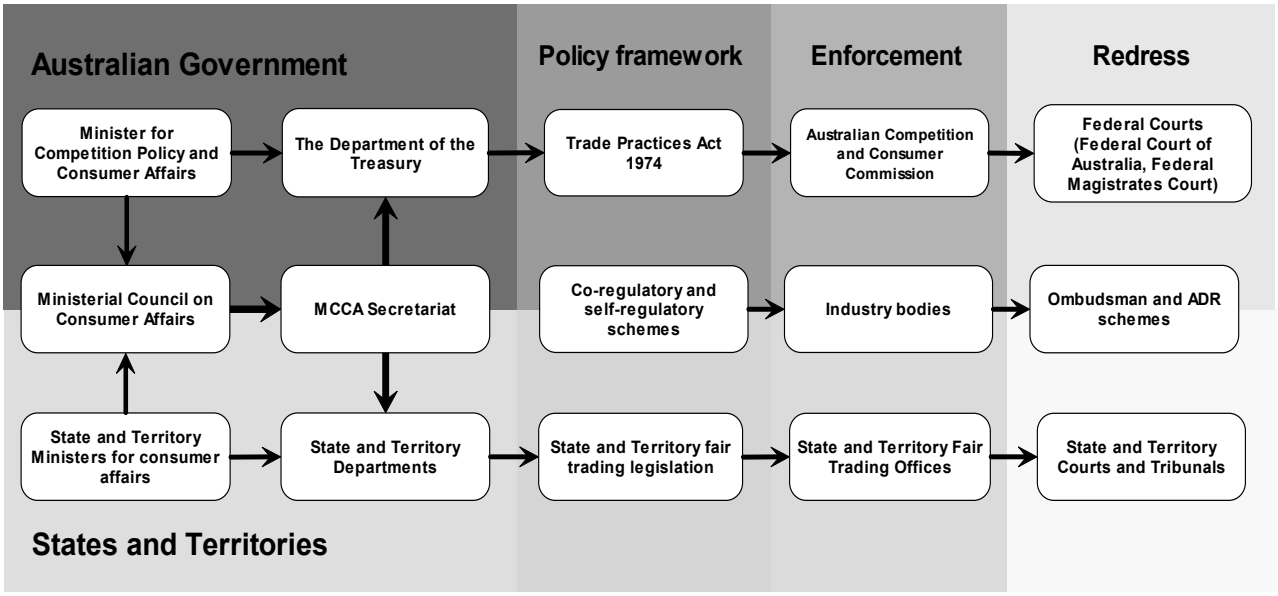
The National Competition Council (NCC) is an independent statutory authority established under Part IIIA of the TPA. The NCC's role involves making recommendations to the relevant Minister on whether essential infrastructure services should be declared and on whether certain state and territory access regimes should be certified. It reports annually on the national access regime, including on recent legislative developments and the operation and effectiveness of the regime (copies of NCC reports can be obtained from its website, www.ncc.gov.au).

1.1.3 Consumer Policy

Australia regards consumer policy and competition policy as part of an integrated approach to regulating markets and ensuring consumer well-being. Australian consumer policy is focussed on demand-side issues, enabling consumers to make effective choices and providing protection, where required, from misleading, exploitative or harmful conduct by traders. It serves to activate competition, leading to wider economic benefits, such as increased productivity and growth.

Consumer laws provide a range of approaches for action against businesses that mislead, exploit or harm consumers, including private rights of action, providing specific guarantees of fitness for purpose and quality, regulating labelling and contract terms, prohibiting specific forms of conduct and product safety regulation.

Australian consumer policy is developed, implemented and enforced at the national and state levels. Generally speaking, national laws apply to businesses operating across state borders and internationally, and state laws apply within their jurisdiction. The Australian Government works closely with the States and Territories to integrate and harmonise policy development and consumer law enforcement. Australia's governments are also active in consumer information and education campaigns and encourage the use, where possible, of industry self-regulation to address issues in the market.



1.3 Enforcement: Australian Competition and Consumer Commission

Australia's competition and consumer policy arrangements separate policy and enforcement functions. While national policy responsibility rests with the Minister and Treasury, enforcement is the responsibility of the ACCC (www.accc.gov.au). The ACCC's role goes well beyond simply taking action for breaches of the TPA, but seeks to "*enhance the welfare of Australians by promoting vigorous, lawful competition and informed markets, encouraging fair trading and protecting consumers and regulating national infrastructure services and other markets where there is limited competition*." The States and Territories also have their own enforcement bodies, which enforce State and Territory consumer laws.[2] The ACCC and the State and Territory enforcement bodies work cooperatively through formal and informal links.

The ACCC is an independent statutory commission, made up of the chairman and a board of commissioners, which is responsible to Parliament, with supporting staff. It was set up in 1995 to take over the functions of the Trade Practices Commission and the Prices Surveillance Authority, so as to achieve better coordination of competition and consumer law enforcement. Like the Treasury in relation to policy issues, the ACCC provides advice to ministers on law enforcement issues.

Enforcing both competition and consumer laws gives the ACCC synergies and efficiencies in carrying out its functions. For example, understanding the competitive dynamics of a market can assist the ACCC to identify and assess likely consumer detriment. The ACCC has a range of enforcement powers at its disposal, so as to use the most effective mix of litigation, enforceable undertakings, administrative settlements, persuasion and education to achieve compliance with the TPA.

The ACCC recognises that the vast majority of businesses wish to comply with the law, and widely utilises education and awareness tools to inform businesses and consumers about their rights and obligations, with the aim to reducing potential breaches. The ACCC takes a targeted approach to enforcement, including targeting conduct that has a national or international focus or where the implications of the case can have a broad educational or deterrent effect. This is to ensure that their resources are utilised effectively in the delivery of well functioning markets.

In addition to the ACCC each state has its own consumer regulatory body, with broadly similar enforcement powers within their jurisdictions. There are also a number of markets regulated on a sectoral basis. These include:

- financial services, where the Australian Securities and Investments Commission (www.asic.gov.au) works with the ACCC to enforce consumer regulation;

- communications and the media, where the Australian Communications and Media Authority (www.acma.gov.au) has primary responsibility for the enforcement of competition and consumer laws , but also works with the ACCC; and

- energy, where the Australian Energy Regulator (www.aer.gov.au) works closely with the ACCC to enforce laws regulating national energy networks and whose role will expand to cover consumer regulation in the near future.

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[2] State and Territory enforcement bodies include: New South Wales Office of Fair Trading, Consumer Affairs Victoria, Queensland Office of Fair Trading, Western Australian Department of Consumer and Employment Protection, South Australian Office of Consumer and Business Affairs, Tasmanian Office of Consumer Affairs and Fair Trading, Australian Capital Territory Office of Fair Trading and the Northern Territory Department of Justice.

The role of educating and informing consumers rests primarily with the ACCC and other national and State and Territory government agencies, with industry support. The ACCC has a highly visible and effective role in educating consumers and businesses on consumer and competition related matters. Australian markets have responded to market failures, particularly in the area of information provision, and have created a number of tools that can aid consumers in making decisions in the market, such as intermediaries and price comparators.

2. Redress

Actions for breaches of national competition and consumer laws, brought by either the ACCC or by private litigants, are conducted in the Federal Court of Australia in the first instance. Reviews of decisions made under Australia's national infrastructure access regime are conducted by the Australian Competition Tribunal, from which matters of law may be appealed to the Federal Court. In both cases, appeals are then made to the Full Court of the Federal Court and then, subject to leave to appeal being granted, the High Court of Australia.

State and Territory consumer laws are enforced through State and Territory courts and administrative tribunals. Appeals proceed through the state court systems and then, ultimately, to the High Court of Australia, subject to leave being granted. The ultimate appellate role of the High Court gives some coherence to the interpretation of similar national, State and Territory laws.

There are also many industry based schemes for informal redress and dispute resolution between consumers and traders. These are generally industry-based and initiated or, in some cases, co-regulatory, with government sponsorship and approval or subject to mandatory application.

3. Future reform priorities

The regulation of Australian markets face continual challenges to address the ongoing development of competition, greater product choice and complexity, changes in spending patterns, technological change, changes in essential services provision and greater consumer diversity and expectations.

In addition to the extensive reform of Australia's competition laws in recent years, Australia's consumer policy framework is currently undergoing its first comprehensive review in over 20 years, which is being conducted by the Productivity Commission (the Commission) (see http://www.pc.gov.au/inquiry/consumer).

The Commission has been asked to report on improvements to the policy framework to assist and empower consumers, the harmonisation and coordination of consumer policy across jurisdictions, rationalisation of consumer protection laws, more effective use of self-regulatory, co-regulatory and consumer education and information approaches and principles-based regulation and changes to the consumer policy framework to facilitate greater economic integration between Australia and New Zealand.

The Commission's final report is due at the end of April 2008. However, after extensive public consultation, the Commission has made a number of draft recommendations aimed at improving the functioning of Australia's consumer policy framework. These include introducing clear objectives for consumer regulation, better integrating national and state approaches to policy and consumer law enforcement, including reducing regulatory complexity and cost, introducing a national generic consumer law, introducing national "unfair contract terms" laws and improving the quality of information disclosure.

4. Specific questions for written contributions

1. How does consumer policy interact with competition policy in your country, if at all? Can you give examples where they have conflicted? Where have they been complementary?

Answered in the main text.

2. What do you feel are the benefits and drawbacks to your own country's choice of "dual-function" or "separate agencies" for handling competition and consumer policy?

Answered in the main text.

3. Has your country required that "no frills" versions of complicated products be offered, to help vulnerable consumers? If so, who provided the product and how was its supply enforced? What was the effect on competition, if any?

No.

4. Can you identify areas where a better convergence of both competition and consumer policies globally would be beneficial?

Given Australia's preference for generic, economy-wide competition and consumer regulation, it considers that coupling, rather than the convergence of, competition and consumer policies would be beneficial for the development of well-functioning supranational and international markets.

5. Can you provide examples of sectors or products where an increased international cooperation between competition authorities and consumers representatives could render the markets more competitive while ensuring an adequate protection of consumers around the globe?

Given Australia's preference for generic, economy-wide competition and consumer regulation, it considers that increased international cooperation between competition authorities and consumers representatives could render markets more competitive in relation to all sectors and products.

CANADA

1. Competition and Consumer Policy Landscape in Canada

The Canadian institutional landscape responsible for competition and consumer issues reflects the uniqueness of the Canadian political system. Consumer protection and policy is, in practice, a shared responsibility between the Canadian federal and provincial governments as the Canadian Constitution does not specifically assign consumer affairs to either level of government.

Under their constitutional power to regulate property and civil rights, Canadian provincial and territorial governments administer and enforce statutes that create a wide variety of rights and remedies for consumers. Examples of their work include the legislation of contractual matters associated with the terms and conditions of the sale of goods and services (such as guarantees and licensing of vendors) and certain sectoral issues (such as building codes and electrical safety). Most provinces also have statutes regarding unfair business practices and misleading marketing[1].

Complementing provincial consumer protection statutes, the Canadian federal government has responsibility over consumer issues that are a consequence of its various jurisdictional powers, including broad marketplace rules such as peace, order and good government; trade and commerce; criminal law; currency; banking; and weights and measures[2]. In practice, a variety of federal government departments are therefore responsible for consumer protection issues that are a consequence of their more general powers to regulate certain industries (such as transportation, telecommunications and banking), and for a large number of health and safety issues (such as food, general consumer products, new vehicles and inter-provincial transportation services).

Under the *Department of Industry Act*, the Minister of Industry has a role in promoting and protecting consumer interest throughout Canada. The Office of Consumer Affairs (OCA) responds to these responsibilities by helping to build trust in the marketplace so that consumers can both protect themselves and be able to confidently and knowledgeably drive demand for innovative products and services at competitive prices. It prepares various tools that consumers can use to make informed purchasing decisions; expands marketplace consumer protection by encouraging the development of voluntary codes and standards; helps consumer organisations to build their capacity so that they are better able to contribute to the development of public policy; and facilitates the harmonisation of consumer protection legislation and regulations between provinces and territories. In this regard, the OCA co-chairs the Consumer Measures Committee (CMC)[3], which is a forum providing for open dialogue between the federal, provincial and territorial governments in the area of consumer protection.

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1 Please see the Industry Canada website, OCA – Canada's Consumer Legislation at: http://www.ic.gc.ca/epic/site/oca-bc.nsf/en/ca02240e.html.

2 Jenkin, M. "Federal-Provincial Cooperation: The Role of Ministers and Officials in Consumer Protection Policy", presentation at Mount Allison University, February 8, 2006.

3 Further information on the CMC can be found at the CMC Web site at: http://cmcweb.ca/epic/site/cmc-cmc.nsf/en/home.

The Competition Bureau (Bureau), on the other hand, is an independent law enforcement agency responsible for the administration and enforcement of the *Competition Act* and the three standard-based acts, which include: the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act.*

The *Competition Act's* purpose clause states that the Act serves:

> *...to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognising the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.*

The reference to consumers in the purpose clause of the *Competition Act* reflects Parliament's appreciation that a properly functioning marketplace requires not only enforcement against market power abuses, but also transparency in information provided to consumers to promote well informed purchasing decisions. Hence, consumer and competition policy are mutually reinforcing and the Bureau operates with this premise while carrying out its law enforcement duties. This portion of the Bureau's mandate is administered by the Fair Business Practices Branch (FBPB).

The Bureau therefore focuses not only on traditional antitrust issues such as cartels and abuse of dominance and their downstream effects on prices (which ultimately affect consumers) but also investigates false or misleading representations and deceptive marketing practices to ensure that consumers are not confronted with deceptive price and product information when making purchasing choices. The Bureau is further responsible for the accuracy of information on packaging and labels and performance claims regarding the efficacy of product and services.

As such, while the Bureau aims to protect the integrity of information in the marketplace to ensure both a level playing field for competitors and adequate information for consumers, the OCA strives to offer consumers various tools to enable them to make informed purchasing decisions.

Lastly, there are additional networks in Canada that deal with consumer issues, including organisations such as the Better Business Bureau and the Canadian Anti-Fraud Call Centre (previously known as Phone Busters)[4]. There are also several consumer groups in Canada, including the Consumers Council of Canada, the Consumers' Association of Canada, the Public Interest Advocacy Centre, Option *consommateurs* and *l'Union des consommateurs*[5]. However, the Canadian consumer movement is smaller and less well resourced relative to many other OECD countries.

2. How Competition and Consumer Policy Interact in Canada

In Canada, over time, there have been varying degrees of interaction among the agencies that have jurisdiction over competition and consumer protection issues. Most notably, coordination has occurred in the area of public education, where it is recognised that increasing the public's awareness of competition and consumer policy helps to create consumers who are demanding, knowledgeable, and better equipped to make informed purchasing decisions. As a result, various partnerships and initiatives have been

4 Please see the Canadian Better Business Bureau Web site at: http://www.ccbbb.ca/ and the Canadian Anti-Fraud Call Centre Web site at: http://www.antifraudcentre.ca.

5 For links to Canadian consumer association Web sites, please visit the Consumers' Association of Canada Web site at: http://www.consumer.ca/1655.

developed. For example, the Bureau chairs the Fraud Prevention Forum, which undertakes an extensive campaign every year to educate the public about how to recognise, report and stop fraud; while the OCA, through the CMC, serves to improve the marketplace for Canadian consumers by working to harmonise laws, regulations and practices and taking actions that raise public awareness[6].

Within the Bureau itself, it is also important to examine the links between competition law enforcement and consumer policy. While the Bureau is not a consumer protection agency *per se*, a secondary effect of its enforcement efforts – more particularly surrounding truth in advertising – is to benefit consumers. For example, when the Bureau assesses marketplace issues dealing with false and misleading advertising, it does so by conducting a rigorous analysis of the extent and gravity of deceptive conduct to determine priorities and only undertakes to intervene where competition or consumers experience significant harm. The Bureau considers the more general impression created by representations made to the public and assesses whether or not the representations were materially false or misleading, therefore leading consumers to purchase a certain product or service. In essence, competition could be negatively affected if a representation which is deemed false or misleading leads a consumer to buy a particular product instead of buying from a competitor who is playing by the rules and being transparent. Misleading advertising and deceptive marketing practices victimise consumers but also harm competitors who suffer losses as consumers increase their demand for the misleading product. Absent the consumer deception, the advertiser would have been required to compete vigorously, spurring innovation, greater efficiencies and more competitive prices.

In recent years, the FBPB has been aggressively investigating those involved in mass marketing fraud (MMF) as it is an economic crime and one that victimises consumers, businesses, governments, NGOs and charities. MMF is defined as fraud or deception committed over mass communications using the telephone, mail or the Internet. Of particular concern to the Bureau is that vulnerable consumers and businesses are specifically targeted by MMF, negatively impacting commerce and the proper functioning of the economy.

3. Benefits and Drawbacks to the Competition and Consumer Policy Landscape in Canada

The Bureau's mandate to deal with both traditional antitrust issues as well as enabling informed consumer choice allows it to have a comprehensive approach to maintaining an effective competition regime, through advocacy and compliance initiatives, public education programs and enforcement actions. The Bureau is able to draw upon in-house expertise on both consumer and competition issues and there is a cross-pollination of knowledge between different Bureau branches. With the appropriate expertise, the Bureau is able to develop and conduct effective consumer education and outreach programs, which inform the public about its mandate and deliverables. Competition advocacy initiatives also serve to enhance business and consumer awareness of Bureau work and promote understanding and compliance. Finally, with respect to enforcement, the cross-pollination of expertise between Bureau branches has helped achieve desirable market and consumer outcomes when cases are pursued or when fraudulent behaviour in the marketplace is challenged.

Although there are clear benefits to the Bureau's agency model, generally, the layering and fragmentation of consumer protection responsibility in Canada can be problematic as there may be some confusion among consumers as to which level of government and which agency has jurisdiction over consumer protection issues. Further, jurisdictions have different departmental mandates and structures,

6 Industry Canada - Office of Consumer Affairs, "Work Plan 2007-2009", p.3.

perspectives on issue prioritisation, and resource levels. When combined, these challenges can result in long time frames required to resolve various consumer issues[7].

To confront the challenging competition and consumer policy landscape in Canada, there is a need for coordination between all levels of government and agencies involved in consumer protection issues. In the case of provincial responsibilities, harmonisation is an important issue given the level of inter-provincial commerce. At the federal level, co-operation on education and outreach will continue to be a priority given the number of agencies with responsibility for consumer protection. To facilitate coordination between the provincial and territorial governments and the federal government, the Bureau will continue to develop key partnerships such as the Toronto Strategic Partnership[8].

As well, the CMC will undoubtedly remain an important partner of the OCA in undertaking consumer policy development, conducting analysis, and supporting and harmonising appropriate legislation and regulatory initiatives.

Further, the Bureau also has a role to play in ensuring that regulations are pro-competitive. Specifically, section 125 (1) of the *Competition Act* gives the Commissioner of Competition the right to intervene where issues developed by another federal board, commission or tribunal affect competition. In the case of deregulation or re-regulation, the Bureau has the ability to protect consumers by promoting healthy competition.

4. Sectors or Products where Increased International Cooperation between Competition Authorities and Consumer Representatives would be Beneficial

Recent technological advances and rapid economic globalisation have provided businesses and consumers with larger markets and greater choice. However, these conditions have enhanced the ability for criminals to use borders to their advantage and deception is now crossing international boundaries. Investigations are becoming increasingly complex, demonstrating a need for fast and effective cooperation among enforcement agencies. A focus for increased international cooperation between competition authorities and consumer representatives exists in areas where deceptive cross-border scams are becoming increasingly prevalent, such as in the area of e-commerce. In this regard, the Bureau, along with its international counterparts, have recently participated in joint Internet sweeps to expose Web sites with deceptive health claims. Cooperation among agencies on issues such as health claims could provide an international response to cross-boundary anti-competitive and misleading activity. Such cooperation should be enhanced as it serves to create a predictable environment for businesses and consumers entering into cross-border activity and protects vulnerable consumers and businesses from deceptive conduct.

5. Areas where the International Convergence of Competition and Consumer Policy could be enhanced

International convergence could be enhanced in the area of competition and consumer advocacy. More particularly, a dialogue should be commenced to enhance the convergence of education, outreach and, in particular, enforcement. All three tools are necessary to create a level playing field for global

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7 Jenkin, M. "Federal-Provincial Cooperation: The Role of Ministers and Officials in Consumer Protection Policy", presentation at Mount Allison University, February 8, 2006.

8 Toronto Strategic Partnership Members include: the Competition Bureau, the Ontario Provincial Police, the Toronto Police Service, York Regional Police, the RCMP, Ontario's Ministry of Government Services, the U.S. Federal Trade Commission, the United States Postal Inspection Service and the UK's Office of Fair Trading

competitors and in staying ahead of the fraudsters who bilk consumers and businesses to the tune of millions of dollars by using borders to their advantage.

Greater similarity in standard tests for determining competitive effects and penalties such as extradition would also promote greater compliance among businesses operating trans-nationally and would prevent perpetrators from hiding behind national borders. Greater convergence in the area of e-commerce is also suggested given the growing prevalence of this type of borderless commerce.

In conjunction with the OECD *Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders*, the Committee on Consumer Policy could begin to look at whether the EU Enforcement Cooperation Regulation model could be extended beyond Europe to allow enforcers around the world to take on cross-border scams. It would also be useful to build greater consensus on appropriate consumer protection principles more broadly, so that consumers may know, no matter what the jurisdiction involved, what to expect in terms of protection.

CHILE

1. Introduction

In Chile there is increasing awareness on the complementarity between Competition and Consumer Protection policies and authorities. The notion that competitive markets are the best way to achieve consumer welfare impinges political discourses and policy proposals in the entire political spectrum, and the perception of poor competitive conditions in a particular market rapidly triggers actions and the mobilisation of consumer associations and representatives, as well as both Competition and Consumer Protection authorities. But this is a prerequisite, since on the other hand, there are several market failures which go beyond market power or, more practically, beyond the usual reach of competition authorities. Those market failures, such as information asymmetries, transaction costs and externalities, may under some circumstances threat consumers' rights, which enforcement is guaranteed by the consumer protection policy.

There are also several areas in which Competition and Consumer Protection may interact. For instance, freedom of choice, adequateness of information, advertising regulation (misleading advertising does not only affect consumers, but also competition since it detours people's choice; comparative advertising can also affect competition) is essential for both areas at the same time. Moreover, the right working of the markets is paramount in both Competition and Consumer Protection policies, and for their common search of the public interest.

There are two separate agencies within the Chilean government one for each area: the FNE (Fiscalía Nacional Económica) enforcing Competition Law, and the SERNAC (Servicio Nacional del Consumidor) in charge of Consumer Protection.

2. Competition authorities

Besides the FNE, the Chilean System for the Defence of Free Competition currently operates on the basis of the decisions of a Competition Tribunal,[1] created in April 2004.

The system started in 1959, with the enactment of the Law Nr. 13.305. This miscellaneous statute, in one of its chapters, created the "Antimonopoly Commission", entitled with the powers to punish conducts and to control industrial and commercial activities. Later on, the FNE was created as a prosecution office, for the technical support of the mentioned Commission and for the investigations procedures aimed at the improving of the effectiveness of the law.

In 1973, the Decree Law Nr. 211 was enacted. This was the first regulating body exclusively related to competition law in Chile. Over the years, both the FNE and the Commissions (the decisions were divided into several commissions) developed and became well established. The Decree Law Nr. 211 was amended several times, but it was not until 2004 that the current decisional structure was set, with all of the decisions being concentrated into a single body, the already mentioned Competition Tribunal, which was

[1] Its Spanish acronym is TDLC, which stands for "Tribunal de Defensa de la Libre Competencia" (Free Competition Defence Tribunal).

placed as part of the judiciary system. According to this statute, the FNE deals with the promotion and defence of the free competition in the markets, by investigating, submitting complaints if necessary, providing with the asked reports to the Competition Tribunal and proposing the right amending or punishing measures for antitrust conducts.

3. Consumer protection authorities

On the other hand, the SERNAC finds its origins in the years of the Great Depression, when, in order to solve the crisis, the Government decided to participate more on the economy and created the "General Commission for Prices and Supplies." Its functions were to ensure provisions and reasonable prices. Later, its functions were limited to the monitoring and protection of consumers against commercial malpractices.

In year 1960, the DIRINCO was created. Its tasks were to monitor, receive complaints, investigate and sanction consumer rights violations. Its creation was consistent with the economical and political context existing at the time, in which the State had a large influence in the market.

Under the Dictatorship, its sanctioning and monitoring functions ceased due to the establishment of a liberal economical system.

The institution known as SERNAC was created by the Act Nr. 18.959, in 1990.

Nowadays, even though the SERNAC cannot sanction malpractices, it has several tools to enforce consumer rights taking actions in Courts under the 1997 Consumer Protection Act. Moreover, in the year 2004 this act was completed by act 19.995 by the sanction of spam, abusive clauses in adhesive contracts and the establishment of several rights.

4. Competition and Consumer protection interactions; a merger case example.

The FNE and the SERNAC are aware of the synergies that they can generate, and carry out in consequence several joint initiatives. In this written contribution we will give an example of the type of cooperation which can be carried out between both agencies, by presenting a briefing on the presentations made by both agencies before the Competition Tribunal, for the occasion of the consultation on the merger between Falabella and D&S, two of the mayor retail/credit companies in Chile.

On May 17th, 2007, the alliance between the retail firms Falabella and D&S was agreed as a share exchange, granting the first a 77% of the new society's property and a 23% to the latter. Thus, it was created a firm which joint sales amounted for approximately US$ 8,000,000,000 per year, which sets it in the second place among the Chilean firms which shares are traded in the local stock-market. At regional level, the merged retailer becomes the second largest of Latin America, only after Wal-Mart in Mexico.

In order to be executed, this merge needs the approval of the Chilean Competition Tribunal, which asked for the FNE's opinion. During the process, the SERNAC also submitted its own. The contents and purposes of both presentations are briefed next.[2]

[2] Although the final decision is not yet issued at the time of the elaboration of this document, we shall describe the participation and approaches of the competition and consumer protection agencies, and the coordination which took place between them, towards the submission of their opinions and independently from what could be the final unknown decision of the Tribunal.

4.1 The FNE presentation

The FNE focused its presentation on the definition of the relevant markets, its characteristics and the risks for free competition introduced by the eventual merge, concluding with the suggestion of remedies for decreasing such risks in case of an approval of the operation.

Consequently, the competition agency stated that the operation was tending to restrain competition in supermarkets and retail credit cards, also affecting the markets of shopping centres and electric home appliances. It was considered that the operation as presented would increase the risks of unilateral abuse and coordination in each of these relevant markets. Such risks were mainly revealed by the characteristics of each of the affected markets.

In the case of supermarkets, the FNE pointed out that there exist high market concentration and barriers to entry (sunk costs, scale economies, know-how, strategic behaviour, among others) which forces potential competitors to use specific vehicles of entry -the buying of little incumbents- rather than to enter as a new competitor. This view was supported by evidence on entry, changes in market shares over time, and importantly, econometric evidence on showing that higher concentration would lead to higher prices for consumers.

The FNE claimed that the main risk associated to the merger was that it would increase market power, with an upstream effect since the greater buying power would allow the payment of minor prices or the imposition of worse trading conditions to providers, affecting the investment and output levels. On the other hand, it would allow abuses against consumers through the increase of final prices of products or the decrease of quality, services or innovation.

In the market of retail-credit cards, the FNE asserted that the there are serious problems of transparency and exclusion that could be augmented with the merger and result in abuses against card holders.

In order to contend these risks, the FNE proposed, among other measures, the conditioning of the merger to the sale of Falabella's supermarkets to a third party likely to become a third strong competitor.

It also suggested the prohibition of several conducts, such as the unilateral refusal, without a justified reason, of third party credit cards or alternative means of payment to be used in the stores of the new society, or the marketing of certain products or services in more favourable terms because of the use of related credit cards. All of these measures aim to protect free competition as well as consumers.

4.2 The SERNAC presentation

The presentation of the Chilean Consumer Protection Agency, the SERNAC, was focused on the effects that the merge would have on consumers, should the operation is approved by the Tribunal. It presented on analysis of consumer's opinion on the retail and credit markets, while quoting evidence on the infringements on both market that are reported to them, and predicting an increase in the number of complaints if the scenario turns to be of even higher concentration. This section summarises the main ideas presented by this agency in this case.

The presentation began with an overview of *consumer opinions* on the retail market, based on surveys prepared by them on a regular basis and to internal statistics on the number and characteristics of complaints. They reflected that, for instance, (1) only a 25% of the surveyed people believed that companies were interested in solving their problems; (2) 1 out of 5 consumers claimed that Departmental Stores had made charges to their bills without their consent; (3) 90% of consumers argued that Department Stores' bills could not be understood; (4) 23% of the complaints submitted to the SERNAC were related to

Department Stores and supermarkets, and that in case the merger was approved, they estimated that the new Company would be the second most claimed company in Chile; (5) that the information given by retail companies about the credit conditions offered by their own cards is scarce and vague; (6) that there are also huge differences between the interests charged by different competitors. Furthermore, there are major differences between the interest rates charged by the same department stores to different customers.

SERNAC explained that the information given by Department Stores and Supermarkets about their credit conditions was extremely complicated. For instance, charges are divided into different items (i.e. interest rate, commissions, etc) and these items are expressed in different formats (for instance percentages, indexed units, etc).

Regarding advertising, there were cases in which companies claimed that people could buy without paying interests while they were charging high commissions for the use of their credit cards. Furthermore, even though they offered discounts if people bought with their store cards, the overall prices paid were much higher than the prices paid in cash, once interests and commissions were actually charged.

Moreover, SERNAC described several safety infringements and abusive clauses incurred by both companies in their contracts, which had been penalised by Chilean courts. For instance, the Chilean Supreme Court declared void a contract clause established by Falabella in which consumers were made responsible for transactions made with their stolen credit cards, and condemned the company to compensate the consumers with US$ 50.000.

SERNAC also claimed against several abusive clauses included in the credit card contracts of D&S. For instance, consumers were forced to contract three different types of insurance, and the company established that it could unilaterally change the conditions of the contract. Both clauses were ruled out by the Chilean Consumer Protection Act.

In SERNAC's opinion, all of these consumer claims and statistics could have an impact on Competition in this market. If there is not enough competition, if concentration continues to grow, and the number of rival players in the retail markets continues to fall, not only this will lead to higher prices as stated by the FNE, but also to consumer harm in a broader sense. Hence, all of the evidence added by the SERNAC constituted a sample and example of the symptoms and current problems faced by consumers in the retail and credit card markets, which are projected to grow if the operation goes on.

5. Conclusion

The presentations submitted by the FNE and the SERNAC in a merger case are good examples of how the existence of different agencies for Competition and Consumer Protection is not an obstacle for cooperation. By developing good communication practices, agencies can take advantage of their individual strengths and yet develop synergies.

This experience is also an example of the strong relationship between Competition and Consumer Protection. In a non competitive market, consumers are not only going to be affected by higher prices, but also because of potential harms in several of their rights that may be affected. As we suggested while introducing this document, violations of consumers' rights are many times indicative of behavioural or structural problems in competition.

APPENDIX: QUESTIONS AND ANSWERS

1. How does Consumer Policy interact with Competition Policy in your Country, if at all? Can you give examples where they have conflicted? Where have they been complementary?

There are separate agencies in Chile for Consumer Protection and Competition policy. However, both agencies are aware of the synergies that they can generate when they act together. For instance, they have both recently participated in the Competition Tribunal consultation on the merger operation between D&S and Falabella (the example given above) and in the legal actions established recently against a credit bureau.

2. What do you feel are the benefits and drawbacks to your own country's choice of "dual-function" or "separate agencies" for handling competition and consumer policy?

The main benefit is the institutional autonomy. In Chile, the choice of "separate agencies" allows each agency to define their own strategy, based on their own strengths and faculties. No decision is subordinated to the interest or priority of the other agency. Importantly, as each institution develops its own reputation, in which their autonomy plays a role, coordination proves to have an additional impact. The drawback is the natural difficulty and cost of coordination, and to identify areas of synergies on a regular basis.

3. Has your country required that "no frills" versions of complicated products be offered, to help vulnerable consumers? If so, who provided the product and how was the supply enforced? What was the effect in competition, if any?

There are minimum information requirements in products and services such as credit, safety instructions, among others. The Consumer Protection Act mandates that all information and advertising must be clear and understandable and has to be provided before the transaction

4. Can you identify areas where a better convergence of both competition and consumer policies globally would be beneficial?

Areas in which a better convergence between competition and consumer policies would be beneficial are: credit, retail, basic services (natural monopolies) and telecommunications.

5. Can you provide examples of sectors or products where an increased international cooperation between competition authorities and consumers representatives could render the markets more competitive while ensuring and adequate protection of consumers around the globe?

Although no decision has been made by the Chilean authorities on this matter, at this stage, it is considerable that in areas within the software industry, when highly concentrated (if not monopolistic), several consumer protection issues arise (for instance security breaches). The fact that this is an extremely technical product also raises several information issues linked to both competition and consumer protection matters.

Another instance of cooperation could be ICPEN (International Consumer Protection and Enforcement Network). This International Organisation carries out several actions against frauds on the internet that might be useful in order to maintain a healthy environment for Competition.

COSTA RICA

1. How does consumer policy interact with competition policy in your country, if at all? Can you give examples where they have conflicted? Where have they been complementary?

Political Constitution of Costa Rica, through Article 46, implements the protection of competition and consumers. This article is the constitutional base of "Law of Promotion of Competition and Effective Defence of Consumer", knows as Law N. 7472.

The purpose of Law N.7472 is to protect in an effective manner the rights of consumers and at the same time it promotes the process of competition and free concurrence. In order to carry out their objectives the Law created two different organisations: Commission for promotion of competition (COPROCOM) and National Consumer Commission (CNC).

COPROCOM is responsible for competition policy and CNC is liable for consumer policy. Each commission works independently and has specific tasks to achieve their goals; however, there are no conflicts between both fields and rather competition policy has a relation directly with consumers.

COPROCOM is the institution in charge of analysing all practices that obstruct or restrict the competition among economics agents; in such way competition promotes that enterprises compete with each other and increase quality, variety and decrease prices of products and services. In this sense COPROCOM gives the opportunity to consumers to choose between different alternatives for goods and services without monopolies or other restrictive trade practices.

In conclusion, Law N.7472 introducing a set of principles and standards which define and consolidate the legal framework that tries to complement both policies, competition and consumer.

2. What do you feel are the benefits and drawbacks to your own country's choice of "dual-function" or "separate agencies" for handling competition and consumer policy?

As it was previously mentioned, each commission takes their decisions in an autonomous way; this independence promotes a transparency and an efficient system that contribute to the success of goals of each agency.

In the same way, an independent budget guaranties that each commission has the freedom to distribute their recourses according to their priorities and necessities.

In addition, there is an excellent communication and coordination between COPROCOM and CNC, and this situation makes it easy to promote specific activities or polities when necessary.

On the other hand, occasionally people do not understand that commissions are different, although there is only one Law and sometimes people confuse COPROCOM and CNC.

3. Has your country required that "no frills" versions of complicated products be offered, to help vulnerable consumers? If so, who provided the product and how was its supply enforced? What was the effect on competition, if any?

In a general way, the company's products have to comply with different regulations or standards of quality. The objective is to protect the health, safety of people and legitimate interests of consumers. In this sense, in Costa Rica there are 277 technical regulations in the food area and approximately 155 for non-food products, as well as institutions such as the Ministry of Health, the Ministry of Economy, the CNC and others work towards ensuring that these policies get fulfilled.

CNC has done some researches about misleading advertising, specific promotions, cellular mobile telephony, and others. Also, CNC has been doing publications such as *"Regulation on Information and Publicity"*.

Finally, these kinds of regulations are out of the responsibilities of COPROCOM and our agency respects the opinion of institutions in charge of these topics.

4. Can you identify areas where a better convergence of both competition and consumer policies globally would be beneficial?

Law N.7472 provides a legal framework that integrates competition and consumer policies, and education is an ideal complement for this legislation.

A thorough knowledge of the subject provides to create competition and consumer culture. In this way a good education generates synergies in both fields and an adequate utilisation of resources of each agency.

As a final point, Law N.7472 establishes a set of principles and standards in consumer's benefit and Costa Rica's economy in general.

5. Can you provide examples of sectors or products where an increased international cooperation between competition authorities and consumers representatives could render the markets more competitive while ensuring an adequate protection of consumers around the globe?

Thanks to the international cooperation agreements that COPROCOM has managed in the last years with countries and institutions such as Spain, Chile, Mexico, Switzerland, the World Bank, Canada and the ICN, we have prepared a bill to amend the competition law in order to strengthen the agency's faculties and expand its field of application.

We have been working in specific markets, such as a Telecommunications, Rice, Gas and Bank; with the objective of eliminating entry barriers and unnecessary regulations that affect markets and consumers.

EL SALVADOR

1. The Consumer and Competition Policy: Its Origin in the Peace Accords

1.1 The efforts on consumer protection and competition matters

The Constitution in force since December 1983 raised to a constitutional level the State´s obligation to promote economic and social development, as well as the defence of consumers´ interests, forbidding monopolistic practices in order to insure entrepreneurial freedom and protect consumers´ interests.

Years later, with the peace negotiations of El Salvador which culminated with the subscription of the Chapultepec Accords in January 1992, various objectives were set forth, amongst others, to contribute to the strengthening of the market economy and the creation of the necessary conditions to improve the population´s level of life.

As far as the economic and social stabilisation are concerned, parallel to the implementation of the Peace Accords, the Government of El Salvador set forth a five year Economic and Social Development Plan, aiming, amongst others, at creating the necessary conditions to achieve a sustainable economic development and, in the medium term, implement a social program to establish a market economy and the reforms to the economic system.

In Chapter V, number 6 of the Peace Accords, two important aspects were included regarding the measures to alleviate the social costs of the structural adjustment programs, amongst which were found those related to consumer protection. In said Accords, the Salvadoran Government committed itself to adopt the policies and create the effective mechanisms in order to insure the consumers´ defence, pursuant to the mandate set forth in Article 101 of the Constitution of the Salvadoran Republic. For the enforcement of the aforementioned constitutional mandate, the Government committed itself to present to the Legislative Assembly within 60 days after the subscription of the said Accords, a draft of the Consumers´ Protection Law, which would include the strengthening of the Ministry of Economy and would lay down the first step in the eventual creation of a consumers´ protection authority.

Likewise, a commitment was set forth to adopt the mechanisms to prevent monopolistic practices and, simultaneously, guarantee entrepreneurial freedom and protect consumers´ interests, pursuant to Article 110 of the Constitution. The price liberalisation and a free competition market scheme, thus, permitted a normal supply of goods and services and price stability.

During 1992, the discussion of the legal framework on free competition to regulate monopolies and oligopolies was also initiated. Nevertheless, these definitions where incorporated in the Consumers´ Protection Law.

In 1994, the first draft of a Free Competition Law was presented to the Legislative Assembly but did not achieve its approval. The competition issue was practically unknown in the country, hence, various study delegations were formed by different economic agents´ representatives, from both public and private sectors, including assemblymen of the Legislative Assembly, who were part of the commission responsible for analysing the aforementioned draft. The objective of these study visits was to know about the experiences of countries with a long tradition in competition law enforcement. In a ten year period,

different draft laws were presented; each one differing from others basically regarding the nature of the authority responsible of enforcing the law, the view point on mergers and acquisitions, and the system of sanctions.

Likewise, the 2004 National Meeting of the Private Enterprise (in Spanish, Encuentro Nacional de la Empresa Privada, ENADE), stated the following:

> "The country must adopt a policy that protects and promotes competition, through adequate mechanisms, strong institutions, and an unmistakable legal framework, insuring the efficient assignment of resources and a market development that benefits all.
>
> "Said policy must include, amongst others, the promotion and defence of competition, an engagement against unfair commercial practices -such as smuggling, dumping, fiscal fraud, the informal sector of the economy- the prevention of anticompetitive practices, the promotion of economic efficiency, and the consumers´ welfare.
>
> "Consequently, a clear understanding must be provided regarding the benefits to be obtained from the economic system as a result of a public policy intended to protect and promote competition with the support of consumers, businessmen, and politicians".

In order to comply with the aforementioned constitutional principles and as a recognition of the need to achieve a more competitive and efficient economy, promoting its transparency and access, encouraging its dynamism and growth in order to benefit the consumer, El Salvador found convenient to issue in 2004 the Competition Law in force since January 1st, 2006; at the same date, the Competition Superintendence started its operations. It is important to point out that the protection of competition is a constitutional duty; nevertheless, such obligation lacked of detail in the legal framework to make it effective, thus, the new law was a step forward for the consolidation of the constitutional regime.

1.1.1 Consumer Protection Law

- The first Consumer Protection Law was issued in 1992. During this period, the Consumer Protection Division was created as part of the Ministry of Economy, with the objective to safeguard the consumers´ interest, establishing a legal framework to protect individuals from fraud and market abuses.

  Objective of the aforementioned law:

  > "Art. 1.- The objective of this law is to safeguard the interest of the consumers, establishing the legal framework to protect individuals from frauds and abuses within the market."

- During 1996, the 1992 Consumer Protection Law was abolished and a new law was approved, under the mandate of Article 101 of the Constitution, which states: "It is the State´s duty to promote economic and social development, through the generation of the optimum conditions for an increment in the production of goods and services, encouraging, at the same time, the defence of the consumers´ interests." On the other hand, the aforementioned law vested the Ministry of Economy with the power to enforce said legal framework through the Consumer Protection General Division.

Objective of said law:

"The objective of this law is to safeguard the interest of the consumers, establishing the legal framework to protect individuals from frauds and abuses within the market."

As done by the previous law, this one intended to strengthen the conditions in our country for its introduction in the worldwide globalisation process, guaranteeing the participation of the private enterprise, promoting competition, and entitling consumers with the necessary rights for their legitimate defence.

- In August 2005, the currently in force Consumer Protection Law was issued, abolishing the 1996 law.

  Objective of the aforementioned law:

  "Art. 1.- The objective of this law is to protect the rights of the consumers, in order to procure equilibrium, certainty, and legal security in their relations with suppliers."

  Various elements were taken under consideration when issuing said law, figuring as the principal reason, the need for a better structure and systematic development, as well as a global and preventive vision that guarantees the consumers´ protection.

i) National System for Consumer Protection

Article 151 of the aforementioned law institutes the National System for Consumer Protection in order to promote and develop the consumers´ protection. This system is formed by the Authority of the Consumer (in Spanish *Defensoría del Consumidor*), agencies of the Executive Branch, and other State institutions, vested with the attribution to look by sector after consumers´ rights or watch over enterprises that work with public.

Article 153 of the said law mentions the activities of the National System for Consumer Protection, establishing amongst others, the following activities related to consumer protection:

- Training its officers in that topic;
- Register and classify complaints filed by consumers and the sanctions imposed or the supplier´s exoneration, whichever is the case;
- Creation of nets of participants in the System´s officers to execute specific and preventive actions relating to consumer protection;
- Strategically plan the necessary activities for the surveillance and enforcement of the legal framework relating to consumers;
- Elaborate information and communication instruments;
- Elaborate the technical framework, methods, and guides for officers in charge of enforcing the law; and,

- Compile data regarding investigations and other information about the behaviour and attitude of consumers.

ii) Consultive Council of the Consumer Authority (in Spanish, Consejo Consultivo de la Defensoría del Consumidor)

An important element in the Consumer Protection Law is the creation of the Consultive Council. This body is in charge of counselling the President of the Consumer Authority in technical matters. The Council is attended, amongst others, by the Competition Superintendent.

Article 64 of the aforementioned law mentions the following attributions of the Consultive Council, amongst others:

- Serve as a counsel body to the President of the Consumer Authority in matters related to the protection of the consumers´ rights, as well as to the organisation and performance of the Authority;

- Issue opinions regarding the Authority´s internal regulations;

- Propose to the President of the Republic the removal of the President of the Consumer Authority and of the members of the Sanctioning Tribunal, in case of severe infringement of their duties; and,

- Other attributions legally assigned.

1.1.2 Competition Law

- The Competition Law and Superintendence

The objective of the Competition Law is to promote, protect, and guarantee competition, by preventing and eliminating any anticompetitive practice, regardless of its nature, that limits or restricts competition in any way, or that impedes the access of any economic agent to the market, in order to increase economic efficiency and consumer's welfare.

In this sense, the Competition Superintendence is created as an independent and technical institution, with a legal status and its own equity, vested with administrative and budgetary autonomy to exercise its attributions and duties, in charge of the compliance of the Competition Law, by means of a technical, legal, and economic analysis system, complemented by support studies and other pertinent activities to perform its attributions in an optimum manner including the prevention, detection, and investigation of anticompetitive practices.

In accordance with the aforementioned, Article 42 of said law prescribes the following: regarding an anticompetitive practice stated herein, any person may file a written complaint with the Superintendence against an alleged infringer, indicating the description of said practice. The plaintive shall state all the facts that build the alleged anticompetitive practice. The aforesaid is applicable to any economic agent, including the State´s institutions, for instance, the Consumer Authority.

- Legal amendments

In November 2007, certain amendments to the abovementioned law were approved in order to institutionally strengthen the Competition Superintendence. These amendments are important for such

institution in order to dully fulfil its objectives, by vesting it with the powers that enable it to act effectively, hardening the system of sanctions, including the maximum fines to be imposed according to an alternate criteria proportional to the severity of the anticompetitive practice committed in order to increase the dissuasive effect of committing such practices.

The amendments include the following attributions and duties:

- The Superintendent
  - Carries out searches or raids, with a prior order issued by the corresponding civil or commercial judge of the jurisdiction where the property to be searched or raided is located;
  - Orders during the investigation, the necessary precautionary remedies when an imminent risk to the market exists, when competition might be limited, when the investigated practice might result in damages to third parties or to public or collective interests, amongst others;
  - Accepts guarantees for the suspension or modification of anticompetitive practices;
  - Accepts the recognition of an economic agent who has been involved or is currently involved in agreements amongst competitors, as long as the economic agent fully complies with the requirements determined by the law (be the first to inform of the existence of such an agreement, collaborate with the Competition Superintendence, and carry out the necessary actions to guarantee the termination of his/her participation in the alleged anticompetitive practice).
- The Board of Directors
  - Issues, at the request of a third party or ex-officio, opinions on drafts of laws, ordinances, or regulations, and the procedures for public acquisitions and contracts, which might significantly limit, restrict, or impede competition;
  - Determines structural conditions and obligations, amongst others, ordering an economic agent to disinvest in a certain economic activity;
  - Attenuates an economic sanction when sufficient guarantees have been given, ensuring the suspension or modification of the investigated anticompetitive practice or has collaborated with the Competition Superintendence in the investigation of an agreement amongst competitors.
- New system of sanctions

The system of sanctions has been hardened, including maximum fines to be imposed according to alternate criteria proportional to the severity of the anticompetitive practice committed in order to increase the dissuasive effect of infringing the Competition Law. The fines may go up to 6% of the total annual sales made by the infringer, or up to 6% of its assets´ value during the prior fiscal year, or a fine equivalent to a minimum of twice and up to a maximum of ten times the estimated profits resulting from the anticompetitive practice, whichever is higher.

Furthermore, fines have been established for those agents who do not comply with the obligation of requesting prior authorisation of a merger or acquisition, to those who do not comply with the conditions

imposed by the resolution authorising a merger or acquisition, and to those who do not comply with the precautionary remedies ordered.

- 2006-2007 Activities

During its first two years of operations (2006-2007), the Competition Superintendence received 30 complaints and initiated 8 ex-officio investigations, regarding alleged violations to the Competition Law committed by economic agents from different sectors of the Salvadoran economy. Twenty seven cases concerning anticompetitive practices were analysed, 15 of which were for abuses of dominant position. Seven anticompetitive practices were sanctioned. 6 merger and acquisition notifications were received, 5 of which were authorised and 1 was declared not to require the prior Superintendence´ authorisation, pursuant to Article 31 of the Competition Law.

Cooperation and technical assistance agreements for the enforcement of the Competition Law

- With Government institutions

Internationally, cooperation and collaboration agreements have proven to be useful tools for the effective enforcement of the Competition Law. Since its creation and during 2006 and 2007, the Competition Superintendence has subscribed cooperation and technical assistance agreements with various regulators in order to strengthen the investigative process and the access to information. It is important to point out the agreements signed with the Electricity and Telecommunications General Superintendence (in Spanish, Superintendencia General de Electricidad y Telecomunicaciones, SIGET), the Maritime Port Authority (in Spanish, Autoridad Marítima Portuaria. AMP), the Financial System Superintendence (in Spanish, Superintendencia del Sistema Financiero, SSF), the Science and Technology National Council (in Spanish, Consejo Nacional de Ciencia y Tecnología, CONACYT), the Civil Aviation Authority (in Spanish, Autoridad de Aviación Civil, AAC), the Securities Superintendence (in Spanish, Superintendencia de Valores, SV), the Pension Funds Superintendence (in Spanish, Superintendencia de Pensiones, SP), and the Central Reserve Bank of El Salvador (in Spanish, Banco Central de Reserva de El Salvador, BCR).

- With Competition Authorities

In order to exchange experiences and know about diverse techniques, the Competition Superintendence signed cooperation and technical assistance agreements with different competition authorities such as the National Competition Commission of Spain (in Spanish, Tribunal de *Defensa de la Competencia de España, hoy Comisión Nacional de Competencia de España*), the Tribunal for the Defence of Competition of Chile (in Spanish, *Tribunal de Defensa de la Competencia de Chile*), the National Economic District Attorney´s Office of Chile (in Spanish, *Fiscalía Nacional Económica de Chile*), the National Institute for the Defense of Competition and the Protection of Intellectual Property of Peru (in Spanish*, Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* -INDECOPI- de Perú), the Authority for Consumer Protection and Defence of Competition of Panama (in Spanish, *Autoridad de Protección al Consumidor y Defensa de la Competencia de Panamá*), the Federal Competition Commission of Mexico (in Spanish*, Comisión Federal de Competencia de México*), and the Commission for Competition Promotion of Costa Rica (in Spanish, *Comisión para Promover la Competencia* de Costa Rica).

Several studies on competition conditions have been completed in the following sectors: Cargo, terrestrial transportation, liquid fuels, medicines, electricity, eggs and chickens, liquid fuel gas, and telecommunications. Furthermore, two internships in the Swiss Competition Authority (COMCO) were concluded.

Likewise, relations for information exchange are maintained with institutions such as the Federal Trade Commission and the Department of Justice of the United States of America.

2. Competition Policy as Core of Economic Efficiency and Consumer Fundamental Rights Protection.

Due to its scope and dynamism, competition policy, together with the fiscal and political policy, constitutes the fundamental milestones of the economy. Hence, the competition authority must be viewed as enforcer of the economic policy of the country and not as a mere enforcer of the Competition Law.

And this is so because competition policy fits within its broad concept; it refers to all the government measures which may influence the intensity of competition in the national markets or which may impact on the freedom of economic agents to carry out profitable or non-profitable economic activities. Thus, the competition law of any country is part of its competition policy, as well as other laws and policies, including commercial policies, measures to attract direct foreign investment, regulations of enterprises at a national level, privatisations initiatives, consumer protection law, amongst others.

Currently, there is an almost unanimous criterion that the objective of competition policy must be the promotion of economic efficiency and consumer welfare. Notwithstanding the aforementioned, there is still some debate on whether to include in this objective other goals of social and distributive nature. Nevertheless, there is unanimity as to include consumer protection in the objective of competition policy, even though for competition purposes the meaning of the term changes to the more commonly used definition.

Under the context stated herein, it is important to point out that, contrary to the consumer protection policy, the competition policy does not consider the consumer as the principal core of its activities. This is due to the fact that the objective of competition policy is to preserve competitive conditions in the market. For the abovementioned policy, the consumer is an indirect beneficiary of the consequences resulting from fair competition amongst economic agents in the market.

Nevertheless, it is necessary to emphasise that for competition policy the aforesaid does not mean a lesser importance of the consumer, because when a possible remedy for an anticompetitive practice is presented, the remedy that benefits consumers the most will be preferred, without diminishing economic efficiency and the legitimate rights of all economic agents to participate, giving preference to the generation of added value to all phases of the value chain.

Hence, the objective of competition policy is to protect, guarantee, and reestablish competitive conditions in the market and its economic efficiency, which indirectly, result in benefits for the consumers.

In spite of the above mentioned, the relation between both State institutions is vital and necessary but understood within each other´s roles. As it can be understood from the mere reading of the cited legal frameworks, the Competition Superintendence has wrongly been included in the National Consumer Protection System, due to the fact that it is not a duty of the Superintendence to protect consumers´ rights on a sectoral basis or watch over enterprises that operate with public, its objective is far beyond the aforesaid: economic efficiency and consumer welfare understood pursuant to the concepts stated herein.

Furthermore, the Consumer Authority is also an economic agent for the purposes of the Competition Law, and, thus, must file complaints pursuant to the requirements determined by the law and not because of a mere belief of the existence of anticompetitive practices, complying with Article 42 of the aforementioned law.

On the other hand, it is of upmost importance to emphasise the concept of competition policy as a pivot for the establishment of healthy competition in the different markets, as a means to guarantee the economic and social development of the country, as well as the defence of the consumers´ interest, through the prevention and elimination of anticompetitive practices, thus, achieving a more competitive and efficient economy, promoting its dynamism and growth for the benefit of consumers.

Hence, in order to contribute to the development of competition and competitiveness of productive activities, both in local and foreign markets, it is vital to have a clear and transparent scheme of action which impedes the existence of discriminatory barriers to economic agents.

That is why it is not only necessary to adopt a competition law but also to enforce a competition policy which recognises the identification and elimination of anticompetitive agreements, the abuse of dominant position, and also, to have sound instruments to control mergers and acquisitions that allow an increase of a healthy competition, an increase of investment, and promote the voluntary adoption of good business practices in favour of economic efficiency.

To summarise, in the country´s policies, the Competition Law and the Consumer Protection Law play a determining role in the establishment of the rules of the game that serve as a guide to enforce other economic and social policies which are the basis for the development of the country. Nonetheless, both authorities must join efforts to accomplish, within their respective legal frameworks, the objective of each ones law, respecting each others´ attributions and duties.

There are still other pending chores to carry out for the consolidation of the competition culture, such as the signature of cooperation and coordination agreements with the consumer protection authority, which as an economic agent, may considerably contribute to achieve a better enforcement of the Competition Law and a better understanding of the society in general, in order to make sure that the market, as a good of our society, is understood as an authentic style of life and of development, rather than just a mere economic concept.

LE SALVADOR

1. La politique de protection du consommateur et de la concurrence: leur origine dans les accords de paix.

1.1 Les efforts en matière de protection du consommateur et de la concurrence.

A partir des négociations de paix du Salvador, lesquelles ont abouti à la souscription des Accords de Chapultepec en janvier de l'année 1992, divers buts ont été formulés, visant entre autres à contribuer au renforcement d'une économie de marché et à la création des conditions nécessaires pour améliorer le niveau de vie de la population salvadorienne.

Quant à la stabilisation économique et social, parallèlement à la mise en œuvre des Accords de paix (ci-après « les Accords »), le Gouvernement du Salvador a entrepris un Plan de développement économique et social pour cinq ans, visant entre autres à créer les conditions nécessaires pour atteindre un développement économique soutenable, améliorer le niveau de vie de la population, et à moyen terme, à mettre en œuvre un programme social qui établirait une économie de marché et ainsi que des réformes du système économique.

Dans le chapitre V No. 6 des Accords, deux volets importants ont été insérés relatifs aux mesures pour atténuer le coût social des programmes d'ajustement structurel, parmi lesquels figuraient celles liées à la protection du consommateur. Dans les Accords il a été établi que le Gouvernement du Salvador s'était engagé à adopter des politiques et à créer des méthodes effectives destinées à défendre les consommateurs, en accord avec le mandat de l'article 101 de la Constitution de la République (ci-après la Constitution »). Pour accomplir cet objectif constitutionnel, le Gouvernement s'est engagé a présenter auprès de l'Assemblée législative (ci-après « l'Assemblée »), dans un délai de 60 jours à partir de la souscription des dits accords, un avant-projet de loi de protection du consommateur qui concernait aussi le renforcement du Ministère de l'économie (ci-après « le Ministère ») et qui pouvait représenter un premier pas pour la création d'une Autorité générale de défense du consommateur.

En définitive, en 2004, la Loi sur la concurrence (ci-après « LCon ») a été approuvée ; elle est fondée sur la Constitution. Il faut remarquer aussi qu'à partir du mois de décembre 1983, avec l'entrée en vigueur de la nouvelle Constitution salvadorienne, l'Assemblée avait élevée au rang constitutionnel l'obligation de l'Etat de promouvoir le développement économique et social, ainsi que la défense de l'intérêt du consommateur, en interdisant les pratiques monopolistiques afin de garantir la liberté des entreprises et de protéger au consommateur.

Par ailleurs, des méthodes ont été adoptées pour lutter contre les pratiques monopolistiques, en garantissant la liberté des entreprises et la protection du consommateur, en accord avec l'article 110 de la Constitution. La libéralisation des prix de l'économie accompagnant l'adoption d'un système de libre marché a entraîné la stabilité de ceux-ci et la fourniture normale de produits.

En 1992 ont débuté des discussions d'une norme portant sur la libre concurrence et visant à réguler les monopoles et les oligopoles. Ces dispositions ont depuis lors été incorporées dans la loi de protection du consommateur.

En 1994 le premier avant-projet de la LCon a été présenté à l'Assemblée. Il n'a pas été approuvé. Il est vrai que la concurrence était un sujet pratiquement inconnu au Salvador. A ce propos, pour améliorer les connaissances, divers groupes d'étude ont été formés avec des représentants de différents secteurs salvadoriens, y compris le secteur privé, le secteur public et des députés de l'Assemblée. Ces secteurs ont aussi fait l'objet des travaux de la commission chargée d'analyser l'avant-projet de la LCon. Les visites d'étude réalisées visaient à bien connaître les expériences d'autre pays plus expérimentés dans la mise en œuvre d'une loi relative à la défense de la concurrence. Dix ans après, différents avant-projets de la LCon ont été présentés, avec certaines différences, notamment dans la conception du type de l'autorité chargée de mettre en œuvre la LCon ainsi que la manière d'évaluer les concentrations économiques et le régime de sanctions.

En outre, lors de la Rencontre nationale de l'entreprise privée (« ENADE » en espagnol) de 2004, des représentants de cette institution ont prononcé le discours suivant:

> « Le pays (El Salvador) devrait adopter une politique visant à protéger et promouvoir la concurrence, en utilisant des méthodes appropriées, des institutions fortes ainsi que des règles claires, et en assurant aussi l'allocation efficiente des ressources et le développement du marché pour le bénéfice de tous.
>
> Cette politique doit inclure, entre autres, la promotion et la défense de la concurrence, la LCon, le combat contre la concurrence déloyale – y compris la contrebande, le dumping, la fraude fiscale, les secteurs informels de l'économie, la prévention de pratiques anticoncurrentielles, la promotion de l'efficience économique et le bien être des consommateurs.
>
> Par conséquent, nous devons partir d'une compréhension claire des bénéfices qui vont découler du système économique, avec une politique publique visant à protéger et promouvoir la libre concurrence, et soutenue par les consommateurs, les entreprises et la classe politique. »

Pour mettre en œuvre les principes constitutionnels indiqués antérieurement et en reconnaissant le besoin d'une économie plus compétitive et efficiente, en promouvant la transparence et l'accès au marché, en encourageant le dynamisme et la croissance de celle–ci pour le bénéfice du consommateur ; El Salvador a considéré nécessaire d'adopter la LCon, laquelle est entrée en vigueur le 01 janvier 2006. Par ailleurs, à la même date, la Superintendance de la concurrence (ci-après « la SC ») a commencé à fonctionner. Il est important de souligner que la protection de la libre concurrence est une obligation constitutionnelle ; El Salvador avait manqué du développement législatif nécessaire pour la mettre en œuvre. Alors, l'approbation de la LCon a été une avancée dans la consolidation d'un régime constitutionnel.

1.1.1 La Loi de protection du consommateur

- La première loi de protection du consommateur (ci-après « LPro ») a été approuvée en 1992. A de cette période, on a crée la Direction de protection du consommateur, institution publique qui dépendait du Ministère de l'économie, et avait pour objectif de sauvegarder les intérêts des consommateurs, en établissant des règles de protection des personnes contre les fraudes et les abus sur le marché.

But de la LPro

« Art. 1.- La présente loi a pour but de sauvegarder les intérêts des consommateurs, en établissant des règles qui protègent les personnes des fraudes et des abus sur le marché ».

- En 1996, la nouvelle LPro a été approuvée. Elle se fonde sur l'article 101 de la Constitution, laquelle établit qu' « il est obligatoire pour l'État de promouvoir le développement économique et social, en générant les conditions optimales pour augmenter la production des biens, et en favorisant au même temps la défense des intérêts des consommateurs ». Par ailleurs, la LPro désigne la Direction générale de protection du consommateur (ci-après « La Direction ») du Ministère en tant qu'autorité responsable de la mise en œuvre de la dite loi.

  L'intention était de renforcer les conditions économiques du pays dans le cadre de son intégration dans le processus de globalisation, en assurant la participation du secteur privé dans le développement économique, en favorisant aussi la libre concurrence et en confiant aux consommateurs les droits nécessaires pour leur défense légitime.

- En août 2005 une nouvelle loi de protection du consommateur (ci-après « NLPro ») a été approuvée ; la LPro antérieure a été abrogée.

Le but de la NLPro

« Art. 1.- Le but de cette loi est de protéger les droits du consommateur afin d'assurer l'équilibre, la certitude et la sécurité juridique dans ses relations avec les fournisseurs. »

Pour la création de la NLPro de nombreux éléments fondamentaux ont été considérés, mais notamment le besoin d'améliorer sa structure et de lui donner un développement systématique, ainsi qu'une vision intégrale et préventive qui garantisse la protection du consommateur.

i) Le Système national de protection du consommateur

L'article 151 de la NLPro « institue le Système national de protection du consommateur (ci-après « le SNPC »), afin de promouvoir et développer la protection du consommateur. Le SNPC est composé par : l'Autorité de défense du consommateur (ci-après « l'ADC »), des diverses dépendances de l'organe exécutif et d'autres institutions de l'État qui sont chargées de veiller dans leurs domaines respectifs pour les droits du consommateur ou bien de surveiller les entreprises qui opèrent avec la population».

L'article 153 de la NLPro mentionne les activités du SNPC, en incluant entre autres, les activités suivantes concernant la protection du consommateur :

- La formation de ses fonctionnaires en la matière ;

- L'enregistrement et le classement des plaintes présentées par les consommateurs et des sanctions imposées ou, le cas échéant, l'exonération du fournisseur.

- La création d'un réseau des fonctionnaires qui font parties du SNPC, afin de réaliser des actions spécifiques et préventives de protection du consommateur ;

- La planification stratégique des activités nécessaires à la surveillance et à la mise en œuvre de la législation relative aux consommateurs.

- L'élaboration d'instruments d'information et de communication.

- L'élaboration de normes techniques, de méthodes et d'orientations pour les fonctionnaires chargés de la mise en œuvre de la législation ; et

- Le recueil de données, d'enquêtes et d'autres renseignements portant sur le comportement et l'attitude du consommateur.

ii) Le Conseil consultatif de l'ADC

Un élément essentiel à remarquer dans la LNPro est la création du Conseil consultatif. Organe constitué de différents membres, il est responsable de donner des avis techniques au président de l'ADC. Le Superintendant de la concurrence fait, entre autres, partie du Conseil.

L'article 74 de la NLPro indique les attributions du Conseil consultatif, parmi lesquelles :

- Agir en tant qu'organe de référence et de consultation du Président de l'ADC en matière de protection du consommateur, ainsi que de l'organisation et du fonctionnement de celle-ci.

- Donner des avis concernant le règlement interne de l'ADC.

- Faire des propositions au Président de la République concernant la destitution du Président de l'ADC et des membres du Tribunal chargé de sanctionner les infractions en matière de protection du consommateur, en cas d'inaccomplissement de leurs obligations ; et

- D'autres attributions qui leur sont légalement assignées.

1.1.2 La Loi sur la concurrence

- La LCon et la SC

La LCon vise à promouvoir, protéger et garantir la concurrence, en prévenant et en éliminant des pratiques anticoncurrentielles qui, quelque soit leur forme, limitent ou restreignent la concurrence ou empêchent l'accès au marché des agents économiques, ceci afin d'augmenter l'efficience économique.

C'est en ce sens qu'a été créée la SC. En tant que personne morale, la SC est une autorité indépendante et technique, avec un patrimoine propre ainsi qu'une autonomie administrative et budgétaire pour l'exercice des ses attributions et devoirs. Par ailleurs, la SC veille à mettre en œuvre la LCon, en utilisant un système d'analyse technique, juridique et économique ; ce système doit être complété par des études de soutien et d'autres outils pertinents pour effectuer toutes ces activités d'une manière optimale, y compris la prévention, la détection et l'investigation des pratiques anticoncurrentielles.

En conformité avec ce qui précède, l'article 42 de la dite loi prévoit ce qui suit : en matière de pratique anticoncurrentielle, toute personne est susceptible de déposer une plainte contre un auteur d'infraction présumé en décrivant cette pratique. Le plaignant doit mentionner tous les faits constitutifs de la pratique anticoncurrentielle dénoncée. Ceci est applicable à tous les agents économiques, y compris les autorités gouvernementales et, notamment, l'autorité de défense des consommateurs.

- Les Réformes légales

En novembre 2007 certaines réformes de la LCon ont été approuvées et elles ont renforcé la SC. Elles sont importantes pour la réalisation des buts fixés par la SC puisque les outils pour combattre les pratiques anticoncurrentielles ainsi que le régime des sanctions ont été renforcés. Par ailleurs, les réformes ont ajouté au régime d'amendes maximales qui pouvaient être imposées par la SC, un critère alternatif et proportionnel à la gravité de la pratique réalisée, afin d'augmenter l'impact dissuasif de la réalisation de dites pratiques.

Les réformes approuvées comprennent les droits et devoirs suivants :

- Concernant le Superintendant :

  - Réaliser des perquisitions, lesquelles doivent avoir l'autorisation d'un juge de première instance compétent en matière civile ou commerciale, de la juridiction où se trouvent l'immeuble ou les immeubles qui feront l'objet d'une perquisition.

  - Ordonner lors d'une enquête les mesures provisoires qui sont nécessaires, notamment lorsqu'il existe un risque imminent pour le marché ; lorsqu'on peut avoir une limitation de la concurrence ; ou lorsque la pratique faisant l'objet de l'enquête pourrait entraîner des dommages aux tiers ou aux intérêts publics ou collectifs, entre autres.

  - Accepter les garanties de suspension ou de modification des pratiques anticoncurrentielles.

  - Accepter l'engagement d'un agent économique qui a réalisé ou est en train de réaliser un accord entre concurrents, pourvu que les conditions détaillées dans la LCon soient réalisées (y compris, à condition qu'il soit le premier à informer la SC, qu'il collabore avec elle et entreprend des actions qui garantissent la fin de sa participation à la pratique anticoncurrentielle qu'il a dénoncée).

- Concernant le Conseil de direction :

  - Émettre des avis concernant des avant-projets de lois, des ordonnances, des règlements ainsi que des appels d'offres permettant de limiter, restreindre ou empêcher de manière significative la concurrence.

  - Établir des conditions et des obligations structurales, y compris ordonner le désinvestissement d'un agent dans une activité économique ;

  - Atténuer la sanction économique lorsqu'ont été données des garanties suffisantes portant sur la suspension ou la modification de la pratique anticoncurrentielle faisant l'objet d'une enquête ; ou bien lorsqu'on a collaboré avec la SC lors de l'enquête sur un accord entre concurrents.

- Le nouveau régime de sanctions

Le régime de sanctions a été renforcé en incorporant aux amendes maximales qui peuvent être infligées aux agents économiques par la SC, un critère alternatif et proportionnel en fonction de la gravité de la pratique anticoncurrentielle réalisée, afin d'augmenter l'impact dissuasif de réaliser les dites pratiques. En outre, a été introduit la possibilité d'infliger une amende pouvant aller jusqu'à 6% du chiffre d'affaires annuel réalisé par l'auteur de l'infraction lors de la dernière année fiscale, ou bien une amende

pouvant aller jusqu'à 6% des actifs de l'auteur de l'infraction lors de la dernière année fiscale; ou encore une amende équivalant à un minimum de 2 fois, pouvant aller jusqu'un maximum de 10 fois, le bénéfice estimé et dérivé de la pratique anticoncurrentielle, en choisissant le critère qui s'avère le plus sévère.

Par ailleurs, des amendes ont été mises en place à l'encontre des agents économiques qui, alors que leur opération de concentration était soumise à autorisation ne l'ont pas notifiée; ainsi que pour les agents économiques qui n'ont pas respecté les conditions imposées dans la décision finale de l'autorisation d'une concentration et pour ceux qui n'ont pas respecté une mesure provisoire ordonnée par la SC.

- Activités 2006 - 2007

Lors des deux premières années de fonctionnement (2006 – 2007), la SC a reçu de nombreuses plaintes portant sur des violations présumées des dispositions de la LCon, lesquelles ont émané notamment d'agents économiques actifs dans divers secteurs de l'économie salvadorienne. 27 plaintes contre des pratiques anticoncurrentielles ont été instruites, dont 15 concernant des abus de position dominante. 7 pratiques anticoncurrentielles ont été sanctionnées ; et 6 demandes d'autorisation de concentrations ont été traitées, dont 5 ont été autorisées et 1 n'avait pas besoin de l'autorisation préalable de la SC (car elle n'était pas soumise aux les dispositions de l'article 31 de la LCon).

Les accords de coopération et d'assistance technique pour la mise en œuvre de la LCon.

- Les accords de coopération avec des autorités gouvernementales

Au niveau international, les accords de coopération et coordination se sont révélés être des outils très importants pour bien mettre en œuvre la LCon. A partir de sa création et en 2006 et 2007, la SC a aussi signé des accords de coopération et d'assistance technique avec de nombreuses autorités régulatrices, afin de renforcer les enquêtes et l'accès à l'information. Il est important de souligner notamment les accords avec la Superintendance générale d'électricité et des télécommunications (ci-après « la SIGET »), l'Autorité maritime et portuaire (ci-après « la AMP »), la Superintendance du système financier (ci-après la « SSF »), le Conseil National de science et technologie (ci-après « le CONACYT), l'Autorité de l'aviation civile (ci-après « la AAC »), la Superintendance des valeurs (ci-après « la SVAL »), la Superintendance des pensions (ci-après « la SP ») et la Banque Centrale du Salvador (ci-après « la BCR »).

- Les accords avec d'autres autorités de la concurrence

Afin d'échanger des expériences et de mieux connaître les diverses techniques d'enquête, des accords de coopération et d'assistance technique ont été signés avec des autorités homologues de la concurrence, y compris le « *Tribunal de Defensa de la Competencia*» (Espagne), le « *Tribunal de Defensa de la Competecia*» (Chili), la « *Fiscalía Nacional Económica* » (Chili), l' «*Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* – INDECOPI –» (Pérou), l'« *Autoridad de Protección al Consumidor y Defensa de la Competencia*) (Panama), la « *Comisión Federal de Competencia* » (Mexique) et la « Commission for Competition promotion of Costa Rica (en espagnol, *Comision para Promover la Competencia* de Costa Rica).

Des études des conditions de concurrence ont été réalisées dans divers domaines de l'économie salvadorienne, y compris le transport maritime, le marché du transport terrestre de marchandises, le marché du fuel, celui des médicaments, le marché des œufs et des poulets ainsi que celui du gaz liquide et des télécommunications. Par ailleurs, 2 collaborateurs de la SC ont réalisé un stage auprès de la Commission Suisse de la concurrence (« COMCO») pour une période de 3 mois.

En outre, des relations d'échanges de renseignements existent avec différentes autorités étrangères, y compris la « Federal Trade Commission » (États-Unis) et le « United States Department of Justice » (États - Unis).

2. La politique de la concurrence en tant que pilier pour l'efficience économique et la protection du consommateur et pour protéger les droits fondamentaux du consommateur.

Grâce à son champ d'application et à son dynamisme, la politique de la concurrence est, avec les politiques commerciale et fiscale, un pilier fondamental d'une économie. Dans cette optique, l'Autorité de la concurrence devrait agir en tant qu'autorité de mise en œuvre de la politique économique du pays, et pas seulement comme simple instrument d'application de la LCon.

La politique de la concurrence correspond dès lors à un concept assez large; elle fait référence à toutes les mesures gouvernementales qui peuvent influencer l'intensité de la concurrence sur les marchés nationaux ou qui mettent l'accent sur la liberté de commerce des agents économiques. Dans cet esprit, la réglementation de la concurrence d'un pays fait partie de sa politique de la concurrence tout comme les autres lois et politiques, y compris les politiques commerciales, les mesures pour attirer les investissements étrangers directs, la régulation des entreprises au niveau national, les initiatives de privatisation, la loi de protection du consommateur, entres autres.

A l'heure actuelle, L'on est proche du consensus en ce qui concerne l'objectif de la politique de la concurrence, lequel doit être la promotion de l'efficience économique et le bien-être du consommateur. Néanmoins, on débat encore sur le point de savoir si l'on devrait incorporer dans l'objectif en question d'autres buts de type distributif et social. Malgré cela, on existe en effet unanimité quant à inclure dans le but de la politique de la concurrence, la protection du consommateur, bien que pour les effets de la concurrence, ça change le sens au terme utilisé le plus fréquent.

Ainsi, il est important de remarquer que, contrairement à la politique de protection du consommateur, la politique de la concurrence ne considère pas le consommateur comme le pilier principal de ses activités. En effet, le but de la politique de la concurrence est de préserver les conditions de la concurrence sur le marché ; du point de vue de cette politique le consommateur est un bénéficiaire indirect des conséquences qui découlent de la concurrence entre les agents économiques dans un marché en particulier, lesquels respectent les règles en matière de la concurrence.

Toutefois, ainsi que cela a été mentionné auparavant, il faut remarquer que pour la politique de la concurrence ça ne signifie pas une diminution de l'importance du consommateur. En effet, lorsqu'on envisage un remède possible à une pratique anticoncurrentielle, on préférera celui qui bénéficie le plus au consommateur, sans nuire à l'efficience économique et aux droits légitimes de tous les agents économiques qui y participent, mais en donnant la préférence à la génération de valeur ajoutée par toute la chaîne de production.

Ainsi, la politique de la concurrence est chargée de protéger, de garantir et de rétablir les conditions de la concurrence sur le marché et son efficience économique, ce qui, de manière indirecte, bénéficie aux consommateurs.

Cependant, la relation entre les deux institutions de l'État (la SC et l'ADC) est fondamentale et nécessaire dans leurs rôles respectifs. Comme l'on peut le comprendre à la simple lecture des dispositions légales, la SC a été mal intégrée dans le système de protection du consommateur, puisqu'au titre des affaires de la compétence de la SC il ne lui appartient pas de veiller sur un plan sectoriel au respect des droits des consommateurs ou de superviser les entreprises qui opèrent avec la population. Le but et

l'objectif ultime de la SC est au-delà de cela, il s'agit de l'efficience économique et du bien-être du consommateur, entendu dans une chaîne de valeur.

On peut considérer que l'ADC est aussi un agent économique aux termes de la LCon, et qu'elle doit donc déposer des plaintes en satisfaisant toutes les conditions définies par la LCon et pas simplement en se fondant sur une simple suspicion de l'existence de pratiques anticoncurrentielles et abusives, en application de le l'article 42 de la loi mentionnée ci-dessus.

Par ailleurs, il est important de souligner que conceptuellement la politique de la concurrence est un pilier pour l'établissement d'une saine concurrence sur les différents marchés : elle est un moyen de garantir le développement économique et social du pays, ainsi que la défense de l'intérêt des consommateurs, en prévenant et en éliminant les pratiques anticoncurrentielles et en rendant ainsi l'économie plus compétitive et efficiente, en promouvant la transparence et l'accès au marché, et en renforçant le dynamisme et la croissance pour le bénéfice des consommateurs.

Dans ce sens, pour contribuer au développement de la concurrence et à la compétitivité des activités productives, aussi bien sur le marché intérieur qu'à l'exportation, il est nécessaire de se fonder sur un cadre clair et transparent d'action qui empêche les barrières artificielles aux opérations des acteurs économiques.

A ce propos, il est important, outre l'adoption d'une loi de la concurrence, de mettre aussi en application une politique de la concurrence qui permette l'identification et la suppression des accords anticoncurrentiels et des abus de position dominante ; il est également important d'avoir des outils flexibles pour contrôler les concentrations économiques et les fusions et qui permettent d'accroître une saine concurrence, l'augmentation des investissements et favorisent l'adoption volontaire de bonnes pratiques commerciales pour promouvoir l'efficience économique.

Bref, dans les politiques d'un pays, la loi sur la concurrence et la loi sur la protection des consommateurs exercent un rôle déterminant pour l'établissement des règles du jeu qui servent de référence pour élaborer d'autres politiques économiques et sociales à la base du développement du pays. Néanmoins, les autorités de la concurrence et celles en charge des consommateurs doivent conjuguer leurs efforts pour atteindre, dans leurs cadres juridiques respectifs, leurs propres objectifs tels que fixés par la loi, tout en respectant les sphères d'action et les attributions de chacune.

Il reste encore des mesures à prendre pour la consolidation d'une culture de la concurrence, comme la signature d'accords de coopération et de coordination avec l'ADC. En effet, en tant qu'agent économique, l'ADC peut fortement contribuer à une meilleure application de la LCon. Elle peut aussi aider à faire mieux comprendre à la société en générale que le marché est un bien, un réel standard de vie et de développement et non pas un simple concept économique.

EUROPEAN COMMISSION
Speech by Commissioner Kuneva

CONSUMER AND COMPETITION POLICIES – BOTH FOR WELFARE AND GROWTH

Ladies and Gentlemen,

It is a great honour for me to address the OECD Global Forum on Competition. I am delighted to have this opportunity to share with you my vision of EU consumer policy and how it can work with competition policy to make market deliver for consumers. Let me begin by stressing the aims of the EU consumer policy strategy 2007-2013 adopted by the Commission last year.

Consumer policy strategy

This strategy recognizes the consumer as an essential economic agent in markets and aims to empower them to act in their best interest at all times. In so doing, consumers make markets work better: by exercising their power of comparison and choice, they reward the efficient operators and weed out the inefficient ones.

The synergies between competition and consumer policy are clear. Both policies share the goals of healthy competition and consumer welfare. But they complement each other by tackling different problems with different tools.

Consumer policy aims to ensure that consumers are provided with information, choice and flexibility, and that they operate in an environment they trust.

I strongly believe that the consumer side of the internal market of 490 million Europeans is a **powerful force**, both for competition and for connection with our citizens.

But, at the moment, this opportunity is far from being fully exploited. The retail internal market is currently **fragmented** between 27 national markets, to the detriment of both producers and consumers. In essence, at the retail level we have 27 national mini-markets, instead of a pan-European supermarket.

The **Internet era** has opened up new opportunities, allowing cross-border shopping and enabling consumers to get better information and to compare prices. However, although 50% of European consumers with an Internet connection at home made an on-line purchase in 2006, only 12% of them dared to make a cross-border purchase.

The Commission's objective is therefore to harness the untapped potential of the internal market to expand consumer welfare in terms of better prices, choice, quality, affordability and safety.

But building and integrating markets requires building trust. Markets are becoming more complex and sophisticated, as are commercial practices and consumer fraud. Consumers need to be empowered to play their full role in making markets work.

To have confidence in the markets and make better choices, they need accurate information and market transparency.

If we are to make the internal market work for consumers and businesses, we also need to develop the predictability of conditions that exist in a national market. Sound regulation that delivers a clear and robust framework for consumer choice is a sine qua non.

The Unfair Commercial Practices Directive has put in place a harmonised framework banning practices such as misleading advertising. The legal framework on consumer contract law is currently being reviewed and studied with the same goals in mind: to introduce a single, simple set of basic rights and obligations to consumers and business.

The Commission is also working hard to ensure that consumer law is effectively **enforced**. The value of an effective enforcement regime as a deterrent is a common theme to both consumer policy and competition policy. A network of consumer protection enforcement authorities - similar to the European Competition Network - was established in 2007 and is now cooperating to crack down on rogue traders.

The links between consumer and competition policy

Obviously, consumers need markets with healthy competition. EU competition policy has undoubtedly been of great benefit to consumers. The Commission's work on cartels in recent times, for example, has had a clear and direct effect on consumer welfare. The fines levied against car manufacturers who pressurise dealers not to accept cross-border purchases is another good example.

The Commission's efforts to tackle cases of dominant position on the market, of cartels and other anti-competitive agreements between businesses have had a very significant positive impact in our markets.

However, I'm sure you will agree that this is not always sufficient. Competition policy cannot **address** all the problems that may reduce market efficiency and consumer welfare. Certain practices collectively adopted by an industry can mislead consumers. Obfuscation, complex pricing and in some cases product tying all impair consumers' ability to take optimal decisions. Tacit collusion is another example of practices that cause consumer detriment, yet are not (easily) caught by competition instruments.

The bad news is that such practices not only impact negatively on consumer welfare, but also may prevent more efficient producers from reaping their just rewards. This in turn **weakens competition and innovation**.

The good news is that some of these issues such as unfair and misleading practices could be tackled by consumer policy and in particular by the Unfair Commercial Practices Directive. Tackling these problems refocuses competition on the fundamentals of price and quality.

Consumer policy is therefore central to addressing potential demand-side failures preventing consumers to exercise undistorted choice.

So it is clear that competition policy and consumer policy are **complementary.** Competition is a necessary condition for consumer welfare. Consumer policy in turn enhances competition by empowering consumers to exercise the power of choice.

I am convinced that confident, informed and empowered consumers are a crucial motor of economic change, as their choices drive innovation and efficiency.

Cooperation between consumer and competition policy

I think we can agree that the two policies are complementary. The question remains as to how they can work better together.

Both policies seek to monitor the behaviour of economic operators for the good of consumers. But the problems tend to be different and there is no automatic correspondence between competition problems and consumer problems in a particular sector. Problems in markets must be clearly identified and dealt with using the appropriate tools.

I see the main area for cooperation as upstream in the policy cycle at the market screening and analysis phase.

The Commission's recent initiative to launch a consumer market scoreboard offers a new way forward to detect market malfunction as perceived by consumers. We are putting in place the tools to monitor five indicators of market malfunction – prices; complaints; switching; consumer satisfaction and safety.

When these indicators are in place, I hope they will provide the tools for the Commission to prioritise markets for more in-depth study. These indicators are no more than that – they are not proof of market failure. But the problems they reveal will not only be consumer policy ones. I expect that the evidence gathered will also point to competition or regulatory problems.

For example, high consumer dissatisfaction or a very high level of complaints may not be due only to the effects of misleading advertising or unfair contracts. Disproportionately high prices or inability to switch suppliers may indicate poor competition.

But our work can not stop at this stage. The Commission's next step will be an in-depth analysis of the markets that show signs of malfunctioning. The Commission's Single Market Review has committed the Commission to carrying out these studies in a more coordinated way, bringing together the experience of competition and consumer analysts, but also sectoral experts.

I have great hopes that through this analytical work a broader scope for cooperation between the two policy areas can be found. To mention one particular aspect of this work, I have high hopes for the work the OECD is doing on behavioural economics.

The ever increasing complexity of markets and commercial practices is shedding new light on the capacity and willingness of consumers to make optimal choices. Behavioural economics is beginning to explain the boundaries to rational consumer behaviour. As regulators and policymakers we have to take into account the way consumers actually behave rather than the way the economics textbooks say they should behave.

So I hope that behavioural economics will deliver insights that policymakers can use. These insights have obvious potential for consumer policy, whether in relation to regulation or information. But I think they could also have important implications for competition policy, especially in the development of remedies.

So I look to the OECD to advance our understanding and make behavioural economics operational for policymakers and enforcers.

In conclusion, let me again underline the importance of greater cooperation between competition and consumer policy. Both policies strive for the same goals. They are two sides of the same coin. I wish the conference every success in bringing the two policies closer together.

EUROPEAN COMMISSION

1. Introduction

Both competition policy and consumer policy play a central part in meeting core EU goals. They play a key part in the EU's "Lisbon strategy" to improve the competitiveness of the EU but also to seek to improve the day to day life of citizens, in their role as consumers. Consumer protection policy deals with the behaviour of economic operators in their direct contacts with consumers, and competition policy deals with the relations of economic operators with each other (e.g. mergers, cartels).

The EC Treaty set downs the "principle of an open market economy with free competition". Competition stimulates innovation, encourages companies to provide to consumers products and services that consumers want, and pushes down prices. It rewards firms offering lower prices, better quality, new products, and greater choice.

However, while competition is necessary to deliver consumer welfare and competitiveness, it is not sufficient. Competition policy is effective at tackling market problems that arise from agreements or collusion between undertakings, mergers, and an abuse of a dominant position by an operator. It does not seek to tackle operators who apply, individually or collectively, commercial practices which adversely affect consumer choice and welfare, in other ways than agreements, collusion, mergers or abuse of a dominant position. Such practices (misleading or aggressive advertising, complex pricing or unfair contracts terms) when they are industry-wide or adopted by non dominant firms, can only be tackled by consumer policy instruments. These failures cannot be addressed by competition policy but can be equally harmful to both competition and consumers.

Despite the difference in their field of operation and type of remedies, it is essential for competition and consumer protection policy to operate in a complementary and mutually enhancing way, in the interest of the EU's consumers and its international competitiveness.

2. Complementary application of competition and consumer policy

Although they tackle different types of market failure, the complementarity of both policies in enhancing competition and consumer welfare has been shown in a number of recent examples, which fall neatly into the category of competition or consumer policy. For example:

- Regarding cartels, in the six-year period 2002-2007 (to 5 December 2007), the Commission imposed over €7 billion Euros of fines on over 235 different companies involved in 39 different cartels in sectors such as beer, glass, elevators, plasterboard, and synthetic rubber[1]. Hard-core cartels, including those on wholesale markets, have a direct and clear effect on consumers. In merger cases handled by the Commission, consumer-related issues are often central to the evaluation. For example, a number of mergers in the banking sector involved switching costs as a central part of the analysis.

[1] http://ec.europa.eu/comm/competition/cartels/statistics/statistics.pdf.

- Recent EU consumer protection measures will also enhance competition in the retail sector. For example, the Directive on Unfair Commercial Practices which came into force on 12 December 2007[2] will enhance competition on the merits and real choice by banning unfair practices such as misleading advertising. More importantly it will enhance competition by facilitating cross-border advertising in the EU, deepening competition in the retail economy.

- On enforcement of consumer legislation, in September 2007 the Commission has coordinated the first EU "Sweep" on websites selling air tickets. Member States carried out a simultaneous and coordinated check of websites to investigate breaches of consumer protection law and initiated further enforcement actions when it was necessary. Many companies adopted voluntary measures changing their sites while in other cases agencies had to use their enforcement powers. This action was conducted in the framework of the Consumer Protection Cooperation Regulation[3] and it strengthened competition by forcing companies to abolish deceptive practices providing unfair advantage for them over honest traders.

However, where market failures clearly exist which do not fall neatly into the traditional areas of intervention of competition and consumer protection rules, a cross-category approach is needed. The position of the Commission as a supra-national body, places it in a position to evaluate sectors as a whole and determine subsequently which response is appropriate, be it investigations under competition rules, enforcement of consumer legislation, EU-level regulatory proposals or others measures like promoting information or self-regulation codes. For example:

- Cross-border payments in the euro zone are the subject of a Regulation adopted in 2001[4], laying down that cross-border payments of up to €50,000 within the euro zone, should not be charged at a price higher than the price charged for an equivalent payment domestically. Since its adoption fees for cross-border inter-bank money transfers have fallen considerably, from 24 euro in 2002 to 2.50 euro in 2006 for a payment of 100 euro[5]. Regarding cross-border credit card payments, the Commission in December 2007 decided that the way in which MasterCard applies "interchange fees" for cross-border payments in the European Economic Area violates the EC Treaty rules on restrictive business practices; this will likely have the effect of reducing the fees paid by retailers for credit card acceptance, and competition between retailers should ensure that this reduction is passed on to consumers[6].

- In car retailing the Commission has actively brought cases, with increasingly high fines, against car manufactures who agree with or pressurise dealers not to accept purchases from residents of other Member States (for example, a fine of €43 million on Opel Nederland in 2000[7]). The latest Block Exemption Regulation for car distribution, in force since 2003, no longer authorises certain restrictive practices which were previously exempted. Furthermore, the Commission has

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2 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 (Official Journal L149/22)

3 Regulation (EC) N. 2006/2004 of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation).

4 Regulation 2560/2001, which entered into force on 1 July 2002 for payment card transactions and withdrawals from cash machines and 1 July 2003 for credit transfers.

5 See Commission press release IP/07/32 of 11 January 2007.

6 Decision of 19 December 2007. See press release IP/07/1959

7 See press release IP/00/1028 of 29/9/2000.

published a six-monthly car price report since 1992. Since 1992, price differentials for motor vehicles, and absolute prices, have progressively fallen in the EU.

3. Current and future measures to improve complementarity between competition and consumer policy

Competition and consumer policy at EU level differ substantially as to their enforcement structures.

Regarding *competition policy*, the Commission has enforcement powers enforcing articles 81 and 82 of the Treaty (which prohibit anti-competitive agreements between undertakings and abuses of a dominant position) but only as regards restrictions of competition with a cross-border effect ("effect on trade between Member States"). It does not however have an enforcement monopoly regarding articles 81 and 82 of the Treaty, as the national competition authorities of the EU member states can also apply those articles of EU law themselves[8].

This shared enforcement task requires co-ordination, regarding case allocation, and interpretation of the law. For this reasons, the European Competition Network was created in 2004. The EU Commission and competition authorities from EU member states cooperate with each other through the ECN by: informing each other of new cases and envisaged enforcement decisions; coordinating investigations, where necessary; helping each other with investigations; exchanging evidence and other information; and discussing various issues of common interest. This Network focuses in particular cross-border business practices which restrict competition and aims at effective and consistent application of Community competition laws. In the cross-border cases, it is decided within the Network to whom the case should be allocated.

The structure of enforcement of the EU *consumer policy* is essentially different. The Commission has a monitoring and co-ordination role, but no enforcement powers. The enforcement of consumer law is the responsibility of the Member States. The Consumer Protection Co-operation Regulation[9] provides coordination and facilitation of enforcement. As well as requirements to cooperate in cross-border cases, the competent national authorities are encouraged to coordinate their enforcement actions especially in cases when consumer rights are infringed in numerous Member States. The co-operation concerns, besides exchange of information (in particular on complaints), training and exchanging officials.

There is also co-operation between consultative bodies for competition policy and consumer policy. The European Consumers Consultative Group, composed of the representatives of national and EU consumer organisations has a sub-group to examine competition policy.

The Commission's contribution to the preparation of the OECD Recommendation on Consumer Dispute Resolution and Redress was formed thanks to the close co-operation of the Competition and the Health and Consumer Protection Directorates General.

Co-operation between both policies at EU level seems likely only to grow. The Commission's recent Communication on the single market for 21st century in Europe[10] underlined that the single market needs to deliver more results for citizens, consumers and SMEs. As well as putting a strong emphasis on

8 Regarding restrictions of competition on their territory which do not affect trade between EN member States, they apply national competition law.

9 Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 (Official Journal L364/1)

10 A single market for 21st century Europe (COM(2007) 724 final of 20.11.2007)

enforcement of all EU policies, it also highlighted the need to develop further an outcome and evidence-based approach to the single market. A process to monitor and screen markets for market malfunctioning has been established. Screened markets should then be studied in greater depth.

The review also underlined the need for a greater focus on evidence and outcomes from a consumer perspective. To that end, it has recently adopted a Consumer Markets Scoreboard. The Scoreboard sets in place a process to gather data on consumer markets on prices, complaints, switching, satisfaction, safety that will enable consumer markets to be effectively screened for malfunctioning.

In time these new monitoring and analysis processes will enlarge the areas for co-operation between both policies. Work on price comparison of products across the EU may indicate competition problems. Switching indicators may also indicate competition or consumer policy problems. Not all of this co-operation will take place at EU level. Monitoring and analysis at EU level may indicate problems in either policy area at national level. At a time of rising retail food prices, recent action by both UK and Greek competition authorities in the dairy sector show the potential for co-operation in analysis and market comparison.

A further area where greater co-operation seems likely between both policy areas at both national and EU level is in developing work on behavioural economics. The new research offers interesting insights into consumer policy but also competition policy in relation to retail markets. The Commission is therefore actively participating in the OECD work to make behavioural economics operationally useful for policymakers and enforcers.

FRANCE

The General Directorate for Fair Trading, Consumer Affairs and Fraud Control (DGCCRF) welcomes the holding of this Global Forum. The DGCCRF is responsible for regulating and safeguarding trade in goods and services. In this context, it takes action to regulate competition in the markets and to provide economic protection and safeguards to consumers.

1. The synergies between competition policies and consumer protection as developed in economic theory

General equilibrium models show that competition between suppliers leads to an optimal allocation of resources to consumers, provided that those consumers are able to appreciate correctly the characteristics of the goods and suppliers acting independently of each other in the market.

Thus, the principal objective of competition policy is to preserve and promote competition as a means of ensuring an efficient allocation of resources in the economy, giving the best possible choice in terms of quality at the lowest possible price and consumer-oriented supply.

Ensuring a high degree of competition is the way to attain this objective.

Competition policy is proactive in its desire to promote consumers' interests in the market while consumer protection policy rather lays stress on a reactive programme to protect the consumer and provide a means of remedy against abuses. Competition policy, which applies to all sectors, chiefly seeks to ensure an adequate level of competition in markets by combating cartels or anti-competitive agreements, abuses of dominant position and concentrations which would be a significant obstacle to effective competition, in order to allow consumers to buy high quality goods or services at market prices. Consumer policy, on the other hand, deals with any problems encountered by consumers.

An effective competition policy reduces barriers to entry to the market and creates a business-friendly environment. However, competition policy does not necessarily guarantee that everyone has access to basic needs. This is particularly likely to be true of public services, some segments of which are natural monopolies (telecommunications, postal services, electricity, gas, railways). Government intervention is then necessary. Historically, these services have been provided in France by state monopolies. Nowadays, with the opening up to competition, sectoral regulators play a major role in guaranteeing the right to basic services. For example, they impose universal service obligations on suppliers requiring them to provide services to people on low incomes at a reasonable price, even where that results in losses in those segments[1].

This shows clearly that market economic theory does not have to mean a uniform competition policy and that the policy would be condemned to remain incomplete in terms of impact and results in the absence of an effective consumer protection system.

[1] Losses which are offset by various mechanisms, such as state subsidies or tariff equalisation with profitable segments.

2. Synergies between competition law and consumer protection in practice

2.1 An economic approach

Practitioners are currently engaged in a debate on the question of whether competition policy should tend to improve the consumer surplus or the global surplus. France has lined up with the partisans of the consumer surplus, although some business associations often object that an excessively strict application of competition law can be an obstacle to the formation of powerful groups able to withstand global competition and finance research and development programmes. The pursuit of the consumer surplus is reflected in the following provisions:

- article L. 464-1 of the Commercial Code on protection measures makes express reference to consumers' interests;

- the Competition Council considers the impact of prices among factors which can damage the economy. In the case of retail prices, the Council takes account of the financial impact of the practice on the final consumer, in particular when the good is essential and when it represents a significant part of the household budget. It did so, for example, in the following cases: mortgages (00-D-28), Marne bakers (04-D-07), mobile telephony (05-D-65). Many cases of agreements, however, concern intermediate markets (recent examples: electric cables 07-D-26, industrial processing of work clothing 07-D-21, doors 06-D-09) or invitations to tender where the buyer is often the State or a local authority. In these cases, it is generally impossible up front to determine the impact on retail prices applied to final consumers by the businesses or public bodies affected. However, the distortion of intermediate prices impairs the productive efficiency of the economy,

- the consumer surplus (intermediate or final), of course, does not depend on price alone, but also on the quality and diversity of products and business innovation. These aspects can be affected by anti-competitive practices, especially those which have the effect of excluding or punishing effective competition. In this regard, it may be recalled that certain types of eviction can benefit consumers in the short run, but harm them in the longer run. This means striving for a better balance between different time horizons,

- the majority of cases referred to the Competition Council by the Minister concern final consumption sectors, especially agreements between suppliers and retailers to fix the retail price;

- analysis of concentrations focuses on the risk of an excessive concentration of the market which would lead to an increase in prices to consumers or a reduction in the quantity or quality of the supply. Efficiencies are only taken into account if they benefit consumers.

Competition is beneficial for consumers when they can use all the information necessary to make an informed choice. In practice, information is frequently asymmetrical to the detriment of the consumer and both the consumer surplus and the global surplus are then reduced, even if the competition is operating properly.

In this regard, consumer goods are usually classified into three categories:

- "search goods": the consumer can ascertain the characteristics and quality by examining the good;

- "experience goods": the quality can only be known after purchase;

- "confidence goods": the seller knows better than the buyer the quality that the latter needs (the seller is more expert than the consumer).

The French Government deals with these problems of asymmetry in different ways. Thus, taxi fares are regulated, estate agents or funeral directors have to provide precise information on the content of contracts, and in 2005 the Government required the banks to conclude an agreement on the abolition of account transfer fees.

The DGCCRF monitors the application of these regulations or agreements. It also provides consumers with a number of information tools (brochures, websites, etc.) to advise them and allow them to reduce the information asymmetry.

2.2 A legal approach

The consumer is the chief actor in competition. He compares the prices and quality of goods and numerous formal obligations are required of businesses so that the consumer can make his choice as efficiently as possible. The consumer may thus come to discover breaches of competition or consumer law. It is essential that he can then refer such breaches to the courts without difficulty.

1. Consumers' associations can apply to the Competition Council. The following examples are worth mentioning:

- the UFC (one of the largest consumers' associations) was behind the case which led the Competition Council, which also acted on its own initiative, to impose a fine for price-fixing of 534 million euros on mobile telephone operators in 2005,

- the same association filed a case of abuse of dominant position in the water supply sector with the Competition Council which, it alleged, resulted in a higher price of drinking water,

- the CLCV (another important association) sought the advice of the Competition Council on whether a universal service could be instituted in the banking sector without infringing competition law.

2. Consumers' associations can file criminal or contractual proceedings on behalf of a group of consumers (the association then receives the money paid by the supplier) and can obtain compensation for damages suffered on behalf of consumers. In this sense, the civil action is an effective complement to official action by the competition authorities. The potential of a claim for damages, on top of a fine imposed for the offence, has a dissuasive effect for businesses. A business which might contemplate entering into a price-fixing agreement or abusing its dominant position would have to take into account the risk of having to pay civil damages as well as an administrative penalty.

France welcomed the publication by the European Commission of a Green Paper on civil actions which lists the chief obstacles to the pursuit of such actions:

- the need to provide evidence of illegal practices,

- the assessment of damages,

- the capacity of businesses to charge the damages to other entities without that being a punishable offence,

- the difficulty of setting up a class action.

The French Government is taking steps to remove these obstacles.

In this regard, French law provides that judges can ask the DGCCRF for any record or investigation report that they see relevant to the proceedings (article L.470-5 of the Commercial Code). Similarly, the Competition Council can ask judges to communicate matters relevant to the administrative action.

Consumers' associations do not yet have the capacity to file class actions, but the French Government has been working on this. Three options have been suggested:

- improvement of the current system,
- the creation of a new legal procedure allowing consumers to join an action already filed by another consumer to obtain redress,
- the introduction in France of the system of class action used in Quebec or the United States with an "*opt-out*" mechanism.

2.3 An administrative approach

The interaction between competition and consumer protection can often be complex and there are sound arguments for setting the two policies in an integrated framework. This option was adopted by France, within the limits of the principle of the right to defence which requires separation of the investigative body and the judges.

Although the legal powers of officials differ depending on whether they are investigating into competition or consumer matters, links and simplifications are being developed. For example, settlement and plea-bargain type procedures were recently introduced both for consumer protection and anti-competitive practices, which enhances the efficiency of administrative action and speeds up claims. It is important to note that both French competition authorities can, within their jurisdiction, propose an arrangement to a business in the context of consumer protection and competition policy.

The integration of the two policies is not merely window-dressing but an on-going commitment. For example:

- surveys into both aspects are carried out in economic sectors declared as priorities by the National Orientation Directive following consultation with the National Consumer Council. In 2008, the priorities cover several sectors where the two aspects, competition and consumption, are examined: energy and sustainable development, the digital economy, home services, real estate and housing.
- the targeting methods to discourage anti-competitive practices take account of the structure and pattern of consumer prices,
- quality standards are monitored to ensure that very costly standards do not lead to the eviction of too many small businesses,
- a ban on marketing of a product takes into account the risk that a supplier has to cease his activity and withdraw from the market.

Supervision of the market requires the same professional skills for both tasks. Investigators who detect a breach of consumer law in the course of a competition investigation can issue a summons after

informing the business of the nature of the offence. Proportionate implementation of consumer law requires proper evaluation of the economic circumstances of the business which has broken the law. The market analysis is the same for competition and consumption.

Examination of accounting documents or computer audits may be used to uncover anti-competitive practices as well as to provide evidence of fraud relating to the quality of goods. There is now a common internal database which contains the results of all checks. Knowing the specific profile of a business can be useful to the competition authorities since an operator who has breached the economic rules on one point may be tempted to do the same with others.

2.4 A political approach

While over 80% of French people think that competition is good for consumers (CREDOC, consumer survey January 2005), some still express a degree of distrust about competition.

To assuage this distrust and a degree of conservatism, the DGCCRF needs to educate consumers and their associations by showing the contribution of competition in electronic communications (innovation, lower prices, more choice) or air transport, for example.

The DGCCRF is committed to promoting competition among the public and consumer associations can be of great help to us in this task. However, that is not always the case:

> in August 2005 and recently, legislation on loss-leading was amended to allow distributors to deduct a significant part of the value of the services that they invoice to their suppliers. Consumers' associations did not specifically endorse these new measures although the purpose was to lower retail prices.

In 2005, the improvement of the functioning of the National Consumer Council marked an important step forward, allowing it to make more practical recommendations more quickly to the Government. To strengthen the capacity of consumers' associations, the DGCCRF wants to improve the organisation of the consumer movement. There are 18 organisations, but only 2 or 3 have the critical mass to influence competition and consumer policy, develop expertise and engage in lobbying activities.

The DGCCRF is also raising awareness among other competition authorities and is endeavouring to limit the restrictive impact of some regulations by influencing the inter-ministerial debate. It also exercises constant pressure in favour of opening certain regulated professions to competition and has succeeded in persuading professionals that progressive liberalisation is in their interests. Furthermore, the DGCCRF has set up a training programme on competition law for senior civil servants and show them how it should be implemented for the benefit of consumers and the French economy.

ANNEX

1. How does consumer policy interact with competition policy in your country, if at all? Can you give examples where they have conflicted? Where have they been complementary?

Cf. reply above.

The Consumer Confidence and Protection Act of 28 January 2005 is a good example of the complementarity of these two policies. In the case of fixed-term contracts renewable by tacit agreement, this law makes the renewal of the contractual relationship subject to fulfilment of an obligation to inform imposed on the professional. Failure to fulfil this obligation results in the conversion of the contract to an indefinite term and allows the consumer to cancel it unilaterally at any time. While protecting the consumer, these provisions encourage competition. The consumer can free himself from the contract, despite the renewal by tacit agreement clause, if the obligation to inform has not been fulfilled and this can create competition between the various professionals operating in the market.

The Act of 3 January 2008 on the development of competition in the service of consumers provides new guarantees to holders of electronic communications contracts and bank customers to make it easier to switch contracts.

2. What do you feel are the benefits and drawbacks to your own country's choice of "dual-function" or "separate agencies" for handling competition and consumer policy?

Cf. reply above.

3. Has your country required that "no frills" versions of complicated products be offered, to help vulnerable consumers? If so, who provided the product and how was its supply enforced? What was the effect on competition, if any?

The authorities have not asked that "no frills" products or services should be offered to vulnerable consumers but they have introduced measures aimed at these consumers in the banking sector.

The right to a bank account

In the banking sector, a right to an account was introduced for vulnerable consumers by the Act of 29 July 1998. Under article L. 312-1 of the Monetary and Financial Code, the Act provides the right of any natural or legal person resident in France, who does not have a deposit account, to open such an account in a bank of his choice or at the Post Office.

Decree No. 2001-45 of 17 January 2001, adopted in application of article L. 312-1 of the Monetary and Financial Code, lists basic banking services and establishes the principle that they should be free to persons benefiting from the right to an account procedure.

These services are:

- opening, maintaining and closing the account;
- one change of address per year;
- delivery on request of bank or post office bank identification forms;
- domiciliation of bank or post office transfers;
- monthly bank statement;
- cash transactions;
- banking of cheques and bank or post office transfers;
- cash deposits and withdrawals at the bank holding the account;
- payments by direct debit, interbank payment order or bank or post office transfer;
- means of remote consultation of the account balance;
- an automatic authorised payment card, if the bank is able to issue it or, failing that, a cash card allowing weekly withdrawals from cashpoints in the bank;
- two bank cheques per month or equivalent means of payment providing the same services.

In 2006, the Banque de France arranged the opening of 30,460 accounts under the right to an account. Although this figure is constantly rising, it is not enough to have a significant effect on the market. The provision allows France to have one of the highest rates of bank account-holders in Europe (over 98%).

The right to an account does not apply to people who have already been refused a deposit account by a bank. It is not a universal basic service which should be offered by all banks. Following an application by the Consumer, Housing and Lifestyle Federation (CLCV), the Competition Council pronounced in its Opinion No. 05-A-08 on the conditions in which a basic banking service might be envisaged. It considered that a universal service in the banking sector, which would limit banking exclusion (exclusion of access and exclusion of use) was not inherently incompatible with competition rules, but care would be needed to ensure that the mechanisms for selection of operators and financing did not create distortions in competition in the banking market.

4. Can you identify areas where a better convergence of both competition and consumer policies globally would be beneficial?

As indicated in the main text of the contribution, strengthening civil action by consumers would allow better convergence of the two policies.

5. Can you provide examples of sectors or products where an increased international cooperation between competition authorities and consumers representatives could render the markets more competitive while ensuring an adequate protection of consumers around the globe?

- Electronic commerce, and especially on-line advertising, need considerable international cooperation. On-line advertising is showing sustained growth. France is the most dynamic European market for sponsored links with growth of 35% in 2006. The challenge is such that international and national initiatives have proliferated. Technical, economic and legal developments have led to serious adjustments in regulatory and monitoring bodies. The French authorities have shown themselves to be extremely responsive to the prospect of development of electronic commerce and recent years have been marked by a series of actions providing both a framework and a content to discussions of the development of the information society. The DGCCRF is well placed to consider the development of new economic sectors and, accordingly, new consumer demands thanks, in particular, to the Electronic Commerce Surveillance Centre (CSCE), created in November 2000. This mechanism was complemented in 2001 by a

monitoring and control network which gives the DGCCRF a presence in the world of the Internet.

- Combating brand counterfeiting also requires increased cooperation. Counterfeiting causes major disruptions to the economic order. It distorts the play of free competition, deceives consumers and can endanger their safety, it steals know-how, wipes out businesses and causes the loss of many jobs. Counterfeiting accounts for 10% of world trade, or 200 to 300 billion euros lost to the global economy, of which 6 billion to France. Apart from its direct impact on investment in R & D, the impoverishment of creation, and destruction of jobs, counterfeiting also imperils the safety and health of consumers due to the fact that the copied products do not comply with production and safety standards. The DGCCRF has jurisdiction over brand counterfeiting, which is an offence liable to three years imprisonment and a fine of €300,000 in the case of possessing, importing, offering for sale, sale of goods presented under a counterfeit brand, reproduction, imitation, use of a brand in violation of the rights conferred by registration and four years imprisonment and a fine of €400,000 (article L. 716-9 of the Commercial Code) for persons who engage, in particular, in the import and industrial production of such goods, with a view to selling, supplying, offering for sale or renting goods presented under a counterfeit brand.

FRANCE

La Direction générale de la concurrence, de la consommation et de la répression des fraudes se réjouit de l'organisation de cette table ronde. La DGCCRF exerce une mission de régulation et sécurisation des échanges de biens et services. Dans ce cadre, elle intervient à la fois en matière de régulation concurrentielle des marchés et pour assurer la protection économique et la sécurité des consommateurs.

1. Les synergies entre politique de la concurrence et protection du consommateur telles qu'elles sont développées dans la théorie économique

Les modèles d'équilibre général montrent que la concurrence entre fournisseurs conduit à l'allocation optimale des ressources pour les demandeurs, à condition que ces demandeurs soient capables d'apprécier correctement les caractéristiques des biens et des offreurs en agissant indépendamment les uns des autres sur le marché.

Ainsi, l'objectif principal de la politique de la concurrence est de préserver et de promouvoir la concurrence comme un moyen d'assurer une allocation efficace des ressources dans l'économie, ce dont il résulte le meilleur choix possible en terme de qualité aux prix les plus bas possibles et des offres adaptées pour le consommateur.

Garantir un haut degré de concurrence est le moyen d'atteindre cet objectif.

La politique de la concurrence est proactive dans sa volonté de promouvoir l'intérêt du consommateur sur le marché alors que la politique de protection du consommateur met davantage en avant un programme réactif afin de protéger le consommateur et de fournir une voie de réparation contre les abus. La politique de la concurrence, qui s'applique à tous les secteurs, vise principalement à assurer un fonctionnement suffisamment concurrentiel des marchés, en luttant contre les cartels ou les ententes anticoncurrentielles, les abus de position dominante et les concentrations qui se traduiraient par une entrave significative à une concurrence effective, afin de permettre au consommateur d'acheter des biens ou services de qualité à des prix de marché tandis que la politique de consommation traite de tout problème rencontré par les consommateurs.

Une politique de la concurrence efficace réduit les barrières à l'entrée sur le marché et crée un environnement favorable aux affaires. Cependant, la politique de la concurrence ne garantit pas nécessairement l'accès de chacun aux besoins élémentaires. Ce peut être en particulier le cas pour des services publics, dont certains segments constituent des monopoles naturels (télécommunications, postes, électricité, gaz, chemin de fer) : une intervention publique est alors nécessaire. Historiquement, ces services ont été rendus en France par des monopoles publics. Aujourd'hui, avec l'ouverture à la concurrence, les régulateurs sectoriels jouent un rôle majeur en garantissant le droit aux services de base. Ils imposent par exemple des obligations de service universel aux fournisseurs afin que ceux-ci soient dans l'obligation de fournir des services aux personnes aux revenus bas à un prix raisonnable, quitte à réaliser des pertes sur ces segments [1].

[1] Pertes qui sont compensées par différents mécanismes, comme des subventions publiques ou une péréquation tarifaire avec les segments rentables.

Cela montre bien que la théorie économique du marché ne doit pas conduire à une politique de la concurrence uniforme et que cette politique serait vouée à demeurer incomplète en terme d'impact et de résultats en l'absence d'un régime de protection effective du consommateur.

2. Les synergies entre le droit de la concurrence et la protection du consommateur dans la pratique

2.1 Une approche économique

Un débat est en cours entre les praticiens sur la question de savoir si la politique de la concurrence doit tendre à améliorer le surplus du consommateur ou le surplus global. La France s'est rangé du côté des partisans du surplus du consommateur, bien que certaines associations d'entreprises objectent souvent qu'une application trop sévère du droit de la concurrence peut être un obstacle à la constitution de groupes puissants capables de soutenir la concurrence mondiale et de financer des programmes de recherche et développement. Cette recherche du surplus du consommateur se manifeste par les dispositifs suivants :

- l'article L. 464-1 du code de commerce sur les mesures conservatoires fait expressément référence aux intérêts des consommateurs ;

- le Conseil de la concurrence considère l'impact sur les prix parmi les éléments qui déterminent le dommage à l'économie.. Lorsqu'il s'agit de prix de détail, le Conseil tient compte de l'impact financier de la pratique sur les consommateurs finals, en particulier lorsque le bien est indispensable et lorsqu'il représente une part importante du budget des ménages. Il l'a fait, par exemple, dans les affaires suivantes : crédits immobiliers (00-D-28), boulangers de la Marne (04-D-07), téléphonie mobile (05-D-65). Mais de nombreuses affaires d'entente concernent des marchés intermédiaires (exemples récents : câbles électriques 07-D-26, traitement industriel du linge professionnel 07-D-21, portes 06-D-09) ou des marchés d'appel d'offres pour lesquels l'acheteur est souvent l'État ou une collectivité locale. Dans ces cas, il est généralement impossible de déterminer l'impact sur les prix de détail pratiqués, en aval, par les entreprises ou organismes publics victimes auprès des consommateurs finaux. Cependant, la distorsion des prix intermédiaires éloigne l'économie de l'efficacité productive,

- Pour mémoire, le surplus des consommateurs (intermédiaires ou finals) ne dépend pas seulement des prix, mais aussi de la qualité et de la diversité des produits, de l'innovation des entreprises. Ces éléments peuvent être affectés par des pratiques anticoncurrentielles, notamment celles qui ont pour effet d'exclure ou de discipliner des concurrents efficaces. A cet égard, on peut rappeler que certaines pratiques d'éviction peuvent bénéficier aux consommateurs à court terme, mais leur nuire à plus long terme, ce qui implique la recherche du meilleur équilibre entre les divers horizons temporels,

- la plupart des saisines du Conseil de la concurrence par le Ministre portent sur des secteurs de consommation finale, et notamment sur des ententes entre fournisseurs et détaillants pour la fixation de prix au détail ;

- l'analyse des concentrations se focalise sur le risque d'une concentration excessive du marché qui conduirait à une augmentation des prix pour les consommateurs ou à une réduction quantitative ou qualitative de l'offre, les efficiences ne sont prises en compte que si elles bénéficient aux consommateurs.

La concurrence est bénéfique pour le consommateur lorsqu'il peut utiliser toutes les informations nécessaires pour faire un choix cohérent. En pratique, les asymétries d'information au détriment du

consommateur sont fréquentes et le surplus du consommateur tout comme le surplus global sont alors réduits, même si la concurrence fonctionne correctement.

A cet égard, les biens de consommation sont usuellement classés en trois catégories :

- les « biens de recherche » : le consommateur peut connaître les caractéristiques et la qualité en inspectant le bien ;
- les « biens d'expérience » : la qualité ne peut être connue qu'après l'achat ;
- les « biens de confiance » : le vendeur connaît mieux que l'acheteur la qualité dont ce dernier a besoin (le vendeur est plus expert que le consommateur).

Le gouvernement français traite de ces problèmes d'asymétrie de différentes façons : ainsi, les prix des taxis sont réglementés, les agents immobiliers ou les opérateurs de pompes funèbres ont à fournir une information précise sur le contenu des contrats, les pouvoirs publics ont amené les banques à conclure un accord en 2005 pour la suppression des frais de transfert de comptes.

La DGCCRF contrôle l'application de ces règlements ou de ces accords ; elle met également des nombreux outils d'information à disposition des consommateurs (brochures, sites internet, etc.) afin de conseiller le consommateur et de lui permettre de réduire l'asymétrie d'information.

2.2 Une approche légale

Le consommateur est l'acteur principal de la concurrence : il compare les prix et la qualité des biens et de nombreuses obligations formelles sont requises par les entreprises afin que le consommateur puisse exercer son choix de la façon la plus efficace. Le consommateur peut être ainsi amené à découvrir des infractions au droit de la concurrence ou de la consommation. Il est indispensable qu'il puisse alors saisir sans difficulté un tribunal de ces agissements.

1. Les associations de consommateurs peuvent saisir le Conseil de la concurrence. On peut notamment citer les exemples suivants :

- l'UFC (l'une des plus importantes associations de consommateurs) est à l'origine de l'affaire qui a conduit le Conseil de la concurrence, qui s'est également autosaisi, à imposer une amende pour entente de 534 millions d'euros à des opérateurs de téléphonie mobile en 2005,
- La même association a saisi le Conseil de la concurrence d'un cas d'abus de position dominante dans le secteur de la distribution d'eau dont il résultait selon elle un prix plus élevé de l'eau potable,
- La CLCV (une autre association importante) a sollicité l'avis du Conseil de la concurrence de la question de savoir si un service universel pouvait être institué dans le secteur bancaire sans enfreindre le droit de la concurrence.

2. Les associations de consommateurs peuvent engager une action délictuelle ou contractuelle au nom de l'intérêt collectif des consommateurs (l'association reçoit alors l'argent versé par le fournisseur) et elles peuvent obtenir réparation des dommages subis au nom des consommateurs. En ce sens, l'action civile est un complément efficace de l'action publique des autorités de concurrence. La potentialité d'une demande de réparation des dommages, en plus du paiement d'une amende infligée pour l'infraction, a un effet dissuasif pour les entreprises. Une entreprise qui envisagerait de conclure une

entente ou d'abuser de sa position dominante devrait prendre en compte le risque de paiements au civil en plus de celui d'une sanction administrative.

La France a accueilli favorablement la publication par la Commission européenne d'un livre vert sur les actions civiles qui recense les obstacles principaux au développement de telles actions :

- la nécessité d'apporter la preuve des pratiques illicites,
- l'évaluation des dommages,
- la capacité des entreprises à faire supporter les dommages à d'autres entités sans que cela soit sanctionnable,
- la difficulté à mettre en place une action de groupe.

Le gouvernement français s'efforce de faire disparaître ces obstacles.

En ce sens, la loi française dispose que les juges peuvent demander à la DGCCRF tout procès-verbal ou tout rapport d'enquête qu'ils estiment utile pour la procédure (article L.470-5 du code de commerce). De la même façon, le Conseil de la concurrence peut demander aux juges la communication d'éléments utiles à l'action administrative.

Les associations de consommateurs n'ont pas encore la capacité d'engager des actions de groupe mais le gouvernement français a travaillé sur ce sujet. Trois options ont été évoquées :

- l'amélioration du système actuel,
- la création d'une nouvelle action légale permettant aux consommateurs de se joindre à une action déjà engagée par un autre consommateur pour obtenir réparation,
- l'introduction en France du système d'action de groupe en usage au Québec ou aux États-Unis avec un mécanisme d'"*opt-out*".

2.3 Une approche administrative

L'interaction entre concurrence et protection du consommateur peut être souvent complexe et il existe des arguments solides pour que ces deux politiques prennent place dans un cadre intégré. Cette option a été adoptée par la France – dans la limite du principe des droits de la défense qui impose une séparation entre les corps d'enquête et les formations de jugement.

Bien que les habilitations légales des agents soient différentes selon qu'ils enquêtent en matière de concurrence ou de consommation, des liens et des simplifications sont en cours d'élaboration. Par exemple, des procédures de type transaction et plaider-coupable ont été récemment introduites à la fois pour la protection du consommateur et les pratiques anticoncurrentielles, ce qui accroît l'efficacité de l'action administrative et accélère les recours. Il est ainsi important de noter que les deux autorités française de concurrence peuvent, chacune en ce qui la concerne, proposer une transaction à une entreprise, dans le cadre de la protection du consommateur et dans celui de la politique de la concurrence.

L'intégration des deux politiques n'est pas un simple affichage mais un engagement au jour le jour. Par exemple :

- des enquêtes sur les deux aspects sont menés dans les secteurs économiques qui ont été déclarés prioritaires par la Directive Nationale d'Orientation, après consultation du Conseil National de la Consommation. En 2008, les priorités de la direction portent sur plusieurs secteurs où les deux aspects, concurrence et consommation, sont examinés : énergie et développement durable, économie numérique, services à domicile, immobilier et logement.

- les méthodes de ciblage pour dissuader les pratiques anticoncurrentielles prennent en compte la structure et l'évolution des prix à la consommation,

- les standards de qualité sont contrôlés afin d'éviter que des standards très coûteux ne conduisent à l'éviction de trop nombreuses entreprises,

- l'interdiction de commercialisation d'un produit prend en compte le risque qu'un fournisseur doive arrêter son activité et se retirer du marché.

La surveillance du marché requiert les mêmes compétences professionnelles pour ces deux missions. Les enquêteurs qui découvrent une infraction au droit de la consommation lors d'une enquête de concurrence peuvent rédiger un procès-verbal après avoir informé l'entreprise de la nature de l'infraction. Une mise en œuvre proportionnée du droit de la consommation nécessite une évaluation correcte des conditions économiques de l'entreprise qui a enfreint la loi. L'analyse du marché est la même en ce qui concerne la concurrence et la consommation.

L'examen des documents comptables ou les investigations informatiques peuvent être utilisés pour découvrir des pratiques anticoncurrentielles mais aussi pour mettre en évidence des fraudes sur la qualité des biens. Il existe désormais une base informatique interne commune qui recense les résultats de tous les contrôles. Connaître le profil spécifique d'une entreprise peut être utile pour les autorités de concurrence car un opérateur qui a enfreint la réglementation économique sur un point peut être tenté de l'enfreindre sur d'autres.

2.4 Une approche politique

Si les français estiment à plus de 80 % que la concurrence est bénéfique pour les consommateurs (CREDOC, enquête consommation janvier 2005), une partie de la population exprime encore une certaine méfiance vis à vis de la concurrence.

Pour lever cette méfiance ainsi qu'un certain nombre de conservatisme, la DGCCRF doit faire de pédagogie auprès des consommateurs et de leurs associations en mettant en évidence les apports de la concurrence en matière de communications électroniques (innovation, baisse de prix, développement de l'offre) ou de transport aérien par exemple.

La DGCCRF s'est engagée à promouvoir la concurrence auprès des citoyens et les associations de consommateurs peuvent nous être d'une grande utilité dans cette tâche. Cependant, tel n'est pas toujours le cas :

> en août 2005 et récemment, la législation sur la revente à perte a été modifiée afin de permettre aux distributeurs de déduire une partie significative de la valeur des services qu'ils facturent à leurs fournisseurs ; les associations de consommateurs n'ont pas apporté un soutien spécifique à ces nouvelles dispositions bien qu'elles aient eu pour objet de faire baisser les prix de détail,

En 2005, une étape importante a été franchie avec l'amélioration du fonctionnement du Conseil national de la consommation, qui lui permet de rendre plus rapidement des recommandations plus

pratiques au gouvernement. Pour renforcer la capacité d'action des associations de consommateurs; la DGCCRF souhaite améliorer l'organisation du mouvement consumériste. Il existe 18 organisations mais seules 2 ou 3 atteignent la taille critique qui permet de peser sur la politique de la concurrence et de la consommation, de développer une expertise et une activité de lobbying.

La DGCCRF sensibilise également les autres administrations à la concurrence et s'efforce de limiter l'impact restrictif de certaines règlementations en pesant dans le débat interministériel. Elle exerce en outre une pression permanente en faveur de l'ouverture à la concurrence de certaines professions réglementées et a réussi à convaincre les professionnels qu'ils auraient avantage à une libéralisation progressive. Par ailleurs, la DGCCRF a mis en place un programme de formation pour les hauts fonctionnaires afin de leur présenter le droit de la concurrence et la façon dont il doit être mis en œuvre au bénéfice des consommateurs et de l'économie française.

ANNEXE

1. Comment la politique de protection du consommateur interagit-elle dans votre pays avec la politique de la concurrence, si elles interagissent ? Pouvez-vous donner des exemples de conflit entre ces deux politiques ? Dans quels cas se sont-elles montrées complémentaires ?

Cf. réponse ci-avant.

La loi du 28 janvier 2005 tendant à conforter la confiance et la protection des consommateurs constitue un bon exemple de la complémentarité de ces deux politiques. Cette loi subordonne, dans le cas de contrats à durée déterminée tacitement reconductibles, la reconduction du lien contractuel à l'exécution d'une obligation d'information imposée au professionnel. Le non-respect de cette obligation emporte une mutation du contrat, qui devient à durée indéterminée, et permet au consommateur de le résilier unilatéralement, à tout moment. En même temps qu'elles protègent le consommateur, ces dispositions stimulent le jeu de la concurrence. Le consommateur peut en effet se délier du contrat, malgré la clause de tacite reconduction, si l'obligation d'information n'a pas été remplie et peut donc mettre en concurrence les différents professionnels qui évoluent sur le marché.

La loi du 3 janvier 2008 pour le développement de la concurrence au service des consommateurs apporte des garanties nouvelles aux titulaires de contrats de communications électroniques et aux clients des banques pour faciliter la mobilité des contrats.

2. Quels sont selon vous les bénéfices et les inconvénients du choix de votre pays pour un modèle de « fonctions duales » ou d' « agences séparées » pour traiter des politiques de concurrence et de consommation ?

Cf. réponse ci-avant.

3. Votre pays a-t-il demandé que des versions simplifiées de produits compliqués soient mises sur le marché, afin d'aider les consommateurs vulnérables ? Si oui, qui était le producteur concerné et comment l'approvisionnement a-t-il été mis en œuvre ? Ces mesures ont-elles eu un effet sur la concurrence et si ou, lequel ?

Les autorités n'ont pas demandé que des produits ou services sans option soient offerts aux consommateurs vulnérables mais elles ont mis en place des mesures à destination de ces consommateurs dans le secteur bancaire.

Le droit au compte bancaire

Dans le secteur bancaire, un droit au compte a été instauré à destination des consommateurs vulnérables par la loi du 29 juillet 1998. La loi, par l'article L. 312-1 du Code monétaire et financier, prévoit le droit pour toute personne physique ou morale domiciliée en France, dépourvue d'un compte de dépôt, à l'ouverture d'un tel compte dans l'établissement de crédit de son choix ou auprès des services financiers de La Poste.

Le décret n° 2001-45 du 17 janvier 2001 pris pour l'application de l'article L. 312-1 du Code monétaire et financier a énuméré les services bancaires de base et a posé le principe de leur gratuité en faveur des personnes bénéficiant de la procédure du droit au compte.

Ces services sont :

- l'ouverture, la tenue et la clôture du compte ;
- un changement d'adresse par an ;
- la délivrance à la demande de relevés d'identité bancaire ou postale ;
- la domiciliation de virements bancaires ou postaux ;
- l'envoi mensuel d'un relevé des opérations effectuées sur le compte ;
- la réalisation des opérations de caisse ;
- l'encaissement de chèques et de virements bancaires ou postaux ;
- les dépôts et les retraits d'espèces au guichet de l'organisme teneur de compte ;
- les paiements par prélèvement, titre interbancaire de paiement ou virement bancaire ou postal ;
- des moyens de consultation à distance du solde du compte ;
- une carte de paiement à autorisation systématique, si l'établissement de crédit est en mesure de la délivrer, ou, à défaut, une carte de retrait autorisant des retraits hebdomadaires sur les distributeurs de billets de l'établissement de crédit ;
- deux formules de chèques de banque par mois ou moyens de paiement équivalents offrant les mêmes services.

En 2006, la Banque de France a fait procéder à l'ouverture de 30 460 comptes au titre du droit au compte. Même si ce chiffre croît régulièrement, il n'est pas assez important pour que la mesure ait un effet significatif sur le marché. Cette disposition permet à la France d'avoir un des taux de bancarisation les plus élevés d'Europe (plus de 98%).

Ce droit au compte ne s'applique qu'aux personnes qui se sont vues refusées préalablement l'ouverture d'un compte de dépôt par les établissements de crédits. Il ne constitue pas un service universel basique qui devrait être offert par toutes les banques. Saisi par la Confédération de la Consommation, du Logement et du Cadre de Vie (CLCV), le Conseil de la concurrence s'est prononcé dans son avis n°05-A-08 sur les conditions dans lesquelles pourrait être envisagée la mise en place d'un service bancaire de base. Il a estimé que l'instauration d'un service universel dans le secteur bancaire, qui permettrait de limiter l'exclusion bancaire (exclusion d'accès et exclusion d'usage) n'était pas en elle-même incompatible avec les règles de la concurrence mais qu'il convenait de veiller à ce que les mécanismes de sélection des opérateurs et de financement ne créent pas de distorsions dans la concurrence sur le marché bancaire

4. Pouvez-vous identifier des domaines où une meilleure convergence des politiques de la concurrence et de la consommation serait bénéfique ?

Comme cela est indiqué dans le texte principal de la contribution, le renforcement de l'action civile des consommateurs permettra une plus grande convergence de ces deux politiques.

5. Pouvez-vous donner des exemples de secteurs ou de produits où une coopération internationale plus importante entre autorités de concurrence et représentants des consommateurs pourrait rendre les marchés plus compétitifs en assurant une protection adéquate des consommateurs dans le monde ?

- Le commerce électronique, et particulièrement la publicité en ligne, nécessitent une coopération internationale importante. La publicité en ligne connaît une croissance très soutenue. La France est le marché européen le plus dynamique pour les liens sponsorisés avec une croissance de 35 % en 2006. L'enjeu représenté est tel que les initiatives internationales et nationales se sont multipliées ; les évolutions techniques, économiques et juridiques ont conduit à des adaptations sérieuses des organisations de régulation et de contrôle. Les pouvoirs publics français se sont montrés extrêmement réactifs à la perspective d'un développement du commerce électronique et

les dernières années ont été marquées par une série d'actions donnant à la fois un cadre et un contenu aux discours sur le développement de la société de l'information. La DGCCRF est en mesure de prendre en considération le développement de nouveaux secteurs économiques et, corrélativement, des demandes nouvelles des consommateurs grâce notamment au Centre de Surveillance du Commerce Électronique (CSCE), créé en novembre 2000. Ce dispositif a été complété en 2001 par un réseau de veille et de contrôle et permet d'assurer la présence de la DGCCRF dans le monde de l'Internet.

- Le domaine de la lutte contre la contrefaçon de marque suppose également une coopération accrue. La contrefaçon cause un trouble important à l'ordre public économique. Elle fausse le jeu de la libre concurrence, trompe le consommateur et peut mettre en danger sa sécurité, pille le savoir-faire, fait disparaître des entreprises et cause la perte de nombreux emplois. La contrefaçon représente près de 10 % du commerce mondial, soit 200 à 300 milliards d'euros de perte pour l'économie mondiale dont 6 milliards d'euros pour la France. Outre son impact direct sur les investissements de R&D, l'appauvrissement de la création, les destructions d'emplois, la contrefaçon met en danger également la sécurité et la santé des consommateurs du fait du non-respect des normes de fabrication et de sécurité des produits copiés La DGCCRF est compétente pour la contrefaçon de marque, laquelle est un délit passible de trois ans d'emprisonnement et de 300 000 € d'amende en cas de détention, importation, offre de vente, vente de marchandises présentées sous une marque contrefaite, reproduction, imitation, utilisation d'une marque en violation des droits conférés par l'enregistrement et de quatre ans d'emprisonnement et 400 000 € d'amende (article L.716-9 du code de commerce) pour les personnes qui, en vue de vendre, fournir, offrir à la vente ou louer des marchandises présentées sous une marque contrefaite, se livrent notamment à l'importation et à la production industrielle de ces marchandises.

INDIA

1. Competition and Consumer Protection: Indian Scenario

India was one of the first developing countries to have an anti-monopoly legislation, with the enactment, in 1970, of the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969. The MRTP Act covers both competition policy related provisions, mainly in terms of Restrictive Trade Practices (RTPs) and Monopolistic Trade Practices (MTPs), and consumer protection provisions in the form of Unfair Trade Practices (UTPs).

The process for this legislation started with the setting up of the Monopolies Inquiry Committee in 1966, which found that the Indian market was concentrated with four firm concentration ratios (CR 4) over 75 per cent in respect of products like infant food, biscuits, coffee, shirting, suiting, kerosene, coal, petroleum, stove, fan, lamp, radio, refrigerator, typewriter, vitamins, penicillin, cars, commercial vehicle, cement, roofing sheets etc. The Committee also found prevalence of a number of restrictive trade practices (RTP) in the Indian market, including hoarding; resale price maintenance; exclusive dealing; price fixing; boycott; and price discrimination.

While the MRTP Act, 1969 prohibited RTPs like hoarding, re-sale price maintenance, exclusive dealing, price fixing, boycott, and price discrimination, in the case of monopolistic practices it only provided that these can be referred by the government to the MRTP Commission. Regulation of Mergers and Acquisitions remained in the exclusive domain of the Government. An asset based regulatory framework was put in place, with enterprises having Rs.200 million(subsequently raised to Rs. 1000 million) in assets and dominant enterprises having Rs.10 million in assets being required to seek prior approval of central Government for expansion or for setting up of a new undertaking.

Pursuant to the report of a high level committee (Sachar Committee, 1977) recommendations the MRTP Act was amended in 1984 to insert Unfair Trade Practices (UTPs) like misrepresentation as well as misleading or disparaging advertisement. Also the concept of deemed illegality was introduced in respect of a host of trade practices like exclusionary behaviour, tie-in sale, re-sale price maintenance, bid rigging, allocation of market, boycott, predatory pricing etc.

MRTP Act, as currently administered, has jurisdiction related to RTPs and UTPs. Fourteen practices are deemed RTP. MTP can be looked at by the Commission if referred to it or on a *suo moto* basis, but the powers of the Commission are only recommendatory (to Government). The 1991 amendment to the Act deleted M & A related provisions.

2. Competition Act, 2002

As a follow up of the wide ranging economic reform programme that started in 1991, a modern competition law, the Competition Act, 2002, was enacted on 13th January, 2003, which is state-of-the-art, covering prohibition of anti-competitive agreements and abuse of dominance, and regulating combinations (covering mergers, amalgamations and acquisitions). Competition advocacy is an important component of the Act.

The Competition Act, 2002 envisages that the MRTP Act, 1969 would stand repealed and the MRTP Commission may continue to exercise jurisdiction and power under the repealed Act for a period of two years from the date of the commencement of the Act (Competition Act, 2002). In respect of all cases or proceedings (including complaints received by it or references or applications made to it), the MRTP Act would cease to be in force. During the intervening two year period the MRTP Commission will not take up any new cases, but would complete the ongoing cases under the provisions of MRTP Act, 1969. The fall out of this for consumer protection is in terms of the fact that Unfair Trade Practices (UTPs) which are a major element of consumer protection would be left uncovered in CA, 2002, and would disappear with the MRTP Act, 1969. Keeping this in view it has been proposed to have a National Consumer Protection Authority Act.

3. Consumer Protection Act, 1986

The Indian Consumer Protection Act, 1986 was enacted "to provide for better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and for matters connected therewith"[1]. The obvious objective is to protect consumers from exploitation. The Act was last amended in 2002, which came into effect on 15th March, 2003. It applies to all goods and services unless specifically exempted by the Government. Until now no sector has been specifically exempted and, therefore, it is universally applicable.

The basic purpose of the Act is to provide relief to four categories of persons, viz.

- consumers, who have purchased goods for consideration, if they suffer from any defect;
- consumers from whom the trader has charged a price in excess of the price displayed on the goods or package thereof or price list exhibited, or as agreed between the parties or the one fixed under any law;
- consumers who have suffered loss or damage as a result of any unfair trade practice or unscrupulous exploitation by the trader; and
- consumers of service for consideration, if it suffers from deficiency in any respect."[2]

The Act also provides for a three tier redressal mechanism for consumer grievances, consisting of the District Forum, the State Commission and the National Commission. Pecuniary limits for original jurisdiction for the three redressal agencies have been prescribed by the Act. While the legislation is at the national level the administration at the district and state levels has been left to various States governments who have framed rules in this regard. The National Commission is constituted by the central government and has the power to make its own rules. The National Commission also has the power to review its order. Appeals from the District Fora lie to the respective State Commission and from State Commission to the National Commission. Appeal against the orders of the National Commission, in case of original jurisdiction, lie to the Supreme Court of India. As regards orders passed by the Commission in its appellate or revisonal capacity there is no provision for appeal.

The three tier Redressal Authorities are quasi-judicial Tribunals. Their decisions can be appealed only in the manner laid down in the Act and cannot be agitated in a Civil Court. They are vested with the

1 Preamble to the Consumer Protection Act, 1986

2 Duggal S.M. (2006) Commentary on the MRTP Law, Competition Law and Consumer Protection Law (Law, Practice and Procedures), 4th Edition, Vol. 2, Wadhwa and Company, Nagpur (p. 1122) – page 1122

power: to give 'cease and desist order'; to order issue of corrective advertisement to neutralise the effect of the impression created by the misleading advertisement; to provide adequate cost to the parties; to grant *ad interim* stay or injunction; and to award compensation; and to order compensation to be paid by public servants for their *mala fide*, oppressive or capricious act, where circumstances so warrant. The provisions of the Consumer Protection Act, 1986 are in addition to and not in derogation of any other law. The Reddressal forums at the District level have power to pass interim order, as is just and proper.

4. Interaction of Consumer Policy with Competition Policy

Consumer protection and competition law have similar, but not identical objectives. Both aim at consumer welfare. Competition laws benefit consumers in the ultimate analysis. Theoretically, policies and laws aimed at enhancing competition in the markets result in minimisation of exercise of market power on the part of producers and suppliers to the detriment of the process of competition. In the absence of an enforceable competition law, the producers, including distributors and suppliers, may be tempted to deviate from the rules of the competition game, for short term gains.

Consumer protection generally involves compensation for the loss or damage suffered by the consumer. Competition law goes beyond this and ensures that the market functions efficiently. Consumers other than those immediately affected and who have complained would also benefit. Besides, the definition of consumer under the consumer protection law and that under Competition Act, 2002 differ. Commercial buyers stand excluded from the definition of consumers under consumer protection law, but not under the Competition law.

Consumer protection law and Competition law are currently administered by two separate Ministries in the Government of India. Their respective policies are also, therefore, formulated separately, but process of consultation is provided in government business rules. The MRTP Act, 1969 is still in vogue and has under its purview UTPs which consist of: misrepresentation and false or disparaging advertisement; deceptive practices; lucky draw; violation of standards; and destruction of goods, with a view to affecting price. MRTP Commission thus dispenses partly consumer protection, though except for the UTPs the rest of the consumer redressals are under the Consumer Protection Act, 1986.

5. Dual System Vs Single Agency

India had a mixed system with the MRTP Commission having jurisdiction over certain aspects of consumer protection (UTPs) (with the amendment to the Act in 1984) and over competition issues: MTPs and RTPs. A separate Consumer Protection legislation was enacted in 1986, while at the same time UTPs continued to be under the purview of the MRTPC. With the establishment of the Competition Commission of India in October 2003, India has a dual system in the strict sense of the term though the Commission has not become functional, with the enforcement process not yet having started. Within two years of the full functioning of the Competition Commission the MRTP Commission will cease to exit and there will be separation of consumer protection and competition policy enforcement. It is pre-mature to comment on the benefits and drawbacks of such an arrangement.

However, a dual system has been found necessary and practical primarily because of the continental size of the country (3.288 million sq kms) and its population (1.1billion). Consumer protection issues are generally large in number, small in size and need urgent attention and can be sorted out in a short to medium term.

The dual role that is unfolding in the country is justified also because of the stage of development of the country. Consumer issues in a developing country differ from those in a developed industrial economy, which is in the 'age of mass consumption', and where the level of information asymmetry is much lower

compared to that in developing countries. In fact, the concept of consumer protection legislation was originally envisaged because of the introduction of new and diversified products as modernisation advanced, with more and more sophisticated products advertised through print and electronic media, resulting in information asymmetry and consequent chances of consumers being misled about the quality, end use and price of the product/service on offer. Thus over pricing, misleading advertisement, violation of terms and conditions of contract for sale, negligence in providing service etc are matters directly affecting the consumers.

The thrust of competition law, on the other hand, is on deviations from the rules of the market that have or that are likely to have appreciable adverse effect on competition in markets in the country. Thus anti-competitive agreements among enterprises and abusive acts by enterprises stand prohibited and anti-competitive combinations are regulated under the Act. The benefits of competition regulations may not benefit any specific individual or any specific group of consumers. The benefits of competition would eventually accrue to the consumers in general, though in the short to medium term the efficiency enhancing effects of an agreement or combination may not be directly transferred to the consumer. In many competition law jurisdictions, *rule of reason* is applied while evaluating acts by enterprises from the competition angle. Under the Indian Act, horizontal agreements, other than four types specified in Sec 3 (3) and all vertical agreements and combinations will be examined in terms of *rule of reason* i.e. by weighing benefits and costs from the perspective of competition. Even in respect of horizontal agreements in the form of joint ventures (JVs) efficiency enhancement criteria are available under the Act (proviso to sec 3). However, there is no stipulation that the efficiency enhancement will have to be passed on to the consumer(s) immediately in order that efficiency enhancement be treated as not having appreciable adverse effect on competition in markets in India, unlike the Art. 81 (3) provisions in EC.

Competition law analysis is more complex and time consuming with analysis of the relevant market in most cases and analysis of the generation of abuse of dominant position in the relevant market. Detailed analysis of any act as regards its impact on the market is not generally the concern of consumer protection law and policy. The major, and in most cases the only, concern is related to redressal of consumer grievances. It may in most cases be confined to redressal of the grievances of an individual consumer. Competition law, on the other hand is concerned about the impact of an anti-competitive act by an enterprise or a group of enterprises on competition in the market. The market process and its distortion is more important than whether and what an individual consumer has suffered.

There is also the inter-temporal differences as between the objectives of consumer protection laws and competition law. Consumer protection aims at redressal of consumer harm in the short run. On the other hand the benefits of the implementation of competition law to consumers may not be in the short or medium term. The benefits may accrue to consumers in the long term only, through increased efficiency in the economy as a whole and in the specific sector concerned. Though such benefits or efficiency gains may not be transferred to the consumers in the short run, these may come back to them in the medium to long run in the form of newer and more diversified products or the same products at lower prices, arising, *inter alia,* out of new investments by enterprises from the accumulated efficiency gains.

An important point to note is that efficiency gains in one sector or sub-sector by an enterprise may be shared with consumers not in the same sector or sub-sector, but in a different sector or sub-sector, so that while there may be losses or grievances by consumers in one sector or sub-sector due to the acts of an enterprise efficiency gains or benefits may accrue in an altogether different sector or sub-sector. Such is the case when an enterprise diverts funds for the purpose of Research and Development (R&D) and training of personnel, which will result in higher prices for the consumer for the existing products (at least for the present), but may result in the production of a new product benefiting he consumers of such new product.

6. Competition in The Market And "No Frills" Versions Of Products

India does not have any specific legal or administrative requirement as regards, provision of 'no frills' products, except in the case of bank accounts. However, the concept of 'no frills' products has gained currency in sectors like civil aviation, mobile telephone services and banking. As regards airlines only the core facility/service is provided at competitive prices by certain airlines while value added services are offered by the same service providers or others at higher prices. In the banking sector, the banking regulator has recently required that banks offer 'no frills' account to their customers so that the objective of 'inclusive banking' is achieved and more persons from the lower income groups enter the banking service net. The mobile phone revolution in the country was also ushered in by new entrants in the market in the early part of this decade who offered low cost mobile services with not 'no' but (rather) 'low frills' connections to the consumers. This made mobile connectivity affordable and within the reach of millions of consumers paving the way for a near revolution in the sector.

In the civil aviation sector the recent entry of a low fare 'no frills' carrier led to accessibility of air travel to millions of new consumers because of its affordability. This has resulted in over-all reduction in the fares across the country which has been sustained over a decade. Consolidation tendencies are now visible in the market, which are likely to reverse the trend.

One clear fall-out of the trend towards 'no frills' products is the difficulty in distinguishing the pricing strategy by these enterprises and predatory pricing which is frowned upon under sec 4 (2) (a) (ii) of the Competition Act, 2002. Predatory pricing has to be invariably by a dominant enterprise. Sec. 19 (4) requires that the Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the factors, which include, besides market share, size and resources of the enterprise, size and importance of the competitors, economic power of the enterprise concerned, vertical integration, dependence of consumers on the enterprise, statutory monopoly position, existence of entry barriers, countervailing buying power, market structure and size of the market, social obligations and social costs, contribution to economic development by the enterprise concerned, and any other factor that may be found relevant by the Commission.

Tackling predatory pricing by the Competition Commission could be considered anti-consumer in some cases, because predatory pricing benefits consumers in the short to medium run until the enterprise engaging in predatory behaviour recoups the losses from the consumers.

7. International Cooperation between Competition Authorities and Consumers' Representatives

An area where the interests of consumer protection and competition policy and law converge is the case of cartels, especially cartels of a hard core nature, involving price fixing, market sharing, quantity or supply limiting and bid rigging. These four types of horizontal agreements are considered in several competition jurisdictions as *per se* anti-competitive and prohibited. The Competition Act, 2002 envisages that agreements of the four types indicated above are presumed to have appreciable adverse effect on competition and, therefore, prohibited. Any such agreement would be void and would run the risk of penalties. In the case of cartels the penalties would be to the tune of three times the profits or ten per cent of the turn over for the entire period of the working of such cartel. Such presumptive logic is based on the understanding that such practices bring benefits only to the perpetrators of such agreements and results in dead-weight losses to all other stakeholders in the market, including consumers and competitors.

International cooperation is essential to address cartels of a cross border presence, keeping in view the fact that international cartels are common, with presence in a number of jurisdictions, making it difficult to prove cartelisation without the cooperation of the competition authorities of the countries.

8. Conclusion

There is strong commonality between competition policy and law on the one hand and consumer protection policy and law on the other. An effective competition policy lowers entry and exit barriers and makes the environment conducive to promoting entrepreneurship, which also provides space for the growth of small and medium enterprises and consequent employment expansion. Competition law concentrates on maintaining the process of competition between enterprises and tries to remedy behavioural or structural problems in order to re-establish effective competition on the market. The consequence of this is higher economic efficiency, greater innovation and enhancement of consumer welfare. Thereby the consumer experiences wider choice and greater availability of goods at affordable prices. On the other hand, the consumer protection policy and law are primarily concerned with the nature of consumer transactions, trying to improve market conditions for effective exercises of consumer choice. Thus, the two disciplines focus on different market failures and offer different remedies, but are both aimed at maintaining well functioning, competitive markets that promote consumer welfare. The two disciplines are mutually reinforcing.

JAPAN

1. Position of the Japan Fair Trade Commission

The Antimonopoly Act provides that, "The purpose of this Act is, by prohibiting private monopolisation, unreasonable restraint of trade and unfair trade practices, by preventing excessive concentration of economic power and by eliminating unreasonable restraint of production, sale, price, technology, etc., and all other unjust restriction on business activities through combinations, agreements, etc., to promote fair and free competition, to stimulate the creative initiative of entrepreneurs, to encourage business activities, to heighten the level of employment and actual national income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of general consumers," (Article 1) and the direct purpose of the Act is interpreted as "to promote fair and free competition." In order to achieve this purpose, the Japan Fair Trade Commission ("JFTC") was established (Article 27) and is responsible for competition policy in Japan. The AMA makes it clear that the JFTC independently carries out its authority concerning the enforcement of the Act (Article 28).

2. Integrated Implementation of Competition and Consumer Policies

From the provision of Article 1 of the AMA, it is clear that the ultimate purpose of competition policy is "to assure the interests of consumers." In order to accomplish this purpose, it is important to help the market mechanism work effectively by maintaining and promoting competition among companies, and to create and ensure an environment in which consumers, as key players in the market, can make decisions in an independent and reasonable manner.

The JFTC had held Study Group on Consumer Transactions meetings comprised of experts in competition and consumer policies since November 2001. In a bid to help the JFTC positively tackle consumer transaction issues, the Group had discussed several topics, including the relationship between competition and consumer policies and the realisation of proper choices made by consumers. As a result, it produced a report in November 2002, affirming the view mentioned above and the integrated implementation of competition and consumer policies:

1. Integrated Implementation of Competition and Consumer Policies

(1) The purpose of competition policy is to promote fair and free competition in the market and to assure the interests of consumers by increasing the efficiency of all economic activities through competition.

In order to achieve this policy purpose, the JFTC has been actively working on competition policy with a main focus on making the market mechanism work effectively by maintaining and promoting competition among companies through the strict enforcement of the AMA, surveys and recommendations on anticompetitive non-government regulations, proposals on regulatory reforms and the like. Consumer interests realised through this competition policy means the fact that good quality, low price and various goods and services are sufficiently supplied to consumers.

> However, the purpose of competition policy, namely "to assure the interests of consumers" cannot be achieved only through the sufficient supply of good quality, low price and various goods and services to consumers. It is also necessary to enable consumers to make independent and reasonable decisions on the choice among goods and services supplied. Unless these two conditions are both met, consumers cannot maximise their utility by purchasing goods and services that suit their needs. This means that consumer policy for building and ensuring an environment in which consumers can make independent and reasonable decisions is essential for realising "the interests of consumers," the purpose of competition policy.
>
> Moreover, if consumers can take independent and reasonable action as the end users of goods and services, entrepreneurs who are able to meet their needs appropriately will survive while those who fail to do so will drop out of the market, which is the most fundamental function of the market mechanism. In ensuring this function, consumers play an important role in terms of competition policy. Thus, consumer policy to create and assure an environment in which consumers can make independent and reasonable decisions is closely associated with competition policy in that it helps the market mechanism work more effectively.
>
> Therefore, it is important to maintain two perspectives at the same time - the so-called "narrow sense" and "broad sense" of competition policy - in order to adequately realise "the interests of consumers." In the narrow sense, competition policy places its focus on making the market mechanism work effectively by maintaining and promoting competition among companies. In the broad sense, competition policy is implemented in an integrated manner with consumer policy that creates and ensures an environment in which consumers can make independent and reasonable decisions.
>
> Competition policy to promote fair and free competition and consumer policy to create and ensure a decision-making environment in which consumers can make proper choices both have a common purpose, "to assure the interests of consumers." In addition, they are closely related to each other since the implementation of consumer policy helps the market mechanism work effectively. Consequently, the JFTC should actively carry out consumer policy, as an integral part of competition policy, for creating and securing a decision-making environment in which customers can make sound choices.

3. Significance of the JFTC's Commitment to Consumer Policy

In addition to the importance of the integrated implementation of competition and consumer policies, as discussed in 2 above, the significance of a role played by the JFTC in consumer policy is also recognised in Japan, given the organisation character of the JFTC, responsible for competition policy. With respect to this significance, the report from the Study Group on Consumer Transactions states the following:

> In order to ensure sound consumer transactions, ministries and agencies governing specific business sectors have been implementing their consumer policy by enforcing sector-specific laws that provide, for example, for a ban on the unjust act of solicitation for business-to-consumer contracts, for an obligation to display and explain important facts and for invalidation of unfair contractual terms.

On the other hand, the Premiums and Representations Acts[1] ("PRA") and the AMA are general laws covering all industries, so they can be extensively applied to any field, irrespective of whether it is subject to regulations under sector-specific laws. They can also be applicable even to those industries that have emerged as new businesses so recently that there is still no sector-specific law, as well as to those areas where regulations for ensuring proper consumer transactions are not adequately enforced even if there is a sector-specific law.

Also, if the PRA and the AMA facilitate proper consumer transactions, civil remedies under the provisions of the AMA are expected, such as a claim for no-fault damages and a petition for injunction against violations, in addition to the JFTC's cease and desist order against these violations. This provides an advantage whereby the government and private parties conduct law enforcement in an integrated manner.

In addition, the JFTC, which governs no particular industry, should play a central role in resolving consumer problems as a neutral administrative institution that can effectively enforce the laws with investigative powers and divisions.

In view of these advantages, the JFTC should in the future make positive efforts toward consumer policy to create and ensure a decision-making environment in which consumers can make sound decisions.

4. Consumer Policy Implemented by the JFTC

4.1. Legislation Enforced by the JFTC

In order to implement consumer policy for creating and ensuring a decision-making environment in which consumers can make sound decisions, the JFTC enforces the PRA, which regulates the unjust inducement of customers, including misleading representations to consumers.

Japan's AMA prohibits conduct that tends to impede fair competition as unfair trade practices (Article 19), which include the unjust inducement of customers. However, although expeditious proceedings are necessary to eliminate the unjust inducement of a large number of consumers and to minimise damage to them, a long time is required in order to take action against the unjust inducement under the AMA. In order to address this problem, the PRA was enacted in 1962, granting the special treatment of the AMA procedures. Based on the PRA, the JFTC has been strictly and promptly regulating misleading representations that prevent consumers from making sound decisions as well as making efforts to help consumers exercise good judgment on the details of and transaction conditions for goods and services and to provide appropriate information to them.

4.2. Enhanced Regulations against Ungrounded Representations

Essentially, any entrepreneur who fails to provide consumers with true, correct and useful information when offering goods and services and who fails to provide goods and services as represented will be unable to gain the trust of consumers in the market. Such entrepreneurs will also lose out in competition with other entrepreneurs who provide appropriate information and will be removed from the market. However, as social and economic structures change in response to rapid technical innovations, the increased amount of complex information and diversified consumer needs, new goods and services, transaction methods and contracts that are so advanced and complicated as to exceed the ability of

[1] See 4.1.

consumers to process and comprehend the information are continually emerging. In such a situation where there is a large disparity between consumers and entrepreneurs in their capacity to process information and to negotiate, it is important to make efforts in order to promote proper consumer transactions, including immediate actions against misleading representations under the PRA.

For instance, as consumers become more interested in health and weight loss, we see an increasing number of representations stressing the superior "performance" of goods and services and "benefits" that consumers may expect from them as a result, such as products and/or devices advertised as being beneficial in relation to weight loss or the recovery of eyesight. Before taking action under the PRA against misleading representations on the benefits or performance of goods and services, the JFTC once had to conduct investigations and examinations through special organisations and prove that such goods and services were not able to provide the benefit or performance advertised. For this reason, even if the entrepreneur had no justifiable grounds for making the representations, it took considerably long time before administrative measures could be carried out. Meanwhile, the goods and services that were suspected of making misleading representations might continue to be sold, thereby expanding consumer damage. In light of these circumstances, a new regulation was introduced in 2003 to pave the way for effectively regulating representations on goods and services without reasonable grounds. Pursuant to Article 4 (2) of the PRA, the JFTC may request any entrepreneur making a representation referring to any benefit provided by goods or services to submit reasonable grounds that support the representation within a predetermined period. When the entrepreneur fails to submit such materials, the JFTC can now regard it as an infringement without specifically demonstrating that it differs from fact and take the necessary action, which may include issuing an injunction to the representation.

5. Conflict and Coordination between Competition and Consumer Policies

In order to deter the unjust inducement of customers, such as misleading representations that distort the consumer choices of products, thereby ensuring fair competition, it is effective for individual industries to set up self-regulations based on the particular features of their products and their own trade practices and to comply with them. However, these self-regulations developed by separate industries may deviate from their objective of preventing the unjust inducement of customers and have the effect of restricting competition.

In terms of coordinating such possible conflicts between consumer and competition policies, the PRA provides for a system that requires entrepreneurs or trade associations who prepare self-regulations that aim at deterring the unjust inducement of customers and ensuring fair competition to have such self-regulations authorised by the JFTC in order to prevent them from being anticompetitive. Self-regulations authorised under the PRA are called fair competition codes.

The JFTC does not authorise any self-regulation unless it satisfies all four requirements listed below. Any act of entrepreneurs or trade associations under the authorised fair competition code is exempted from the applications of the AMA and PRA.

- It is appropriate for preventing the unjust inducement of customers and for maintaining fair competition;
- It is not likely to unreasonably impede the interests of consumers in general or related entrepreneurs;
- It is not unjustly discriminatory; and

- It does not unreasonably restrict the participation in or withdrawal from the fair competition code.

As of the end of 2007, there are 105 fair competition codes established in a wide range of fields. Such codes can ensure fair competition in their respective industries and provide an environment that is helpful to consumers in making sound decisions in relation to goods and services. In addition, they can be expected to eventually produce the effect of promoting competition, such as expanding the market size and facilitating new entry, by enhancing the confidence of consumers in individual industries.

6. Conclusion

Japan is facing the urgent challenge of actively implementing a policy from the standpoint of consumers. Like the JFTC, other relevant ministries and agencies are working to carry out different consumer policies in their respective areas. The JFTC will continue its positive efforts, largely in accordance with the PRA, to implement consumer policy in order to create and ensure a decision-making environment in which consumers can make appropriate choices.

JORDAN*

The consumer's aim, everywhere, is to get the best possible quality of goods, and pay the least possible price. To follow this rule, we have to consider these two elements: Quality and Price.

In Jordan we have two directorates to do the job:

- **Competition Directorate**: by implementing the competition law No 33 of the year 2004.

The Committee for Competition Affairs is the Advisory body of the Competition Directorate. The role of this Committee is:

  - To provide advice on the general competition strategy.

  - To review matters related to the provisions of the law.

Some of the Competition Directorate tasks are:

  - Conduct the necessary investigations of practices that may contravene competition.

  - Receive complaints and requests for economic concentration activities and exemptions and following them up.

  - Cooperate with similar entities outside the Kingdom for the purpose of exchanging information and data and in relation to the execution of competition rules to the extent permitted by international treaties.

  - Issue clarifying opinions in competition matters.

- **Quality and Market Controls Directorate**: by implementing the Industry & Trade Law No.18 for Year 1998 and by implementing the Classification & Promotion regulations.

Both directorates are working as part of the Ministry of Industry and Trade. The Directorate of Quality & Market Control works towards enabling the private sector, both trade and industry, in a way so as to complement the Ministry's policy aiming at freeing the goods and services markets, and organising market procedures in an attempt to avoid private sector abuse of this freedom, thus rending the policy useless to consumers.

Its activities which deal with market control may be summarised as follows:

  - The identification of the basic goods as per a Prime Minister decision.

* By Haitham Abu Karaki, Legal Researcher, Complaints and Consultations Division, Competition Directorate, Ministry of Industry & Trade, Jordan.

- Ensuring the sale of goods as per publicised prices.
- Checking available stock with wholesalers.
- Monitoring the concealing of or refusing the sale of basic goods.
- Monitoring sales, liquidation, and promotional prices.

1. Consumer Protection Association

Also we have the Consumer protection association, a nongovernmental association, to educate people and give them the necessary information about products by using brochures, pamphlets meeting and media advertising. More than that, the association stands against some factories if the quality of their products is low or the price is high.

The President of consumer protection association is a member of the Committee for Competition Affairs.

However there is no legislation for the consumer protection till now, but the consumer protection law is in proceed.

2. Interact between the Consumer Policy and the Competition policy in Jordan.

There is no clear consumer policy in Jordan but the tasks of the Ministry of Industry and Trade and the Consumer Protection Association shows interaction between the Consumer Policy and the Competition policy.

The tasks have a great deal in common. They are designed to enhance consumer sovereignty and effective consumer choice, to address market failures. (That is the situation where market transactions and outcomes fail to serve the consumer interest, economic efficiency and a nation state's productivity and competitiveness).

There are also important differences between Consumer and the Competition policies.

- First: there are differences in their core objectives. Competition law is intended to ensure that markets work according to the market forces, provide consumers with a competitive range of product or service options. In contrast, consumer protection association are intended to ensure that consumers have the information they need to choose effectively from among those options, with their purchasing decisions unimpaired by, for example, coercion, deception or the withholding of important information.

- Second: competition law violations stem from market failures that are external to consumers whereas consumer protection violations, which negatively affect consumers' ability to choose, are founded by market failure that derives from the consumers' own perceptions.

The two policies also differ with respect to enforcement approaches and institutions. Competition law is enforced in a highly selective and reactive manner in response to complaints and investigation by the Competition Directorate. In contrast, the enforcement of consumer protection policy involves direct intervention by the Consumer Protection Association and the Quality and Market Controls Directorate.

More generally, there are important synergies between the two, for example:

- enforcement competition in the marketplace can lead to better consumer information, just as a better informed and more demanding consumer — who is prepared to make his or her preferences clearly known to suppliers — can stimulate greater competition and more product choice.

- Alternatively, overly burdensome regulation of consumer protection can impede market entry and thus reduce market competition and product choice.

Analysing the two policies together underlines that facilitating consumer choice involves more than low prices. Promoting competition is important to consumer sovereignty.

Both competition and consumer protection law should be based on rigorous marketplace analysis and a sound understanding of competitive dynamics and corporate strategy between the two policies, to ensure that unacceptable company behaviour is not confused with legitimate corporate strategy to increase profits and market share.

3. Governmental Organisations: Competition & Consumer Protection Agency

As mentioned above there are three parts working on related issues and as we mentioned before the President of consumer protection association is a member in the Committee for Competition Affairs so the consumer protection association share in designed general competition strategy.

But it is believed that it will be much better if the ministry of industry can enhance the competition administration by combining consumer protections function and competition functions within one directorate and keep the role of the Directorate of Quality & Market Control just for the basic goods.

There are benefits from combining both functions in a single public institution:

- Performing the consumer protection function can provide useful insights about how we should execute competition policy.

- In several important instances, enforcing our laws concerning advertising and marketing practices has improved our understanding of how markets operate.

- Protection functions and competition functions allow a harmonic and complete vision of the realities to be evaluated when they are handled by one entity, therefore leading to decisions that take into account and regard the effects that they may generate in the market, in competition, and in the consumer".

4. Prohibit frills to save the vulnerable class of consumers.

Unfortunately Jordan doesn't have official measures to help the vulnerable class of consumers yet, the traders can use frills to show their goods much better in the consumers eyes than they are . However, if a consumer became a victim from this method he could complain to the jurisdiction authority according to the Jordanian civil law.

But I suggest that the (entrusted authority) directorate for competition and consumer protection have to come up with more balanced policies for the vulnerable class of consumers. It has to establish a centred agency and regional offices, a consultative body consisting of local experts on consumer issues, including

local governments, local councils and consumer groups, so as to promote consumer policies. And contribute to enhancing the rights of those lacking capacity to resolve consumer problems by supporting the vulnerable class through counselling services and education programs and by preparing measures to ensure consumer safety.

The competition & consumer protection directorate have to lay the ground for a practical and comprehensive consumer education and develop an index to objectively measure the consumers' capacity to have a reasonable consumption, which will be utilised for designing consumer education programs focused on the weaknesses and problems of consumers.

5. The Convergence of Competition and Consumer Policy Globally.

Most of the international trade fields are a ground to globally convergence of competition and consumer policy. If we look at the principles in the GATT treaty, we find the Most Favoured Nation Principle (MFN) they are Pursuant to the WTO Agreements.

Countries cannot normally discriminate between their trading partners. If a member grants a country a special favour (such as a lower customs duty on one of its products), the member must grant the favour to all WTO members.

The National Treatment Principle reads that imported and locally-produced goods (as well as services and intellectual Property rights such as patents or copyrights) should be treated equally in a Member's territory.

The Quantitative Restrictions Principle in Rules on Trade in Goods proscribes any prohibition or restriction other than duties, taxes or other charges whether made effective through quotas, import or export licenses or other measures.

The world became a small village. Goods and services are crossing the continents so the competition advances to become not only between domestic products, but between products from all over the world.

International products now compete in global markets. The competition authorities everywhere should work together and cooperate by sharing information. The international representatives have to cooperate to enhance consumer sovereignty and effective consumer choice.

In Jordan Article 3 of the competition law No. 33 of the Year 2004 identify The Law's Scope of Application:

> The provisions of this Law shall apply to all production, commerce and service provision activities in the Kingdom, as well as to any economic activities occurring outside the Kingdom and having an effect inside the Kingdom of Jordan.

As an example of convergence of Competition and Consumer Polices is Electronics Software:

In 2004 Microsoft Company was ordered to cooperate with rival software computer companies, Microsoft was also ordered to make a version of its Windows operating system available without Microsoft's Media Player software

This is because Microsoft obliged customers to buy its Media Player software along with the operating system.

KOREA

1. Background for discussion

The integration between competition policy on the one hand and consumer policy on the other is recently emerging as a major issue for discussion at home and abroad in that the two policies have complementary roles to ensure a functioning market mechanism and integrated implementation of the two policies can contribute to advancing their shared goal of consumer welfare.

On the international front, competition authorities of other countries have adopted this as a major agenda to seek specific ways to connect the two policy areas. In fact, within the OECD, the Committee on Consumer Policy and the Competition Committee already held a workshop under the theme of "Interaction between Competition Policy and Consumer Policy" in October 2003 where member countries exchanged ideas and shared experience concerning the issue.

In Korea, its competition authority, the Korea Fair Trade Commission (KFTC), has steadfastly made efforts to link competition policy to consumer policy. In Korea, the authority of consumer policy had been enforced under two jurisdictions of the KFTC and the Ministry of Finance and Economy (MOFE). However, through amendment of the Framework Act on Consumer of 2006, the KFTC came to have the jurisdiction over consumer policies concerning consumer information, education and safety along with its original mandate to oversee trade practices. In addition, the authority over the Korea Consumer Agency (KCA), a quasi-government organisation to carry out policy analysis, damage redress and provision of information and education to protect rights and interest of consumers, has been transferred to the KFTC. Furthermore, recently, the MOFE's jurisdiction to integrate, coordinate and assess consumer policy was transferred to the KFTC, through which the consumer policy enforcement system has been integrated within a single institution. This change was possible thanks to the perception that it is more efficient for the KFTC to integrate and coordinate consumer policy as well as enforcing it, and it is more effective to integrate responsibility for the enforcement of competition policy and consumer policy within a single institution to promote consumer welfare. The following is KFTC's experience in integrating the two policy areas and its future strategy to promote it.

2. Relationship between competition policy and consumer policy

It is widely believed that competition policy and consumer policy make up for each other in pursuit of their common goal of consumer welfare. Yet, whether it is theoretically or practically, the case has not been vindicated. Therefore, it is important for countries with various institutions to share their experience and continue to have discussions so as to vindicate the relationship between the two policies.

In Korea, over the course of reorganisation of consumer policy enforcement system since 2004, examination on the relationship between competition policy and consumer policy has been conducted actively. In addition, the idea was prevalent that while the two policies are in complementary and at the same time, in conflicting terms, for a single institution to integrate the two policies and enforce them together is effective to enhance consumer welfare. Accordingly, the KFTC, which had been the competent authority to enforce consumer policy, was handed down the authority to consolidate, coordinate and assess consumer policy from MOFE, thereby getting rid of overlapping and inefficiency in policy enforcement,

and eventually advancing consumer welfare. As a result, the KFTC became to have the whole enforcement authority in consumer policy and the jurisdiction over the KCA.

In the Seoul Competition Forum in September 2007, those in charge of policies from China, the UK, the US and Canada were unanimous in saying that competition policy and consumer policy share a common goal and integrating and enforcing them together will enable them to employ various policy instruments in an integrated manner to promote effect of policies and efficiency of enforcement bodies.

2.1 Complementary relationship

Competition policy and consumer policy share an ultimate goal. However, either competition policy or consumer policy alone has limitations to achieving the goal. For one thing, competition policy can extend the scope of choices available to consumers, but cannot guarantee consumers make a reasonable choice due to information asymmetries. That is, even if fair and free competition ensures supply of various products in the market, when consumers cannot make effective choices in selecting the best products by price, quality and service, competition among enterprises will fail to translate to advancing consumer welfare. While competition policy can be effective in widening the scope of choices for consumers, decreasing product prices and enhancing product quality, it is provision of information and other consumer polices that enable consumers to make a reasonable choice, which in turn serve as the pressure to facilitate competition among enterprises in price and quality. This way, the two policies play complementary roles for each other to achieve their common goal.

2.2 Conflicting relationship

Basically, competition policy and consumer policy have a high probability of being complementary to each other and thus are less likely to clash. However, when it comes to actual policy enforcement, the possibility of conflicts between them cannot be ruled out completely. In particular, regulations under the name of consumer protection could restrict competition, conflicting with competition policy. Cases in which consumer policy enforcement leads to negative effects on competition policy are as follows.

First, establishment of minimum standards such as standardised contracts and safety standards that enterprises should abide by can restrict competition. Of course, such minimum standards contribute to protecting consumers from enterprises' unfair trade practices and hazardous products. However, in case of setting such standards excessively, they can restrain new entrants' access to the market and incur excessive social costs, ultimately undermining consumer interests.

Second, promoting self-regulations through the introduction of codes of conduct among enterprises can restrict competition. Codes of conduct refer to a collection of best practices that enterprises should observe by a minimum standard stipulated by laws. This self-regulation and implementation by enterprises is one of the recommended efforts to ensure consumer protection. But it should be noted that under the same terms of transactions, such self-regulations can restrict competition among enterprises.

3. Current status of integration of competition policy and consumer policy

For its part, the KFTC has made various attempts to integrate competition policy and consumer policy so far. Considering that the two policies are being enforced under separate teams within the KFTC, the focus of integration efforts is more on between tasks than on between organisations. In addition, the integration between competition and consumer policies has taken place in a way that ensures consideration of each policy perspective in mapping out either policy, and the following are noteworthy cases of its kind.

3.1 Consideration of consumers in competition policy enforcement

3.1.1 Selection of investigation cases in areas closely related to consumers

A typical case of integration between the two policies can be seen in selecting a competition law violation where a priority is given to a case which has a significant effect on consumers. As the KFTC is strengthening regulations on cartels recently, it is focusing its investigation efforts on consumer goods rather than raw or intermediate materials so as to prevent consumer damage.

Case 1 – Corrective order on cartel concerning essential consumer goods such as flour and laundry detergent

The KFTC established establishment of competition order in areas closely related to people's lives as its policy objective. To this end, it has conducted investigation by virtue of its authority into commodities market which has a great risk of cartel due to a high level of monopolisation. In 2006, the KFTC investigated into flour market (CR_3=75%) with its authority to impose a surcharge of USD 45,871,104 on eight flour manufacturing companies for their collusion in price and supply volume that began in 2000. In addition, the KFTC analysed latest development in laundry and dishwashing detergent market (laundry detergent CR_3=82.3%, dishwashing detergent: CR_3=85.5%) to detect a price cartel by four companies including LG Household & Health Care and Aekyung that has lasted since December 1997 and impose a surcharge of USD 43,317,485.

3.1.2 Consideration of consumer welfare in competition law enforcement

The KFTC conducted assessment on effects of law enforcement after imposing corrective measures on competition law violations in an area closely related to daily lives of consumers in order to inform consumers of damage done by cartel to them and effect of the KFTC's corrective measures.

Case 2 – Post-assessment on school uniform cartel case

In 2001, the KFTC imposed an order to cease there from and a surcharge of 11.5 billion won on three school uniform manufacturers for their price cartel. Later, the KFTC carried out post-assessment and announced the result on the case. As a result of comparing uniform prices before and after imposing corrective measures, the KFTC found that the breakup of the cartel led to decreases in school uniform prices, with 17%~19% for winter uniform and about 20% for summer uniform, which translated into an estimated benefit to consumers of 60 billion won (winter uniform: 30,000 won per piece *1.5 million pieces = 45 billion won and summer uniform: 10,000 won per piece * 1.5 million pieces = 15 billion won). This corrective measure led to active joint purchase of school uniforms and a damage compensations suit by 3,525 parents, who won the suit to receive a compensation of about 58,000 won per person (in total, USD 211,305).

3.2 Consideration of competition in consumer policy enforcement

3.2.1 Efforts to redress consumer damage incurred by competition law violations

The KFTC's administrative measures on competition law violations have limitations that they cannot remedy consumers' financial damage but instead redress consumer damage indirectly by imposing sanctions against law violators. Therefore, the KFTC has sought various systems to facilitate redress of consumer damage.

Collective Consumer Dispute Mediation System

Above all, the KFTC adopted the Collective Consumer Dispute Mediation System in 2007 and has been implementing the System in order to ensure an effective redress of consumer damage for areas where damage is incurred against a majority of consumers. A case can be filed by more than 50 consumers who suffered the same damage to the Consumer Dispute Settlement Commission of the Korea Consumer Agency. And when the Commission makes a judgment on the case and the accused enterprise agrees to the decision, the case is deemed as settled. During some six-month-long operation of the System, nine cases were filed and seven of them were settled, with most of the disputes concerning apartments. This system is being successfully established as an effective remedy for small-sum damages to multiple consumers.

Application and settlement status as of January 2008

Types of industry	No. of application (applicants)	No. of settlement
Apartment	9(3,119)	6
Goods	4(882)	-
Rental service	1(3,109)	1
Communications	1(80)	-
Total	15(7,190)	7

Consumer Complaints Management System (CCMS)

Furthermore, the KFTC is implementing a system to certify the CCMS designed to help undertaking autonomously manage consumer complaints. To further spread the CCMS, the KFTC is implementing the system from September 2005 in which in case a company operating the CCMS applies for the KFTC's certification, the KFTC assesses the applicant's system by core factors to grant certification. So far, 16 out of 62 companies with CCMS have been granted a certification from the KFTC. In assessing a CCMS, the KFTC considers whether the applicant has violated competition law, not just consumer law, based on the perception that no matter how well-equipped its system for consumer protection is, if the applicant violates competition law, it cannot be a company that truly serves consumers.

Current status of CCMS management as of January 2008

Types of industry	No. of companies with CCMS	No. of companies with certified CCMS
Industrial products	7	2
Finance	14	6
Food	24	5
Energy	1	-
Distribution	4	1
Clothes	1	-
Communications	2	1
Automobiles	1	-
Chemicals	1	-
Service	2	-
Pharmaceuticals	2	-
Electronics	2	1
Total	62	16

Assistance to lawsuits related to consumer damage

Currently, in Korea, as class action lawsuits or Parents Patriae Actions to redress consumer damage have yet to be introduced, efforts to help consumers get remedy for their damage through legal suits are in dire need. This issue was raised when the KFTC detected a cartel of collective price raise by four local oil refining companies and imposed surcharge in February 2007, and subsequently, consumer organisations filed a damage compensation suit under Article 56 of the Monopoly Regulation and Fair Trade Act. In order to provide assistance to such legal actions, the KFTC is to induce the KCA to set up and implement a support team for consumer damage suit. Through this, the KFTC is planning to support consumers by providing materials related to investigation or various consultation within the legal boundary to keep trade secrets of enterprises so that consumers have an easier access to suits deemed to promote public good.

Also with the aim of advancing consumers' rights and interests, the KFTC plans to link consumer dispute settlement to its case-handling function. Specifically, cases aiming at redressing damage among reported cases as competition law violations to local offices of the KFTC are to be transferred to the Consumer Dispute Settlement Commission, and for cases that failed to be settled, the KFTC plans to handle them for themselves.

3.2.2 Consumer orientation project

In the past, the Korean government employed a producer-oriented economic policy with which it took the initiative in supporting and developing industries. This policy that championed only the supply side of the market economy, however, was criticised for undermining development of the national economy by sacrificing interests of the other important side, consumers. To address the concern, the need of policies to invigorate competition between producers and to ensure a functioning market economy through consumers' reasonable choices was raised. In response, the KFTC began to implement projects to ensure "consumer orientation," in which it review the government's policies and institutions for each sector from consumers' point of view and seek ways to improve them.

First of all, the KFTC designated five industries including telecommunications, finance, public service, education, legal and medical service as warranting improvement in terms of consumer orientation, and it established plans for market research, government policy and institution study, and methods to improve them for one or two industries on an annual basis. For instance, in 2006, the KFTC chose telecommunications and public service to review their consumer orientation, and medical service for 2007. As a result, the KFTC identified areas to improve for each industry, with pricing plans and cartel regulations for telecommunications and structural and preliminary regulations on prohibiting competition and advertisement regulations for medical service, pushing forward institutional reform in concerted efforts with relevant government agencies or teams within the KFTC.

Measures to secure consumer orientation for telecommunication service (2006)

No.	Institution	Measures for improvement	Reference
1	Pricing plan	To cut telecommunications fees	
		To review the government's pricing control in a way to promote market competition	
		To induce simplification and systemisation of telecommunications fees	
		To ensure pricing plan disclosure	
		To strengthen control over pricing plan names not to mislead consumers	
2	Regulations on unfair practices	To set a separate criteria for unfair practices concerning consumer protection in IT other than "Types and Criteria of Prohibited Practices of Telecommunications Business Operators"	
		To incorporate downstream distribution such as agencies of common carriers to regulation scope	
3	Mobile content	To include a special clause for adolescents	
		To set a criteria for mental damage compensation	

Measures to secure consumer orientation for medical service (2007)

No.	Institution	Measures for improvement	Reference
1	Lifelong licensing of medical workers	To convert to renewal-base licensing system through regular assessment	
2	Prohibition on analogous medical treatment	To selectively permit for proven areas via certification	
3	Advertisement control	To increase proportion of consumer	

No.	Institution	Measures for improvement	Reference
		representatives in the Review Board To enlist the Internet for review	
4	Selective medical treatment	To rescind it from the law to liberalise it	
5	Structural and preliminary regulations on prohibiting competition	To change it to case-base and post regulatory system	
6	Expansion of consumer information in medical service	To expand the scope and items for assessment	
7	Medical dispute settlement system	To enhance expertise in dispute resolution and settlement system	

4. Challenges to integration of competition and consumer policies

Nowadays, as for integration of competition policy and consumer policy, the debate on whether it is necessary or not is over. Rather, the relevant question to ask for now is how to facilitate it. The KFTC so far mainly focused on connecting the two policy areas while handling competition law violations and redressing consumer damage, during which it made various attempts and experienced many trials and errors.

Last year, as the amendment of the Framework Act on Consumer equipped the KFTC with the authority to enforce consumer policy and the jurisdiction over the KCA was transferred to the KFTC, now the KFTC can seek ways to integrate the two policy areas not just at task level but also at organisation level. Besides, the ongoing active support for suits to redress consumer damage is expected to further facilitate integration of the two policy areas.

Surely, to that end, it is necessary to step up efforts to figure out the state of integration of the teams responsible for the two policies within the KFTC and boost it further, along with efforts to share tasks efficiently and strengthen cooperation between the KFTC and the KCA. And to set up a system to analyse and use the KFTC's experience in integration of policies is yet another challenge.

MALTA

1. Introduction

In Malta one and the same government entity, the Consumer and Competition Division at the Ministry for Competitiveness and Communications, is responsible for the formulation and enforcement of both competition and consumer policies. The Division embraces the Office for Fair Competition and the Department of Consumer Affairs.

2. Office for Fair Competition

The Office for Fair Competition (OFC) investigates complaints from competitors as well as consumers and their associations or related bodies and carries out *ex officio* investigations in relation to alleged breaches of the Competition Act[1] which prohibits anti-competitive agreements and concerted practices and abuse of dominance. Under this Act, the OFC is empowered to find infringements and to issue cease and desist or compliance orders against the undertakings concerned in order to remedy the infringement, which decisions and orders are then appealable to the Commission for Fair Trading (CFT), an independent administrative tribunal presided by a magistrate. Where the infringement concerned is a serious infringement or involves a breach of Articles 81 or 82 of the EC Treaty, the Office may only issue a report with its findings and must then remit the case to the CFT for a decision and any orders for remedial action that it may deem appropriate. The OFC and the CFT are the administrative bodies in the country competent to apply and enforce the antitrust rules.

The OFC is set to take on an even more pivotal role in the enforcement of competition law under newly proposed amendments to the Competition Act drawn up by the Office and recently submitted for public consultation.[2] Under these amendments it is proposed that not only would the OFC become the administrative body empowered to decide on any infringement of the Maltese and EC competition rules (subject to a right of appeal to the CFT in all cases) but it would also acquire the power to impose hefty administrative fines for such infringements, apart from the remedial orders for cease and desist and compliance.

The OFC is also entrusted with the appraisal of modifiable concentrations under the Control of Concentrations Regulations[3] issued under this Act to ensure that such concentrations do not lead to the substantial lessening of competition in the market and in this capacity it is empowered to block concentrations that are deemed likely to have this effect or to force changes to these concentrations to remove the competition concerns. These decisions are likewise appealable to the Commission for Fair Trading.

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1 Chapter 379 of the Laws of Malta.

2 See http://www.mcmp.gov.mt/pdfs/Consultations/ConsultCompAct2007.pdf

3 LN 294 of 2002 as subsequently amended.

3. Department of Consumer Affairs

The Department of Consumer Affairs is responsible for providing information and guidelines to the public on matters affecting the interests of consumers and for the enforcement of a number of consumer laws, foremost amongst which is the Consumer Affairs Act[4] that empowers the Department to investigate consumer complaints in respect of various consumer concerns and to issue compliance orders for the deletion or alteration of unfair contract terms or the discontinuation or prevention of misleading advertising or illicit comparative advertising as well as in respect of distance selling contracts,[5] price indication[6] and consumer credit[7] when the relative information requirements and other obligations are not fully complied with; apart from the general power to issue public statements and warnings about trading practices detrimental to the interests of consumers and about the persons who engage in such practices. In relation to doorstep selling activities, the Department is also empowered to withdraw, suspend or withhold the renewal of the seller's licence if he breaches the provisions of the Doorstep Contracts Act[8] which provides for a number of safeguards to protect consumer interests. The Department is also responsible for the administration of the Product Safety Act[9] in terms of which it is vested with extensive powers to ensure the safety of products on the market. By virtue of wide-ranging amendments to the Consumer Affairs Act that are currently before Parliament, the Department's powers are set to increase in terms of scope as they will extend to all forms of unfair commercial practices detrimental to consumer interests and in terms of sanctions as the power to impose administrative fines will be added to the power to issue compliance orders.

4. Dual-function Agency

Both the Competition Act and the Consumer Affairs Act and the regulations issued under them vest all these powers in the hands of the 'Director' of the Office for Fair Competition and the 'Director' of the Department of Consumer Affairs respectively, but, in practice, since 2001, when both offices were joined together to form the Consumer and Competition Division and thereby became a dual-function agency, these powers have been exercised by the Director General of the Consumer and Competition Division. Moreover, the Director General sits as an *ex officio* member of the Consumer Affairs Council that has the function *inter alia* of advising government on the formulation of consumer policy, monitoring and keeping under review business practices and the working and enforcement of consumer laws and undertaking or commissioning studies or research that may be necessary to promote consumer protection.

Although within the Division the consumer lawyers and competition lawyers work separately, they regularly liaise and collaborate both in the formulation of policies and drafting of legislation as well as in the investigation of cases that involve both competition and consumer issues. Thus, in the recent drafting of the amendments to the Competition Act and the Consumer Affairs Act, the lawyers drew upon each other's experiences in order to draft amendments that will boost the enforcement capabilities of the Division in relation to both the competition and the consumer laws. The Division strives to give equal importance and to provide equal resources to the implementation of both policies.

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4 Chapter 378 of the Laws of Malta.

5 Distance Selling Regulations, LN 186 of 2001.

6 Consumer Affairs Act (Price Indication) Regulations, LN 283 of 2002.

7 Consumer Credit Regulations, 2005, LN 84 of 2005.

8 Chapter 317 of the Laws of Malta.

9 Chapter 427 of the Laws of Malta.

Although the two agencies were joined only in 2001, the complementarity of competition law and consumer law was appreciated from the very beginning because the two laws that introduced the competition and consumer regimes in Malta, the Competition Act and the Consumer Affairs Act that were both enacted in 1994, were launched together through a single white paper on fair trading in 1993 that stated that the two regimes 'deal with two matters which though distinct are actually complementary and inter-related through their common objective of promoting fair trading practices and the welfare of consumers.'[10]

5. Synergy between Competition and Consumer Policies

The Consumer and Competition Division believes that while it is true that competition policy benefits consumers indirectly, as the indirect beneficiaries of a policy that induces market operators to strive towards economic efficiency, competition policy alone without a robust consumer policy would not achieve the desired result of fully safeguarding consumer interests.

By curbing all forms of collusive anti-competitive behaviour on the market and abusive conduct by dominant or monopolistic firms that exploit their market power to make monopoly profits or to drive out meritorious competition and by preventing the acquisition of market strength through mergers and acquisitions that substantially lessen competition, competition policy ensures that markets work well for consumers. In this way not only does the consumer enjoy the most competitive prices, cutting edge innovation and the widest choice but he can also exercise fully his right of 'economic self-determination'.[11] Moreover, in recent years, competition policy has sought market liberalisation by opening up to competition certain sectors that were previously run by monopolies such as the telecommunications sector, thereby bringing in new competitors and resulting in more and better services at lower prices for consumers.

However, the Division believes that 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 a 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 these 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 (e.g. over the Internet) on the basis of incomplete information on the product and on the trustworthiness of the supplier. Nor does it safeguard against practices such as doorstep selling and aggressive timeshare selling which surprise and pressure consumers into making the wrong choices.

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

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10 'Fair Trading: The next step forward …' DOI November 1993 at 2.

11 In the sense that he can, through his purchases, choose the products and services that best accord with his needs and thereby send a signal to the producer as to what he values and needs most. In markets where the prices and the output and choice of products is not dictated by traders through their collusive behaviour and exercise of market power, the producer must 'listen' to the consumer and be sensitive to his demands resulting in producers supplying the market with the products that are most valued and needed by consumers.

interests and that effective remedies exist when his economic interests are prejudiced. 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 manifested in the dual function played by the Consumer and Competition Division.[12]

6. Consideration of Consumer Interests in Competition Policy

It was stated above that consumers are merely the *indirect* beneficiaries of competition policy. However, there are three instances where the competition rules in Malta take specific and direct account of consumer interests. In the case of anti-competitive agreements and concerted practices, the Competition Act provides that restrictive agreements or practices would not infringe the provisions of the Act if they generate enough efficiency gains to outweigh the negative effects on competition, provided that 'consumers' get 'a fair share' of these benefits.[13] In the application of this 'pass-on' requirement the Consumer and Competition Division resorts to the European Commission's Notice on the Application of Article 81(3) EC for guidance.[14]

The same consumer welfare approach is to be found in the Control of Concentrations Regulations that require the Office for Fair Competition to take into account *inter alia* 'the interests of the intermediate and ultimate consumers' in appraising the legality or otherwise of notified concentrations.[15] Moreover, in its appraisal of the concentration's effect on competition the Office may take into account the development of technical and economic progress only to the extent that this is 'to consumers' advantage'.[16] Furthermore, though an anti-competitive merger may be 'saved' by claims that it will (or is likely to) generate efficiency gains that will be greater than and will offset the effects of any prevention or lessening of competition resulting (or likely to result) from the concentration, these claims will be successful in clearing the merger only if the undertaking concerned proves to the satisfaction of the Office that such efficiency gains *inter alia* are 'likely to be passed on to consumers in the form of lower prices, or greater innovation, choice or quality of products or services'.[17] This ensures that mergers that create a national champion but confer no concomitant benefits for consumers would not be approved on the basis of this efficiencies defence.

Thirdly, the Competition Act specifically includes as an abuse of a dominant position (i) the limitation of 'production, markets or technical development to the prejudice of consumers'; (ii) the refusal 'to supply goods or services indiscriminately in order to eliminate a trading party from the relevant market to the prejudice of consumers' and (iii) the charging of excessive or unfair prices taking into account *inter alia* of 'the importance of the product to consumers'.[18] Thus, in the latter case, 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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12 E. Buttigieg 'Consumer and Competition Policies: Synergy Needed' (2005) 15 Consumer Policy Review 192.

13 Article 5

14 Guidelines on the Application of Article 81(3) of the Treaty [2004] OJ C101/97.

15 Regulation 4(2).

16 *Ibid.*

17 Regulation 4(4).

18 Article 9.

In respect of exclusionary abuses, it is felt that it is important that the long-term consumer interests rather than the short-term consumer gains be taken into account in assessing practices such as below-cost pricing, fidelity rebates or bundling of products/services that might appear attractive to the consumer in the short term but may result in higher prices and lesser consumer choice in the long term.

Unfortunately, private enforcement of competition law in Malta remains virtually non-existent. The competition law provisions do not contemplate an action for damages for breach of the competition rules when this results in damages for competitors or consumers. Thus, consumers may only have recourse to the general tort provisions of the Civil Code[19] which of course do not cater for the particular difficulties that a damages action in the competition law field may give rise to. So to date there has been no case where an action for damages was instituted for breach of competition law. Moreover, class actions and representative actions are not possible under Maltese law and consumers shun from seeking relief individually.[20]

7. Interaction between Consumer Policy and Competition Policy in Malta

Consumer policy in Malta really took off only with the enactment of the comprehensive Consumer Affairs Act in 1994. This Act not only set up the existing consumer related bodies, namely the Department of Consumer Affairs, the Consumer Affairs Council and the Consumer Claims Tribunal, but has also served as a kind of consumer code because over the past 13 years new provisions have been regularly added to it to extend the scope of consumer protection to new areas. Likewise, competition policy is also relatively young as the competition regime was also introduced in Malta in 1994 with the enactment of the Competition Act that set up the Office for Fair Competition and the Commission for Fair Trading. Throughout these thirteen years there have not been any notable instances of conflict between the decisions taken by the enforcement agencies or between the policies formulated by them and after the two agencies were joined in 2001 the likelihood of conflict is even more remote.

Since 2000, consumer policy in Malta has been largely driven by EC initiatives and so it cannot be said that consumer policy measures have been overprotective of consumers, such as to themselves create barriers to trade for competition. Indeed, the consumer yardstick used in most instances has been the 'average consumer' benchmark rather than the 'vulnerable consumer' benchmark. Still, in some sectors, such as the liberal professions, restrictions, traditionally justified on the grounds of ensuring the integrity of the profession and protection of clients' interests, continue to mute competition in these sectors. The Division is in fact conducting an inquiry into such sectors to determine whether and to what extent such restrictions may be justifiable, with a view to striking the right balance.

A consideration that is particular to Malta, given the very small size and insularity of its market, is that in some economic sectors high levels of minimum efficient scales of operation might be required for survival or efficiency and so opening such sectors to unbridled competition might not be in the interests of consumers. It can be argued that, in a small market economy as that of Malta, competition law should attempt to strike an optimal balance between structural efficiency and competition so that firms may operate at efficient scales and pass some or all of the benefits arising from efficiency on to consumers. For small economies productive and dynamic efficiency considerations need to be given major importance,

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19 Chapter 16 of the Laws of Malta.

20 See Malta report by Muscat and Cachia in Ashurst (D Waelbroeck, D Slater and G Even-Shoshan), 'Study on the Conditions under National Law of Claims for Damages in Case of Infringement of EU Competition Rules' 31 August 2004:

http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/national_reports/malta_en.pdf

given their small size. Some form of consolidation and concentration may be a necessary evil in order to attain efficiency.[21]

It could also be argued that, in small economies, in some cases, letting joint dominant oligopolists indulge in discriminatory practices may be to the advantage of the consumer. As Gal opines, in oligopolistic markets discriminatory pricing may work against rigid oligopolistic price structures and could result in lowering prices to the benefit of the consumers.[22] Indeed, Gal is also of the opinion that in such economies discounts are generally to be encouraged and she argues that: 'To forbid them would often reduce efficiency and slow reactions to changed market conduct ... Discrimination in small economies, thus, merits a deeper analysis of its real effects on the market.'[23]

It has been noted[24] that while in large economies, structural remedies such as vertical and horizontal disintegration are generally resorted to in order to increase competition in the market and avoid market power, in smaller economies because of the high incidence of market failure and problems associated with economies of scale, structural remedies may not be appropriate and therefore small jurisdictions should not slavishly pursue such policies. Small economies may have to tolerate a smaller number of players in the market and hence some amount of market power. Therefore, the focus of competition policies in such economies should be on conduct behaviour, to ensure that firms do not operate in such a way as to reduce consumer welfare.

In small market economies, acknowledging efficiency claims and properly weighing them against perceived anti-competitive effects in all aspects of competition oversight is essential. Collaborative or unilateral action or consolidation through external growth might be crucial for operators in small economies to reach the minimum efficient scale of operation and thereby operate efficiently and optimally for the benefit of consumers. Thus, it has been observed that it is advisable for competition agencies in small market economies to recognise the importance of the realisation of scale economies to increase productive and dynamic efficiency while balancing this with the need for competitiveness. In such economies, competition policy should be sensitive to the constraints facing operators in such small markets and if and where necessary even trade off competition for improved efficiency.[25]

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21 See OECD Third Global Forum on Competition 2003 and M.S. Gal *Competition Policy for Small Market Economies*, Harvard University Press.

22 M.S. Gal 'Size does matter: The Effects of Market Size on Optimal Competition Policy' (2001) 74 University of Southern California Law Review1437, 1467.

23 Ibid. See also E. Buttigieg 'The Notion of Dominance and the Control of Abusive Pricing under Maltese Competition Law' (1999) 19 Bank of Valletta Review 1.

24 L. Briguglio and E. Buttigieg 'Competition Policy in Small Jurisdictions', paper presented at the Research Symposium 'Political Economy Constraints in Regulatory Regimes in Developing Countries', New Delhi India, March 2007.

25 Ibid.

PAPUA NEW GUINEA[(*)]

1. Competition and Consumer Protection- Papua New Guinea goes its own way

PNG has been an independent nation since 1975. For many years it was thought that the economy had not developed enough to warrant competition law. There was some limited consumer protection law and price control. Furthermore with most utilities being provided by the national Government time was not ripe for competition law.

However, with the move to privatisation of some utilities and the development of the PNG economy, competition law was introduced. That process commenced in 1996.

In 2002 the PNG Parliament enacted ***the Independent Consumer and Competition Act 2002.*** It created the Independent Consumer and Competition Commission (ICCC). The ICCC, the consumer protection provisions and the regulatory provisions came into effect on 16 May 2002. The competition provisions did not come into effect until 16 May 2003.

The PNG Act is similar to the Australian Trade Practices Act 1974 and the NZ Commerce Act 1986. It has some provisions from both. The institution, the ICCC, has substantial similarity to the Australian Competition and Consumer Commission.

However there are some important differences between PNG law and Australian and NZ law.

The law is tailored to meet PNG needs. In particular there are extensive provisions on regulatory contracts that are to be entered into by PNG monopoly utilities. There is also the provision of price control.

In effect the ICCC Act has an overall competition and consumer protection mix. In addition the Act has extensive and some unique provisions relating to essential utilities which affect the bulk of PNG consumers.

2. Competition Provisions of ICCC Act

The competition provisions cover the following;

- price fixing- such conduct is per se prohibited.
- any other contract, arrangement or understanding that substantially lessens competition.
- resale price maintenance

(*) This paper was prepared by Thomas Abe, Commissioner/CEO, Independent Consumer and Competition Commission, Papua New Guinea.

- contracts containing exclusionary provisions -, namely primary boycotts by competitors; but it does not apply if it does not substantially lessen competition.

- the Act does not specifically pick up exclusive dealing but the provision on anti- competitive arrangements is broad enough to pick up such conduct. It is not limited to conduct between competitors, it simply applies to all contracts, arrangements and understandings.

- misuse of market power- there is a prohibition on the taking advantage of market power to damage or eliminate competitors.

- business acquisitions which lead to a likely substantial lessening of competition.

These prohibitions can be enforced by the ICCC as regulator, or by private legal action by an affected party.

3. Clearance and authorisation

The Act provides for both clearance and authorisation in relation to mergers and has some set time limits for both. In relation to merger clearances the ICCC has 20 days from date of application to make a decision; in relation to merger authorisations it has 72 days. If the ICCC does not make a decision within the required time frame, the clearance or authorisation is deemed to be granted. Clearance is where the ICCC is requested to declare whether or not a merger may result in a substantial lessening of competition. Authorisation is available where a merger which may be in breach of the law can be allowed to proceed on public benefit grounds.

Authorisation is also available for all other anti-competitive conduct, except taking advantage of market power. The 72 day time limit does not apply to non merger applications.

To date the ICCC has had a number of merger clearance/authorisation applications The ICC has allowed most such applications to proceed, however one merger has been blocked and others allowed subject to conditions. A small number of authorisation applications for anti-competitive arrangements have also been adjudicated. However, to date there have been no legal proceedings instituted in the Courts in relation to these competition provisions.

In a small non trade exposed economy such as PNG there is a very high likelihood that most mergers will substantially lessen competition. Further, conduct such as resale price maintenance, price fixing between competitors and exclusive arrangements that have no doubt been prevalent in PNG for many years are now either clearly unlawful or potentially unlawful.

4. Consumer protection provisions of the ICCC Act

The ICCC Act has important consumer protection functions, these are:

- Promoting and protecting the bona fide interests of the consumers and businesses in relation to the acquisition and supply of goods and services;

- Making available any information in relation to matters affecting the interest of consumers and businesses, including information with respect to the rights and obligations of persons under Papua New Guinea laws that are designed to protect the interest of consumers;

- Investigating complaints concerning matters affecting or likely to affect the bona fide interests of consumers and businesses in relation to the acquisition of goods and services and to enforce compliance with laws relating to such matters;

- Strong provisions relating to product safety and recalls;

- The ICCC Act sets out a number of consumer rights, but (except in the case of product safety and recalls) it does not provide any legal redress through the Courts for breach of these rights.

Furthermore the ICCC administers national trade measurement and packaging laws.

5. Regulatory and price control provisions of the ICCC Act

The ICCC Act has extensive regulatory and price control roles. This is seen as a critical area of consumer protection in PNG.

PNG regulatory contracts relate primarily to utilities and amount to a contract between the utilities and PNG community. For example such contracts exist in relation to power, ports, telecommunications and postal service

The Regulatory contracts are developed and enforced and reviewed by the ICCC. The contracts relate to pricing, service standards, capital expenditure, innovation and increased efficiencies.

Price control has been rolled back in recent years, and price monitoring has been introduced as an alternative to price control. While the number of goods and services covered by price controls has been much reduced, it still applies to some basic commodities used by PNG citizens. For example price control or price monitoring exists in relation to fuel, passenger transport services, rice and flour.

In addition to the regulatory contracts, the ICCC conducts regular reviews of sectors of PNG industry and advises the Government on possible changes to regulation or policies generally. Recent reviews include petroleum, energy, coastal shipping, water and sewage, airlines, and general insurance, amongst others.

6. The ICCC

The ICCC is the only national regulatory body that acts as a consumer and business watchdog. The provisions of the ICCC Act apply to all businesses in Papua New Guinea including government enterprises. The ICCC Act also applies to conduct outside PNG which affects the PNG market.

The Commission consists of a full time Commissioner and two part time Associate Commissioners. One such Associate position is allocated to an overseas competition/regulatory expert.

Thomas Abe is currently the Commissioner as well as the Chief Executive Officer and has also been the ICCC General Manager since its inception in 2003.

In fulfilling this primary role, the ICCC performs a number of functions, in addition to those mentioned in paragraph 14 above, they include;

- Functions relating to price regulation, regulatory contracts, industry regulation and other matters as conferred on the ICCC by or under the ICCC Act or any other Act, including issuing, administering and enforcing regulatory contracts under the Act. This includes licensing and other

regulatory functions under industry specific utilities legislation such as the Telecommunications Act and the Electricity Industry Act;

- Promoting and protecting competition in the market and enforcing compliance with laws relating to anti - competitive behaviour in Papua New Guinea in accordance with Part VI of the ICCC Act;

- Monitoring the operation of, and review from time to time, the codes and rules relating to the conduct or operation of regulated entities;

- Advising and making recommendations to the Minister in relation to any matter referred to the ICCC by the Minister; and to advise and make recommendations to the Minister with respect to any matter connected with the ICCC Act or with respect to any matter connected to any other Act which confers functions on the ICCC; and

In performing its functions and exercising its powers under the ICCC Act, the ICCC will have regard to the following primary objectives:

- Enhance the welfare of people through the promotion of competition and fair trade and the protection of consumers' interests;

- Promote economic efficiency in industry structure, investment and conduct; and

- Protect the long term interests of people with regards to the price, quality and reliability of significant goods and services.

Three **priority** areas for ICCC are;

- First, informing all stakeholders about the ICCC Act and the roles and functions of ICCC. This is important because the work of ICCC is new and there are a large number of people across the county who has yet to become aware of the ICCC and the ICCC Act.

- The second priority area is to achieve compliance with the ICCC Act. Many small and medium businesses are still ignorant of the ICCC legislation. Hence strict enforcement of the Act has not yet been applied. This also applies to some of the compliance requirements that are placed on regulated entities.

- The third priority is to mobilise ICCC resources efficiently and effectively to achieve desired outcomes. This includes human resource capacity strengthening and having the correct IT capacity in place to enhance our core functions.

7. Interaction between the ICCC's competition, consumer protection and regulatory roles

While bearing in mind that the ultimate goal of competition is to enhance consumer welfare, it is clear that another part of the story is consumer protection. In fact, the view of the ICCC is that consumer protection issues are an integral part of competition policy.

The ultimate objective of both competition policy and consumer protection is to enhance consumer welfare by ensuring that consumers have greater choice in terms of price, quality and service. In this goal the ICCC sees its regulatory roles as essentially consumer protection goals and then competition goals. PNG is a small economy and competition is not always possible but consumer protection is essential.

The competitiveness of a market affects the level of consumer protection required. In PNG we strive for competitive and informed markets but that is not always possible, hence the reliance on regulatory involvement and, in some limited cases, price controls.

In circumstances where there is little or no competition in the market (e.g. in a natural monopoly situation such as a telephone or electricity utility, **and particularly in small economies that tend to have less competitive markets**) there may be greater justification for intervention to ensure that consumer welfare is maintained because consumers are not driving the market.

In short, the amount and type of consumer protection regulation there should be depends on the competitiveness of markets. In highly contested markets, regulation should be only introduced with great care, while in markets where there is little or no contestability, some form of regulation may be more readily justified.

Given the high degree of interaction between the two policies, it is not possible to determine competition law policies and consumer protection policies in isolation. It is not only possible, but necessary, to administer these laws in harmony to achieve the ultimate goal of consumer welfare.

8. Importance of competition policy to a small economy

Competition policy, which is appropriately designed and effectively enforced, can be more important in small economies than in larger ones.

Small economies can support only one or two competitors in many industries, because of the small size of the markets. Openness to trade is a good solution to many of the problems of small size, because it enlarges the market. But competition policy also plays a crucial role in regulating market activity:

- it helps trade by reducing barriers to both foreign importer entry and domestic product exports;
- it plays a critical role where exposure to international trade is not sufficient to solve a small economy's efficiency problems, including markets for services rather than goods; and
- where artificial trade barriers (such as tariffs) are not reduced, competition policy is an alternative for regulating 'closed' small markets.

However, since competition policy is adopted to address various failures of the market, the policy should be carefully designed to deal effectively with the unique obstacles to competition that are present because of the small size of the economy.

The main goal of competition policy in small economies should be to promote efficiency. But when considering competition policy for small economies you are faced with a dilemma.

On the one hand, large firm or plant size may be required in order to achieve efficient scales of production, so it may be that only one or two firms can operate in an industry in order to achieve efficiency.

But on the other hand, the high level of concentration, or even monopoly control, of a market that results can lead to certain types of industry behaviour that is very damaging to efficiency. It is such situations that may require greater intervention by the regulator than would be needed in larger economies where larger scale production can be undertaken in a competitive domestic market.

9. Dual system v Single agency

PNG has chosen a single agency model, where the agency operates largely independently of government direction or political influence.

To some extent this is because of what it observes in Australia and New Zealand and Asian counterparts.

However a critical reason is the belief that competition law, consumer law and regulatory control are all part of the same goal - the protection of consumers.

Furthermore PNG is a small economy and does not have the financial resources or skills to have a dual or multiple agency model.

The Single Agency model suits PNG both for policy and practical reasons.

10. Competition in the market and No frills version of products

PNG does not have any specific laws aimed at the encouragement of no frills products.

However, as a developing economy, the market itself calls for such products, which is encouraged by the ICCC. But the range of no frills products available in PNG is still small.

In its regulatory role the ICCC is very much aware of the need to have products that the PNG consumers can understand and that PNG businesses can promote.

11. Convergence of global competition and consumer policies

PNG would welcome such a move and points to its role in regulation in interests of the consumer. Competition agencies often criticise such a role but it is suggested that more thought be given to the impact of concentrated or non competitive markets and how consumers are protected in such cases. Competition will not do it in such environments.

PNG as a member of the East Asia and Pacific Regulatory Forum is continuing to advocate a better understanding of such issues (Thomas Abe, the Commissioner/CEO of ICCC has been the EAPRF pioneer Chairman since the formal inception of the organisation in 2003.)

12. International cooperation between competition authorities and consumer representatives

The ICCC is very open to international cooperation. It is a member of the East Asia and Pacific Infrastructure Regulatory Forum, it has a cooperation agreement with the ACCC and has the observer status on the Australia/New Zealand Consumer Products Advisory Committee.

It is keen to be part of any global or regional dialogue with consumer representatives and is receptive to learning from consumer groups of how best to administer competition law in the interests of consumers.

In PNG consumer representative bodies are in their infancy and hence inputs from consumer representatives in other developing countries and OECD members would help.

13. Conclusion

PNG is a newcomer to the global competition and consumer agency community.

Its law is modelled on well known models but its administration has a PNG bias.

Competition law aims to assist consumers but if the market does not foster competition, other instruments must be used to assist the consumer. In PNG that includes regulation of monopolies, including price control.

Such regulation is regularly reviewed to keep up with market changes. It is basically seen as a prelude to competition but in PNG we are not prepared to wait for competition to help the consumer. We see the need for other measures in the meantime.

POLAND

1. Introduction

A free market governed by an invisible hand is an "out-of-the-book" example of Max Weber's ideal type. It constitutes a model, which actually does not exist, such as the perfect competition does not exist. It does not exist because the same mechanisms that constitute them – e.g. maximising of profit – lead in certain cases to their depravation, for example, when the entrepreneurs recognise after the calculations that it is more profitable for them not to compete instead of conducting a price war. Or when the maximising of profit takes place at the cost of health or economic interests of the consumers.

Presently, there is a clear consensus as to the necessity of legal protection of competition and the consumers – as the condition *sine qua non* of economic freedom. The question remains whether these values should be protected jointly or separately.

2. The institutional model – the pros and cons

The institutional model accepted by the Polish legislator 11 years ago – joining in one governmental entity the antitrust and consumer protection policy – was very innovative at the time. Its acceptance resulted partly from the process of adaptation of the national legal system to the *acquis communautaire*. However, most importantly, the process constituted a consequence of the development of the market, which suffered from the lack of an institution articulating the consumer interests whose awareness has raised significantly.

In 1996, the consumer protection became in Poland an independent policy and an important issue in the agenda of the Polish Council of Ministers. Entrusting its implementation to the agenda responsible for antitrust policy brought measurable benefits – allowing for leading both policies from a wider perspective, considering the impact of the decisions issued in one area onto the other and using the synergy effect.

Beyond a shadow of doubt, the enforcement of both policies under one roof provides for a high level of coordination of the enforcement activities. Any irregularities in the market functioning within the jurisdiction of joint enforcement agency can be analysed together from the point of view of the competition policy as well as assessing the effects they might have on consumers' welfare leading to an effective counteracting of any practices, which might have a negative impact in both fields. Furthermore, an effective exchange of experiences and ideas between the experts responsible for enforcement of each policy within the agency is provided, as the joint enforcement constitutes a perfect platform for cooperation.

The enforcement of both policies in one body leads to a greater understanding in implementation of the policies, due to the fact that joint supervision over those policies provides one common President of the Office of Competition and Consumer Protection (OCCP) with competences for adjusting the structure of activities carried out within each of the policies in a way, which will not only eliminate any potential clash and overlapping of competences but also give grounds to the emergence of a substantial comparative synergy.

The synergy between competition policy and consumer protection policy also means transfer of solutions, which proved to be useful in one area to the other. The new antitrust act[1] on the basis of which the Polish Office of Competition and Consumer Protection has been operating since April 2007 provides for, *inter alia,* enabling the President of the OCCP to impose financial penalties on the undertakings who apply practices infringing collective consumer interests amounting to 10% of their income from the previous year. The Act on competition and consumer protection in its previous form did not provide for such possibility.

According to the practice of the Office, this solution proved to be good in case of competition restricting practices – financial sanctions in this amount have a repressive and preventive role. Introduction of analogous sanctions as in the case of the activities conflicting with the antitrust regulations contributes to an even more effective fighting of the most common and severe cases of infringement of consumer economic interest.

The synergy resulting from bringing together the two policies also means a substantial reduction of state budget costs. The savings are generated through a joint administration, analytical and research projects, training, as well as lower costs of hiring various experts.

Advantages of implementing both policies by one central body are noted also by the entrepreneurs as well as consumer NGO's. However, in the opinion of the latter, there are also some drawbacks to this form of institution.

It is considered that in some cases the OCCP is not sufficiently authorised. The Office sometimes does not possess the sufficient means or is not able to take certain actions to influence other public institutions, which often creates provisions with direct or indirect impact on consumers and entrepreneurs' rights.

According to the municipal ombudsmen and consumer organisations, competition protection dominates over consumer protection. There is a belief that a central institution for competition and consumer protection would grant consumer protection a higher status if it were equipped with the appropriate statutory competences, and would strengthen the position of consumer ombudsmen whose work in the poviats[2] raises some doubts. The reason for this opinion is that the entrepreneur's interests are believed to be better protected than the consumer interests, and thus a central institution dedicated only to consumer protection would make it possible to balance the powers and the opposing interests of these two groups.

Unsurprisingly, the representatives of entrepreneurs claim the things go in reverse. They emphasise that the Office's concern lies in consumer protection only.

3. How competitive markets can promote consumer interest - examples from the Office's practice

Still today, joint coordination of competition and consumer protection policies is not a common solution. However, all agree that consumer interests must be considered in the implementation of the antitrust policy. With the experience of the Chicago school, no one questions that the only and final objective of the pro-competitive legislation is consumer welfare. Competition contributes to the increase of effectiveness of management and technical and economic progress. It also contributes to the improvement

1 Act of 16 February 2007 on competition and consumer protection (Journal of Laws of 2007, No. 50, item 331).

2 Unit of administrative division of the territory of Poland. They constitute part of a region.

of goods and quality of services and at the same time to the reduction of their prices. As a consequence, consumers may acquire products on favourable conditions, and what is more important, their choice increases. Therefore, one could say that the final beneficiary of the market competition is always the consumer and the number of competing suppliers constitutes an instrument for ensuring and enforcing his interests.

The synergy between the policies is to be best seen in practice, when the effects of competition restricting practices directly influence the situation of the consumers. Examining several cases carried out by the OCCP proves this thesis.

As an example, in January 2007 the OCCP issued a decision declaring unlawful the practices applied by twenty banks consisting in jointly setting the fees collected on transactions made with Visa and MasterCard cards. The Office investigated the method of establishing the *interchange* charges (commission from every non-cash transaction, which the bank collects from the seller) and revealed that the amount of the *interchange* charge was not based on real costs incurred by banks for the development and functioning of the payment system. It had been established by the undertakings that came to agreement to keep high income from each transaction with the Visa and MasterCard cards. In the opinion of the Office, the payment established in this way constitutes a kind of a tax imposed on retailers offering goods and services, who lose a certain amount at each transaction paid with the payment card in favour of the card-issuing banks. Economic expenditures of transactions services incurred by the stores, which accept credit cards usually translate into differences in higher prices for consumers, even those paying with cash. Actually, costs of using credit cards pertain to all market participants, even though they might be unconscious of such situation. To restore competition on the market, the President of the Office ordered the banks – participants of Visa and MasterCard systems - to discontinue immediately the disputed practices**.** According to the OCCP, non-cash transactions can be settled at nominal value, without deducting the *interchange* fee.

Often while conducting an antimonopoly proceeding (e.g. in the case of abuse of dominant position) the Office takes into consideration the fact that the undertaking may also recourse to an unlawful activity prejudicial to collective consumer interests. An example of such "two-fold stroke" is the proceeding carried out in one of the OCCP's regional branches against a water-supply enterprise operating on the regional market in the Lubelskie region. The proceeding embraced an abuse of dominant position consisting in the application to equivalent transactions with third parties of not homogenous agreement terms and conditions, thus creating for the parties diversified conditions of competition. Furthermore, it was found that the practice was harmful to the consumers, who were offered different prices for exactly the same product (water). That is why, a proceeding referring to practices violating collective consumer interests was conducted at the same time and one decision elaborating on both competition and consumer aspects was issued. Worth mentioning is the fact that the proceeding was initiated upon a motion submitted by a consumer.

On the whole, it may be said that the Office conducts antimonopoly proceedings in the interest of the entrepreneurs. By combating illegal practices of some companies we enable other ones to conduct their activity in an orderly way, raising their competitiveness. This results beneficial to the consumers.

Another remaining question that remains refers to the influence of mergers on the situation of the consumers on the market. Should the consumers be afraid of an acquisition or a takeover or should they be glad about a merger taking place? The answer to this question is ambiguous.

From one point of view the undertakings joining their powers may offer better quality of products, develop technology, and even lower the prices of services. From a different perspective, there are some instances, where as a result of a merger the competition is eliminated and this can lead to a monopoly. A

monopolised market can result detrimental to consumers, due to the independence of activity of the undertaking on the market.

The President of the OCCP rarely refuses clearance for mergers as, on the whole, they may be treated as beneficial. However, often conditional clearances are issued. Considering the effects that the merger may cause on a relevant market, the President of the OCCP always examines not only the impediments to competition, but also the consequences to the consumers.

As an example, in 2006 the President of the OCCP banned a merger between companies from the spirit branch. The takeover of the company Jablonna by Carey Agri would seriously restrict competition on the national market of flavoured vodka. Taking over control by Carey Agri, one of the biggest producers of this beverage in Poland, would lead to the creation of the biggest entity on the flavoured vodka market. Such a strong position would allow the undertaking to prevent efficient competition, thus enabling it to act in a significant degree independently from the competitors, the contracting parties and most of all from the consumers. The decision of the President of the OCCP probably prevented a vodka price increase, thus was beneficial to consumers.

4. How effective consumer policy can assist the competitive process

The awareness that an effective competition is not possible without an effective consumer protection policy is growing. The effect of such opinion is for example the Directive 2005/29/EC of the European Parliament and Council on Unfair Commercial Practices. According to its preamble it – "approximates the laws of the Member States on unfair commercial practices, including unfair advertising, which directly harms consumers' economic interests and thereby indirectly harms the economic interests of legitimate competitors." The European legislator, accepting this act aiming at convergence of national regulations protecting the economic interest of weaker market participants considered also the impact it would have on the situation of the entrepreneurs and competition on the market.

An efficient system of protection of weaker market participants eliminates unreliable entrepreneurs, which reduces the prices at the cost of the quality or safety of their clients.

The postulate for the necessity of consideration of the impact of the policies on each other and running activities in a wider context maintains its validity especially during the construction of the instruments for consumer protection. We always have to consider that in this scope, it is the competition that is a very significant if not the most significant instrument. When competition is weak, the entrepreneurs may maintain higher prices and lower the level of innovation and they can offer worse quality of goods since they are not under pressure of other entities operating on a given market. Such situation is disadvantageous for the consumers and for the entire economy.

Of course we can consider circumstances in which attention to competition is against the customers interests. We can imagine such situation studying for example the sales below the costs. This practice, which infringes the antitrust law, brings benefits to the consumers; however, they are only illusory. The prices are reduced only for a short period. After the elimination of the competitors from the given market, they return to the previous level and often exceed it.

In this context, balancing the pros and cons of following a more competition approach or a more consumer-oriented protection should be followed by a thorough analysis of the economic situation and revised from a wider national perspective.

5. Conclusions

Competition and consumer protection are closely linked to each other and they cannot be considered separately. Both areas of activities complement each other and influence each other. On one hand, the more competition protection policy is protected, the larger is the care for interests of the weaker market participants, and the level of their service becomes an element of competitive advantage of the entrepreneur. On the other hand, consumer protection policy contributes to the implementation of competition protection policy, since it imposes on the business entities specified behaviours towards the consumers.

The experiences of the Office of Competition and Consumer Protection show that placing the implementation of competition and consumer protection policies side-by-side brings numerous benefits. It is worth noticing similar development tendencies – in particular at the Community level. The Community competition rules (in particular Articles 81 and 82 of the EC Treaty) from the very beginning considered consumer interests. Due to that, both the European Commission and the Community courts could, in their settlements, refer to the position of the consumer on the common market. This possibility became a necessity after the entering into force of the Amsterdam Treaty. In its Article 152(2) it states that the requirements for consumer protection are considered at determination and implementation of other policies and measures of the Community. Therefore, there is no doubt that consumer protection is to be an element of all the policies significant for consumer protection, in particular competition policy. This is the path pursued by the Office of Competition and Consumer Protection.

PORTUGAL

1. General Remarks

In Portugal, the fundamental aim of competition policy is drawn directly from the Constitution of the Portuguese Republic, in which article 81, e) gives the State a primary duty *"to ensure the efficient operation of markets in such a way as to guarantee balanced competition between businesses, counter monopolistic forms of organisation and repress abuses of dominant positions and other practices that are harmful to the general interest"*. Likewise, article 81, i) of the Constitution also includes, among the primary economic and social duties of the State, *"To guarantee consumer rights and interests"*. Furthermore, consumer rights are enshrined in article 60 of the Constitution of the Portuguese Republic, which states that 1) "*Consumers shall be entitled to good quality of the goods and services consumed, to training and information, to the protection of health, safety and their economic interests, and to reparation for damages"*; 2) *"Advertising shall be regulated by law and all forms of concealed, indirect or fraudulent advertising shall be prohibited"*; and 3) *"Consumers' associations and consumer cooperatives shall be entitled under the law to receive support from the State and to be heard in relation to consumer-protection issues, and shall possess legitimatio ad causam in defence of their members or of any collective or general interests"*.

The two aforementioned 'Primary duties of the state' are implemented through two diverse legislative frameworks and entrusted to two different Agencies. The Portuguese Competition Authority (PCA) was created to enforce the Competition Act, to promote compliance with competition law and policy, and to guarantee the respect for the principles of a market economy and free competition thus ensuring the functioning of efficient markets and taking into account consumer interests. Additionally, the substantive framework of the Portuguese Competition Act reflects the content of European Community competition rules and, to that extent, is a key instrument in fully implementing the internal market and giving Portuguese consumers access to the benefits of the Community-wide market.. The PCA is an independent and financially autonomous administrative body, with regulatory powers over all sectors of the economy, including the regulated sectors, the latter in cooperation with the relevant sector regulators. Portugal is a country in which a culture of competition still needs to become further ingrained – often starting with consumers themselves. In this sense, the Decree-Law No 10/2003, which set up the PCA and approved its statute, established the development of a Competition Culture as one of the Authority's key goals.

The Consumer Directorate-General (Consumer DG) promotes and protects consumer rights, defines, creates and executes Portuguese Consumer Policy with the aim of ensuring a high level of consumer protection. It has the responsibility for promoting policies to safeguard consumer rights and for coordinating and implementing measures to protect, inform and educate consumers, as well as for supporting consumer organisations. In relation to advertising, the Consumer DG is the public body with a general responsibility for monitoring and for bringing proceedings for administrative irregularities. The Consumer Directorate-General is not, however, a regulatory body.

The first Portuguese law on consumer protection, dates from 1981 (Law 29/81), and started a new era of legislative and institutional framework in this field until today's Law 24/96. Nevertheless, Portuguese consumer protection still needs to be further enhanced in different areas. An example of that is the recent approval of an amendment to the Law on Services of General Economic Interest, which recognises specific rights to consumers, enlarging its scope of application.

Although different in nature, the interplay and complementary between competition regulation and consumers protection is reflected in that competition regulation fosters the welfare of society in general and of consumers in particular. Competition law enforcement ensures that both intermediate users and final consumers have a vast range of competitive options to choose from, both in terms of better value for money and the available supply.

Reciprocally, consumer rights enforcement allow for active and informed consumers which enhance competition and play a key role towards more competitive markets. In fact, today, consumers can no longer be regarded as mere buyers or users of goods and services, with a solely passive role, but rather as economic partners with duties and rights just as worthy of protection as those of producers or traders. Active participation by consumers in the economy implies that each consumer should act in a responsible and knowledgeable way when acquiring goods and services, because it is his or her decisions which make producers aware of the pressures and preferences of the market.

Therefore, information and education of consumers is essential to empower and allow them to act in a responsible and knowledgeable way.

Training and access to information by the consumer is vital if consumers are to act as an informed economic agent and obtain all the potential benefits available from the market.

However, many factors can impede consumers from making the right choice. The increasing complexity of the market, the aggressiveness of sales techniques and some types of advertising can unbalance relations between consumers and undertakings.

Furthermore, both competition and consumer policies allow consumers to seek and effectively obtain redress from damages caused by anticompetitive practices. In spite of the fact that the Portuguese legal system is generally well equipped to respond to these claims, consumers still have to go a long way in order to fully access to redress mechanisms.

In this regard, an efficient platform for communication with consumers, companies and economic agents is vital and has, accordingly, been implemented by both the PCA and the Consumer DG. For instance, the PCA's website is noteworthy, with a dedicated Consumer Portal (www.autoridadedaconcorrencia.pt/Consumidores.asp), displaying in a timely manner full details of proceedings, merger notifications, decisions, recommendations, legislative developments, conference programmes, seminars and public speeches.

The PCA has also launched initiatives to raise awareness, directed at target groups, and the role of the media as a vital channel for access to citizens/consumers is decisive in fostering the widespread dissemination of competition issues and increasing awareness of the benefits of competition.

In the area of raising awareness and consumer training and information, the Consumer DG has a consumer portal (www.consumidor.pt), through which it provides information on all topics covering a range of goods and services, up-to-date legislation, information on national and international bodies active in areas linked to consumer protection, and the publication of notifications and other relevant information. Consumers can file complaints and request clarification through this portal. Also, important advices to consumers are periodically released by this tool.

The outcome of the synergies between competition policy and consumers' protection can be illustrated by three concrete initiatives undertaken by the PCA on the sectors of (i) Mobile telecommunications, (ii) Fuel and (iii) Pharmacies. These cases underline the positive results of the interaction between the PCA and the Consumer DG and how competition advocacy may foster consumer welfare.

2. The interplay between Competition Authorities and Consumer Protection Agencies in practice

2.1 The presentation of mobile telecommunications prices

In 2005 the PCA adopted a Recommendation regarding the presentation of mobile telecommunication prices. This represented a successful example on how cooperation between competition agencies, consumer protection agencies and business associations can lead to concrete and efficient results, where consumers and competitors are the winners (See Box 1).

Box. 1: PCA Recommendation No. 2/2005, to the Government on presentation of mobile telecommunications prices[1]

1. Background
a. The Consumer DG input

The contact established by the PCA with the Consumer DG emphasised the need to take action on tariff transparency in the mobile telecommunications sector, which corresponds, at the same time, to consumer protection and the promotion of competition in the market place.
It was the common view of both agencies that (*i*) mobile operators offer a huge number of tariff plans; (*ii*) this may limit the consumer's ability to make informed decisions; and (*iii*) the limited tariff transparency may remove the markets from the typical competitive equilibriums.
In concrete terms, mobile communication tariffs vary greatly. There is a wide range of minute-packages, post-paid plans (subscriptions) and prepaid plans (with or without a top-up requirement). Furthermore, comparing tariffs is a highly complex matter. It involves taking a vast number of variables into account, thus making comparability more difficult, as well as the choice of the most suitable tariff for each consumer. These variables include, in particular:
- the service type (with or without a subscription or top-up requirement);
- the number of minutes included in the tariff;
- the credits for calls received;
- the price of the first and additional minutes;
- the prices of each type of call (on-net and off-net for each of the other networks, off-peak times, weekends and peak times);
- the prices of calls for a pre-defined number of users;
- the prices of short message and multimedia messaging services.

b. The adequate tariff choice

A study published by DECO/PRO TESTE – a Portuguese consumer organisation – in February 2005 confirmed the difficulties that consumers face in choosing the most appropriate mobile phone tariff. It carried out a survey among 1800 associates, confirming that over 90% of subscribers do not use the tariff that minimises their mobile communication expenses.

The referred study revealed that, on average, consumers waste over 100 euros per year. Moreover, on average, even the consumers who said that they did not wish to change operator would save between €52 and €106 per year, depending on the operator. The figures mentioned above mean that, even without changing operator, consumers could save over 700 million euros a year if they used the most appropriate tariff for their consumption profile.
In addition, the advices of tariff plans to consumers, generally provided by the mobile operators' agents, are not necessarily impartial, even when a mixed agent (representing more than one mobile operator) intervenes. In fact, commissions and bonus schemes for these agents may influence the advice given regarding one or another operator, irrespective of that operator being the most advantageous for the consumer.

[1] Direct link to the Recommendation and related documents in English:
http://www.autoridadedaconcorrencia.pt/Download/recommendation2_2005.pdf

2. The recommendation

Taking into account, on the one hand, the input by the Consumer DG, by DECO, as well as the European Commission's understanding of the development of competition levels in the Portuguese Market, and, on the other hand, the comparison between tariffs in other European Union Member States and the developments of the wholesale prices charged by mobile operators, the PCA issued a Recommendation to the Government proposing a strategy and suggestions that were intended to offer an effective contribution to increase competition in the sector, where three players are active: TMN, Vodafone and Optimus.
It was deemed appropriate that mobile operators should provide simulators that determine the tariff plan best suited to the usage profiles described by each consumer at their websites as well at their agents. A minimum of data set to be included in the envisaged tariff simulators was established for the purpose of this recommendation, in order to ensure that the results of the simulation can be easily compared by the consumers.

3. Achievements

Following this Recommendation, APRITEL, the business association representing the Mobile Operators, working together with PCA, set up a Protocol between its associates, committing themselves to provide easy-to-use price plan simulators in their outlets by the 1st October 2006 and at their websites by the end of 2006. The simulators contain:
(i) The price plan that minimises the consumer's costs for the user profile specified;
(ii) Estimates of monthly expenses for the user profile.

This action has obvious advantages for competition and the consumers, who are now able to choose their operator and price plan on the basis of directly comparable and easily accessible data.

3. Competition Advocacy fosters Consumer Welfare

3.1 The removal of entry barriers for new operators and dissemination of information to consumers in the motor fuel market

The liberalisation of fuel price in Portugal is quite recent, dating from early 2004. Notwithstanding, the PCA found that it was necessary to further promote competition in the market. Acknowledging the crucial role played by consumers in choosing the most competitive offer, a broader effort to disseminate information on prices and other conditions of sale among consumers was deemed necessary. Furthermore, supermarkets, acting as non-vertically integrated fuel retailers, play a significant role in promoting competition in the market.

Consequently, the PCA addressed Recommendation No. 3/2004 to the Government concerning the removal of entry barriers for new operators and the dissemination of information at points of sales. Following the PCA's Recommendation, the Government has approved legislation that implements the proposals of the PCA.

This Recommendation from the PCA illustrates how a competition-driven measure aiming at promoting a well-functioning market can simultaneously pursue consumers' rights, in particular the right to information (See Box 2).

Box 2: PCA Recommendation No 3/2004, to the Government on the removal of entry barriers for new operators and dissemination of information to consumers in the motor fuel market[2]

The PCA presented a systematic set of recommended measures to the Government focusing on different aspects concerning legislation on motor fuel market.

1. Market access – structural measures
a. Access to essential logistical infrastructure

- Franchises and/or the assignment of the operation of port terminals used or capable of being used for the handling of fuel should always be carried out on the basis of open calls for tender, with a guarantee that their attribution neither creates nor strengthens a dominant position on the market;
- Selection should be based on a transparent and non-discriminatory process, with objective and easily demonstrable criteria;
- The transfer, under any form, of facilities (tanks or land) that are public propriety and that may be used for storing fuel should be carried out by means of a process open to all parties with a possible interest and on the basis of competitive criteria;
- In any of the situations referred to above, the period stipulated for the transfer should not be excessive and should be limited to the minimum that may be demanded for the underlying investments, so as to avoid that the restriction on competition inherent in the resulting closed market is disproportionate in relation to the objectives.

b. New transport infrastructure

- It is considered useful to set up a committee of representatives from public and private bodies to study and assess the situation and then present proposals that may improve the structural limitations in this area.

c. Installation of public filling stations – regulatory changes

- An amendment to legislation concerning the installation of petrol stations is proposed, in order to eliminate all the provisions restricting competition by preventing market access for certain undertakings, in particular, hypermarkets and supermarkets;
- The safety requirements laid down on the legislation for the installation of filling stations should be objective, universally applicable, non-discriminatory and transparent.

d. The installation of filling stations on motorways

- Franchise contracts for petrol stations in motorways should include the obligation of the franchisor to sublease the service areas on the basis of criteria promoting competition and thus avoid creating or strengthening individual or collective dominant positions on each of those roads;
- It should be ensured that the franchises for subsequent stations on the same motorway belong to operators with different brands.

2. Retail prices: display and transparency – new regulations

- The legislation should establish the obligation to display the retail prices in effect, in a way that is easily visible to drivers, in all petrol stations and for all the fuels on sale there;
- Price displays, in accordance with the preceding point, should consist of panels placed on the carriageway, outside the station, so as to allow consumers to make their fuel purchase choices before entering the station;
- For motorways, notices for the retail prices in the various stations along the route should consist of common panels placed at the main entry points and at distances to be defined by law.

[2] Direct link to the Recommendation and related documents in English:
http://www.autoridadedaconcorrencia.pt/Download/recomendation2004_03.pdf

3. Achievements

Following the PCA's Recommendation, the Government approved Decree-Law 170/2005, of 10 October imposing that fuel prices should be advertised outside filling stations. In the particular case of highways, signs shall be installed informing consumers about fuel prices offered in the next three service stations, as shown in the following picture:

3.2 Measures to reform the regulatory framework applying to pharmacies, with a view to promoting competition in the sector

In 2006, the PCA issued Recommendation No.1/2006 proposing to the Government concrete measures to promote competition in the pharmacies sector. Without prejudice of some sector-specific rules that safeguard ethical and social aspects of this activity, the Recommendation aimed at eliminating the main legal, administrative and structural constraints in the sector that prevent competition from operating, with serious repercussions on market efficiency and consumer welfare.

Before presenting the Recommendation to the Government, the PCA commissioned a study on the pharmacy sector to a group of consultants/experts, with the aim of identifying legal, administrative and structural barriers restricting competition and estimate their impact on efficiency and social welfare. The econometric model adopted by the study shows that, in a scenario allowing price discounts in medicines and liberalised entry in the pharmacy sector, significant gains could be achieved in consumer welfare. Calculated for the year 2002, these gains would represent around EUR 145 million per year, in addition to the gains arising from the reduction of around 13% in the average distance to a pharmacy (1.74 km to 1.52 km).

The Recommendation contained a set of concrete measures related to 3 areas: *(i)* liberalising market access; *(ii)* promoting a balanced and effective competition between enterprises; and *(iii)* creating a favourable environment for competition to develop. The recommended measures were based on the criterion of proportionality, taking into account, *inter alia*, social justice, access, service quality, transparency and the achievement of gains for general welfare, especially from a consumer perspective.

Most legal changes proposed by the PCA have been accepted by the Government, through a general reform of the legal framework of the pharmacy sector, as shown in Box 3.

Box 3: PCA Recommendation No 1/2006, to the Government proposing measures to reform the regulatory framework applying to pharmacies, with a view to promoting competition in the sector[3]	
Proposed Measures	**Legislation**
1 – Measures liberalising market access	
1.1 Elimination of public bid procedures (and respective geographic and demographic criteria) for the establishment of new pharmacies	No
1.2 New rules to promote medicine distribution through the pharmacies of social support organisations so as to uphold the principle of access to a pharmacy, in particular in deprived urban and rural areas	Decree-Law No. 235/2006, 6 December Decree-Law No. 307/2007, 31 August
1.3 The elimination of all restrictions on the transfer of premises or exploitation or the relocation of a pharmacy	Decree-Law No. 307/2007, 31 August
1.4 Liberalisation of pharmacy ownership (repeal of the legislation that reserves pharmacy ownership for pharmacy graduates and cancellation of the obligation that the technical control of the pharmacy is carried out by its owner)	Decree-Law No. 235/2006, 6 December Decree-Law No. 307/2007, 31 August
1.5 New specific rules regarding merger control at local and national level, on the basis, for example, of a defined maximum number of pharmacies under the same control at local level and a defined maximum share at national level	No (Decree-Law No. 307/2007, 31 August defines concentration limits)
1.6 Abolishment of the ban on pharmacy ownership by drug wholesalers, without prejudice of the applicability of Competition Act to any future transactions	No
1.7 New rules prohibiting pharmacy-owning enterprises and the respective sector associations from owning drug-producing enterprises, except where financial investments are involved	No
2 – Measures for the promotion of balanced and effective competition between enterprises	
2.1 Abolition of the ban on pharmacy discounts, the current system of retail marketing margins being allowed to function as an effective system of maximum marketing margins	Decree-Law No. 65/2007, 14 March
2.2 Revision of the retail sales pricing system for subsidised medicines and of the subsidy system procedures	New pricing system: Decree-Law No. 65/2007, 14 March Portaria No. 300-A/2007, 19 March
2.3 Authorisation for pharmacies to advertise their activity, on the basis of specific regulations	Decree-Law No. 307/2007, 31 August
2.4 Authorisation of distance selling by pharmacies (Internet and mail)	Decree-Law No. 307/2007, 31 August Portaria No. 1427/2007, 2 November
2.5 The elimination of self-regulation processes in the application of rules on pharmacy activities, in particular the definition of permanent-service	No

[3] Direct link to the Recommendation and related documents in English: http://www.autoridadedaconcorrencia.pt/en/Content.asp?ID=750.

Proposed Measures	Legislation
3 – Measures aimed at creating a favourable environment for competition to develop	
3.1 Settlement of the present debt corresponding to the delayed subsidy payments to the pharmacies and substitution by public debt, with a debt-servicing charge substantially lower than at present 3.2 Termination of the agreement between the National Association of Pharmacies and the Ministry of Health on financial intermediation concerning the delayed subsidy payments to the pharmacies: instead, the payment should be made to each pharmacy directly, in line with the principles contained in the State Budget Law for 2006, and without any involvement of the sector associations in these payment procedures	State Budget Law for 2006 (Law No. 53A/2006, de 29 December) Decree-Law No. 242-B/2006, 29 December Portaria No. 3B/2007, 2 January

RUSSIAN FEDERATION

Since January 2007, according to the data of the Federal Service on State Statistics the price on minimal grocery set in the Russian Federation has increased by 17%. The rapid price hikes on the basic products is now surely faster than inflation.

FAS Russia, in order to provide a competitive approach and an observance of consumers interests in the situation of price raising on the food market, has taken some measures to lower the growth rate of consumer prices, in particularly on the food market.

FAS Regional offices conduct control actions to check the observance of the antitrust legislation by all participants on the food market: suppliers, producers, wholesalers and retailers.

After these controls on the retail and wholesale markets of milk, bread, sunflower oil, and poultry, a number of cases were opened against economic entities for antitrust law violations. Most of the violations were competition restraints agreement and concerted actions, and abuses of dominant position.

Another area of competition enforcement, conducted by FAS Russia in association with Regional offices relates to the control against the prevention of restriction of free movement of the groceries between subjects of the Russian Federation. Thus, after inspections in a few regions, violations of the restriction of free movement of groceries were detected, and cases against the executive branch of the subjects of the Russian Federation were opened. For example, in some regions there is a restriction on the export of milk products outside the subjects of the Russian Federation, and a restriction on the import of cattle and meat from outside the subjects of the Russian Federation.

FAS Russia took part in the preparation of the Agreement on measures adopted on prices stabilisation concerning certain types of socially important groceries that were implemented among various organisations working at retail level and organisations working in groceries production.

According to its competence, which is defined by the Federal Law “On protection of competition”, FAS Russia considered the Agreement according to part 2 of the Article 12 and Article 13 of the Competition law. It was found acceptable, as it is only temporary. The Agreement presumes that contracts between producers and retailers, with shares not exceeding 20%, as being unable to restrain competition on the market. This Agreement had social and economic effects such as prices stabilisation on the consumer market of the Russian Federation and the protection of mostly vulnerable population.

Another issue is the relationship between outlet chains and suppliers. At present, the fast development of large outlet chains and the growth of their share on the regional retail market of groceries lead to inevitable consequence – the shift of market power from the producers to the retailers, which amounts to a difficult position for the suppliers.

The specificity of the relationship in this sphere is that in spite of small shares of economic entities (such as outlet chains), that operate on the market and deficit of trading spots, these economic entities have an ability to influence arising legal relationships and competition on certain markets, in particular on contracting legal relationships with suppliers, creating discriminatory access to the outlet chains.

The current provisions of the antitrust law over the relationship between economic entities do not provide enough empowerment to exercise control over commercial activities. In order to resolve the problem between outlet chains and suppliers, maintain competition on the market, protect groceries producers and suppliers, FAS Russia included provisions of antitrust regulation into the draft legislation "On the basis of state regulation of commercial activities in the Russian Federation", that provide:

- Reduction of economic entity shares on certain retail markets, upon which its position can be recognised as dominant, up to 15%;

- Reduction of the total economic entity share, in the case of collective dominance on certain retail markets;

- Establishment of geographical borders of retail markets on main activities (household appliances, groceries, pharmaceuticals);

- Application of antitrust provisions to economic entities with a dominant position on certain retail markets, that are operated on neighbouring markets (for example, suppliers market).

According to FAS Russia, the introduction of these provisions in the draft legislation will stimulate solutions to specific problems of retail market functioning, competition development in the area of retail, and protection of interest for both outlet chains and producers. It will also be an instrument to balance provision of the interest of the participants to commercial activities.

SINGAPORE

1. Introduction

Competition policies are government policies that affect the level of competition in markets such as policies on trade, the number of market participants, entry in markets, privatisation etc. Competition law, which is one aspect of competition policy, focuses on addressing market failures arising from *market power*. Common competition policy instruments include competition advocacy and competition law enforcement.

Consumer policy on the other hand, focuses on the protection and empowerment of consumers. The main market failure that consumer policies address is a lack of consumer information – particularly *information asymmetries,* where a producer is at an advantage because he knows more about the product or service being supplied than consumers. The consumer policy regimes of most countries are aimed at improving market transparency and information flows between producers and consumers, weeding out rogue traders and minimising transaction and search costs for consumers. Consumer policies typically employ a wide range of tools such as regulation and enforcement (e.g. product safety laws, ethical advertising codes), licensing for professional and technical services, mediation and negotiation practices as well as advocacy and education.

2. Competition and consumer policies are largely acknowledged to be complementary

Both sets of policies are necessary for the effective functioning of markets, given that consumer behaviour has an impact on firm behaviour and vice versa. The relationship between competition and consumer policies has been generally acknowledged to be harmonious and complementary, not least because they both seek to ensure that markets function effectively.

The largely complementary nature of both competition and consumer policies results in benefits that accrue both to consumers and producers. Competitive markets spur firms to be more responsive to consumer needs. Consumers benefit because competition forces firms to lower costs and to pass cost-savings on to consumers through lower prices in the short-term. In the longer term, competition stimulates innovation so that consumers are able to both enjoy better quality products and have more choices.

Consumer policies also contribute to competitive markets. By addressing information asymmetries, consumer protection enhances competitive markets, thereby allowing consumers to make more informed decisions. This in turn promotes competition by forcing producers to distinguish and price their products to better meet informed consumer needs.

3. Competition policy in Singapore

Competition is a key tenet that underpins Singapore's economic policies. Although competition law is relatively new in Singapore (the Competition Act 2004 was passed on 19 Oct 2004, and became effective 1 Jan 2006), policies that encourage competition and ensure that businesses can compete on a level playing field have been fundamental to the development of Singapore's economy since independence in 1965.

Wherever appropriate, Singapore has opened up sectors of the economy to market competition as competition benefits the economy by promoting greater productivity gains and more efficient resource allocation. Post-independence, Singapore opened her ports to free trade and embarked upon an export oriented strategy to attract foreign multi-national companies (MNCs) to develop the manufacturing and finance sectors in Singapore. This occurred at a time when other countries were focusing on import substitution. By opening the economy to foreign competition, consumers were afforded more choice, better quality products as well as lower prices. Subsequently, Singapore also de-regulated sectors long thought to be natural monopolies. For example, when the telecommunications sector was fully liberalised in 2000, the entry of new players such as StarHub into the market to challenge the incumbent, SingTel, resulted in both price and product competition, with consumers enjoying more choice and lower prices.

More recently, in 2003 the Economic Review Committee (ERC), which was established in 2002 to review Singapore's development strategy, articulated in their report that competition policy would be a key component of its blueprint to restructure the economy. In addition, a generic competition law was enacted in 2004 to create a level playing field for businesses, big or small, to compete on an equal footing. The Competition Commission of Singapore (CCS) was established in 2005 to administer the Competition Act. Competition policy and law currently form part of a set of pro-enterprise approaches with the three fold purpose of promoting enterprise growth, enhancing the efficiency of markets and strengthening external competitiveness. .

4. Consumer policy in Singapore

In Singapore, consumers are afforded protection through product safety standards and regulations such as the Consumer Protection (Fair Trading) Act (CPFTA), the Unfair Contract Terms Act and the Sale of Goods Act which protect consumers from unethical business practices. The CPFTA lists 20 unfair trade practices for which consumers can seek recourse through the Small Claims Tribunal.

The Consumers Association of Singapore (CASE), an independent and non-profit body, was set up in 1971 with the three pronged aim of educating consumers, working with businesses to create a consumer friendly environment and lobbying the government on consumer issues. CASE provides a host of services, from informal channels for consumers to seek redress such as mediation and negotiation, to providing accreditation services through CASETrust for the retail and services industries. To qualify for CASEtrust accreditation, companies must follow certain standards when conducting businesses and providing services to their customers. CASE also has accreditation schemes tailored for industries which tend to be more prone to information asymmetries such as employment agencies, educational centres, travel agencies, and e-commerce firms.

In addition, the Advertising Standards Authority of Singapore (ASAS), an Advisory Council to CASE, has issued the Singapore Code of Advertising Practice (SCAP) for the advertising industry. The ASAS Council is empowered to take action in relation to advertisements, which are found to contravene the SCAP.

Beyond providing a base line for consumer protection, the general policy approach to consumer protection has largely been *caveat emptor*, or buyer beware. The emphasis in Singapore has been on encouraging competitive processes and raising consumer awareness instead of direct consumer protection, as active competition policy is seen as a more efficient way to deliver benefits to consumers. Furthermore, in addition to end-user consumers, competition also benefits business consumers.

5. The interface between competition and consumer policies in Singapore

It is worthwhile noting that there are cases where competition issues arise due to information asymmetries; in such cases, consumer policy can play a role in providing a solution. For example, some motor distributors were found to have an arrangement with an insurance company (Company A), for the provision of discounts to buyers of new cars who took up motor insurance from Company A. The complaint from a competing motor insurer was that such an arrangement foreclosed the motor insurance market through the bundling of motor insurance from Company A with new cars sold by some large car distributors coupled with the provision of discounts to entice consumers to take up the bundled packages. In this case, many customers took up the bundled package although Company A's motor insurance was more expensive than competitors'. This could be because consumers preferred the convenience of conducting their motor transactions at one location as it saved them the search costs of shopping around for motor insurance. However, it was just as likely that consumers could have been ignorant of the prices of motor insurance and were enticed by the discount on the purchase price of the car. The arrangement was cleared on competition grounds as buyers were not compelled to buy the insurance together with the car. The success of the scheme was simply because consumers preferred the bundled discount package and not due to foreclosure of competitors. It is interesting to note that in this case, improved consumer welfare is more likely to result from raising consumer awareness instead of taking action on competition grounds.

However, there are instances when tradeoffs need to be made, as competition and consumer policies do not always complement each other. For example, the issue of price guidelines has generated some public debate in Singapore on the extent to which guidelines may serve to protect consumers from overcharging. The issue of whether non-binding price guidelines should be allowed, remains whether accurately or not, mired in public perception as a consumer and competition trade-off. To consumers, price guidelines may be seen as providing a measure of certainty, by indicating the price they can expect to pay, which may reduce search and negotiation costs. However, price guidelines may tend to stifle price competition by acting as a price signal to suppliers, resulting in the clustering of prices in a narrow range around the recommended price. As such, competition authorities are in general agreement that price guidelines are harmful to the competitive process.

6. Institutional design in Singapore

Given the closely intertwined nature of competition and consumer policies, some jurisdictions have called for an integrated approach to policy-making on competition and consumer issues.

Singapore has sectoral specific regulators that deal with competition matters for certain services such as telecommunications, energy and water, which are excluded under the Competition Act. These sectoral regulators, which were in existence before the enactment of generic competition law and the CCS, are effectively dual role agencies, i.e., apart from being regulators, they also deal with both competition and consumer issues and some, where necessary, engage in price regulation to stabilise prices.

Generic competition law in Singapore is administered by the CCS, which acts to administer the Competition Act, whilst CASE deals with consumer matters. Singapore has adopted a dual agency design in the area of generic competition law, as consumer protection laws and competition laws require different perspectives of the market. In Singapore's context and market environment, it is more appropriate for consumer and competition issues to be administered by separate agencies. Although there are complementarities between competition and consumer policies, as addressed earlier, both aspects have different economic issues underpinning policy. Combining both functions in one agency may run the risk that competition policy may tend to create a bias towards consumer welfare, instead of seeking to maximise total welfare.

There are admittedly, some limitations in a dual agency design. Firstly, the range of tools available to the CCS is narrower than a dual function agency. When the CCS refrains from intervening in cases that do not raise competition concerns but which impact consumers, the CCS may be seen as not being consumer friendly. Given the nascence of competition law in Singapore, consumers often mistakenly believe that the primary objective of competition law is to protect consumers. Consumer advocacy and education has therefore been a key challenge and focus for the CCS in its outreach programme.

7. Conclusion

While there is little controversy that both competition and consumer policies are needed for efficient markets to spur economic growth, there seems to be less consensus on what is the 'right' institutional design, as can be seen from the various permutations in the international community.

Singapore has chosen to adopt the dual agency design as best suited to the needs of the Singapore economy. As the Competition Act is relatively new, the CCS' immediate focus has been on the promotion and enforcement of competitive practices. Once past the formative first few years, the CCS' next step will be to expand its role, to include building closer ties with CASE, the consumer body, so as to bring about more benefits for both businesses and consumers.

SLOVAK REPUBLIC

1. Introduction

Competition policy and consumer policy are separated both institutionally and also legislatively in the Slovak Republic. Competition policy is adjusted by independent act and its performance lies within authority of the Antimonopoly Office of SR. Consumer policy is considerably fragmented, adjusted by many independent acts and tens of institutions deal with particular performance of consumer protection.

2. Competition policy

Enforcement of competition law lies within authority of the Antimonopoly Office of the Slovak Republic (hereinafter only "the Office") and is adjusted by the Act No. 136/2001 Coll. on Protection of Competition. Protection of competition against its restriction and creation of conditions for its development to support competition development in favour of consumers are the aim of this Act.

The Act distinguishes two forms of non-permitted competition restriction, which the Office punishes, namely agreements restricting competition and abuse of a dominant position. In these two areas proceedings is initiated on a basis of complaints or own incentive and if the breach of the Act is proved the Office issues decisions, in which it requires ending illegal situation and it is also entitled to impose a fine on entrepreneurs breaching the Act.

Control of concentrations is another basic area of Office's activities. The Office monitors, whether concentration does not create or strengthen a dominant position, result of which would be significant barriers of effective competition in relevant market.

The Slovak Republic as member of the European Union applies also relevant legislation of EU in given cases.

3. Consumer policy

Differently from competition policy, many institutions deal with consumer policy in the Slovak Republic and many acts relate directly or indirectly to this area.

Main competences in the area of consumer protection lies within authorisation of the Ministry of Economy, which coordinates activities of all institutions in this area and fulfils many executive, conceptual and strategic functions.

Particular performance of policy of consumer protection relates to many institutions. Slovak Trade Inspection, which performs state control of sale of products and provision of services to consumers apart from foodstuff, tobacco and cosmetic products is one of the most important and is key institution of consumer protection from many aspects in Slovakia.

Many competencies of consumer protection are divided by sectors. For example, State Veterinary and Food Administration is competent in consumer protection in the area of some foodstuff; many competences in health protection in the area of cosmetic products belong to the Office of Public Health

Care; regulatory offices are competent in their industries, namely the Office for Regulation of Network Industries, Post Regulatory Office, Telecommunication Office, State Energy Inspection, State Institute for Drug Control, Slovak Inspection of Environment, etc.

Policy of consumer protection relates also to territorial self-administration authorities, which for example perform supervision over observance of consumers' rights in public marketplaces.

Consumer associations are special groups of subjects acting in the area of consumer protection. Provision of consultancy, legal protection, involving in international activities is their task and many of them have the right to represent consumers at courts and also in solving litigations in reclaiming proceedings. More than 40 of such associations are registered in Slovakia, although not all of them are active. Some of them are focused on consumption of particular products or services; others have been created for needs of particular region.

Legislative framework of consumer protection is similarly wide. Protection of consumer relates directly to some tens of acts in Slovakia. Here are some of them:

- Act on Consumer Protection,
- Government Regulation on General Safety of Products,
- Act on State Control of Internal Market in matters of Consumer Protection,
- Act on Liability on Damage Caused by Faulty Product,
- Act on Consumer Protection in Home Sale and Mail Order,
- Act on Advertising,
- Act on Consumer's Credits, etc.

4. Interface between consumer and competition policy in Slovakia

Consumer and also competition policies in the Slovak Republic have common goal – both of them are finally focused on reaching consumer welfare.

However, competition policy is specialised in consumer indirectly. As it arises from the Act on Protection of Competition, its aim is to protect competition with the goal to support economic development in favour of consumer. Thus the task of the Office is to ensure effective competition and functioning markets through prohibition of anticompetitive agreements and abuse of a dominant position and also non-approval of concentrations leading to creation of a dominant position. Competition environment leads to low prices, wider supply, innovations and etc., from which consumer benefits. Consumer's effect of competition policy implementation appears in middle-term or long-term horizon, it is not directly visible and is hardly measurable.

Consumer policy is focused on consumer more directly than competition policy, since consumer policy deals directly with relation supplier-consumer and covers the areas, which competition policy does not achieve, for example problems of products safety, misleading advertising cannot be solve only by insurance of competitive environment.

Consumer policy in Slovakia faces also the problem that control bodies of this area deals with the relation consumer – entrepreneur, but they cannot entry the contractual relations between consumer and entrepreneur – these can be solved only by courts. However, due to the poor legal awareness and weak knowledge the consumers have low ability to protect their interests.

In spite of the fact that no significant conflict between consumer and competition policy has occurred in Slovakia so far, the competition authority and the authorities on consumer protection do not cooperate actively, mainly due to the considerable dilution and narrow specialisation of individual consumers´ associations or other consumers´ authorities. Changing this situation, better results in implementation of both policies could be reached to the benefit of consumer.

Area of liberal professions was one of the areas where the Office experienced the lack of cooperation with the authorities on consumer protection and where the mutual cooperation would indubitably contribute to better solution of situation to the benefit of consumers.

In 2005 and 2006 the Office reassessed the regulation in the area of liberal professions in the Slovak Republic. Liberal professions in SR, as in the most countries are more or less regulated, mainly in the area of prices, advertisement, determination of requirements to entry the market and regulation of behaviour of professional services providers. Regulation advocates present as a main argument that regulation assists to maintain the quality of professional services and it protects consumers from abuse, since it is a case of markets where a significant information asymmetry exists (also as a result of a fact that in some cases there are credence goods and many goods have low purchase frequency).

The Office does not contest the fact, that certain regulation in the market of professional services is needed, right for the purpose of consumers´ protection. However, unreasoned, excessive and disproportionate regulation does not meet its goal for which it has been introduced, but vice versa, it has negative effects on consumer, since due to the elimination of competition among services providers the impulses for providers to work more effectively, to reduce prices, to increase quality or to offer more innovative services are reduced, what could lead to overall decrease of services´ quality and to higher prices.

The Office concluded that, in most cases, reassessing liberal professions regulation in SR is unreasoned, that it hinders competition and it is not to the benefit of consumer, but rather to his/her detriment. In its request to abolish such an unneeded regulation the Office faced the conflict with chambers and regulators which mostly do not agree with regulation abolishing or change and in the interest of consumer protection they asked to maintain, possibly even extend or tighten it.

In spite of invitation the authorities on consumer protection did not become actively involved in discussion on liberal profession regulation and the main problem – regulation influence on consumer and the need to protect the consumer's interests – has been solved by other institutions.

The banking sector serves as another example where the Office substituted the authorities on consumer protection to the certain extent and where the involvement of the mentioned authorities would have been desirable.

In 2007 the Office dealt with bundling of some retail banking products. Though this problem could not have been solved as abuse of a dominant position or agreement restricting competition, the Office felt that such a conduct has negative impact on consumer and it entered the discussions with commercial banks. In cooperation with Narodna Banka Slovenska (National Bank of Slovakia) it reached that this practice by banks is finished towards consumers since the end of 2007.

The area of private enforcement of competition law is the last example where the Office sees the considerable space for cooperation between competition authority and authorities on consumer's protection.

There is no specific legislation to regulate private actions for damages for breach of competition law in the Slovak Republic. Consequently, general provisions governing actions for damages under civil and

commercial law will apply. And so far, there have been no actions for damages for breach of competition law filed or decided by the courts in the Slovak Republic.

The Office sees the considerable space for cooperation, as well as role of authorities on consumer protection mainly in the area of consumers´ informing and in lodging complaints – bring forward cases where consumers are suffering because of anticompetitive behaviour.

In the view of the Office the issue of consumer protection is immensely important, so it is necessary to deal with it systematically with the participation of relevant authorities.

SWITZERLAND

1. Consumer welfare

First, the first question is whether the term "welfare" is appropriate. Would it not be better to talk about the position of consumers? For consumers, it is important:

To be acknowledged as vital partners in the functioning of the economy, given that they actually have the virtual power to shape the content of supply;

To be able not only to defend their interests and be protected as consumers, but also to defend their right to the protection of their health, safety and economic interests, their entitlement to redress, as well as to information and education, and their right to representation;

To ensure that their interests are as highly valued as those of other economic players.

1.1 Role of competition and consumer protection in promoting consumer welfare

1.1.1 Competition

Competition promotes diversity of supply and lower prices. It maintains diversity of supply and ensures that lower prices benefit both firms and consumers;

1.1.2 Consumer protection

This ensures that customers are:

- properly informed;
- protected against unfair business practices and goods/services that fail to meet health and safety standards;
- able to obtain redress.

Consumer protection should encompass any aspect that will ensure or maintain the sound functioning of a competitive market. These include, above all, good faith, diversity of supply/demand for a given product, and transparent information enabling consumers to compare and exercise choice.

Consumer protection plays a major role in promoting and defending consumer interests when markets fail to do so.

2. Does consumer information promote competition? Can increased consumer information harm competition?

Consumer information promotes competition inasmuch as it helps consumers to make informed choices. In fact it is crucial to economic players wishing to make know the qualities of the goods and

services they put on the market, so we do not see how more information would undermine competition. In particular, it can rid the market of "black sheep" and allow competition to flourish between those who live up to consumer expectations.

3. Does competition encourage sellers to provide sound, useful information and keep their promises?

If they are complement competition policy, government measures to protect consumers must aim to achieve two things, namely to restore the power of consumers vis-à-vis suppliers and promote objective consumer information on supply. This should give individual consumers freedom of choice and empowerment. However, no measure should go against the general interest, i.e. the principle of free trade and industry. This is why the introduction of new measures always involves considering the interests of others.

Information and competition are thus connected and help to make markets more transparent. If they are to enjoy consumer confidence, fair competitors will place the emphasis on sound, clear information that is not misleading. Above all, they will be careful to keep their promises.

4. Does advertising promote the competitive process?

Comparative advertising does promote competition. But advertising in the form of a non-objective information medium undermines informed choice. Permanent, aggressive marketing may also harm competition by seeking to impose a brand or trend on consumers, or to create a need.

5. Are consumer and competition policies complementary? Can you give examples of how they might conflict?

Again, consumer policy and in particular consumer protection should above all serve the public interest, while at the same time factoring in economic considerations. Consumer protection is in fact also an economic activity in its own right and is thus in the general economic interest. Attempts to render the market as transparent as possible so that consumers can make relatively rational decisions can lead to a wide range of measures that assist, educate and inform consumers. It can be seen from the features these measures have in common that none is unduly restrictive, i.e. they do not hamper competition. They are therefore in compliance with the market, meaning that consumer protection and competition are complementary (see 3: No measure should go against the general interest).

Practice shows the need for vigilance on a range of points, including the following:

- Diversity of supply and lower prices can only benefit consumers if competition is regulated. Regulation should ensure, first, that keen competition does not lead to a market where the major suppliers impose their own rules and, second, that competition remains fair, failing which consumers would be exposed to unfair business practices;

- Competition, in offering diversity of supply, makes consumer choices hard. Consumer protection promotes competition by providing the information consumers require to make informed choices;

- There is a risk that price cuts may be far greater for businesses than for consumers;

- There is a risk that consumer protection may clash with free trade;

- There is a risk that a free market may be achieved through decision-making rather than legislation;

- There is a risk that competition, while resulting in lower prices, could also lead to poorer quality goods and services.

6. What are the benefits and drawbacks of a dual-function agency?

The first step is to decide what is meant by "agency".

There are more drawbacks than benefits, as it is hard for a single agency to reconcile the interests of the economy with the interests of consumers ("judge and jury"). The Swiss system, for instance, acknowledges the consumer function and affords individual/special status to each party. This makes each of them specific and empowers them to reach solutions that serve the general interest, rather than solutions stemming from one side having pivotal power. Of course, this involves effective and ongoing co-operation.

7. Is successful co-operation between the two contingent on particular factors? What are delegates' experiences in this field?

1. Successful co-operation is based on balanced, dialogue-based consideration of both economic and consumer interests. For this, competition needs to be perfectly regulated. Care is needed to ensure that each party is acknowledged as an equal partner and an economic player.

2. Consumer protection is not confined to diversity of supply, lower prices and fair business practices. Co-operation extends well beyond competition, and constant care is required for co-operation to be optimal.

8. Conclusion

Switzerland's Federal Consumer Affairs Bureau would like to make the following point: *consumer protection*, in the strict sense of the term, generally involves resources to defend consumers. *Consumer policy* is a wider notion, encompassing not only rules aimed solely at protection but also a whole range of government measures. This is how the relationship between competition policy and consumer policy should be viewed.

It should be borne in mind that governments shapes consumer behaviour by intervening in the economy with measures in the field of enforcement or economic/social policy that are not aimed specifically at consumer protection. Regardless of the field concerned, government should act in the interests of consumers. Within that framework, co-operation between the competition authorities and consumer repesentatives is vital.

SUISSE[(*)]

1. Bien-être des consommateurs

Tout d'abord, il faudrait se demander si le terme « bien-être » est approprié. Ne faudrait-il pas plutôt parler de position des consommateurs. Pour les consommateurs, il s'agit :

- d'être reconnus comme des partenaires indispensables au fonctionnement économique vu qu'ils ont en fait un pouvoir virtuel d'orienter le contenu de l'offre économique ;

- de pouvoir non seulement défendre leurs intérêts et être protégés, mais de pouvoir défendre leurs droits de protection de la santé et de la sécurité, de protection des intérêts économiques, du droit à la réparation, du droit à l'information et à l'éducation, du droit à la représentation ;

- de donner à leurs intérêts la même valeur qu'à ceux des autres acteurs économiques.

1.1. Rôles de la concurrence et de la protection du consommateur pour promouvoir le bien-être du consommateur

1.1.1 La concurrence

Elle favorise la diversité de l'offre et la baisse des prix. Elle maintient une diversité de l'offre et veille à ce que les baisses de prix profitent aussi bien aux entreprises qu'aux consommateurs ;

1.1.2 La protection du consommateur

Elle veille à :

- la bonne information des consommateurs ;

- protéger ces derniers contre les pratiques commerciales déloyales et contre les biens ou services ne répondant pas aux critères de santé ou de sécurité fixés ;

- obtenir réparation.

Il faut rattacher à la protection du consommateur toutes les notions qui tendent à assurer ou à maintenir le bon fonctionnement d'un marché concurrentiel. Surtout, assurer la bonne foi, la pluralité de l'offre et de la demande pour un même produit et la transparence de l'information qui permet de comparer et de choisir.

(*) Document basé sur les réponses antérieures suite au questionnaire OCDE « Comité de la politique à l'égard du consommateur », séances des 16 et 17 novembre 2003 et joint meeting politique de la concurrence, écrit par Monique Pichonnaz Oggier, Chef du Bureau Fédéral de la Consommation.

La protection du consommateur a un rôle prépondérant pour faire avancer et défendre les intérêts du consommateur lorsque le marché ne réussit pas à le faire.

2. L'information aux consommateurs contribue-t-elle à la concurrence ? Une information accrue des consommateurs peut-elle nuire à la concurrence ?

L'information aux consommateurs contribue à la concurrence dans la mesure où elle aide le consommateur à choisir en connaissance de cause. De fait, elle est indispensable aux acteurs économiques qui veulent faire connaître les qualités des produits et services qu'ils offrent sur le marché. Nous ne voyons donc pas en quoi une information accrue nuirait à la concurrence. Surtout si l'on sait qu'elle a notamment pour effet d'écarter les « moutons noirs » et laisse subsister la concurrence entre les acteurs répondant aux attentes des consommateurs.

3. La concurrence contribue-t-elle à encourager les vendeurs à fournir une information sûre et utile et à respecter leurs promesses ?

Pour parachever la politique de la concurrence, les mesures de protection du consommateur prises par l'Etat doivent tendre à deux choses : donner aux consommateurs un pouvoir de participation propre à rééquilibrer leur rapport de force à l'égard des fournisseurs et promouvoir l'information objective des consommateurs sur l'offre disponible. Cela doit contribuer à la liberté individuelle du consommateur de pouvoir choisir et de garantir sa souveraineté. Néanmoins tous les moyens choisis ne peuvent s'écarter de l'intérêt général, soit du respect du principe de la liberté du commerce et de l'industrie. C'est pourquoi, l'adoption de mesures donne lieu. Chaque fois, à une pensée d'intérêts.

Dans ce cadre, l'information et la concurrence sont liées et contribuent à améliorer la transparence du marché. Afin d'obtenir le choix des consommateurs, les concurrents loyaux mettront l'accent sur une information sûre, claire, non fallacieuse. Ils seront avant tout soucieux de tenir leurs promesses.

4. La publicité contribue-t-elle à la concurrence ?

Certes, la publicité comparative contribue à la concurrence. Pour le reste, la publicité en tant que voie d'information non objective détourne les consommateurs du choix en connaissance de cause. Un marketing permanent et agressif peut également porter préjudice à la concurrence puisqu'il cherche à conditionner les consommateurs sur une marque, sur une mode ou créer un besoin.

5. La protection du consommateur et la concurrence se complètent-elles l'une l'autre ? Qu'est-ce qui pourrait les opposer ?

Comme dit plus haut, la politique à l'égard du consommateur, en particulier la protection du consommateur doit répondre à un intérêt public prépondérant dans le calcul duquel entrent également les considérations économiques. De fait, la protection du consommateur est aussi en soi une activité économique spécifique et relève donc en principe de l'intérêt économique général. En cherchant à rendre le marché le plus transparent possible afin que les consommateurs puissent faire un jugement relativement relationnel, il en résulte toutes sortes de mesures qui ont pour but d'assister les consommateurs, de les éduquer, de les informer. Leurs caractéristiques communes montrent qu'aucune d'entre elles ne constitue de restriction abusive, c'est-à-dire qu'aucune n'intervient dans le jeu de la concurrence. Il s 'agit donc de mesures conformes au marché, donc protection du consommateur et concurrence se complètent (voir point 3 : tous les moyens choisis ne peuvent s'écarter de l'intérêt général).

La pratique montre que la vigilance est de rigueur sur divers points, notamment :

- la diversité de l'offre et la baisse des prix ne peuvent profiter aux consommateurs que si la concurrence est réglée. La réglementation doit veiller, d'une part, à ce que la lutte n'aboutisse pas à un marché où les géants imposent leurs lois et, d'autre part, à ce que la concurrence demeure loyale, faute de quoi les consommateurs seraient exposés aux pratiques commerciales déloyales ;

- la concurrence, de part sa diversité, rend le choix des consommateurs difficile. La protection du consommateur assure le jeu de la concurrence en leur donnant l'information qui leur permette de choisir en connaissance de cause ;

- le risque que les baisses de prix soient nettement plus importantes pour les entreprises que pour les consommateurs ;

- le risque que la protection du consommateur se heurte à la liberté de commerce ;

- le risque que la libéralisation du marché se fasse à coup de décisions et non sur la base d'une loi ;

- le risque que la concurrence entraîne certes une baisse des prix, mais aussi une perte de qualité des produits ou des services.

6. Quels sont les avantages et inconvénients de combiner les deux fonctions en seule entité publique ?

Il faut tout d'abord définir ce que l'on entend par entité.

Il y a plus d'inconvénients que d'avantages car il est difficile pour une seule et même entité de concilier à la fois les intérêts de l'économie et ceux du consommateur (juge et partie). Si l'on se réfère au système suisse, en reconnaissant la fonction consommation, chacune doit avoir un statut individuel/particulier. Ce qui donne à chaque fonction sa caractéristique et sa force pour obtenir des solutions répondant à l'intérêt général, plutôt que des solutions dues à un pouvoir de force. Cela comprend, évidemment, une collaboration efficace et permanente.

7. Une coopération fructueuse entre les deux disciplines nécessite-t-elle certaines conditions ? Quelles sont les expériences des délégués à ce sujet ?

- Une coopération fructueuse repose sur une prise en compte concertée et équilibrée des intérêts de l'économie et des consommateurs. Pour ce faire. Il faut veiller à une parfaite régulation de la concurrence. Il faut veiller à ce que chaque partie soit reconnue comme un partenaire égal et un acteur économique.

- La protection du consommateur ne se limite pas à la diversité de l'offre, aux baisses de prix et aux pratiques commerciales loyales. La coopération va bien au-delà de la concurrence, elle demande une attention constante pour être optimalisée.

8. Conclusion

Le Bureau fédéral de la consommation rappelle la précision suivante : entendue au sens étroit du terme, la protection du consommateur recourt généralement à des moyens de nature défensive. Par conséquent, la notion de « politique des consommateurs » est plus large : elle comprend à côté des règles purement protectrices toutes autres sortes de mesures prises par l'Etat. C'est ainsi que la relation entre politique de la concurrence et politique à l'égard des consommateurs doit être comprise.

Il ne faut pas oublier que l'Etat lui-même influence le comportement du consommateur quant il intervient dans le cours de l'économie par des mesures de police, de politique économique ou de politique sociale qui n'ont pas la protection du consommateur comme but prioritaire. Dans quel domaine qu'il agisse, l'Etat doit le faire en harmonie avec les intérêts de protection du consommateur. Dans ce cadre, la coopération entre la concurrence et la protection du consommateur est indispensable.

CHINESE TAIPEI

1. Introduction

In preparing the present submission, the Fair Trade Commission (FTC) had consulted with the competent agency, the Consumer Protection Commission (CPC), who is responsible for the enforcement of the Consumer Protection Law. This submission summarises Chinese Taipei's general approaches toward dealing with issues pertaining to competition and consumer policies, especially in regard to the interaction between the two policies and the coordination between the two agencies.

In general, Chinese Taipei holds the view that competition law and consumer protection law pursue common objectives which are to ensure competitive markets in well functions so as to promote consumer welfare. In this respect, the competition and consumer policies should complement each other.

The Fair Trade Act plays an important role in realising the consumer protection in Chinese Taipei. Although the Fair Trade Act has been principally applied to regulate monopoly, mergers, cartels, other restraints on competition and unfair competition practices since it came into force in 1992, yet the protection of consumers' interests has also been one of its stipulated legislative goals.

The promulgation of Consumer Protection Law in 1994 brought the issue of consumer protection in Chinese Taipei into a new era. Based on Article 40 of the Consumer Protection Law, the CPC was established under the Cabinet with a mandate for policy making, supervision, and coordination among different competent authorities regarding consumer protection issues but without the power to enforce the law.

Article 6 of the Consumer Protection Law states clearly that the competent authorities defined by the Law at the central government level shall be the competent authorities having primary jurisdictions, at the metropolitan level the metropolitan governments and at the county city levels the county and city governments. Enterprises violating the Law should be punished by the competent laws. In addition, the government of municipalities and counties (cities) shall each establish a consumer dispute mediation committee to handle the consumer disputes. With respect to Article 39 of the Consumer protection Law, the CPC, the municipality and county (city) government shall respectively maintain several consumer ombudsmen. The consumer ombudsman is responsible for dealing with complaints, approving the consumers protection group's filing of class action suits for damage to customers and having an action for omission. The Consumer Protection Law also already provides the consumers with the legal basis to file a group action. The system is supposed to be a mechanism to achieve the goals of the Consumer Protection Law by encouraging the consumers to search for remedies by themselves.

Most of consumer protection laws address eight consumer rights: (1) The right to basic needs; (2) Right to safety; (3) Right to information; (4) Right to Choice; (5) Right to be heard; (6) The right to redress; (7) The right to consumer education; (8) The right to a healthy and sustained environment. These rights were included in Chinese Taipei's Consumer Protection Law in 1994. The Consumer Protection Law is enacted for the purposes of protecting the interests of consumers, facilitating the safety of the consumer life of nationals, and improving the quality of the consumer life of nationals. The Consumer Protection Law has regulated safeguard of health and safety, standard contracts, extraordinary purchase and sale as well as regulations governing consumer information. Regarding the mail order, door-to-door sale, and

internet transaction, consumers may return the goods or notify in writing the business operators to rescind the purchase contract within 7 days upon receipts of such goods without stating reasons and paying any expenses or the purchase price.

As stated in Article 1, to maintain trading order, protect consumers' interests, ensure fair competition and to promote economic stability and prosperity are the legislative purposes of the Fair Trade Act. More to the point, ensuring fair competition is its core objective. As a tool for stabilising and strengthening economic activity, competition can result in a better allocation of resources, improve business operations efficiency and foster technological progress, all of which leads to the stability and prosperity of the overall economy. The ultimate objective of the Fair Trade Act is to promote economic stability and prosperity. In other words, protecting and nourishing economic stability and prosperity is the policy goal, and the maintenance of market competition order is a kind of policy tool to achieve this goal. However, competition is not the sole policy tool available.

Article 26 of the Fair Trade Act states, "The FTC may investigate and handle, upon complaints or *ex officio*, any violation of the provisions of this Law that harms the public interest." Thus, "consumers' interests," as referred to in the Fair Trade Act, should be interpreted from the standpoint of public rather than personal interest. "Consumers' interests" was added to Article 1 during review sessions by the Congress and should also be given due consideration when interpreting relevant provisions and exercising authority. Yet, consumers' interests, albeit important, should not be mistaken as the only interest protected by the Fair Trade Act. By "ensuring fair competition", the Fair Trade Act enables enterprises to compete in open and free markets, which will enhance efficiency and innovation, thereby indirectly nurturing a healthy environment for consumers and thus protecting consumers' interests, as enterprises compete to meet consumers' needs by ensuring better conditions in which to make transactions.

2. The Complementary Roles of Consumer Protection and Competition

2.1 How does consumer policy interact with competition policy in your country, if at all ? Can you give examples where they have conflicted ? Where have they been complementary ?

The Consumer Protection Law came into force in 1994. The Consumer Protection Commission was established and was responsible for policy making, supervision, and coordination among different competent authorities regarding consumer protection issues. The CPC is chaired by the Vice Premier, and the chairman of the FTC is a member of the CPC who is invited to its monthly Commissioners' Meeting to discuss issues pertaining to consumer protection. To enhance consumer protection, the CPC draws up an annual project which serves as the basis for 26 central government authorities to produce annual proposals on consumer protection and to enforce them accordingly after the proposals being evaluated by the CPC. The FTC also participates in the Commission's evaluation which is carried out every two years and which provides direction for future efforts.

The FTC proposed a consumer protection plan in association with the CPC's annual project. Taking the FTC's annual consumer protection plan of 2007 as an example, several consumer-related issues are included. Those are the regulations of internet advertisements, participation in discussion of standard contracts, the supervision of multi-level sales, announcement of supply and demand information in seasonal commodity markets, regulations and management of weight loss and body care activities as well as the regulations of sales practices of foreign resort membership cards.

The FTC has in practice accepted all cases in which violations of the Fair Trade Act have been subjectively assumed by the complainant, leading the general public to expect that the FTC will intervene in every case in which consumers' interests are to various degrees at stake. There are some cases related to unfair competition practices holding that trading partners' interests and the consumer welfare (public

interest) are both protected by Articles 21 and 24 of the Fair Trade Act. Therefore, it becomes necessary to offer remedies to the general public for possible private actions to enforce the Articles 21 and 24. The FTC is sufficiently experienced in requiring the enterprises to provide consumers with transparent transaction information in this regard.

False and misleading advertising is consider to be an unfair competition practices and regulated by Article 21 of the Fair Trade Act. In addition to the Fair Trade Act, regulations governing false advertisements can be seen in relevant laws under other sector regulatory authorities. For example, regulations regarding false advertisements on the part of securities firms are in the Securities and Exchange Act. Other types of false advertising are covered in other acts and statutes. Insurance and securities advertisements are regulated by the Financial Supervisory Commission. Advertisements for food, dairy products, pharmaceuticals, cosmetics and health foods are under the authority of the Department of Health. Advertisements regarding supplementary education are under the jurisdiction of the Ministry of Education. Employment advertisements are under the jurisdiction of the Council of Labor Affairs. The FTC consults with each of the authorities to ensure that various false advertisements are dealt with by the authorities in charge. The FTC will intervene only when there is no applicable law under the jurisdiction of the competent authority and there appears to be a possibility that fair competition will be impaired. The Fair Trade Act also grants those injured by false and misleading advertisements the right to seek civil remedies.

According to Articles 1 and 9 of the Fair Trade Act, the FTC is expected to play the role more of a competition than consumer protection authority. Therefore, when dealing with unfair competition cases, such as false advertising, the FTC will evaluate and emphasise their competitive effects to the markets in addition to the degree of consumers' harms from alleged violations.

Consumer and competition policies have been complementary in Chinese Taipei. For examples, in typical real-estate transactions, consumers need only propose their written offers to the brokers to establish a real-estate brokerage contract. By introducing an additional mediation fee for the brokerage service, however, firms in the real-estate brokerage industry require consumers to advance a specific amount of mediation fee before they would provide their services. The FTC was of the opinion that the brokerage industry owes consumers an obligation to inform them the right of choice between the use of traditional offer-in-writing model, of which a standard format has been provided by the Ministry of Internal Affairs, and the mediation-fee model. Otherwise, it will be a violation of Article 24 of the Fair Trade Act. The FTC also issues the policy statements for the brokerage industry. The FTC takes the position as a consumer guardian and treats consumer welfare as a legitimate interest to be protected by the Fair Trade Act.

There is another example. In August 2007, the FTC grants the merger approval of two convenient stores, Family Mart and Niko Mart after taking into account its competitive effects on the relevant market. Following the consummation of the merger, Family Mart announced that consumers who owned the gift certificates of Niko Mart would have to have them converted into the gift certificates of Family Mart by 31 January 2008. The CPC was of the opinion that the conversion period set by Family Mart is unreasonable and would affect consumers' interests. Therefore, the CPC organised a meeting at which the CPC consulted with Ministry of Economic Affairs, FTC, Family Mart and Niko Mart regarding the solution of this issue. Finally, the Family Mart agreed to continue validating the gift certificates of Niko Mart after 31 January 2008.

3. The Interaction between the Competition and Consumer Policies

3.1 What do you feel are the benefits and drawbacks to your own country's choice of "dual-function" or "separate agencies" for handling competition and consumer policy?

Article 1 of the Fair Trade Act unequivocally states that, "maintaining trading order, protecting consumers' interests, ensuring fair competition and promoting economic stability and prosperity." The protection of consumers' interests is obviously one of the legislative purposes of the Fair Trade Act. Both the Fair Trade Act and the Consumer Protection Law seek to protect consumers, but the two are different legal systems, and as such, they differ in their approaches and functions.

In contrast with the protection of individual consumers in the Consumer Protection Law, consumers' interests, as referred to in the Fair Trade Act, denote public interests or consumers' interests as a whole within the context of market competition. The Fair Trade Act by "ensuring fair competition" enables enterprises to compete in open and free markets, which increases market efficiency and innovation, thereby nurturing and indirectly enhancing a healthy environment for consumers. Furthermore, as enterprises compete to entice consumers through better transaction conditions, they are in fact protecting consumers' interests.

The protection of consumers' interests under the Consumer Protection Law is primarily by way of civil remedies. Although the Consumer Protection Commission, as an administrative agency, was established to execute the Consumer Protection Law, its main function is to propose and review basic policies related to consumer protection. Individual disputes that harm consumers' interests are between private parties, and the parties should seek civil remedies. The Consumer Protection Law intervenes when the trading parties are on unequal footing and provides collective or class litigation procedures. The Consumer Protection Law also empowers the competent authority to intervene with administrative sanctions on specific issues. The Consumer Protection Law, therefore, consists of a multi-level system of legal protection: Disputes concerning private rights are resolved in civil remedies; collective and class litigation, in civil proceedings, complements the position of consumers; and the competent authority improves the terms for consumers through reinforced supervision of enterprises.

Paragraph 1, Article 9 of the Fair Trade Act provides the vertical regulatory framework for its enforcement. It refers to the FTC under the Cabinet at the central government level; the metropolitan government at the metropolitan level; and the county (or city) government at the county (or city) level. Semi-annual coordination meetings and the usual contact between the FTC and the local government enhance enforcement efforts. Paragraph 2, Article 9 of the Fair Trade Act provides the horizontal regulatory framework of enforcement on matters concerning the authorities of any other ministries or commissions; the FTC may consult with such other ministries or commissions to deal therewith. Accordingly, in addition to enforcing the Fair Trade Act, the FTC has since its inception actively and fully cooperated with the relevant authorities.

In Chinese Taipei, the CPC and the FTC have jurisdictions over the Consumer Protection Law and the Fair Trade Act respectively. The enforcement method and policy goals are dissimilar between the FTC and the CPC. The CPC has its functions with policy making, supervision, and coordination among the competent authorities so as to avoid the same issues related with consumer complaints to be handled in different ways and with conflicting results by relevant authorities. The CPC has experienced much success in this regard. For example, the CPC has actively and coordinated with the relevant authorities regarding the solution of gift certificates issue. The result is that any enterprise should implement the gift certificates redeeming mechanism from the beginning of April in 2007.

There has been discussion since the late 1990s about combining the CPC with the FTC. The Cabinet sent the draft amendment of the Executive Yuan (the Cabinet) Organisation Law for Parliamentary review in 2005, but until now, the review has not been completed. The combining of the two agencies is no longer under consideration.

Both the Fair Trade Act and the Consumer Protection Law seek to protect consumers, but the two are different legal systems, and as such, they differ in their approaches and functions. So the separate agencies for handling competition and consumer policy can respectively carry out its functions and policy goals better. The coordination mechanism among competent authorities in consumer protection issues becomes more important.

4. Selected Cases: Cable TV and Combo Card

4.1 Has your country required that "no frills" versions of complicated products be offered, to help vulnerable consumers? If so, who provided the product and how was its supply enforced? What was the effect on competition, if any?

There is no laws requiring the enterprises to offer "no frills" versions of complicated products to help vulnerable consumers in principle, unless the provision of products or services specifically involve the issue of public interest or has infringed on consumer rights to choose.

With regard to the specific products, there are some regulations requiring the provision of "no frills" versions of complicated products. The enterprise has the responsibility to provide products or ensure its supply. There are some examples. The first one is cable TV channel. Today, most of the existing 51 cable TV service areas in Chinese Taipei have only one, or perhaps two, cable television broadcasting system operators. Therefore, the CPC consulted with the National Communications Commission, the competent authority for the cable television market and many related industries, to require the cable television broadcasting system operators to offer "no frills" versions of the cable TV channel programs. The cable TV subscribers have options in terms of payment for the basic cable TC channel programs or extra payment for additional cable TV channel programs.

A few years ago, the government compulsorily required all financial institutions convert the banking cards with magnetic strip to IC cards by the end of December 2006 to avoid the card being misappropriated by swindlers. It was discovered afterwards that some banks took this opportunity to merge the functions of the ATM card, credit card, and digital wallets into a single card (sometimes called a "combo card"), and demanded consumers to accept them. Such a mandatory policy had violated consumers' freedom to choose and the CPC issued the "Items That Should and Should Not Be Included in Standardised Model Contracts Pertaining to Credit Cards" to require that banks must provide consumers full information and let them choose freely whether they want to apply for a credit card and digital wallets.

5. Issues regarding Internet False Advertisement Practices

5.1 Can you identify areas where a better convergence of both competition and consumer policies globally would be beneficial?

In light of the current trends toward development of global electronic commerce, international cooperation between the competition and consumers protection authorities to combat, for example, cross-border Internet false advertisement practices becomes very important. In Chinese Taipei, our competent authorities including the FTC, the CPC, Ministry of Finance, Ministry of Education and the Investigation Bureau of Ministry of Justice are cooperating to enforce Internet sweep activities regarding false advertisements. Such a cooperation plan can save on investigative costs, prevent the spread of injury and

deter future internet fraud. Chinese Taipei is exploring the possibility of seeking more cooperation from counterparts of other countries to ensure that enforcement activities can be undertaken in an even more effective, far-reaching manner.

6. Conclusions

The competition law enables enterprises to compete in open and free markets, which could increase efficiency and innovation, thereby indirectly foster a healthy environment for consumers and enhance consumers' interests, as enterprises compete to meet consumers' needs by ensuring better transaction conditions. Competition not only increases consumers' choices, but also motivates suppliers to provide useful and transparent information about the products or services and drive them to fulfill their promises concerning prices, quality, and terms of sale. Thus, competition is a means for protecting consumers' interests.

Effective consumer protection is also an indispensable element of ensuring a market will function well. Competition cannot always prevent the enterprises from engaging in unfair conducts and guarantee that the consumers could always be well informed of all transaction conditions and make good decisions. In Chinese Taipei, it is mainly the responsibility of the CPC to oversee the consumer protection issues. However, coordination and cooperation among the competent authorities to provide clearer rules of the game will improve the environment for consumption and enhance consumer welfare in the long run.

TUNISIE

OCDE

Forum mondial de l'OCDE
sur la concurrence

Relation entre la politique de concurrence et la politique à l'égard des consommateurs

Khalifa TOUNAKTI
Directeur Général de la Concurrence
et des Enquêtes Économiques
Ministère du Commerce et de l'Artisanat
Tunisie

21, 22 Février 2008, Paris

1

Introduction

- **La politique de la concurrence a deux objectifs majeurs en Tunisie:**
  - Améliorer la compétitivité de l'économie et de l'entreprise tunisienne
  - Garantir au consommateur la qualité des produits et des services à des prix abordables

2

Introduction

- **Cette préoccupation existait déjà dans la politique d'encadrement suivie avant les années 80**
- **Mais les moyens et les méthodes utilisés sont différents**
- **La protection du consommateur est une prérogative de l'État à travers:**
  - l'encadrement des prix
  - le rôle des entreprises publiques de production
  - la politique de subvention
  - La politique du contrôle économique
  - transferts sociaux et assistance

3

I - La politique de la concurrence

- Dans le nouveau contexte de libéralisation et de réformes, le rôle de l'intervention directe de l'État a été délégué aux forces du marché où la concurrence est au centre des réformes

1- Les composantes d'une politique de concurrence:

- Libéralisation des prix: principe général
- Autorités de concurrence: veillent au fonctionnement du marché
- Obligations à l'égard des professionnels
- Obligations à l'égard des consommateurs
- Assurer un environnement concurrentiel

4

I - La politique de la concurrence

2- Place prépondérante pour le consommateur dans:

- la loi N°91-64 relative à la concurrence et aux prix
- la loi N°91-117 relative à la protection du consommateur
- les lois relatives aux pratiques commerciales
- les réglementations sectorielles

3- Les droits acquis:

- préserver le pouvoir d'achat
- Protéger la santé et la sécurité
- Droit à l'information, au choix et à la qualité
- Possibilité de porter plainte aux services du contrôle économique
- Possibilité de saisir le conseil de la concurrence pour les PAC

5

I - La politique de la concurrence

4- La préservation du pouvoir d'achat du consommateur :

- l'encadrement des prix des produits et services essentiels: fournis par des secteurs non concurrentiels
- la subvention de certains produits et services sensibles
- la garantie de l'approvisionnement régulier du marché (régulation du marché)
- la politique des revenus et la politique fiscale

5- La protection contre certaines pratiques abusives:

- refus de vente et des ventes conditionnées
- Réglementation des ventes avec prime
- interdiction de la publicité mensongère
- Responsabilité du producteur ou de l'importateur à l'égard des produits et leurs conformité
- principe de l'autocontrôle au niveau de la production

6

I - La politique de la concurrence

6- Droit à la protection :

- obligation d'assurer la sécurité des produits
- obligation d'assurer la conformité des produits aux dispositions légales et réglementaires
- protection contre les risques éventuels d'utilisation
- possibilité de retrait de certains produits en cas de risque grave
- responsabilité des dommages causés
- interdiction d'offre ou de distribution de produits falsifiés ou fraudés
- interdiction de la tromperie sur la nature des produits
- droit du consommateur à la garantie au remplacement ou réparation des produits non conformes

7

II - Interaction entre les deux politiques

- Qui se complètent
- deux politiques qui se chevauchent: l'intérêt du consommateur
- Qui s'enrichissent

8

II - Interaction entre les deux politiques

1- deux politiques complémentaires:

- **Politique de la concurrence**:
  - objectif commun = bien-être du consommateur
  - Lutte contre les PAC: effets bénéfiques pour la concurrence et le consommateur
  - amélioration de l'environnement concurrentiel: facilitation d'accès, élimination des barrières à l'entrée, libéralisation des activités: offre des choix

  ➔ **concurrence réelle: baisse des prix et amélioration de la qualité**

9

II - Interaction entre les deux politiques

- **Politique de protection du consommateur:**
  - assurer la transparence des transactions
  - assurer l'information adéquate
  - assurer un minimum de droits (textes)

➔ Lutter contre les pratiques déloyales

➔Favoriser une concurrence réelle: seul moyen de résister pour l'entreprise :

Prix ↘

Qualité ↗

10

II - Interaction entre les deux politiques

2- Deux politiques qui se chevauchent:

- elles ont pratiquement le même cadre juridique
- mêmes autorités chargées du contrôle= le ministère du commerce et de l'artisanat chargé de l'application des textes (les deux politiques)
- non-étanchéité des deux politiques

➔ **Deux niveaux de protection du consommateur**

11

II - Interaction entre les deux politiques

3- Deux politiques qui s'enrichissent:

- Les dispositions relatives aux consommateurs favorisent la concurrence (environnement): pratiques commerciales, promotions, ventes avec facilités…
- Les infractions peuvent avoir comme origine des PAC
- Les requêtes du consommateurs(arnaques, fraudes, publicité mensongère …) peuvent aboutir à des PAC
- Favorisent l'instauration d'un environnement concurrentiel
- Échange mutuel d'informations dans les investigations

12

Conclusion

- Mêmes objectifs: bien être du consommateur
- importance de la sensibilisation et del'advocacy: ont les mêmes cibles et utilisent les mêmes moyens
- Politique de la concurrence: offre des avantages et des choix
- politique du consommateur: assurent les moyens de bénéficier des avantages de la concurrence.

13

UNITED KINGDOM

We welcome this discussion which covers an important issue and one which is currently high on our agenda. The mission of the Office of Fair Trading (OFT) is to make markets work well for consumers. Competition and consumer policy are complementary in achieving this. The OFT has enforcement powers in both areas, and has been working to develop and exploit the synergies between them, to promote and protect consumer welfare.

In doing so, the OFT works closely with sister authorities: the Competition Commission (CC), the sector regulators, and the Local Authority Trading Standards Services (LATSS).[1] A further important part of the UK framework is the existence of two strong consumer representative bodies: the National Consumer Council and Which? These provide a voice to consumers which is reinforced by their ability to make super complaints to the OFT.[2]

This brief paper lays out the OFT's views on this important topic and focuses on the OFT's functions. In doing so it answers questions one and two from the committee. The other questions are addressed briefly in the Annex.

1. Interactions between consumer and competition policy

1.1. Synergies

The OFT combines both competition and consumer enforcement in its mission to make markets work better for consumers. This recognises the potential for competition and consumer policy to form a virtuous circle:

- On the one side, vigorous competition should drive firms to deliver higher quality, increased choice, greater innovation and lower prices, all of which are beneficial to consumers.[3] Importantly, well-functioning markets can also overcome consumer problems without the need

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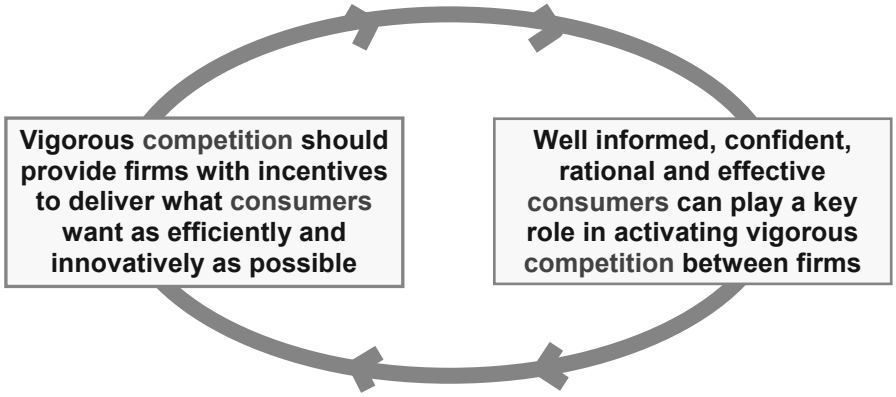
1 The CC carries out market investigations. These are carried out under a competition-focussed legal test, but in practice can play an important role in addressing problems in markets that are driven by consumer behaviour, and in doing so encompassing both competition and consumer policy. They are discussed further below. The UK sector regulators for energy, water and communications also each have both competition and consumer enforcement powers, which they use in a joined up. The 204 Local Authorities Trading Standards Services focus on consumer policy (including both enforcement and advice) and have no duty to consider competition when carrying out their functions, but strategic leadership for these services is provided by the OFT.

2 The system of supercomplaints requires the OFT to give a reasoned response to a formal complaint by these bodies within a set timeframe. See http://www.oft.gov.uk/advice_and_resources/resource_base/super-complaints/

3 There are numerous examples from within the UK of where increased competition has led to substantial tangible benefits to consumers. For example see DTI Economics Paper No.9 prepared by Centre for Competition Policy, University of East Anglia, 'The Benefits from Competition: Some Illustrative UK Cases', July 2004. Available at: http://www.berr.gov.uk/files/file13299.pdf

for consumer enforcement intervention. For example, competition can drive firms to adopt good standards of business behaviour towards consumers, in order to achieve a good reputation, so long as these are observable to consumers and affect their purchasing behaviour.

- On the other side, effective consumer policy has a two-fold role in making markets work well: firstly, it should promote consumer confidence in markets, and it should enhance the ability of consumers to drive vigorous competition. For example, by ensuring that claims made by sellers are not misleading, consumer policy plays a crucial role in enabling consumers to make sensible choices between offers and be confident that they will be well-served by the market. This in turn is necessary for ensuring that it is those suppliers with the most attractive offers that succeed in the market.



Clearly there will be circumstances in which markets will not work perfectly, and thus consumer policy also has a role in protecting consumers from rogue firms or shoddy quality. Moreover, where firms do breach the law, consumer redress can play an important role in improving the position of consumers, including enhancing their confidence in the system as a whole. The potential for costly redress can also enhance the incentives for firms to be compliant in the first place. For both of these reasons, the UK is considering making consumer redress easier (through private damages actions) following breaches of competition law.[4]

Within the spheres of competition and consumer policy, there is a wide spectrum of statutory and non-statutory tools that can be used: from full-on enforcement (with or without criminal sanctions), to settlements, to warning letters, to business guidance, to consumer education, to regulatory recommendations to Government. There are also a wide range of remedies which can result from a CC market investigation.

An interesting aspect of the UK regime is the OFT's Consumer Codes Accreditation Scheme, which aims to facilitate consumer policy outcomes (in particular improved quality and effective consumer redress) through market-based methods. The rationale for this regime is broadly as follows:

[4] See the OFT's discussion paper and consultation responses at: http://www.oft.gov.uk/advice_and_resources/resource_base/consultations/private

- In certain markets, it may be in the interest of any individual firm to offer a poor quality product or service, even though it is in the joint interest of all firms to keep quality high so as to preserve consumer confidence.5

- In such a situation, it may be in the interest of the firms in a market to agree to abide by a code which stipulates certain standards of business behaviour. Where the OFT is persuaded that the firms signed up to a code have incentives to abide by it, and where the code provides effective consumer redress, the OFT can give 'OFT accreditation' to the code. This can add credence and hence improve the effectiveness of such schemes.

- The OFT scheme also requires that such codes do not harm competition by limiting entry into either the market or the code scheme. Indeed, codes will typically be good for entry, in that they can allow small firms to thrive without the need to establish their own reputation.

1.2. Tensions

At the same time, there are potential tensions between competition and consumer policy, mostly associated with the unintended consequences of competition and consumer interventions.

- For example, by over-relying on competition to deliver benefits to consumers, competition policy unless accompanied by other consumer protection measures can sometimes confuse consumers, or reduce their confidence in the market, and in doing so fail to achieve the full benefits of competition.

An interesting UK example of this was the de-regulation of telephone directory inquiry services. De-regulation successfully led to large scale new entry, with over 200 firms initially seeking to enter the market and provide directory inquiry services. In many ways it was a success. In particular, substantial innovation was observed (including new services such as call connect, textback and classified searches). However this was accompanied – at least initially – by higher average prices and higher complaint levels, largely due to the difficulties faced by consumers in assessing price and quality across the many new suppliers. The UK telecommunications regulator[6] now acknowledges that the policy would have benefited from further analysis in advance of how to ensure transparency for consumers and how consumers would react to such multiple market entry. For example, one option for additional consumer protection might have been to set benchmarks for quality of service[7].

- At the same time, by imposing rules of behaviour or standards on markets, consumer policy can potentially impede competition, innovation or choice, to the detriment of (at least some groups of) consumers.

A topical example relates to the way in which credit card issuers calculate interest. The consumer organisation Which? made a super-complaint to the OFT concerning variations in how credit card

5 For example where product quality can only be judged after consumption and it is difficult for individual firms to establish a strong reputation because repeat purchases and 'word of mouth' recommendations are both low.

6 Then Oftel, now Ofcom.

7 Nevertheless, Ofcom's research report on DQ services, published in March 2006, identified significant improvements in accuracy and levels of consumer satisfaction since the period immediately following the introduction of competition.

issuers calculated interest charges.[8] They argued that this made comparing the real cost of different cards difficult and called for standardisation of methodology. The OFT published its response to the super-complaint in June 2007.[9] Whilst the OFT had sympathy with Which?'s concerns, it felt that imposing standardisation could harm choice and innovation in this market. Hence an alternative solution is now being advanced.

2. The UK regime

2.1. The OFT's approach to integrating competition and consumer policy

Given the synergies, and risk of tensions, between competition and consumer policy, the UK supports the establishment of joint consumer and competition agencies. The OFT has powers in both the competition and consumer spheres, as do the key UK sectoral regulators.

A coherent approach to competition and consumer policy consists of a number of elements, each of which is typically less easy to achieve between separate organisations than within a single one:[10]

- *A shared approach to collecting intelligence.* A joined up agency benefits from joined up intelligence: complaints received in one area (whether from consumers or businesses) will often be more effectively dealt with under different powers. Especially important in the UK is the OFT's national consumer advice telephone helpline (Consumer Direct). Data from Consumer Direct provides valuable intelligence on what issues are directly affecting consumers, which can feed into cases and studies which address both competition and consumer issues.[11]

- *A joined up approach to choosing tools.* In the past, the OFT has had a tendency to think about tools first, and market problems second. The issue in the market is now the starting point, and then the tools available to address the issue are considered. These could include competition and consumer enforcement, consumer codes, public education and/or our market studies and market investigatory powers. Knowing when each of the tools will be most effective in promoting consumer welfare is crucial for choosing which to pursue.

Figure 1 below sets out the different categories of factors which can potentially prevent markets from working well for consumers. A joined up approach considers each of these potential sources of market failure, taking care to focus on the causes of problems, not just their symptoms.

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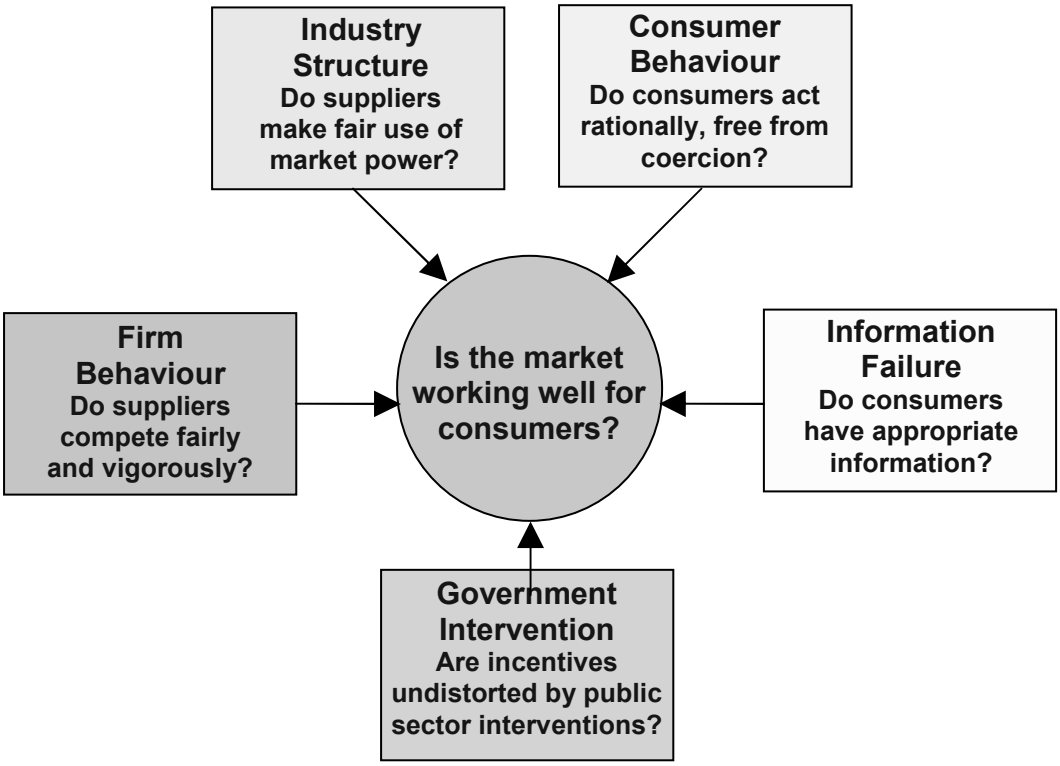
8 Available on the Which? website: http://www.which.co.uk/files/application/pdf/Supercomplaint_pdf-445-111967.pdf

9 Office of Fair Trading, 'Response to the super-complaint on credit card interest rate calculation methods by Which?', 26 June 2007, available at: http://www.oft.gov.uk/shared_oft/reports/financial_products/oft935.pdf

10 The OFT recognises that separate bodies can co-operate closely (indeed the OFT and CC does co-operate closely with other enforcement bodies within the UK). However, the OFT has found it can be difficult to attain the level of integration between organisations that can be achieved within a single one and has also observed tensions between competition and consumer agencies in other countries where they are separate.

11 That said, the OFT's close links with local authorities trading standards services provides a useful local intelligence network without full integration.

Figure 1: Factors that may prevent markets from working well for consumers



- *A consistent approach to enforcement policy.* The OFT is currently reviewing potential areas of inconsistency between competition and consumer policy activities, and how best to ensure greater consistency. This includes a greater focus on risk-based assessments to avoid unintended consequences on each area of policy from the other.

- *A consistent approach to resource prioritisation.* The OFT is committed to ensuring that it takes on the cases where the OFT can have the greatest impact for consumers (relative to cost), irrespective of what tools they involve.[12] That said, the OFT also recognises that a key role of its work is to ensure an effective competition and consumer regime, and that deterrence and clear precedent require it to ensure that it takes a mix of cases, across different tools and different types and sizes of markets.

In order to achieve a more coherent and holistic approach to applying these tools, the OFT has carried out some major changes over the past two years. In particular, the organisation has been restructured to ensure that competition and consumer policy are more joined up. Within its delivery area, reporting lines from both activities go to the same decision makers. Within its policy and strategy area, the activities now sit within the same groups, requiring staff to have a greater understanding across a wide spectrum of

[12] The OFT carries out a substantial *ex post* evaluation of our interventions. This is partly to enable evaluation of its impact, but also to learn about what sorts of interventions have the greatest impact, and indeed how they might have delivered more benefits. All of this provides important learning for its prioritisation and enforcement behaviour. For more about the OFT's evaluation activities, see http://www.oft.gov.uk/about/benefits/evaluation

statutory and non-statutory tools. Key prioritisation issues are addressed at a cross-office prioritisation committee and key substantive policy issues are addressed at a cross-office policy committee, both of which cover the competition and consumer areas in a consistent and holistic way.

2.2. The Role of Market Studies and Market Investigations

Lastly, we would like to highlight the importance to the UK approach of the UK's market studies and investigations regime in ensuring a joined up approach to competition and consumer issues.[13]

The OFT can carry out market studies where it believes that a market is not working well for consumers, irrespective of whether the issues are primarily consumer or competition-focussed. The CC can carry out market investigations, which address 'features' of a market which prevent, restrict or distort competition. Despite the competition-based nature of this legal test, the CC regularly looks at markets in which competition is restricted due, in part, to limited ability or incentive for consumers to search or switch between suppliers. These sorts of factors might more typically be linked with consumer policy (although in reality they often cross the divide between the traditional domains of competition and consumer policy[14]).

CC market investigations also allow for wide ranging remedies. Where the competition problems in the market are essentially associated with a lack of consumer search or switching, these remedies will often be focussed on improving the position of consumers, and thus very closely aligned to those typically associated with consumer policy.

For example, in the Home Credit investigation, the CC found adverse effects on competition partly due to a lack of switching in response to price rises.[15] The CC required that suppliers publish prices on a designated website, provide certain information and statements to customers, share data on the payment records of their customers and pay a "fair" early repayment rebate. The combination of remedies was designed to first address the structure of the market (by for example, facilitating search and switching and thereby enable consumers to activate competition between suppliers and secondly to protect consumers from detriment arising from the fact that the market was not working well.

One particular area where market studies and investigations have proved useful has been in the area of follow-on markets, such as extended warranties for domestic electrical goods.[16] In such markets, the

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13 See CC Guidelines on Market Investigation References (CC3) (2003), OFT 'Market Studies: Guidance on the OFT Approach', OFT516; OFT, 'Market Investigation References: Guidance about the making of references under Part 4 of the Enterprise Act', OFT511. Examples are available at: http://www.oft.gov.uk/advice_and_resources/resource_base/market-studies/ Studies include: Internet Shopping, Personal Current Accounts, Payment Protection Insurance.

14 Such costs can increase market power without any one firm becoming dominant, thus making it difficult to tackle under abuse of dominance or anticompetitive agreements legislation. They can also lead to consumers making suboptimal decisions even without firms' resorting to the misleading advertising or pricing which consumer enforcement might tackle.

15 The CC decision was also based on its finding that lenders did not compete in a significant way on price, incumbency advantages for established lenders, lack of sharing of information about customers, customers' requirements for an agent they could trust and regulation. See http://www.competition-commission.org.uk/rep_pub/reports/2006/517homecredit.htm. Other market investigations in which consumer type remedies have been used include Store Cards, the supply of Liquid Petroleum Gas and Personal Banking in Northern Ireland.

16 See http://www.competition-commission.org.uk/inquiries/completed/2003/warranty/index.htm

consumer may make a well-reasoned and researched decision in respect of the primary market (the domestic electrical good or credit product), but has then traditionally been faced with little choice in the follow-on market (other than the choice to buy or not buy).

The effect of this is that suppliers have 'mini-monopolies' in these follow-on markets, and prices/margins are typically high. This gives rise to two issues:

- Is there real consumer detriment here (or are all the extra profits[17] from the follow-on product effectively given away through competition in the primary market)?

- If there is, how might this best be remedied? Price regulation in the follow-on market can have detrimental effects on incentives and the market, as can a ban on suppliers offering the follow-on product at all. Remedies which encourage shopping around or switching for the follow-on product have greater potential to solve the problem in a way that is sensitive to both competition and consumer policy.

The OFT greatly values the potential within the UK regime to bringing a holistic perspective to problems such as these, which encompass both competition and consumer concerns.

[17] It is worth noting that, even if all extra profits were given away, there may be a potential issue arising from poor consumption decisions. For example, consumers who focus on the primary market price may end up buying a product that is wrong for their needs taking their lifetime usage costs into account.

ANNEX

Q.1 How does consumer policy interact with competition policy in your country, if at all? Can you give examples where they have conflicted? Where have they been complementary?

Answered in the main text.

Q.2 What do you feel are the benefits and drawbacks to your country's choice of "dual-function" or "separate agencies" for handling competition and consumer policy?

Answered in the main text

Q.3 Has your country required that "no frills" versions of complicated products be offered, to help vulnerable consumers? If so, who provided the product and how was its supply enforced? What was the effect on competition, if any?

There are no examples of the OFT mandating a "no frills" product. From within the UK there are some examples of either government regulation or self-regulation, these include:

Basic bank accounts

In 1999, the Social Exclusion Unit's Policy Action Team [1] highlighted the importance of access to basic banking services and recommended the continued development of basic bank accounts for customers who did not wish to open, or had been refused, a standard current account. Following that report, all the main retail banks agreed Memorandum of Understandings with the Government to introduce a basic bank account "specifically designed to address the needs of the financially excluded".[2]

Basic bank accounts are simple personal current account products of which there are two types. Those operated through bank branches and ATMs, and those that can also be operated through post office counters. Typically these are very similar to personal current accounts but overdraft facilities are either not available or curtailed and no cheque book is provided.

The rationale behind basic bank accounts is not one of avoiding over complication, rather one of social inclusion.

Other financial products

There are a variety of other voluntarily simplified products including stakeholder pensions which were intended to stimulate competition through increased consumer understanding and ease of comparison.

1 *Access to Financial Services*, Report of Policy Action Team

2 HM Treasury, *Promoting financial inclusion.*

We are unaware of any research as to whether they have had any impact. These came out of the government's 'Sandler Review of Medium and Long-Term Retail Savings in the UK'.[3]

Funeral services

Some voluntary schemes exist for a standardised no frills product and service. The National Association of Funeral Directors Code requires a 'simple funeral service' is available and defines what that consists of. The other trade association (The Society of Allied and Independent Funeral Directors) has a corresponding 'simple (basic) funeral'. We know of no research into the impact on competition.

Unfair Commercial Practices Directive

It should be noted that the Unfair Commercial Practices Directive should lead to greater convergence of consumer enforcement throughout Europe and this might highlight what benefits can be achieved.

Q.4 Can you identify areas where a better convergence of both competition and consumer policies globally would be beneficial?

We have no in depth examples to provide here, however we do feel the following areas could potential benefit from such increased convergence:

- Work on professional standards could benefit from increased convergence which allowed for easier cross-border trade and thus greater competition.

- Where breaches of competition legislation lead to consumer detriment it might be helpful to have the potential for international recovery.

- Misleading advertising and pricing are both areas where better convergence may be beneficial. The ability to advertise or offer prices across national borders may facilitate competition.

Q.5 Can you provide examples of sectors or products where an increased international cooperation between competition authorities and consumers representatives could render the markets more competitive while ensuring an adequate protection of consumers around the globe?

Again we have no in depth examples to provide here, however we do feel the following area could potential benefit from such increased cooperation:

- Personal financial products such as savings accounts and mortgages are typically national markets. There is less reason for this to be the case given the ability to move money. Differing regulatory standards and concerns about consumer rights and redress may be one area worth investigating here.

- In the EU the Privacy and Electronic Communications (EC Directive) Regulations 2003 regulate the sending of spam. This Directive introduces an opt-in regime for all commercial email to individual subscribers. Business can only send direct marketing messages to individuals where explicit prior consent is given. In other countries an opt out approach has been taken.

[3] Available at: http://www.hm-treasury.gov.uk/documents/financial_services/savings/fin_sav_sand.cfm

Spam is inherently global and the fight against span needs a global approach: unsolicited emails can come from anywhere in the world. Spam and the scams and deceptive content it can deliver may have a serious impact on consumer confidence. Approximately 90% of ecommerce remains business to business which may reflect a lack of consumer confidence.

It may be the EU approach is over-zealous, dampening competition and providing a competitive advantage to firms located outside the EU. Alternatively other countries may be too lax which has a knock on effect to consumer confidence in all countries.

UNITED STATES

Competition policy and consumer protection policy are key elements of the American economic system. Together, they enhance consumer welfare by fostering a vigorous, competitive marketplace that gives consumers greater informed choice and leads to greater availability of products with the qualities desired by consumers at the lowest prices. Strong competition benefits consumers by encouraging new market entrants, creating incentives for innovation, and by motivating sellers to provide more truthful, useful information about their products. Consumer protection policy supports those goals by ensuring the empowerment of consumers to participate in the marketplace by enabling them to make well-informed decisions about their choices. The interplay between protecting competition and ensuring that consumers can make effective choices among competing offerings is a constant feature of competition and consumer policy in the United States. The market for residential real estate provides a prime example.

A home is typically the single most expensive and complicated purchase consumers make in their lifetimes. Individual consumers purchase real estate infrequently, and many are relatively uninformed about the process. Consequently, most consumers must engage real estate service providers, including real estate brokers, mortgage lenders, and settlement services, to help them. Established service providers, however, have found opportunities to capitalise on consumer inexperience and exclude new forms of competition from the market, both through coordinated private conduct and attempts to secure favourable governmental regulation. The Federal Trade Commission (FTC) and the Department of Justice (DOJ) have found that they can help to promote real estate markets that deliver the benefits of competition to consumers through addressing both the supply and demand components of market failure by: eliminating anticompetitive barriers to competition through enforcement and advocacy, and providing consumers with the information they need to take advantage of a competitive marketplace. This paper focuses on how competition, which addresses the supply component, and consumer protection, which addresses demand side issues, have interacted to achieve these goals in the United States.[1]

1. Background on the Real Estate Market in the United States

Consumers typically work with brokers to buy and sell residential real estate.[2] A seller, offering a home for sale, normally contracts with a listing broker to market the home. Most listing brokers are "full service brokers" who offer a wide range of services in return for a fixed percentage of the selling price. The commission rate is negotiable, although in fact, it is rarely negotiated. In recent years, home sellers in the United States have paid around 5 percent on average. Among the most important brokerage service is listing the seller's home on a "Multiple Listing Service" (MLS), a local or regional joint venture of real estate brokers who gather and disseminate information on properties offered for sale in their geographic area. An MLS listing will include the compensation, typically half of the commission paid by the seller, offered to any broker who finds the successful buyer for a listed property. Buyers, for their part, ordinarily

1 *See generally*, T. Leary, *Competition Law and Consumer Protection Law: Two Wings of the Same House*, 72 ANTITRUST L.J. 1147 (2005).

2 This section summarises a more detailed U.S. Submission to Working Party No. 2 on Improving Competition in Real Estate Transactions, DAF/COMP/WP2/WD(2007)5 (February 15, 2007) (hereinafter 2007 U.S. OECD Submission), *available at* http://www.ftc.gov/bc/international/docs/improvingcompin_Real_Estate_Transactions.pdf.

obtain their own brokers to identify and show them properties that meet their specifications. A buyer's broker nominally is compensated by the home seller out of the selling broker's commission, but in fact buyers share this expense to the extent that the seller builds his or her commission fee into the price of a home.

In recent years, the Internet has enabled new forms of real estate brokerage that allow consumers to substitute some of their own efforts for those of brokers, which consequently cost less than traditional full-service brokerage.[3] These include "limited service brokers" who provide a limited range of services, often for a reduced commission or on a fee-for-service basis, "virtual office websites" through which brokers give clients direct access to MLS listings, and services for sellers who market their homes without a broker.

Most consumers must also obtain financing for a real estate transaction. A wide array of financing options are available, ranging from the traditional fixed-rate mortgage payable over 30 years to five-year adjustable rate mortgages that leave the bulk of the principal of the loan payable at the end of five years. Interest rates vary widely, depending in part on the buyer's creditworthiness, the size of the fees paid to the lender, and how the rate changes during the life of the loan.

Transactions then are "closed" in a settlement proceeding in which the mortgage is signed, money is paid, and legal title conveyed. The transaction costs related to the financing process, the closing process, transfer taxes and recording fees, brokerage fees, and miscellaneous expenses are paid through the settlement process. In most states, consumers can choose between attorneys and non-attorneys for settlement services. However, a minority of states prohibit non-attorneys from performing settlement tasks.

Thus, consumers purchasing a house often turn to others for three principal services: locating a suitable house, obtaining financing to purchase the house, and closing the transaction. While market forces are sufficient to protect consumers in most cases, the market brings the benefits of competition to consumers only to the extent that they have adequate information with which to make informed choices among competing brokerage models, mortgage options, and closing services. Attempts to restrict competition and consumer information in all three of these areas have required intervention by the DOJ and FTC.

2. Real Estate Brokerage Services

In any community, hundreds or thousands of homes may be offered for sale by many brokers. It would be extremely inefficient for a consumer to contact every broker in town to identify the properties that meet the consumer's specifications. Accordingly, the brokerage industry developed the MLS concept to collect all local property listings in a single database. The MLS offers benefits to sellers, who obtain wider exposure for their homes, and to buyers, whose information search costs are significantly reduced. Buyers and sellers normally access the MLS through real estate brokers.

However, as alternative forms of lower-cost real estate brokerage have emerged, some traditional brokers collectively have sought to exclude lower cost brokerage options by imposing requirements that effectively excluded them from using the MLS to sell properties. Given the importance of the MLS as a tool for buying and selling real estate, these requirements seriously threaten consumer access to low-cost brokerage options.

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[3] The effect of these new forms of business on competition are discussed in an FTC/DOJ report issued in 2007 entitled *Competition in the Real Estate Brokerage Industry*, *available at* http://www.ftc.gov/reports/realestate/V050015.pdf.

The antitrust agencies have challenged several of these MLS operators on the grounds that such requirements constituted anticompetitive horizontal agreements among competing brokers. Early cases challenged requirements that, among other things, permitted MLS listings only when the seller agreed to pay the listing broker a commission regardless of whether the home was sold through the broker's efforts, fixed the amount of commission that would be shared with a buyer's broker, and prevented part-time brokers and brokers from outside the area from participating.[4] More recently, the agencies intervened when MLS operators took steps to prevent MLS listings by limited service brokers from appearing on the Internet.[5] The DOJ recently challenged the largest real estate trade association in the United States over rules that permitted brokerages to restrict listings from Virtual Office Websites offered by brokers using innovative web-based marketing systems.[6]

Traditional realtors and their associations have also turned to lawmakers and regulators to block the emergence of innovative firms that seek to compete by offering a reduced level of brokerage services in return for a lower commission. While listing properties on the MLS and the Internet are tools that many buyers and sellers find indispensable, other services traditionally performed by brokers could be competently performed by many sellers themselves. These include showing the house to prospective buyers, negotiating price and preparing sales contracts, arranging for financing, arranging for home inspections, and the like. Certain broker associations, however, have sought to persuade states to require that all brokers offer a minimum level of service that would include these and other services, undermining the ability of limited service brokers to offer limited services for a low cost. Advocates of these laws claim that they are justified on grounds of protecting consumers from deception, but they have not been able to articulate how excluding low cost competitors serves this purpose.

Because the "state action doctrine" in United States law protects state laws from antitrust challenge in most cases,[7] the FTC and DOJ have focused their efforts on competition advocacy to persuade legislators that minimum service requirements and rebate bans reduce choice, increase price, and fail to offer them any meaningful level of protection.[8] The U.S. antitrust agencies have argued that consumers are better protected when they can choose between high cost/high service and low cost/low service providers rather than requiring them to pay for services they may not want or need. The FTC/DOJ Real Estate Study, cited above, indicates that the difference between a full service and a limited service commission for a consumer

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4 *E.g.,* United Real Estate Brokers of Rockland Ltd., 116 F.T.C. 972 (1993).

5 *E.g.,* United States v. Multiple Listing Serv. of Hilton Head Island, (D.S.C. filed Oct. 16, 2007), *available at* http://www.usdoj.gov/atr/cases/mlshilton.htm; Multiple Listing Serv., Inc., (FTC File No. 061 0090, Dec. 12, 2007), *available at* http://www.ftc.gov/opa/2007/12/mls.shtm; Austin Board of Realtors, (FTC Docket C-4167, Sept. 5, 2006), *available at* http://www.ftc.gov/os/caselist/0510219/0510219.shtm. Similar cases are still being resolved within the FTC's administrative process. *See* Realcomp II, Ltd, (FTC Docket 9320, Initial Decision of Administrative Law Judge, December 13, 2007), *documents available at* http://www.ftc.gov/os/adjpro/d9320/index.shtm. The initial decision, which preliminarily determined that the policies of Realcomp II, Ltd. did not unreasonably restrain competition and that there was no "actionable consumer harm" in violation of Section 5, is being appealed to the full FTC.

6 United States v. National Ass'n of Realtors (N.D. Ill, Amended Complaint Oct. 4, 2005), *available at* http://www.usdoj.gov/atr/cases/nar.htm.

7 Regulations enacted by non-sovereign components of state governments, such as real estate commissions, do not enjoy the same protection from antitrust challenge as statutes passed by state legislatures. The DOJ, for example, recently challenged the Kentucky Real Estate Commission's restrictions on offering rebates to consumers. *See* U.S. v. Kentucky Real Estate Comm'n (W.D. Ky., Complaint, Mar. 31, 2005), *available at* http://www.usdoj.gov/atr/cases/krec.htm.

8 *See, e.g.,* letters from FTC and DOJ cited in 2007 U.S. OECD Submission at footnote 97.

who bought a house at the 2005 average price of $271,267, for example, could be between $4,000 and $5,000.

In two recent competition investigations, the FTC explored suspected horizontal agreements to suppress the advertising of low-cost brokerage services to consumers. These cases highlight the complementary relationship between competition and consumer protection when suspected anticompetitive practices threaten to restrict consumer access to information. In these matters, trade associations of real estate brokers disciplined discount brokers on the grounds that their low-price claims misled consumers in violation of association ethics codes. Analysis of these matters required not only an assessment of whether the associations engaged in anticompetitive practices, but whether the advertising claims were in fact misleading under Section 5 of the FTC Act, which prohibits deceptive practices, including commercial communications that are likely to mislead a reasonable consumer. Moreover, these cases also required the FTC to strike an appropriate balance between consumer protection interests in promoting effective industry self-regulation and competition interests in ensuring that industry self-regulation does not effectively create anticompetitive barriers to entry by low-cost competitors. The investigations ultimately were closed, but they effectively illustrate the importance of considering cases that implicate restrictions on consumer information from both a competition and consumer protection point of view.[9]

Preventing restrictions on competition goes only so far, however, in making sure that consumers receive the benefits of a competitive real estate market. Even in the absence of anticompetitive restrictions, consumer choice will flourish only when consumers know and understand the choices competition makes available to them. For example, many consumers do not understand that real estate commissions are negotiable; nor do they appreciate the nature of and differences among the types of brokerage services available. In response, through their consumer education functions, the FTC[10] and DOJ[11] have undertaken to educate consumers about the choices open to them in selecting from among the different types of real estate professionals who compete for their business.[12]

3. Mortgage Financing

Most consumers do not have the funds necessary to purchase real estate without using a mortgage loan to finance the purchase. The U.S. market for mortgages is competitive. However, significant consumer confusion exists about many credit terms that implicate, for example, the annual percentage rate and the ultimate cost of the loan. Among the key federal laws governing mortgage lending is the Truth in Lending Act (TILA),[13] which requires lenders to prominently reveal credit terms with the intent of facilitating informed consumer choice among competing lenders. The FTC adds to those efforts through enforcement of the Home Ownership and Equity Protection Act (HOEPA), which amended TILA to

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9 Under FTC Rules, 16 CFR 4.10 (a)(8)(i), investigations of firms that do not result in law enforcement action are not normally disclosed.

10 *E.g.*, "Buying a Home: it's a Big Deal," FTC Consumer Alert, *available at* http://www.ftc.gov/bc/edu/pubs/consumer/alerts/zalt001.pdf (in English) and *at* http://www.ftc.gov/bc/edu/pubs/consumer/alerts/zsalt001.pdf (in Spanish.).

11 Competition and Real Estate, *available at* http://www.usdoj.gov/atr/public/real_estate/index.htm.

12 "Selling Your Home? Tips for Selecting a Real Estate Professional," FTC Facts for Consumers, available *at* http://www.ftc.gov/bc/edu/pubs/consumer/homes/zrea01.pdf (in English) and *at* http://www.ftc.gov/bc/edu/pubs/consumer/homes/zsrea01.pdf (in Spanish.).

13 15 U.S.C. § 1601-1666j (requiring disclosures and establishing other requirements in connection with consumer credit transactions). TILA is enforced by the FTC with respect to non-depository institutions and by the federal banking regulators against depository institutions.

provide additional protections for consumers who enter into certain high-cost refinance mortgage loans[14] and Section 5 of the Federal Trade Commission Act itself (FTC Act), which generally prohibits unfair and deceptive acts and practices in the marketplace as well as unfair methods of competition.[15] In addition, the FTC conducts research on home mortgage lending issues, including two recent studies of consumer mortgage disclosures,[16] and has provided comments to the banking agencies suggesting improvements to the requirements for mortgage disclosures to consumers.[17]

The real estate mortgage market is one in which consumer choice can easily be subverted by deceptive marketing practices that obscure the true cost of credit. The FTC has targeted deception and other illegal practices used in the marketing, advertising, and servicing of mortgage loans, focusing in particular on the subprime mortgage market. In recent years, the agency has brought 21 actions against companies and principals in the mortgage industry.[18] Several of these cases have resulted in large monetary judgments, collectively returning more than $320 million to consumers.

In addition, the FTC has engaged in extensive consumer education on the topic and as the nation's consumer protection agency, takes an active role in educating American consumers about how to make choices in the competitive mortgage marketplace that will best serve their financial interests.[19] The FTC has more than 20 mortgage and homeownership-related publications for consumers, covering topics including buying and selling a home, getting a mortgage or home equity loan, understanding the role of a mortgage servicer, and recognising and avoiding foreclosure scams.

Consumer education components are included with announcements of FTC enforcement activities (both competition and consumer protection) in the real estate field. For example, the FTC in September warned mortgage brokers and lenders, and the media outlets that carry their advertisements for home mortgages, that some of the advertising claims appearing in Web sites, newspapers, magazines, direct mail, and unsolicited e-mail and faxes may violate federal law. In warning letters, the agency advised more than 200 advertisers and media outlets that some mortgage ads are potentially deceptive or in violation of the Truth in Lending Act. The advertisements, including some in Spanish, were identified several months earlier during a nationwide review focusing on claims for very low monthly payment amounts or interest

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14 15 U.S.C. § 1639.

15 15 U.S.C. § 45(a).

16 FTC, Bureau Of Economics Staff Report, J.M. Lacko and J. K. Pappalardo, Improving Consumer Mortgage Disclosures: An Empirical Assessment Of Current And Prototype Disclosure Forms (2007), *available at* http://www.ftc.gov/os/2007/06/P025505mortgagedisclosurereport.pdf; FTC, Bureau Of Economics Staff Report, J.M. Lacko & J.K. Pappalardo, The Effect Of Mortgage Broker Compensation Disclosures On Consumers And Competition: A Controlled Experiment (2004), *available at* http://www.ftc.gov/os/2004/01/030123mortgagefullrpt.pdf.

17 FTC Staff Comment to Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve Board System, Regarding Proposed Illustrations of Consumer Information for Subprime Mortgage Lending (Nov. 1, 2007), *available at* http://www.ftc.gov/be/v080000.pdf.

18 FTC Testimony On Home Mortgage Disclosure Act Data and FTC Lending Enforcement, Presented by Lydia B. Parnes, Director, Bureau of Consumer Protection, Before the Subcommittee on Oversight and Investigations of the Committee on Financial Services, United States House of Representatives (July 25, 2007), *available at* http://www.ftc.gov/os/testimony/P064806hdma.pdf.

19 Education materials on mortgage issues are available at the Commission's web page. FTC, Credit and Loans (2007), *available at* http://www.ftc.gov/bcp/menus/consumer/credit/mortgage.shtm. The materials include brochures such as "Mortgage Payments Sending You Reeling? Here's What to Do," "High-Rate, High-Fee Loans (HOEPA/Section 32 Mortgages)," and "Reverse Mortgages: Get the Facts Before Cashing In On Your Home's Equity."

rates without adequately disclosing other important loan terms. The consumer education component to the effort was a new publication, "Deceptive Mortgage Ads: What They Say; What They Leave Out."[20] The publication provides information to help consumers spot mortgage offers that may be less than complete, and lists buzz words that should trigger follow-up questions.

4. Settlement Services

The settlement process can be both confusing and expensive. The FTC and DOJ have sought to reduce the expense by increasing competition for settlement services, while the FTC has worked with other government agencies to improve the information given to consumers during the process.

After paying for the home and/or mortgage and brokerage fees, buyers are frequently faced with a dizzying and unfamiliar array of fees and costs at settlement. These fees and costs are presented on a standardised form under regulations implementing the Real Estate Settlement Procedures Act (RESPA). Through RESPA, the Department of Housing and Urban Development (HUD) strives to improve the settlement process for consumers and to enhance competition in several respects. The process has not always proven effective, however, in part because consumers usually do not see the form until they arrive at the settlement table. FTC has participated in initiatives aimed at reducing consumer confusion about the process. For example, in 2002 the FTC responded to a request by HUD for comments on proposed amendments to its regulations implementing the Real Estate Settlement Procedures Act (RESPA).[21] The FTC staff strongly supported HUD's initiatives to simplify the settlement process and to foster competition in the market for settlement services, but urged HUD to consider carefully whether the information disclosed would provide consumers with useful information, and if so, whether it could easily be understood. For example, experience and research at the FTC indicate that consumers likely would benefit from a comprehensive review and reform of federal mortgage disclosures, including giving serious consideration to creating a single disclosure document that summarises all the key features and costs of a mortgage.[22]

As noted above, one of the settlement costs that are ultimately passed on to buyers is the cost of settlement services themselves. In some states, these services are offered by a variety of providers, including attorneys, real estate title insurance companies, real estate agents, and paralegals. Laws in other states, however, require that real estate settlements be conducted by licensed attorneys. The economic effect of these laws is to exclude lower-cost providers of settlement services from the market without preventing actual consumer harm or providing countervailing benefits. One empirical study compared five states where lay providers examined property titles, drafted real estate instruments, and facilitated the closing of real estate transactions with five states that prohibit non-attorney provision of identical settlement services. The author found "[t]he only clear conclusion" to be "that the evidence does not substantiate the claim that the public bears a sufficient risk from lay provision of real estate settlement services to warrant blanket prohibition..."[23]

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20 *See* www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt023.pdf.

21 *See, e.g.,* FTC, Staff Comment to the Department of Housing and Urban Development on Proposed Amendments to the Regulations Implementing the Real Estate Settlement Procedures Settlement Act Claims (Oct. 28, 2002), *available at* http://www.ftc.gov/be/v030001.pdf.

22 FTC, Comment from the Commission to Federal Reserve Board on Proposed Illustrations of Consumer Information for Subprime Mortgage Lending, (October 30, 2007) *available at* http://www.ftc.gov/be/v080000.pdf.

23 Joyce Palomar, *The War Between Attorneys and Lay Conveyancers – Empirical Evidence Says "Cease Fire!",* 31 CONN. L. REV. 423, 520 (1999).

The FTC and DOJ have taken the position that these types of rules restrict competition by reducing consumer choice. Both agencies have urged state bar regulators to remove the conduct of real estate settlements from their definition of the practice of law.[24] In one instance, the agencies were asked to provide comments to legislators in New York about the likely effects of a proposed law that would eliminate competition between attorneys and non-attorneys for real estate settlement services.[25] The agencies advocated that such restraints are, "justified only by a showing that they are necessary to prevent significant consumer harm and are narrowly drawn to minimise their anticompetitive impact," and, "[a]bsent such a showing, restraining competition in a way that is likely to harm [consumers] by raising prices and eliminating their ability to choose among competing providers is unwarranted."[26] The legislation was ultimately dropped, and New York consumers still enjoy the benefits of attorney/non-attorney competition for these services.

5. Conclusion

Market imperfections in the residential real estate market can best be addressed by coordinating competition and consumer protection policy to ensure that both supply and demand side imperfections are addressed in a complementary manner. Competition tools are necessary to make sure that consumers realise the benefits of a competitive marketplace, whether in the form of alternate brokerage arrangements, real estate closing services, or financing options that might save them money. Consumer protection tools are necessary to ensure that the information that consumers need to take advantage of those choices is available to them.

There are operational benefits to having close communications between enforcers of competition and consumer protection laws. The FTC has found that enforcing both antitrust and consumer protection laws reinforces the consumer welfare orientation that it brings to accomplishing both of its missions. Regardless of whether both functions are combined in a single institution, consideration of competition and consumer protection as complementary policy goals can result in a collaborative and harmonised approach to competition and consumer policy that enhances consumer welfare by ensuring that consumers are able to make informed decisions about the choices presented to them by a competitive marketplace.

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24 *E.g.,* McMahon v. Advanced Real Estate Title Services of West Virginia, Case No. 31706 (brief of FTC and DOJ *amici curiae,* Sup. Ct. W. Va., May 25, 2004). *See generally*, U.S. Submission to Session 1 on Bringing Competition Into Regulated Sectors: The Legal Profession, Submission Of The United States, DAF/COMP/GF/WD(2005)35 (OECD Global Forum on Competition, Feb. 10, 2005), *available at* http://www.ftc.gov/bc/international/docs/compcomm/2005-Roundtable%20on%20Bringing%20Competition.pdf.

25 *See* two letters from the DOJ and the FTC to the Committee on the Judiciary of the New York State Assembly (June 21, 2006 and April 27, 2007), available *at* http://www.ftc.gov/os/2006/06/V060016NYUplFinal.pdf and http://www.ftc.gov/be/V070004.pdf.

26 *Id.*

UZBEKISTAN

State competition authority in Uzbekistan oversees the wide range of spheres, including consumer right protection issues and the regulation of advertisement market as one of the key parts of consumer rights protection system.

The logic behind the alignment of two separate areas under the single roof came from widespread model of competition authorities' organisational structure in the former Soviet republics. However, increasing consumer welfare was not seen as the end result of the competition policy, because the development competition process was directed towards the de-monopolisation of state controlled sectors and price regulation activities.

It is commonly known that effective competition policy increases consumer welfare. Several studies have shown that healthy competitive environment can be good for the consumers. A study by Antimonopoly Policy Improvement Centre in cooperation with International Development Research Centre (IDRC, Canada) on competition issues in remittance markets has revealed the enormous effect of competition for consumers especially in increased value and quality of services and falling tariffs that saved hundreds of million dollars for consumers. The advancement of the technologies has also played its role in competitive processes of the remittances market in Uzbekistan. So the development of new technologies is good overall for developing countries since governments cannot keep up with the pace of regulating them and hence interferes a little if at all, which further stimulates the development of competition and markets overall (IT sector in India).

However, the other side of the medal shows the existence of systemic issues in the implementation of competition principles in all other markets, even though the benefits of them are real. The society, policymakers, and government officials are ignorant about competition due to increased government intervention in some markets.

The organisational structure of competition bodies and enclosure of consumer policies in them is important in some ways, but does not really matter if the goal of competition legislation is directed towards the increase of consumer welfare and there is a well established competition advocacy mechanism in the country.

In the case of fraudulent and misleading practices, competition authorities can do little without the active involvement of non-governmental consumer rights protection organisations, because fraudulent activities happen between the consumers and retailers. The prevention of fraudulent and misleading practices, as well as the issues related to unsafe products depend more on consumer literacy and effective state and non state mechanisms of implementation of strict consumer policies. Increasing consumer welfare is not really seen as the goal of consumer policy, at least in the consumer rights protection legislation in Uzbekistan and probably other former soviet republics. After all, consumer welfare refers to the individual benefits derived from the consumption of goods and services and, in theory, individual welfare is defined by an individual's own assessment of his/her satisfaction, given prices and income. Since the benefits of consumer policy cannot identify the real saved value from the effective consumer policy, it is sometimes difficult to show its role in increasing consumer welfare.

It is hard to find the cases where both of the functions have conflicted since in practice both of them have different goals. Competition policy in Uzbekistan benefits market participants and consumers with a legal entity status, not a regular consumer in a physical entity status. For instance, if some market player abuses its dominant position and charges monopolistically high price to any player in vertical channel, competition authority only reimburses extra funds to that player.

Sometimes, consumer policy can be complimentary for competition authority since most of the consumer rights abuse cases involve public utilities, where Uzbek competition authority plays a regulating role.

1. Has your country required that "no frills" versions of complicated products be offered, to help vulnerable consumers? If so, who provided the product and how was its supply enforced? What was the effect on competition, if any?

There are no regulations in Uzbekistan requiring that "no frills" versions of complicated products be offered to help vulnerable consumers.

2. Can you identify areas where a better convergence of both competition and consumer policies globally would be beneficial?

It appears that convergence of both competition and consumer policies on a global level could be beneficial in markets that tend to be global.

3. Can you provide examples of sectors or products where an increased international cooperation between competition authorities and consumers representatives could render the markets more competitive while ensuring an adequate protection of consumers around the globe?

Capital markets and financial services markets are probably best suited for this purpose. For example, single minimum standards for disclosing consumer credit terms can foster competition among banks and credit unions across national borders as consumers will be able to more easily compare the banks' effective interest rates.

BIAC

BIAC welcomes the opportunity to provide its views to the Global Forum on Competition concerning the interface between competition and consumer policies. BIAC commends the OECD Secretariat for its recognition of the importance of the links between these two critical components of market economies, for its contributions to the understanding of those links, and for its placement of the topic on the agenda of the Global Forum on Competition. These discussions, BIAC believes, can strengthen the foundations and enhance the implementation of both competition and consumer policies.

1. Introduction

The OECD Background Note articulates well the basic themes of the subject, and identifies the challenges that may face policymakers and practitioners of both disciplines:

> That consumer protection policy and competition policy are largely interdependent instruments of economic policy, both aimed at serving a common purpose of enhancing the efficiency with which markets work, has been stated on many occasions and is widely accepted. It is also widely recognised that there can be, and at times are, tensions between those policies. [1]

This comment examines joint applications of the policies and notes agreement with the proposition stated in the Background Note – that competition policy and consumer policy share a common purpose and usually reinforce each other. BIAC also agrees that it is not uncommon for the policies to clash, for example when consumer policy "is used in ways that unnecessarily restrict competition,"[2] and when competitive remedies are pursued "without sufficient regard to consequential consumer protection issues."[3]

BIAC suggests that there is nothing inherent in the purposes or instruments of competition or consumer policies that should result in tensions between them. To the contrary, an examination of actual or potential conflicts between the policies reveals that the tension could be resolved by taking the principles of each policy into account when implementing the other. Countless examples cited in the research on the subject and shared in the presentations for this session reiterate the value of the minding the links.

Consumer protection laws or regulations that are too restrictive or vague – like competition laws and regulations that are inapt or unclear – can inhibit the free and efficient functioning of the market. Just as overreaching abuse-of-dominance laws can chill pro-competitive discounting, overly stringent or vague consumer protection laws can inhibit the flow of information. Either consequence can prevent consumers from finding and rewarding the best competitors.

BIAC believes that competition and consumer protection unambiguously would benefit from more cooperation among policymakers and more integration of policies – from the identification of enforcement initiatives to the imposition of specific remedies. Whether the structure of cooperation is full integration in

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1 Directorate For Financial and Enterprise Affairs, OECD (2008), Background Note, p. 3.

2 *Id.*

3 *Id.*

one agency, formal cooperation between agencies, or other methods of consultation that permit the introduction of considerations from one policy to the other. This consultation is especially important when a particular intervention is reaching the remedy phase.

Efforts to integrate competition and consumer protection laws and enforcement, however laudable in concept, should not become a pretext for intervention. Each area offers ample temptation to intervene and impose remedies that leave markets more heavily regulated, less responsive and potentially less competitive than before. Applying policy from both disciplines to interventions should improve policymakers' ability to anticipate the unintended consequences of displacing market forces. The objective must be to allow the market to function free of distortion rather than to attempt to perfect the functioning of the market through regulation.

Finally, BIAC supports the proposal that both competition and consumer policy emanate from authorities of multi-sector jurisdiction, rather than sectoral regulators. To the extent that regulation of a particular sector implicates issues of either competition or consumer policy, BIAC recommends a framework for consultation between the sector-specific agency and the agencies with responsibility for competition and consumer policy.

2. Competition and Consumer Policy Serve the Same Purpose

Competition policy seeks to maximise the choices available to consumers by clearing markets of the encumbrances of monopoly, conspiracy and other market distorting structures. Consumer protection seeks to ensure that customer choices – the critical signals that direct competitive activity – are not distorted by deception, misstatements or mistreatment of consumers.

Legal scholars have described the theoretical basis for the connection between consumer and competition policies:

> "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 deceptions or the withholding of material information."[4]

Public officials have long acknowledged the connections between competition and consumer policy. At the United States Federal Trade Commission in the 1970s and 1980s, both the Bureau of Consumer Protection and the Bureau of Competition enforced the agency's mandate to protect competition, and the many cases that involved blended issues led a Director of the Bureau of Consumer Protection to observe, "a good deal of antitrust law and antitrust practice is going to involve consumer protection issues…. a good deal of consumer protection practices are going to be litigated in antitrust cases." [5] A recent Chairman of the U.S. FTC has voiced similar observations.[6] In Canada, consumer protection provisions in the form of both criminal and civil sanctions for misleading representations are part of the Competition Act. The nexus between consumer protection and measures to ensure effective competition is reflected in the following

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4 Neil W. Averitt and Robert H. Lande, "Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law," 65 Antitrust Law Journal 713, 714 (1997).

5 *See e.g.,* MacLeod (1988), 'Federal And State Enforcement Agencies: Current Activities and Priorities: FTC Consumer Protection Activities' 57 *Antitrust L.J.* 163.

6 *See e.g.,* Muris (2002), 'The Interface of Competition and Consumer Protection,' prepared remarks by Timothy J. Muris, Chairman, Federal Trade Commission, at the Fordham Corporate Law Institute's Twenty-Ninth Annual Conference on International Antitrust Law and Policy.

quote from the Bureau's guideline on the Act's Ordinary Selling Price provisions: "A business representing a product with a discount from an inflated 'regular' or 'compare at' price can entice consumers away from competitors who represent their products truthfully, putting them at a competitive disadvantage"[7].

International attention has exposed the issue to wide audiences of policymakers, practitioners and the business community. OECD has led efforts to marshal expertise and share members' experiences, a recent example of which took place in joint meetings of the committees responsible for competition and consumer policy in 2004.[8] Encouraged by agencies in member countries, commentators continue to document progress in theory and practice.[9]

Growing recognition of the interface has encouraged integration of enforcement resources. The Office of Fair Trade in the UK – which has combined its competition and consumer protection groups into one group denominated "Markets and Projects" – has achieved a level of integration that is rare at the national level. OFT's official explanation for the reorganisation echoes the economic theory in the literature:

> Our view is that is more effective to look at the demand and supply sides of markets together. The competition and consumer regimes are complementary to each other. Empowered and well-informed consumers act as a positive stimulus to competition between businesses. Where consumers are able to make informed decisions, businesses are more likely to innovate, reduce inefficiencies in production and supply, and compete in ways which make markets work well for consumers and the wider economy.[10]

> In France, the enforcement authority, *Direction Générale de le Concurrence, de la Consommation et de la Répression des Fraudes* (DGCCRF) has been in charge of both consumer protection and competition policies for many years.

Authorities have amassed significant records in the pursuit of integrated policies. The most explicit examples of the application of competition theory to consumer protection issues typically are represented by policy statements issued by competition authorities. Since 1980, the U.S. FTC has filed more than 750 comments advocating a mix of competition with the regulatory policies that various government agencies had adopted – often in the name of consumer protection.[11] The comments examined the economic effects of marketing restrictions in areas as varied as health care, real estate, wine delivery, legal services. Quite often, the Commission has persuaded regulators that restrictions exceeded the scope necessary to protect customers, and likely raised prices and impeded entry. As early as 1989, the American Bar Association

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7 Ordinary Price Provisions of the Competition Act, http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00844e.html

8 OECD, Joint Meeting of the Competition Committee and the Committee on Consumer Policy on Cross-Border Enforcement Cooperation, October 13, 2004.

9 *See, e.g.,* Hobbs (2005) 'Antitrust and Consumer Protection: Exploring the Common Ground' 72 *Antitrust L.J 1153;* MacLeod (2005) 'Three Rules And A Constitution: Consumer Protection Finds Its Limits In Competition Policy, 72 *Antitrust L.J 943*; Priddis (2007), 'International Developments,' 21 *Antitrust ABA* 89;.

10 Office of Fair Trading Annual Plan 2007-2008, p. 6 *available at* http://www.oft.gov.uk/shared_oft/about_oft/349517/ap08.pdf.

11 See Majoras (8 February 2005), 'A Dose of our Own Medicine: Applying a Cost/Benefit Analysis to the FTC's Advocacy Program' Keynote Address, Current Topics in Antitrust Economics and Competition Policy, Charles River Associates, *available at* http://www.ftc.gov/speeches/majoras/050208currebttopics.pdf.

estimated that the Commission's comments have saved consumers more money annually than the agency's entire budget.[12] Private enforcement can also pursue both consumer protection and competition objectives: for instance in France, government-approved consumer associations are entitled to file actions with both the *Conseil de la Concurrence* (the Competition Agency) and the *Commission d'examen des pratiques commerciales*, a consumer protection agency.

Numerous enforcement actions and orders also have traversed the common ground between competition and consumer protection. Agreements among competitors to restrict advertising have faced sharp rebukes from competition authorities in the United States.[13] Competition policy has provided justification in other jurisdictions that have overturned advertising restraints that go beyond what is necessary to prevent deception or abuse of consumers.[14]

While the benefits of cross fertilisation between competition and consumer policy are well substantiated, effective implementation of the policies presents unique challenges. Typically, competition laws make only incidental reference to consumers. Likewise, ultimate consumer interests are rarely represented directly in competition proceedings.[15] Therefore, finding the best method of benefiting consumers is often largely within the discretion of the competition regulators.

It often can be difficult to draw a clear distinction between a bona fide consumer protection initiative and an anticompetitive restraint. This effort can require extensive evidence and analysis, and the failure to articulate how a restraint exceeds the boundaries of proper consumer protection can be fatal to a charge that the practice was anticompetitive. For example, the U.S. FTC challenged advertising restrictions that were imposed by the California Dental Association that the Association claimed were designed to protect patients from unethical advertising. The FTC instead believed that the Association had suppressed both good and bad advertising, thereby. ,harming consumers searching for new dentists and frustrating dentists who wanted to compete. [16] Finding that neither consumers nor competitors had suffered under the Associations rules, the court ordered dismissal of the action.

In sum, while the two disciplines – competition and consumer protection – are two servants to the same master, it can be a challenge to fully align the two policies. Thus, agencies must carefully evaluate consumer protection actions to ensure that their implementation does not run counter to competition goals, and vice-versa.

3. Application of the Principles Across Disciplines Requires Due Consideration of the "Consumer"

Identification and definition of market participants and stakeholders remains important in both disciplines. It is worth noting that writers and regulators refer almost interchangeably to "consumer welfare," "consumer detriment," "citizen welfare," "consumer interest" and "consumer protection." The

12 *Id.*

13 *United States v. Amer. Pharmaceutical Assn*., 1981-2 Trade Cases (CCH), Par. 64,168 (W.D. Mich. 1981)(consent decree prohibiting restrictions on price advertising); *Association of Independent Dentists*, 100 F.T.C. 518 (1982) (same).

14 *See, e.g.,* Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC Concerning Misleading Advertising so as to Include Comparative Advertising, (OJ L 290, 23.10.1997, p. 18), available at <http://europa.eu.int/eur-lex/en/consleg/pdf/1997/en_1997L0055_do_001.pdf>.

15 Generally competition laws do not require the regulators to prove damage to final consumers and no doubt in many cases this would be difficult, costly and inconvenient to evidence.

16 *California Dental Association v. F.T.C.*, 224 F.3d 942 (9th Cir. 2000).

ascendance of consumer sovereignty as a unifying theory of competition and consumer policy underscores the importance of understanding who the customer is and how the customer deals in the marketplace.

It should be noted that imprecision of language is not limited to consumer policy. A similar lack of definition attends expressions in competition policy, such as "competitiveness" and "competitive process," and the attempts to define these terms have animated much of the discussion of abuse of dominance.

Understanding the specific interests at stake is critical to establishing the applicable standard. In the context of EC competition law the concept of "consumers" encompasses all users of the relevant products, i.e. customers and subsequent purchasers alike. The point has been made that for these purposes intermediate buyers are treated as "honorary" consumers, for example in the EC Guidelines on the application of Article 81(3) point 84:

> The concept of "consumers" 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 are acting for purposes which can be regarded as outside their trade or profession. In other words, consumers within the meaning of Article 81(3) are the customers of the parties to the agreement and subsequent purchasers. These customers can be undertakings as in the case of buyers of industrial machinery or an input for further processing or final consumers as for instance in the case of buyers of impulse ice-cream or bicycles.[17]

There seems to be an assumption in the EC Guidelines that harm caused to intermediate buyers causes harm to final consumers, notwithstanding that final consumers may be affected in a different way, or may not be affected at all.[18] This assumption has been largely rejected in the United States. Noting the difficulty of proving how much of a price increase might be passed to downstream customers, the Supreme Court has held that (except in narrow circumstances) private plaintiffs may not invoke federal competition law in actions against companies that do sell directly to them.[19]

The analysis of consumer harm and the decision to intervene in a competition case should depend in significant part on the sophistication of customers, their exposure to being mislead, and their ability to thwart the allegedly anticompetitive practice under review. Customer status has long been a staple of competition law in areas such as merger analysis and abuse-of-dominance cases. Market definition, vertical restraints, information exchanges, aggressive tactics and many other issues of competitive analysis cannot be assessed without taking into account the characteristics of customers.

Proper characterisation of the customer is as important to sound consumer protection enforcement as it is to effective competition policy. Consumer policy should distinguish between sophisticated and unsophisticated end consumers, and where consumer policy enforcement extends to intermediate customers, it should take their relative sophistication into account as well. For example, the general public

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17 Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty (Text with EEA relevance) *Official Journal C 101 , 27/04/2004 P. 0097 – 0118*, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0427(07):EN:HTML

18 There is arguably a certain policy mismatch in the way that enforcement at EU level is targeted at the wholesale level, with the assumption that the benefits of (potentially unnecessary) enforcement action will flow through to final consumers, whilst victims of anti-competitive behaviour at the wholesale level are not greatly assisted by consumer protection laws in seeking redress. Consumer protection laws predominantly inure to the benefit of final consumers, rather than intermediate buyers. For example, the European Small Claims Procedure, which is intended to make it easier for consumers to recover sums of no more than €2,000 is unlikely to make it easier for victims of anti-competitive behaviour at the wholesale level to bring a private claim for damages (as their losses are likely to be greater).

19 Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

is likely to draw different inferences from an advertisement of a new drug than would an audience of physicians or pharmacists. When contemplating an intervention against self-regulation or sectoral regulation to alter the information flowing to customers, an authority must take into account the both necessity of that information to that specific audience and the ability of the audience to process the information that sellers provide.

It should also be noted that certain competition law remedies, such as those requiring market players to provide consumers with more information, may end up imposing additional costs on the consumer, as companies targeted by the enforcement action will incorporate the additional costs into their pricing scheme.[20] This may be counterbalanced by other factors in each case, but failure to correctly categorise the consumer in the context of competition enforcement has the potential to harm the very consumers that the regulators are trying to protect.

To the extent competition policy is enforced for the benefit of final consumers, regulators should consider the extent to which the consumers who suffer detriment will be compensated. Fines extracted from wrongdoers that are devoted toward public finances may do little to redress consumer injury. Efforts focused on consumer redress should become part of the evaluation of the effectiveness of enforcement. Efforts directed solely at disgorgement, while generating some punitive effect, are arguably of less impact to the welfare of the injured consumers.[21]

A consumer focus is consistent with the need to look at the effects of competitive behaviour and therefore suggests that inflexible per se rules are not required. An evolution toward a standard based on consumer-harm would benefit competition authorities. Even if consumer protection officials have a strong inclination to address technical violations regardless of market consequences, consultation with competition authorities might alter approaches to consumer issues as well. Ideally, this might result in consumer welfare acting as a legal filter in competition cases. Of course, care will be needed to resist the temptation of allowing the primary objective of consumer policy – the protection of the customer – to take the focus away from the primary objective of competition law – the protection of competition rather than the competitor.

4. Interventions and Remedies Should Pass the Tests of Both Competition and Consumer Policy

Various modes of regulation can be useful, but must be proportionate and tailored to the specific problem. Depending on the intervention contemplated, the consequences of a "false positive" can be increasingly severe. This implies that the mode of intervention should be tailored to both the type of violation as well as the type of market actor involved.

Useful mechanisms for intervention can include:

- Industry Guidance
- Policy Statements

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20 Examples include the remedies imposed by the United Kingdom Competition Commission in the *Care Homes*, *Bulk LPG* and *Store Cards* market inquiries. In each case, the Competition Commission imposed, inter alia, a market-wide remedy requiring companies to provide more information to consumers.

21 *FTC v. Mylan Laboratories, Inc., Cambrex Corporation, Profarmaco S.R.I., and Gyma Laboratories of America, Inc.* (District for the District of Columbia) (FTC File No. X990015), *available at* http://www.ftc.gov/opa/2000/11/mylanfin.shtm ($100 million in redress for customers allegedly injured by price fixing).

- Enforcement Actions
- Regulations
- Legislation

The selection of the appropriate tool requires consideration of a number of factors, including *inter alia* the breadth of a practice within an industry, the longevity of the practice, the acuteness of the harm which flows from the practice, the durability of the harm, and the precedential value of the agency action. A unifying consideration in selecting the appropriate and proportionate response should be the application of an economic assessment of the level of potential harm (i.e., lost consumer welfare) created by the practice, and the degree to which this harm can be remedied by the selected response.

Industry guidance and policy statements have been especially effective methods tools to develop and articulate policy in those areas requiring broad-based modification of activity where individual enforcement efforts would have slight impact (e.g., where there are many market participants) and where prosecution might be viewed as selective or biased. One example is the guidance regarding advertisement of weight loss products, where the where U.S. FTC has encouraged broadcasters to scrutinise the claims of advertisers based on some fundamental "red flag" principles.[22] By providing industry the opportunity to share its experiences with policymakers in the formulation of the policy, these exercises are more likely to produce beneficial results and anticipate any unanticipated consequences. By predicting the directions of enforcement, industry guides can obviate costly interventions. BIAC encourages competition authorities to employ these methods before initiating enforcement or regulation, and before considering support of legislation.

Enforcement actions are a useful mechanism but can be en expensive approach to addressing consumer harm. They are a necessary component to consumer protection, however, in that they convey the serious intention of an agency to apply the existing statutory and regulatory scheme. Maintaining flexibility and applying prosecutorial discretion are an important component of an effective programme. In this respect, utilising regulatory or statutory means to address specific industry concerns imposes a significant risk of unintended consequences. Agencies must be particularly cautious with such prescriptive approaches, which can have unintended chilling effects that can impose far greater costs than the benefits of intervention.

BIAC notes with interest that in the most recent public spending approval process in the UK the OFT has given a pledge to the Treasury that it will only intervene in cases where the value of consumer benefits to be achieved is at least five times the anticipated cost of its intervention. Assessments of the costs and benefits of intervention should not end with the initial consideration of action. Such assessments should be renewed at each stage of a proceeding, and a thorough assessment based on the record of the proceeding should be performed at the remedy phase.

The UK offers a recent enforcement example of the benefits of minding the links. In the case of the directory enquiry service which was offered to consumers by BT plc, the OFT opened the sector to entry. Many companies took advantage; now there are a number of companies offering directory enquiries. The contribution from the UK notes that consumer policy considerations might have shed light on whether this application of competition policy provided the best benefits for consumers:

[22] Red Flag: A Reference Guide for Media on Bogus Weight Loss Claim Detection, *available at* http://www.ftc.gov/bcp/menus/resources/guidance/health.shtm.

> However this was accompanied – at least initially – by higher average prices and higher complaint levels, largely due to the difficulties faced by consumers in assessing price and quality across the many new suppliers. The UK telecommunications regulator now acknowledges that the policy would have benefited from further analysis in advance of how to ensure transparency for consumers and how consumers would react to such multiple market entry.[23]

Without the insights of consumer policy, competition policy is more likely to treat "consumer detriment" as solely a supply side issue. The directory intervention demonstrates the value of the multidisciplinary approach. Explanations of the interface between consumer law and competition law need to take into account that a market can appear to be working well by traditional norms of competition but not by metrics of most interest to consumers, for example if their rights are being abused the sellers.

In the area of regulations, the UK, US and EC present an example where different results stemmed from different degrees of consideration of competition concerns. For the last several years, public health authorities have implemented new policies to address trends toward increasing incidence of obesity, especially in children. Although most of the initiatives have focused on traditional tools of public health – like education about diet and exercise – some countries have considered whether the regulation of advertising might assist the effort. Recognising the role of advertising as catalyst for innovation, communication and entry, governments in the US and EC encouraged industry to use advertising to support consumers efforts to choose healthier lifestyles.[24] The Office of Communications in the UK (OfCom), however, decided to ban advertisements for many foods to children and teenagers.[25] The involvement of competition experts in the US and EC likely played a decisive role in allowing market forces to govern food advertising, as did an earlier aborted effort to ban advertising to children at the U.S. FTC.

Overlooking unintended consequences is perhaps most costly in legislation, simply by virtue of its rigidity and durability. The legislative forum is perhaps best suited to advocacy by competition and consumer protection policy experts, and indeed many of the interventions of the U.S. FTC affected the deliberations of state and federal legislators and prevented the imposition of laws that may have resulted in restrictions in competition or unnecessary burdens on consumers or manufacturers.

As noted above, competition policy can sometimes affect existing legislation. We saw this in the EC in the Directive on comparative advertising. In the United States the Constitution has been invoked to advance the interests of competition.[26] A very recent example came in the form of a Supreme Court decision that declared state laws prohibiting interstate shipment of wine violated the Commerce Clause by discriminating against out-of-state competitors.[27] The Court dismissed arguments that the restraints were

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23 United Kingdom (2008) 'The Interface Between Competition And Consumer Policies,' Contribution from the United Kingdom.

24 *See, e.g.,* Majoras, 'The Vital Role of Truthful Information in the Marketplace,' *Roy H. Park Lecture,* University of North Carolina School of Journalism and Mass Communication (October 11, 2007); European Commission, 'EU Platform for Action on Diet, Physical Activity and Health,' available at http://ec.europa.eu/health/ph_determinants/life_style/nutrition/platform/platform_en.htm..

25 *See*, Ofcom (2008) 'Ofcom publishes final Statement on the television advertising of food and drink products to children,' available at http://www.ofcom.org.uk/media/mofaq/bdc/foodadsfaq/.

26 *See, e.g.,* MacLeod (2005) 'Three Rules And A Constitution: Consumer Protection Finds Its Limits In Competition Policy, 72 *Antitrust L.J 943*.

27 *Granholm v. Heald*, 544 U.S. 460 (2005).

needed to control underage drinking, relying instead on a Report of the U.S. FTC, which had found that states that allowed direct shipments reported no problems with minors' increased access to wine.

These and the many other examples cited in the contributions from member countries amount to an impressive case for the value of bringing competition policy and consumer policy to bear on economic regulation whenever possible.

It is worthwhile noting the areas of consumer policy that do *not* adjoin the competition border. Many applications of consumer policy amount to little more than prosecutions of fraud. To be sure, the prevention of fraud is important to a well functioning market. Effective antifraud policy does not necessarily require a rigorous economic foundation. In these instances, swift intervention in the market may be warranted to prevent significant consumer harm or, indeed, personal injury. In a similar vein, some antitrust cases are hard core violations that require little economic analysis; one does not have to consult consumer experts to glean consumers' view of naked cartels.

In cases where the consumer perspective can shed light on competition issues, however, consumer interest may be difficult for even the experts to understand. Despite the advances in the modelling of consumer decision making that have improved the tools of consumer policy, behavioural economics and consumer experts models have not explained many of the decisions that consumers make in the marketplace. For example, why are consumers reluctant to change financial institutions even when better rates are available elsewhere or the incumbent is failing to satisfy the consumer? Do consumers act in their own best interest when they purchase long term commitments in service contracts or accumulate loyalty credits that induce them to acquire goods and services that they would not otherwise purchase? Do consumers prefer to purchase loss leaders and save money or pay more for the sake of preserving greater choice in the market in the long term? Do the models adequately explain the myriad differences in quality and fashion that legitimately appeal to consumers' preferences?

Just as the most sophisticated tools of economic analysis are brought to bear in competition cases, the modern science of consumer decision-making should be applied to consumer policy. However, the evolution of competition policy provides some useful insights for the consumer side, and foremost among them is the realisation that the most sophisticated methodology available cannot take into account all of the complexities of the marketplace. Indeed, the models of consumer behaviour appear to be no closer to solving the complexities of the decisional dynamics than the models of economic markets are at resolving the many complexities of industry dynamics. Given the limitations of the models and theories of consumer behaviour, and the countless objective and subjective factors that motivate consumer preferences, it is important in formulating policy to remain open to the hypothesis that consumers have made rational and informed choices about the goods and services they have decided to acquire.

It is necessary to keep in mind also that competition law is about markets working properly for the benefit of all whereas much of consumer law is aimed at protecting the individual. As such, competition policy cannot and should not bear the full burden of protecting consumers.

5. Conclusion

BIAC understands the value in competition enforcement of an emphasis on consumers, as the value of increased "competitiveness" is not readily appreciated by the general public. In actual fact an inappropriate application of competition law can have detrimental effects on consumers and is not the answer in every case, e.g. in failing to recognise efficiencies of horizontal restraints, network effects or economies of scale. To the extent that consideration of consumer policy can help authorities recognise the benefits of perceived departures from ideal competitive theory, the perspective of consumer policy can enhance competition. To

the extent that the insights of competition policy can advocate the benefits of competition in the marketplace for information, consumer protection will benefit.

In summary, the scope of the actual intersection between consumer policy and competition policy is significant and the objectives of the two disciplines should be melded together as much as possible. But we should not expect the two disciplines to blend perfectly. The challenge is to work out how best to develop this relationship in a manner which makes the laws of each more effective. BIAC welcomes that challenge and looks forward to working with OECD to achieve the goals of enlightened competition and consumer policies.

SUMMARY OF DISCUSSION

Chairman Frédéric Jenny introduced the opening speaker for the day's discussion, Ms. Meglena Kuneva, EU Commissioner for Consumer Protection.

Meglena Kuneva

Commissioner Kuneva outlined the consumer policy strategy adopted by the Commission in 2007. The strategy recognises the consumer as an essential economic agent in markets and aims to empower consumers to act in their best interest at all times. Consumers can exercise a powerful force in the greater European market, but currently that market is fragmented on the consumer side, still consisting to a significant degree of 27 national markets. Sound regulation at the European level that delivers a clear and robust framework for consumer choice is required.

The Unfair Commercial Practices Directive has put in place a harmonised framework banning practices such as misleading advertising. The legal framework on consumer contract law is currently being reviewed and studied with the same goals in mind: to introduce a single, simple set of basic rights and obligations to consumers and business. On the enforcement side, a network of consumer protection enforcement authorities similar to the European Competition Network was established in 2007 and is now co-operating against unscrupulous sellers.

The Commissioner also commented on the links between competition and consumer policy. She praised the work of the Commission in competition policy, but noted that competition policy tools are not always sufficient to address all of the problems that may reduce market efficiency and harm consumer welfare. Consumer policy is therefore central to addressing potential demand-side failures preventing consumers from exercising undistorted choice. Competition and consumer policy are therefore complementary, and the challenge is to find ways in which they can work better together.

In the Commissioner's view the main area for co-operation is upstream, at the market screening and analysis phase. In this regard the Commission has recently devised a market scoreboard for detecting possible market failures from the consumer side, which monitors five indicators of market malfunction – prices; complaints; switching; consumer satisfaction and safety. They are only indicators, however, and by themselves are not conclusive. The next step would be in-depth analysis of markets that the scoreboard highlights, employing the Commission's Single Market Review methodology.

The Commissioner briefly commented on the promises offered by recent developments in behavioural economics as helping to explain how consumers actually react in complex market situations, and she expressed the hope that the OECD would participate in developing this new tool for use by policymakers and enforcers.

The Chairman thanked Commissioner Kuneva for her remarks and for her emphasis on the complementarity between consumer and competition policies. This points up the need for more analytical work on the demand side of markets, since competition policy approaches the topic mostly from the supply side. The Chairman then introduced Mr. Michael Jenkins, Chairman of the OECD Consumer Committee. Chairman Jenny noted that the two committees have long enjoyed a co-operative and productive working relationship.

Michael Jenkins

Mr. Jenkins welcomed the opportunity for dialogue between the competition and consumer protection communities. He noted that historically consumer protection had concentrated on protecting consumers against unscrupulous business practices, but now there is emphasis on empowering consumers to make better and more informed choices in the increasingly complex marketplace. This has the effect of increasing competition as well, and thus the two policies share a common goal. Mr. Jenkins welcomed the non-Members present for the discussion, and encouraged them to offer their views in this important debate.

The roundtable discussion was chaired by Mr. William Kovacic, Commissioner of the United States Federal Trade Commission

The Chairman stated that he hoped to cover four topics:

- an exploration of common goals that link competition and consumer policy;
- a consideration of the institutional arrangements by which the two systems operate and how they can be made most effective;
- the conflicts that can arise between these two systems and how they might be resolved;
- the benefits that can be derived from considering the two systems as part of an integrated whole.

The Chairman introduced the five panellists to lead the discussion: Mr. Colin Brown**,** Policy Director, Office of Fair Trading, United Kingdom; Mr. Chuan Leong Lam**,** Chairman, Competition Commission of Singapore; Ms. Barbara Lee**,** Executive Director, Jamaica Fair Trading Commission; Mr. Hetham Hani Jamel Abu Karky**,** Legal Researcher, Competition Directorate, Jordan Ministry of Trade; and Mr. Allan Fels**,** Dean, Australia New Zealand School of Government. Each topic was addressed by the panellists, after which there were interventions from the floor.

Common goals of competition policy and consumer protection

Allan Fels

Professor Fels was co-author of the background note, together with Mr. Henry Ergas, Regional Head, Asia Pacific, CRA International and Professor, Faculty of Business and Economics, Monash University, Australia. Professor Fels summarised that part of the note which deals with the relationship between these competition and consumer policies. Each largely promotes the goals of the other. Firms in a competitive market have incentives of their own to develop a reputation for quality. Likewise, consumer policy interventions that promote transparency and access to accurate information make consumer choice a more effective discipline, thus strengthening competition. Thus, a competition policy that works well can reduce the work that needs to be done by consumer policy; in the same manner, a good consumer policy, by enhancing the ability of consumers to exercise choice, can make markets more competitive and force firms to compete on the merits, thereby supporting the aims of competition policy.

At the same time, each of these instruments can create challenges for the other. The paper provides several examples of these challenges. A market that becomes newly competitive – liberalised public utility markets, for example – can expose consumers to new risks and difficulties. Likewise, consumer protection policies can sometimes have adverse consequences for competition – prohibitions on comparative advertising, for example.

The paper also briefly addresses new developments in behavioural economics – a discipline that explores departures by consumers from rational decision making models under conditions of costly and imperfect information. A principal point of this discussion is that these new findings in behavioural economics do not necessarily argue for a more interventionist, regulatory approach. Market forces themselves may offer solutions. That is, firms in competitive markets have incentives to provide remedies to consumers that allow potential gains from trade to be more fully realised. Again the background note provides several examples. In retailing, for example, where it is difficult for consumers to compare prices among supermarkets, some competitors have successfully responded by promoting the "everyday low prices" model.

Still, market incentives will not cure all cognitive limitations. Firms have incentives to exploit the situation with advertising and marketing that reinforces consumer biases. Moreover, sophisticated consumers may benefit from market-based responses, but less sophisticated ones may be left behind. Use of the Internet marketing channel is a good example of this phenomenon. Consumer policy is relevant in the design of interventions in these instances, but these interventions should not do harm to the incentives that consumers have to invest in information.

The paper also discusses the interaction of the two policies in markets new to competition. In many countries competition has been recently introduced in the professions. For several reasons consumers lack good information about how to make choices among professionals, but sometimes the reactions to this problem, for example restrictions on advertising or unnecessary restrictions on entry, are themselves harmful. In this situation competition and consumer policies require co-ordination. Likewise, in public services, such as education and health care, there are efforts to introduce competition on the supply side, providing consumers with new choices in these fields. Making choice work in these areas is difficult, however, introducing difficult questions about information disclosure and consumer rights and obligations.

Colin Brown

The written submissions to this roundtable show that countries acknowledge the interrelationship between competition and consumer policies, though we have still to debate its depth and its institutional implications. At the centre of this interconnection there is common ground, which can be defined by two questions: is the market working well for consumers and, if not, what can we do about it? Responses include both traditional competition policy concerns – e.g., cartels, anticompetitive mergers, high entry barriers – and consumer policy concerns – e.g., misleading advertising and information asymmetries. But in addition to this common ground, consumer policy and competition policy have their own distinct territories, and their own cultures and histories. For this reason it is Mr. Brown's thesis, on which he will elaborate later, that there are benefits from bringing them together institutionally.

Chuan Leong Lam

Chairman Lam noted that Singapore is a small country. Much of what it consumes is produced abroad. Thus, there is a significant international dimension in its consumer policy. Singapore exercises a light touch in this area, often relying on agencies in other countries, with whom it co-operates. International standardisation of concepts in consumer protection and competition policy is important to a small economy like Singapore.

Hetham Hani Jamel Abu Karky

In Jordan the overarching goal is to provide consumers with the highest quality goods and services at the lowest price. This encompasses both competition and consumer policies. The Jordanian competition law is enforced by the Competition Directorate, situated within the Ministry of Industry and Trade. The

Committee for Competition Affairs is an advisory body to the Competition Directorate. There is no consumer protection body as such in the government, but the Quality and Market Control Directorate, also within the Ministry for Industry and Trade, has responsibility for monitoring sales and markets. Also, the Consumer Protection Association, an NGO, is active in Jordan, and its president is on the Committee for Competition Affairs. Thus, competition policy and consumer protection interact in this way in Jordan.

Barbara Lee

The Jamaican competition law states as its purpose the provision to consumers of competitive prices and product choices. There are other references in Jamaican statutory law to providing consumers with a fair share of the benefits of commerce. In Jamaica there are both the Fair Trading Commission, which enforces the competition law, and the Consumer Affairs Commission, which serves as an advocate for consumers in various forums. Questions are sometimes raised about the need for two separate agencies, especially since there are other consumer groups operating in the country. In this respect it is important to provide citizens with better information about the activities of the two agencies, and especially how competition policy can benefit them. Elsewhere in the Caribbean, in the laws of Barbados and Trinidad there are explicit statutory links to competition policy and consumer protection.

The Chairman noted how in recent years the two policies have moved toward a more common vocabulary, especially the acceptance by the competition community of consumer welfare as the foundation for competition policy.

Allan Asher/ Energy Watch UK

Mr. Asher expressed his disagreement with the discussion of behavioural economics in the paper, however, to the extent that it suggests that competitive responses can overcome certain specific problems associated with information asymmetry. He stated his view that in some markets, especially those in which entry barriers are high, the problem is growing, citing mobile telephony, financial services and energy retailing as examples. Behavioural economics, in his view, now provides an empirical basis for consumer protection measures.

Chinese Taipei

Chinese Taipei's competition law, which is enforced by the Fair Trade Commission, was enacted in 1992, and includes responsibility for consumer protection. In 1994 the Consumer Protection Law was enacted, which created the Consumer Protection Commission within the Cabinet. It has responsibility for co-ordinating consumer protection efforts at all levels of government, but it does not have independent enforcement powers. The Chairman of the FTC is also a member of the CPC.

The Chinese Taipei delegate gave examples of both complementary actions and conflicts involving the two agencies. One example of the former was in the cable TV industry, which is quite concentrated. The two agencies consulted before the Consumer Protection Commission requested that the cable providers provide a basic, or no frills package of channels, which had not previously been offered. A second involved a supermarket merger, which the FTC approved. After the merger, however, the merged company refused to honour gift certificates from one of the parties. After intervention by both agencies the supermarket agreed to redeem the certificates.

Conversely, there have been conflicts regarding false advertising, over which both agencies have jurisdiction. The FTC tends to be more conservative in this area, intervening only when an advertisement might be significantly misleading, affecting many customers. The CPC, on the other hand, has tended to act on an ad hoc, case by case basis. The FTC tries to avoid such conflicts by consulting with the CPC when it concludes that a particular case is not sufficiently important for it to intervene.

South Africa

The South African delegate remarked that the discussion of behavioural economics in the context of consumer protection was interesting, and he suggested that a related area of business conduct, marketing, might also be a good topic to integrate into the analysis. He commented specifically on the practice of "category management," whereby a retailer effectively cedes to a supplier the management of entire categories of products on the retailer's shelves. The practice is justified as improving efficiency, but it could well have negative implication for consumers.

Tunisia

The two policies have common objectives: improving the productivity of an economy and of individual producers and improving the purchasing power of consumers. But consumer policy has other objectives that are not co-terminus with those of competition policy, and the two use different instruments in enforcement. Still, government policy can and should ensure that they are not in conflict. There must be continuing dialogue between the two to that end. Implementation should also be co-ordinated. Certain actions by competition agencies could have negative short run effects on consumers, for example. Consumer agencies can both help consumers to understand these effects and take measures that would ameliorate those effects.

Tanzania

The Tanzanian competition law contains both competition and consumer protection provisions. When it was last amended in 2003 it was recommended that the two functions be separated, but it was decided not to, because while it is sometimes difficult to generate support for competition policy in a developing country like Tanzania, the public more readily understands the need for consumer protection, and placing the two under one roof could assist in the development of competition policy in that environment. The competition law created both the Fair Competition Commission, which enforces the law, and the National Consumer Advocacy Council, which as its name indicates performs advocacy functions in its field. The FCC served as the Secretariat for the NCAC, and the latter has developed a full program of its own, successfully organising workshops on consumer rights, consumer responsibilities and the need for proper information for consumers.

Portugal

The Portuguese delegate described a situation in which the Competition Authority worked together with consumer interests to provide better information about mobile telecommunication prices. Specifically, the pricing schemes in this industry were thought to be much too complex for the average consumer. The Competition Authority, the Portuguese Consumer Directorate General and the major consumer association collaborated on a recommendation, which was adopted by the mobile operators, that the operators provide to consumers simulators that would help them to determine the price plan that minimises the cost for various user profiles and also aids in producing estimates of monthly expenses for these profiles.

Poland

The Polish competition agency is named the Office for Competition and Consumer Protection, which is an indication that it is responsible for both functions. The competition act created parallel enforcement mechanisms for both, including investigation procedures, the types of decisions that can be taken and sanctions. The Office co-ordinates its competition and consumer functions; for example at the outset of a case it is decided whether it would be best handled as a competition case or a consumer case. The competition and consumer teams regularly consult and exchange information. There are practical benefits

from combining the two functions, including savings in training, administration and research. At the same time, tensions between the two pillars can arise, for example over allocation of resources. Still, both parts of the Office have as a common goal the protection of consumers.

El Salvador

There is close co-operation between the competition and consumer protection agencies in El Salvador. The Constitution, created in 1893, prohibited monopolistic practices in order to ensure economic freedom and to protect consumers' interests. The first consumer law was enacted in 1992, later replaced by a 1996 law. It was not until 2004 that a competition law was enacted, creating an independent competition agency. In 2005 a new consumer protection law was enacted, creating a National System for Consumer Protection. An important part of this new system is the Consulting Council for Consumer Protection, an independent body whose purpose is to counsel the President of the Consumer Protection Authority. Among the members of the Council is the Competition Superintendent.

Meglena Kuneva

Commissioner Kuneva remarked on the importance of good governance in implementing both consumer and competition policies. In the end, it is the consumer whose actions will be determinative, and the question is, what government policies will be most effective in empowering consumers? The set of rules for this purpose should be based on economic evidence, and should be directed toward promoting market outcomes that benefit consumers.

Institutional design

The Chairman noted that he has observed an ongoing commitment by Commissioner Kuneva and her colleagues to improvements in institutional design. This reflects an understanding that policies do not operate in a vacuum, that they are implemented by institutions, and that the quality of institutions determines in many ways the capacity of the system to deliver good policy products to individual citizens. This introduced the second topic of the discussion, making the institutions that administer these two policies most effective. One organisational approach is to combine the two functions in one agency. The Chairman noted that by his count there are as many as 40 jurisdictions that currently have a single agency in one form or another, and the number is growing. He turned to Professor Fels for his reaction to this point and to others that were raised in the discussion on the first topic.

Allan Fels

Professor Fels summarised the portion of the background note that deals with institutional issues, and specifically with the question of whether to place both competition and consumer policies in one agency. The note lists three principal benefits of integration of the two enforcement bodies:

1. Gains from treating competition and consumer policy as instruments that can be flexibly combined and more generally managed within a single portfolio of policy instruments. As noted earlier the two instruments are interdependent and complementary; each can make the other more effective. There may be occasions when one can be substituted for the other with positive effects. For example, competition policy has limitations in making markets structurally more competitive on the supply side; action on the demand side, through consumer policy may be more effective.

2. Gains from developing and sharing expertise across the two areas. Expertise in either area is in limited supply, especially in small economies, and combining it in a single institution may permit it to be used more efficiently.

3. Gains in terms of wider visibility to the community, and understanding in the community, of competition and consumer issues. The public more readily understands and appreciates consumer policy, which can benefit competition policy if they are linked. At the same time, consumer protection tends to lack political support within a government, as compared to competition policy, and is often underfunded. Joining the two can benefit consumer policy in this regard.

There are also costs associated with integration, however. There are inherent limits to integration because the nature of the tasks differs between the two kinds of policies and that reduces the economies of scope achievable through integration. The two kinds of cases differ in their number and scope (competition cases being fewer, and broader in scope), and the specific instruments that are applied to them are different. Further, while there may exist an agency having principal responsibility for consumer protection, in fact a range of agencies have some aspect of consumer protection as part of their portfolios. This usually makes it not feasible to fully integrate consumer protection to the extent that it can be done for competition policy.

These problems can be addressed by requiring, at least, that the competition agency has in-house access to the skills involved in the formulation of consumer policy, and that there exist in one agency a kind of "whole of government" oversight of consumer protection, also mindful of competition concerns.

The Chairman noted that the United Kingdom, represented by Colin Brown, has been especially innovative in integrating the two policies.

Colin Brown

Mr. Brown made two points. First, having the two functions together provides the opportunity to approach a problem from both perspectives. The UK may analyse a market without preconceptions; it will identify the problem and apply the most effective remedy, whether from the competition or consumer side. This has been done in real estate, sales of tickets for public events, new car warranties and in credit markets. Second, on the point regarding expertise, competition and consumer experts tend to come from very different backgrounds, with different training. Thus, they tend to look at problems differently. They are, in his words, "two strong families, each of which has become inbred," and bringing them together helps to "mix up the gene pool."

Chuan Leong Lam

In Singapore the two policies are administered separately. The consumer is one of several stakeholders in Singapore, and sometimes there must be a balancing of the interests of these different groups. Notably, one must recognise that it is the producer who ultimately produces jobs, economic growth and innovation. Singapore is a small, open economy; it heavily depends of foreign investment, and its producers must be competitive in a world market. This sometimes requires a balancing between different policies.

The Chairman thanked Chairman Lam for reminding us of an important point, which is often overlooked: that individuals may have conflicting economic interests – for example as workers (preferring to work for a monopolist, where jobs are secure and income higher) and as purchasers (preferring to purchase goods and services at competitive prices). One's position on specific issues might differ according to which role one occupies.

Hetham Hani Jamel Abu Karky

There are benefits from combining the two functions in a single agency. They include cross-fertilisation – helping each enforcement body to better understand how markets work.

Barbara Lee

Jamaica is a small country, so initially it made sense from a resource standpoint to create a single agency to handle both functions. Subsequently a separate Consumer Affairs Commission was created, though the competition agency continues to have responsibility for misleading advertising. In the beginning it was helpful for competition policy for the FTC also to be working in consumer protection, which the public better understood. A drawback, however, was that most of the cases handled by the FTC in the early years were consumer cases, because the Commission had not developed expertise in competition, and consumer cases were easier to handle. Effective competition policy also required a measure of education for the public, for example on why the agency should be concerned about predatory pricing.

United Kingdom

The Office of Fair Trading is integrating competition and consumer policies in a comprehensive way. Case work of both types has been unified in a Market Project Division; policy work is also under one roof, so that, for example, a behavioural economist may work with a competition economist in the same team; service delivery functions have also been consolidated. Information and intelligence are also shared, and a proactive, market analysis procedure has been implemented. This has had at least two effects: a focus on broader market effects, with less emphasis on short term, specific outcomes; and an effort to employ principles from the competition side to the task of enhancing competition from the demand side.

Finally, there is the realisation that while the core set of principles on the competition side is relatively concise and finite, there is less certainty on the consumer side, and the effort is to more clearly define what consumer policy is and what consumer issues the agency should address.

Slovakia

In Slovakia the two policies are separately enforced, and on the consumer side enforcement is distributed among several agencies. This makes co-ordination difficult. The Slovakian delegate gave two examples: There is insufficient competition in the professions, but there was no one agency with which the competition agency could work on this problem. The competition agency's powers were limited and it could implement reforms only on a piecemeal basis. A second problem was in retail banking, where there were problems related to the bundling of products that could not be resolved by applying traditional competition tools. Again, co-ordination with consumer agencies was difficult, but the competition agency did work with the Central Bank in bringing about an amendment to the ethical code of the Association of Commercial Banks that addressed the tying problem.

Japan

Competition and consumer policy are substantially integrated in Japan, and the Japanese delegate gave one example of how the JFTC enforces a consumer protection law. The law, called the Premiums and Representations Act, gives the JFTC powers to authorise self-regulated codes of conduct adopted by industries or trade associations. To receive JFTC approval such a code must meet certain criteria specified in the Act, including (a) the code is appropriate for preventing unjust customer inducement and maintaining fair competition and (b) it is not likely to impede unreasonably the interests of general consumers and relevant entrepreneurs. Before making its decision on a proposed code the JFTC holds a

public hearing and solicits public comments. Consumer groups are invited to participate in these hearings. If a proposed code is approved by the JFTC it receives an exemption from the Premiums and Representation Act and from relevant provisions of the Antimonopoly Act.

Canada

The Canadian delegate outlined some advantages and disadvantages of combining the two functions in a single agency. There are both internal and external benefits. Internally, a combined agency can address a case more comprehensively, considering both competition and consumer issues. Externally, deciding on which projects to take on from an advocacy and education standpoint benefits from having both perspectives. Canada's initiative in the professions is an example. There are also challenges presented by integration, however. Resource allocation is one. The major stakeholders tend to differ as between the two policies – the business community in competition policy, the consumer community in consumer policy.

As for future challenges, Canada sees e-commerce as one. Consumers must gain confidence in transacting business online. They must feel secure and that they are not going to be misled – a challenge for consumer policy.

Malta

The Maltese delegate approached the issue from the perspective of a small economy. In Malta the competition law and the consumer law are separate, and initially they were enforced by separate agencies, but in 2001 they were consolidated in the Consumer and Competition Division, both for resource reasons and because it was recognised that they are complementary. Still, the small size of a market like Malta's may dictate different decisions in implementing these two policies. High scale economies relative to the size of a market could result in high concentration, which might not always be in the best interest of consumers. On the other hand, authorities must give weight to efficiency claims, which benefit consumers and make local businesses more competitive in the world market. Thus, a balancing between these possibly conflicting objectives may be required.

Chile

In Chile the two policies are administered by separate agencies. The consumer protection agency is much larger than the competition agency. The two agencies co-operate closely, however, through a co-operation agreement adopted in 2006. Both agencies lack internal enforcement mechanisms; their decisions must be enforced by courts. In this regard, the consumer agency has begun participating in competition cases in court when it is appropriate.

In its paper Chile described a case involving the merger of two supermarket chains. The competition agency approached the case from the traditional competition perspective, arguing that the merger, resulting in high concentration and high entry barriers, would enhance the power of the resulting firm to act anticompetitively in the retail market and in a related market, retail credit. The consumer agency, on the other hand, stressed traditional consumer issues, noting concerns expressed by consumers about the transaction and a history of abusive credit practices on the part of the merging firms. Very recently the Chilean Supreme Court ruled in favour of the agencies; it was, in fact, the first merger that was blocked under Chile's 2004 competition law. The court's decision made it clear that it gave significant weight to the arguments of the consumer agency, as well as to the competition issues.

BIAC

The BIAC representative expressed a preference for market-based solutions to regulatory ones, and this includes consumer remedies that do not adequately take competition principles into account. Still, there may be instances, especially in the provision of information to consumers, where competition is not fully serving consumers. Such a situation requires co-ordination between the competition and consumer agencies, and if a consumer protection remedy is indicated it should be consistent with good competition policy.

Pakistan

The Pakistani delegate interjected a note of caution regarding the complementarity of the two policies. In his view there are significant differences between them – different disciplines, different remedial tools and different objectives. It is his position that one cannot expect the competition authority to be able fully to meet consumer protection goals and expectations.

Hungary

Hungary referred briefly to the paper that it submitted for this discussion, which provided a case study of an inquiry by the competition authority into what appeared to be a lack of competition in the financial sector. The preliminary results of the inquiry indicate that the imperfect competition that has been observed is principally the result of the difficulty that consumers have in switching between providers of these products, which is in turn caused by a lack of sufficient information to permit consumers to make informed decisions. The proposed remedies for this situation were consumer protection remedies. This case is an illustration of the interaction between competition and consumer policies. What began as a competition case may be resolved through the use of consumer protection tools.

Switzerland

Consumers have varying sets of interests. They include economic, political, legal and health and safety interests. Competition policy principally addresses economic interests; consumer protection is better suited to address the others. In Switzerland the two policies are administered by separate agencies, but both are placed within the Ministry of the Economy, and they collaborate with one another. It is also true that the interests of consumers are represented in the Swiss Competition Commission.

Korea

In Korea there were originally separate competition and consumer agencies, but in 2006 consumer policy was brought within the responsibility of the competition agency, the KFTC. There had been a long debate about whether to consolidate the two agencies, and ultimately it was decided that consolidation would improve efficiency and provide a better opportunity to integrate these two important policies.

Ireland

There are separate agencies in Ireland, and historically this has not served the consumer well. A good example was the Groceries Order, which effectively made price competition in the retail sector illegal. That order has since been rescinded, however, and the national consumer agency was revamped in 2007. Going forward, it is thought that having two agencies will prove to be useful. Two voices can be more effective than one in the important task of competition advocacy.

Russia

The Russian competition agency, the Federal Antimonopoly Service (FAS) enforced the consumer protection law for about ten years. In 2004 that function was given to another authority, but the FAS continues to be conscious of consumer issues. An example of this occurred in a recent case involving consumer credit. It was determined that lenders were misleading consumers about the real costs of borrowing. The FAS determined that it could not efficiently apply the competition law and related laws to the situation, however, which involved hundreds of individual cases. Instead, the FAS worked with the Central Bank in developing voluntary recommendations for information disclosure by lenders, and simultaneously it engaged in vigorous competition advocacy on the subject. As a result, the Central Bank adopted rules requiring more disclosure, and most recently the Russian consumer protection law was amended to the same end.

Gabon

In Gabon the two functions were placed within one agency, but because there had not been a strong history of consumer protection in that country the result was the creation of a heavy enforcement burden for the agency. Today Gabon is confronted with abuses in several sectors, including water, electricity and mobile telephony. Technical assistance for the agency and for the several embryonic consumer organisations will be required. In this regard, Gabon is benefiting from a co-operation arrangement that it has with France,

Australia

Competition and consumer protection enforcement are combined in Australia. There should not be any conflict between the two. If there is, it means that the competition side is defining consumer welfare too narrowly. It should include not only the traditional concepts of efficiency, but also fairness, freedom from unnecessary risk and complexity, and having the tools to make appropriate, informed decisions. In this way the two policies are completely coherent.

Allan Fels

Professor Fels offered a few words in summary. It is clear that the two policies are interrelated and that there are benefits from uniting them in a single agency. This is the arrangement that he favours personally, as fostering a more coherent approach. But it is also true that there are risks associated with doing so. One side could swamp the other in terms of resources or emphasis, and it is undeniable that the consumer policy portfolio is much broader than competition policy in terms of sectors and activities, all of which probably could not be consolidated into a single agency.

Professor Fels also responded to comments by Allan Asher about the background note. The note provides examples of how markets have responded to cognitive problems of consumers without the need for intervention with consumer protection remedies, but it also acknowledges that businesses may seek to exploit their advantage in some situations in a manner adverse to consumers and that markets may sometimes fall short of providing adequate solutions.

Chairman Kovacic closed the discussion by thanking all participants and he recommended the papers that were submitted for the roundtable to those who want to explore the topic further.

COMPTE RENDU DE LA DISCUSSION

Le Président du Comité de la concurrence, Frédéric Jenny, présente le premier intervenant du débat : Mme Maglena Kuneva, Commissaire européenne à la protection des consommateurs.

Maglena Kuneva

La Commissaire européenne Maglena Kuneva expose les grandes lignes de la politique adoptée à l'égard des consommateurs par la Commission en 2007. Elle considère ces derniers comme des agents économiques essentiels sur les marchés et vise à leur donner les moyens de préserver en permanence leurs intérêts. Les consommateurs peuvent en effet exercer un réel pouvoir à l'échelle du marché européen même si ce dernier demeure fragmenté en termes de consommation, puisqu'il reste divisé en 27 marchés distincts. Il convient donc de formuler une réglementation efficace au niveau européen afin de mettre en place un cadre clair et solide pour préserver la liberté de choix du consommateur.

La directive sur les pratiques commerciales déloyales a permis d'instaurer un cadre de référence harmonisé mettant un terme à certaines pratiques, comme la publicité mensongère. Un examen du cadre juridique relatif au droit des contrats de consommation est actuellement en cours dans la même optique : créer un ensemble unique de droits et de devoirs fondamentaux pour les consommateurs et les entreprises. S'agissant de l'application de la loi, un réseau d'entités chargées de la protection des consommateurs semblable au réseau européen de la concurrence a été déployé en 2007 et œuvre désormais pour lutter contre les pratiques commerciales douteuses.

La Commissaire commente également les liens entre politique de la concurrence et politique à l'égard des consommateurs. Elle salue le travail de la Commission dans le domaine de la politique de la concurrence mais remarque que les outils disponibles dans ce domaine ne sont pas toujours suffisants pour faire face à toutes les difficultés susceptibles de nuire à l'efficience du marché et au bien-être du consommateur. La politique adoptée à l'égard du consommateur joue donc un rôle déterminant dans la résolution des défaillances observées au niveau de la demande et qui compromettent la liberté de choix des consommateurs. Les politiques de la concurrence et de la consommation sont donc complémentaires et le défi consiste à trouver les moyens d'améliorer leur efficacité conjointe.

Du point de vue de la Commissaire, la coopération doit principalement s'opérer en amont, lors de la phase d'exploration et d'analyse du marché. Dans ce domaine, la Commission a récemment élaboré un tableau de bord visant à identifier les éventuelles défaillances du marché du point de vue du consommateur. Ce tableau de bord se décompose en cinq indicateurs : prix, plaintes, fidélité des consommateurs, satisfaction et sécurité. Il ne s'agit toutefois que d'indicateurs qui ne permettent pas, à eux seuls, d'aboutir à des conclusions définitives. La prochaine étape consisterait à entreprendre une analyse approfondie des marchés mis en avant dans le tableau de bord, à l'aide de la méthodologie utilisé par la Commission dans le cadre de l'examen du marché unique.

Mme Kuneva évoque brièvement l'évolution prometteuse de l'économie comportementale, qui pourrait contribuer à expliquer les réactions des consommateurs dans des situations de marché complexes. Elle souhaite que l'OCDE participe au développement de ce nouvel outil afin qu'il soit utilisé par les responsables de la formulation et de la mise en œuvre de l'action publique.

Le Président remercie Mme Kuneva pour ses remarques, notamment sur la complémentarité entre la politique de la concurrence et la politique de la consommation. Il souligne la nécessité d'une analyse plus approfondie de la demande, dans la mesure où la politique de la concurrence s'articule principalement autour de l'offre. Le Président présente ensuite M. Michael Jenkins, Président du Comité de la politique à l'égard des consommateurs de l'OCDE. M. Jenny souligne la coopération de longue date établie entre les deux comités.

Michael Jenkins

M. Jenkins se félicite de l'opportunité donnée d'échanger des points de vue entre les responsables de la concurrence et ceux de la protection du consommateur. En principe, la politique de protection des consommateurs vise à lutter contre les pratiques commerciales malhonnêtes. Néanmoins, elle a également pour priorité aujourd'hui de fournir aux consommateurs les moyens nécessaires pour faire des choix éclairés au sein d'un marché de plus en plus complexe. Or cette stratégie a également pour conséquence de favoriser la concurrence, ce qui signifie que les deux politiques visent un objectif commun. M. Jenkins accueille les représentants des pays non membres et les invite à participer activement à ce débat crucial.

La table ronde est présidée par M. William Kovacic, membre de la Federal Trade Commission américaine.

Le Président souhaite aborder quatre thèmes :

- Analyse des objectifs communs à la politique de la concurrence et à la politique à l'égard des consommateurs
- Étude des mécanismes institutionnels de mise en œuvre de ces politiques et identification des pistes d'amélioration
- Examen des conflits d'intérêts éventuels entre ces deux systèmes et des moyens envisageables pour y remédier
- Avantages apportés par une approche globale et intégrée de ces deux systèmes

Le Président présente les cinq participants au débat : M. Colin Brown**,** Directeur en charge des politiques, Office of Fair Trading, Royaume-Uni ; M. Chuan Leong Lam**,** Président de la Commission de la concurrence de Singapour ; Mme Barbara Lee**,** Directrice de la Fair Trading Commission, Jamaïque ; M. Hetham Hani Jamel Abu Karky**,** Chercheur, Direction de la concurrence, ministère du Commerce de la Jordanie et M. Allan Fels**,** Directeur de l'Australia and New Zealand School of Government. Chaque thème sera débattu par les participants à la table ronde, qui participeront ensuite à une séance de questions-réponses.

Objectifs communs à la politique de la concurrence et à la politique à l'égard des consommateurs

Allan Fels

Le Professeur Fels est le co-auteur de l'étude de référence avec M. Henry Ergas, Responsable régional pour l'Asie Pacifique, CRA International et Professeur, Faculty of Business and Economics, Monash University, Australie. Le Professeur Fels présente la partie de l'étude consacrée aux relations entre les politiques de la concurrence et de la consommation. Il en ressort que ces politiques s'épaulent mutuellement : les entreprises implantées sur un marché concurrentiel sont en effet naturellement incitées à se forger une réputation de qualité, tandis que l'action publique en faveur des consommateurs qui vise à optimiser la transparence et l'accès aux informations renforce la liberté de choix et, partant, la concurrence. Dans ces conditions, l'efficacité de la politique de la concurrence peut faciliter la tâche de la politique à

l'égard des consommateurs. De la même manière, en optimisant la capacité de choix des consommateurs, une politique de consommation performante renforce la compétitivité des marchés et contraint les entreprises à se concurrencer sur le terrain de la qualité, ce qui correspond aux objectifs de la politique de la concurrence.

Néanmoins, ces instruments peuvent engendrer des difficultés mutuelles, dont plusieurs exemples sont fournis dans l'étude. L'ouverture d'un marché à la concurrence, à l'instar de la libéralisation du marché des services publics par exemple, peut exposer les consommateurs à des risques inédits. De la même façon, les politiques de protection des consommateurs peuvent parfois avoir des effets néfastes sur la concurrence, comme l'interdiction de la publicité comparative.

L'étude traite aussi brièvement de l'évolution de l'économie comportementale, une discipline qui analyse les circonstances et les facteurs qui incitent les consommateurs à dévier des modèles rationnels de prise de décision, dans les situations où l'information est incomplète et onéreuse. L'étude conclut notamment que les nouvelles découvertes réalisées dans le domaine de l'économie comportementale ne justifient pas nécessairement un renforcement de la réglementation ou une démarche plus interventionniste. Les mécanismes du marché peuvent en effet apporter des solutions : les entreprises implantées sur des marchés concurrentiels sont incitées à fournir aux consommateurs des recours permettant de tirer davantage profit des gains potentiels. L'étude de référence cite quelques exemples : dans la distribution, où il est difficile pour les consommateurs de comparer les prix entre les supermarchés, les concurrents ont réagi avec succès en adoptant le modèle des « prix les plus bas tous les jours ».

Cependant, les mécanismes d'incitation du marché ne permettront pas de lever tous les obstacles liés à l'information. Les entreprises sont tentées de tirer profit de la situation en menant des campagnes de publicité et de marketing qui renforcent les idées reçues des consommateurs. Par ailleurs, les consommateurs les plus avertis peuvent avoir accès à des réponses apportées par le marché, alors que les consommateurs moins avertis peuvent être désavantagés. L'utilisation de l'Internet en tant que canal marketing illustre parfaitement ce phénomène. Dans ces situations, la politique à l'égard des consommateurs a un rôle à jouer dans les modalités de l'intervention, mais cette dernière ne doit pas nuire aux mécanismes qui incitent les consommateurs à s'informer.

L'étude aborde également l'interaction des deux politiques sur les marchés qui s'ouvrent à la concurrence. Dans de nombreux pays, les professions libérales n'avaient pas encore été libéralisées. Pour différentes raisons, les consommateurs pâtissent d'un manque d'information pour faire leur choix entre les membres des professions libérales. Néanmoins, les mesures mises en œuvre pour pallier des pratiques dommageables, comme les restrictions en matière de publicité ou les barrières à l'entrée inutiles, peuvent se révéler nocives. Dans ce cas, une coordination entre politique de la concurrence et politique à l'égard du consommateur est indispensable. De même, dans les services publics comme l'enseignement et la santé, des efforts sont entrepris pour ouvrir l'offre à la concurrence afin de proposer un choix plus vaste aux consommateurs. L'efficacité de la liberté de choix dans ces secteurs est toutefois problématique et soulève des questions délicates quant à la diffusion des informations et aux droits et devoirs des consommateurs.

Colin Brown

Les documents soumis dans le cadre de la préparation de cette table ronde montrent que les pouvoirs publics ont conscience de l'interdépendance entre la politique de la concurrence et la politique à l'égard des consommateurs même s'il faut encore débattre de son fondement et de ses implications institutionnelles. Cette interdépendance repose sur un socle commun qui peut être défini en répondant à deux questions : le marché est-il efficient pour les consommateurs ? S'il ne l'est pas, que peut-on faire ? Les réponses portent à la fois sur les thèmes chers à la politique de la concurrence (cartels, fusions anticoncurrentielles, barrières à l'entrée élevées) et sur les enjeux de la politique à l'égard des

consommateurs (publicité mensongère et asymétrie de l'information). Toutefois, outre ce socle commun, ces deux politiques ont leurs propres domaines d'intervention et une histoire et une culture distinctes. C'est pourquoi il y aurait intérêt à les réunir au niveau institutionnel selon M. Brown.

Chuan Leong Lam

Le Président Chuan Leong Lam rappelle que Singapour est un petit pays et que la plupart des produits qui y sont consommés proviennent de l'étranger. Dans ces conditions, sa politique à l'égard des consommateurs comporte une forte dimension internationale. Les autorités de Singapour interviennent peu dans ce domaine et s'appuient fréquemment sur les agences des autres pays avec lesquels elles collaborent. La normalisation des principes de protection des consommateurs et de la politique de la concurrence à l'échelle mondiale est essentielle pour une petite économie telle que Singapour.

Hetham Hani Jamel Abu Karky

En Jordanie, l'objectif primordial est de fournir aux consommateurs les produits et services de meilleure qualité au prix le plus bas. Cet objectif s'inscrit à la fois dans le cadre de la politique de la concurrence et dans celui de la politique de la consommation. Le respect du droit de la concurrence jordanien est garanti par la Direction de la concurrence, qui dépend du ministère de l'Industrie et du Commerce. Le Comité des affaires liées à la concurrence joue un rôle consultatif auprès de la Direction de la concurrence. S'il n'existe aucun organisme officiellement chargé de la protection des consommateurs au sein de l'administration, la Direction de la qualité et du contrôle du marché, qui dépend également du ministère de l'Industrie et du Commerce, est responsable du contrôle des ventes et des marchés. Enfin, l'association de protection des consommateurs, qui a le statut d'ONG, joue un rôle actif en Jordanie et son Président siège au Comité des affaires liées à la concurrence. C'est ainsi qu'est garantie la coordination entre politique de la concurrence et politique de protection des consommateurs en Jordanie.

Barbara Lee

Le droit jamaïcain de la concurrence vise à fournir aux consommateurs des prix compétitifs et un vaste choix de produits. Le droit législatif national fait également référence à l'obligation de faire profiter aux consommateurs d'une part équitable des bénéfices du commerce. En Jamaïque, la Fair Trading Commission, chargée de veiller au respect du droit de la concurrence, côtoie la Consumer Affairs Commission, chargée de la défense des consommateurs *via* divers forums. L'utilité de la coexistence de ces deux agences suscite parfois des interrogations, d'autant plus qu'il existe d'autres organismes de protection des consommateurs au niveau national. Il est donc essentiel de diffuser des informations plus précises sur les activités de ces deux agences et plus particulièrement d'informer les citoyens sur la manière dont la politique de la concurrence peut leur être bénéfique. Le droit d'autres pays des Caraïbes, notamment aux Barbades et à Trinidad, prévoit des liens officiels entre politique de la concurrence et protection des consommateurs.

Le Président observe qu'au cours des dernières années, les deux politiques ont évolué pour adopter un vocabulaire plus homogène, notamment depuis que les autorités de la concurrence classent le bien-être du consommateur parmi les fondements de la politique de la concurrence.

Allan Asher/ Energy Watch, RU

M. Asher fait part de son désaccord avec la thèse formulée dans l'étude au sujet de l'économie comportementale. Celle-ci suggère que les mesures visant à favoriser la concurrence peuvent apporter une solution à des problèmes spécifiques associés à l'asymétrie de l'information. Selon lui, sur certains marchés, notamment ceux qui sont caractérisés par des barrières à l'entrée élevées, ce problème continue à

prendre de l'ampleur, comme en témoigne la situation observée dans les domaines de la téléphonie mobile, des services financiers et de la distribution d'énergie aux particuliers. Il estime que l'économie comportementale constitue désormais le fondement empirique des mesures de protection des consommateurs.

Taipei chinois

Le droit de la concurrence du Tapei chinois, mis en œuvre par la Commission de la concurrence, contient quelques dispositions relatives à la protection du consommateur. Mais il existe également dans le pays une commission chargée de la protection des consommateurs, qui exerce une très forte influence auprès du gouvernement. Le délégué fournit des exemples de la complémentarité et des conflits d'intérêts entre les deux instances. Dans le secteur de la télévision par câble, particulièrement concentré, les deux agences ont été consultées par la commission chargée de la protection des consommateurs et ont demandé à ce que les acteurs du secteur proposent un forfait de base, qui n'existait pas auparavant. Autre exemple : suite à une fusion entre deux chaînes de supermarchés approuvée par la Commission de la concurrence, la nouvelle entité a refusé d'honorer les bons cadeaux émis par l'une des sociétés d'origine. Après l'intervention des deux agences, le supermarché a accepté de rembourser les bons.

En revanche, des conflits sont apparus dans le domaine de la publicité mensongère, qui est du ressort des deux agences. La Commission de la concurrence tend à adopter une approche plus prudente dans ce domaine et n'intervient que lorsqu'une publicité pourrait s'avérer particulièrement mensongère et faire du tort à de nombreux consommateurs. À l'inverse, la commission de protection des consommateurs privilégie une approche au cas par cas. Pour éviter tout conflit, la Commission de la concurrence consulte la commission de protection des consommateurs lorsqu'elle estime qu'une intervention n'est pas justifiée dans un cas particulier.

Afrique du Sud

Le délégué de l'Afrique du Sud salue l'intérêt du débat sur l'économie comportementale dans le domaine de la protection des consommateurs et propose d'intégrer à cette analyse un autre aspect du comportement des entreprises, à savoir le marketing. Il insiste notamment sur la pratique de la gestion par catégorie, selon laquelle un distributeur cède à un fournisseur la gestion effective de catégories entières de produits. Si cette pratique est justifiée par l'argument des gains de productivité, elle pourrait avoir des implications négatives pour les consommateurs.

Tunisie

Les deux politiques ont des objectifs communs : améliorer la productivité d'une économie et des entreprises tout en augmentant le pouvoir d'achat des ménages. Toutefois, la politique à l'égard des consommateurs vise également des objectifs qui ne correspondent pas à ceux de la politique de la concurrence, tandis que les deux politiques utilisent des instruments différents. Néanmoins, l'action publique peut et doit veiller à ce qu'elles n'entrent pas en conflit. Pour ce faire, un dialogue permanent doit être mis en place entre les autorités responsables de la formulation et de la mise en œuvre de ces politiques. Certaines mesures prises par les autorités de la concurrence pourraient en effet avoir des conséquences néfastes sur les consommateurs à court terme. Les autorités chargées de la protection des consommateurs peuvent aider les consommateurs à mieux appréhender ces effets tout en contribuant à l'élaboration de mesures permettant de les atténuer.

Tanzanie

En Tanzanie, le droit de la concurrence contient des dispositions relatives à la fois au soutien de la concurrence et à la protection du consommateur. Lorsqu'il a été amendé en 2003, il a été proposé de séparer ces deux fonctions mais cette proposition n'a pas été retenue, car s'il est parfois difficile de mobiliser un soutien à la politique de la concurrence dans un pays en développement tel que la Tanzanie, l'opinion publique est davantage sensibilisée à la nécessité de la protection des consommateurs : ainsi, le regroupement de ces deux domaines au sein d'une même entité pourrait contribuer au développement de la politique de la concurrence. La loi sur la concurrence a instauré la Commission de la concurrence, chargée de veilleur à l'application de la loi, et le Conseil national de protection des consommateurs. La Commission de la concurrence a assuré le secrétariat du Conseil national de protection des consommateurs, qui a développé son propre programme et organise des ateliers consacrés aux droits et aux responsabilités des consommateurs, ainsi qu'à la nécessité de leur garantir une information satisfaisante.

Portugal

Le délégué du Portugal présente un exemple de coopération entre l'autorité de la concurrence et l'agence en charge de la protection des consommateurs pour améliorer l'information de ces derniers quant aux prix pratiqués dans le secteur de la téléphonie mobile. Les systèmes de tarification utilisés dans ce secteur étaient en effet considérés comme trop complexes pour le consommateur moyen. L'Autorité de la concurrence, la Direction générale de la consommation et la principale association de protection des consommateurs ont donc élaboré conjointement une recommandation, adoptée ensuite par les opérateurs de téléphonie mobile, contraignant ces derniers à proposer à leurs clients des systèmes de simulation leur permettant de déterminer le forfait le plus économique en fonction de leur profil d'utilisateur et d'estimer leurs coûts mensuels.

Pologne

L'autorité de la concurrence polonaise est baptisée Bureau de la concurrence et de la protection des consommateurs, ce qui signifie qu'elle est responsable des deux fonctions. Le droit polonais de la concurrence a instauré des mécanismes d'application parallèles pour les deux politiques, couvrant notamment les procédures d'enquête, les types de décisions à prendre et les sanctions applicables. Le Bureau assure la coordination des fonctions de protection de la concurrence et des consommateurs : ainsi, dès qu'un cas est soumis pour étude, il est décidé s'il convient de le considérer comme relevant de la politique de la concurrence ou de la politique à l'égard des consommateurs. Les équipes en charge de la concurrence et de la consommation se consultent et échangent régulièrement des informations. Le regroupement de ces deux fonctions offre des avantages du point de vue pratique, notamment des économies au niveau de la formation, de l'administration et de la recherche. Des tensions peuvent néanmoins survenir, par exemple en ce qui concerne l'allocation des ressources. Quoiqu'il en soit, les deux branches du Bureau ont pour objectif commun la protection des consommateurs.

El Salvador

Les autorités de la concurrence et de la protection des consommateurs ont noué une étroite coopération à El Salvador. Adoptée en 1893, la Constitution interdit les pratiques de nature monopolistique de manière à garantir la liberté économique et la préservation des intérêts des consommateurs. La première législation sur la protection des consommateurs est entrée en vigueur en 1992, puis a été amendée en 1996. Ce n'est qu'en 2004 qu'un droit de la concurrence a été défini, pour aboutir à la création d'une agence de la concurrence indépendante. En 2005, une nouvelle loi de protection des consommateurs a été votée pour créer un dispositif national de protection des consommateurs. Ce nouveau dispositif repose en grande partie sur le comité consultatif pour la protection des consommateurs, organe indépendant dont la mission

consiste à conseiller le Président de l'autorité en charge de la protection des consommateurs. Ce comité compte notamment parmi ses membres le Directeur de la concurrence.

Maglena Kuneva

La Commissaire Maglena Kuneva souligne l'importance d'une bonne gestion des affaires publiques dans la mise en œuvre des politiques de la concurrence et de la consommation. Ce sont en effet les actions du consommateur qui sont déterminantes au final et la difficulté consiste à identifier les politiques les plus efficaces pour préserver les intérêts des consommateurs. Les règles définies pour atteindre cet objectif doivent être fondées sur les données économiques et doivent avoir pour finalité de favoriser les mécanismes de marché avantageux pour le consommateur.

Organisation des institutions

Le Président observe un engagement continu de la part de la Commissaire européenne, Mme Kuneva, et de ses collègues pour améliorer l'organisation des institutions. Cet engagement témoigne de la prise de conscience que les politiques sont mises en œuvre par des institutions et que la qualité de ces dernières détermine à bien des égards la capacité du système à déployer des politiques performantes pour chacun. Cette remarque introduit le second thème du débat, à savoir l'amélioration de l'efficacité des institutions en charge des deux politiques. L'une des stratégies adoptées consiste à regrouper ces deux fonctions au sein d'un seul et même organisme. Selon les calculs du Président, 40 pays comptent actuellement un organisme de ce type et cette proportion continue d'augmenter. Il invite le Professeur Fels à réagir sur ce point et sur les autres questions soulevées lors des débats sur le premier thème.

Allan Fels

Le Professeur Fels présente la partie de l'étude de référence consacrée aux enjeux institutionnels et plus particulièrement à la question de la centralisation de la politique de la concurrence et de la politique à l'égard des consommateurs au sein d'une même entité. L'étude dresse la liste des trois principaux avantages tirés de la centralisation des deux politiques :

1. Bénéfices tirés de l'utilisation de ces politiques en tant qu'instruments complémentaires pouvant être gérés au sein d'un même portefeuille. Comme indiqué précédemment, ces deux instruments sont interdépendants et complémentaires ; ils se renforcent mutuellement. Ils peuvent même parfois se substituer l'un à l'autre pour obtenir des effets positifs : ainsi, il est difficile pour la politique de la concurrence d'améliorer la compétitivité structurelle des marchés en agissant sur l'offre ; en revanche, des mesures sur le front de la demande par le biais de la politique de la consommation peuvent se révéler plus efficaces.

2. Bénéfices tirés du développement et du partage des compétences entre ces deux domaines. Les connaissances dans chacun de ces domaines sont rares, notamment dans les petits pays, et elles pourraient être utilisées de manière plus efficace si elles étaient regroupées au sein d'une même institution.

3. Bénéfices en termes d'amélioration de la visibilité auprès de l'opinion et de sensibilisation aux enjeux de la concurrence et de la protection des consommateurs. L'opinion publique est davantage sensibilisée à la politique de la consommation, qui peut avoir un impact positif sur la politique de la concurrence si une coopération est mise en place. Parallèlement, la question de la protection des consommateurs tend à pâtir de l'absence de soutien politique au sein des pouvoirs publics, contrairement à la politique de la concurrence, et souffre de financements insuffisants. Leur union pourra donc être bénéfique pour la politique à l'égard des consommateurs.

Néanmoins, cette centralisation a un coût et elle présente des limites liées à la différence de nature entre les missions de ces deux politiques, ce qui réduit les économies d'échelle potentielles. Les affaires traitées se distinguent par leur nombre et leur ampleur (les affaires de concurrence sont moins nombreuses mais de plus grande ampleur), ainsi que par les instruments spécifiques qui leur sont appliqués. Par ailleurs, s'il peut exister une entité officiellement responsable de la protection des consommateurs, dans le cadre de leurs missions, diverses agences traitent des questions de la protection des consommateurs, ce qui signifie que la politique à l'égard des consommateurs ne peut pas être intégrée de manière aussi complète que la politique de la concurrence.

Ces difficultés peuvent être surmontées en imposant, au minimum, à l'autorité de la concurrence d'avoir accès en interne aux compétences nécessaires à la formulation de la politique à l'égard des consommateurs et en rendant obligatoire, au sein d'une agence, une supervision « à l'échelle de l'administration » de la protection des consommateurs, qui prenne également en compte les préoccupations relatives à la concurrence.

Le Président remarque que le Royaume-Uni, représenté par Colin Brown, a adopté une stratégie particulièrement novatrice pour l'intégration des deux politiques.

Colin Brown

M. Brown présente deux arguments. Tout d'abord, l'intégration des deux fonctions permet d'envisager un problème sous une double perspective. Le Royaume-Uni est en mesure d'analyser un marché sans idée préconçue : une fois le problème identifié, on lui applique la solution la plus efficace, qu'elle relève de la concurrence ou de la protection des consommateurs. C'est cette stratégie qui a été mise en œuvre dans les secteurs de l'immobilier, de la vente de billets pour les manifestations publiques, des garanties pour les véhicules neufs et du crédit. Ensuite, en ce qui concerne les compétences, les spécialistes de la concurrence et de la consommation ont généralement des bagages différents, notamment en termes de formation, ce qui les conduit à approcher différemment les problèmes. Selon les termes de M. Brown, ces spécialistes sont constitués en « deux familles solides, devenues consanguines» et leur intégration permet de « mélanger le patrimoine génétique ».

Chuan Leong Lam

À Singapour, les deux politiques sont administrées séparément. Le consommateur est considéré comme l'une des nombreuses parties prenantes de l'économie nationale et il convient parfois d'effectuer un arbitrage entre les intérêts de ces différents groupes. C'est bien l'entreprise qui, en dernier ressort, crée les emplois, soutient la croissance et encourage l'innovation. Singapour est une petite économie ouverte : elle est fortement dépendante des investissements étrangers et ses entreprises doivent préserver leur compétitivité au sein du marché mondial. Un arbitrage entre les différentes politiques est donc parfois nécessaire pour y parvenir.

Le Président remercie M. Lam pour avoir soulevé un point crucial et souvent négligé : les individus peuvent avoir des intérêts économiques contradictoires, par exemple en tant que salariés (préférant travailler pour une entreprise en situation de monopole, synonyme de sécurité de l'emploi et de salaires plus élevés) et en tant que consommateurs (préférant acheter des biens et des services à des prix compétitifs). La prise de position de chacun sur certaines questions clés peut donc varier en fonction de son rôle au sein de l'économie.

Hetham Hani Jamel Abu Karky

Le regroupement des deux politiques au sein d'une même entité offre des avantages, notamment un enrichissement mutuel puisque chaque organe de contrôle peut aider l'autre à mieux appréhender les mécanismes du marché.

Barbara Lee

La Jamaïque étant un petit pays, il était plus logique du point de vue des ressources de créer, dans un premier temps, une seule entité regroupant les deux fonctions. Par la suite a été créée la Consumer Affairs Commission mais l'autorité de la concurrence conserve la responsabilité des affaires de publicité mensongère. Au départ, l'implication de la FTC dans la protection des consommateurs était positive pour la politique de la concurrence, puisque l'opinion publique est davantage sensibilisée aux questions de consommation. Néanmoins, l'inconvénient était que la plupart des affaires traitées par la FTC au cours des premières années relevaient de la protection des consommateurs, dans la mesure où la commission n'avait pas encore acquis les compétences nécessaires en matière de concurrence et que les affaires relatives à la consommation étaient plus faciles à gérer. L'efficacité de la politique de la concurrence dépendait également de la sensibilisation de l'opinion publique, par exemple sur les raisons de l'engagement de la commission dans la lutte contre les prix d'éviction.

Royaume-Uni

L'Office of Fair Trading procède à une intégration exhaustive de la politique de la concurrence et de la politique à l'égard des consommateurs. Le traitement des affaires relevant de ces deux domaines est centralisé au sein de la Market Project Division. Le processus d'élaboration des politiques est également centralisé de manière à ce que, par exemple, un spécialiste de l'économie comportementale puisse travailler avec un expert de la concurrence au sein d'une même équipe. Les fonctions de prestations de services sont également centralisées, de même que les informations et la connaissance. Enfin, une procédure d'analyse de marché proactive a été mise en place. Cette réforme a eu deux conséquences majeures : une plus grande attention portée aux effets de grande envergure sur le marché par rapport aux impacts spécifiques à court terme et un effort pour améliorer la concurrence à partir de la demande.

Enfin, les pouvoirs publics britanniques ont pris conscience que, si les principes de la concurrence sont relativement limités et précis, la politique à l'égard des consommateurs présente davantage d'incertitudes. Il convient donc de définir plus clairement ses principes et le champ de compétences de l'autorité compétente.

Slovaquie

En Slovaquie, les deux politiques sont mises en œuvre séparément. La politique à l'égard des consommateurs est quant à elle appliquée par différents organes, ce qui compromet la coordination. Le délégué slovaque expose deux exemples : la concurrence est actuellement insuffisante dans le secteur des professions libérales mais aucun organisme ne peut assister l'autorité de la concurrence pour résoudre ce problème. L'autorité de la concurrence dispose de pouvoirs limités et ne peut mettre en œuvre les réformes qu'au coup par coup. Autre exemple : dans la banque de réseau, les difficultés liées au groupage des produits n'ont pas pu être surmontées à l'aide des outils traditionnellement utilisés dans le domaine de la concurrence. Là encore, la coordination avec l'autorité de protection des consommateurs était difficile mais l'autorité de la concurrence a collaboré avec la banque centrale pour proposer un amendement au code éthique de l'association des banques de réseau mettant un terme au problème de groupage.

Japon

Les politiques de la concurrence et de la protection des consommateurs sont étroitement intégrées au Japon. À titre d'exemple, le délégué japonais explique comment la JFTC (Commission de la concurrence japonaise) fait appliquer une loi sur la protection des consommateurs. Cette loi relative aux primes injustifiables et aux déclarations mensongères confère à la JFTC la possibilité d'autoriser les codes de conduite adoptés par certains secteurs ou organisations professionnelles. Pour recevoir le feu vert de la JFTC, le code doit répondre à des critères précis stipulés dans la loi, notamment aux critères suivants : a) le code doit permettre d'éviter toute incitation trompeuse à l'achat et de garantir une concurrence équitable et b) il ne doit pas menacer de manière injustifiée les intérêts généraux des consommateurs et des entreprises concernées. Avant de rendre sa décision, la JFTC tient une audition publique et sollicite des avis extérieurs. Les groupes de consommateurs sont invités à y participer. Si la JFTC approuve un projet de code, il bénéficie d'une exemption par rapport à la loi sur les primes injustifiables et les déclarations mensongères et aux dispositions pertinentes de la loi contre les monopoles.

Canada

Le délégué du Canada commente les avantages et les inconvénients de la centralisation des deux fonctions au sein d'une même entité. Les avantages sont à la fois internes et externes : en interne, un organisme regroupant les deux fonctions peut traiter les affaires d'une manière plus globale, en tenant compte à la fois des aspects liés à la concurrence et des questions de protection des consommateurs. En externe, il est utile de s'appuyer sur cette double perspective pour sélectionner les projets à soutenir. L'initiative des pouvoirs publics canadiens dans le secteur des professions libérales illustre cette double approche. Parmi les inconvénients figure l'allocation des ressources, dans la mesure où les principales parties prenantes des deux politiques sont différentes : les entreprises dans le domaine de la concurrence, les consommateurs en ce qui concerne la politique de la consommation.

Selon le Canada, le commerce électronique constitue l'un des défis futurs à relever. Les consommateurs doivent avoir davantage confiance dans les transactions en ligne. Ils doivent s'y sentir en sécurité et ne pas avoir l'impression d'être trompés, ce qui représente un véritable défi pour la politique de la consommation.

Malte

Le délégué de Malte contribue au débat en offrant le point de vue d'une petite économie. À Malte, le droit de la concurrence et le droit de la consommation sont distincts et le respect de leur application était initialement assuré par des autorités indépendantes. Toutefois, en 2001, ils ont été regroupés au sein de la division en charge des consommateurs et de la concurrence, à la fois pour optimiser la gestion des ressources et pour tirer profit de leur complémentarité. Néanmoins, la petite taille d'un marché tel que celui de Malte, peut conduire à des décisions différentes lors de la mise en œuvre de deux ces politiques. D'un côté, les économies d'échelle élevées liées à la taille du marché peuvent entraîner un fort niveau de concentration, ce qui n'est pas toujours dans le meilleur intérêt du consommateur. De l'autre, les autorités doivent répondre aux demandes de gains de productivité, qui sont avantageux pour le consommateur et améliorent la compétitivité des entreprises locales à l'échelle mondiale. Il est donc parfois nécessaire d'effectuer un arbitrage entre ces objectifs potentiellement contradictoires.

Chili

Au Chili, les deux politiques sont administrées séparément. L'autorité en charge de la protection des consommateurs est beaucoup plus importante que celle de la concurrence. Néanmoins, les deux entités collaborent activement dans le cadre d'un accord de coopération conclu en 2006. Dans les deux cas, il

n'existe pas de système interne pour la mise en œuvre de la réglementation et leurs décisions doivent être mises en application par les tribunaux. A cet égard, l'autorité de protection des consommateurs commence à intervenir dans les affaires de concurrence jugées devant le tribunal si nécessaire.

Dans sa présentation écrite, le Chili décrit une affaire de fusion dans la grande distribution à laquelle ont participé les deux entités. L'autorité de la concurrence a abordé l'affaire de manière traditionnelle, en arguant que le marché concerné, à savoir celui du crédit aux particuliers, deviendrait très concentré : les barrières à l'entrée étant élevées, la nouvelle société pourrait agir de manière unilatérale et non respectueuse de la concurrence. A l'inverse, l'autorité en charge de la protection des consommateurs a mis en avant les préoccupations traditionnelles des consommateurs, évoquant leurs inquiétudes quant à la transaction et aux antécédents de pratiques de crédit abusives des deux sociétés candidates à la fusion. Il y a peu, la Cour suprême chilienne a tranché en faveur des deux autorités : il s'agit en fait de la première fusion non autorisée aux termes de la loi de 2004 sur la concurrence au Chili. Dans son jugement, la Cour suprême stipulait clairement s'être appuyée sur les arguments de l'autorité de protection des consommateurs, ainsi que sur les questions relatives à la concurrence.

BIAC

Le représentant du BIAC exprime sa préférence pour les solutions fondées sur les mécanismes du marché plutôt que sur la réglementation, celle-ci incluant les solutions en faveur des consommateurs qui ne tiendraient pas suffisamment compte des principes de la concurrence. Cependant, dans certains cas, notamment en ce qui concerne la diffusion des informations au public, la concurrence n'est pas entièrement au service des consommateurs. Une coordination est nécessaire entre l'autorité de la concurrence et l'autorité de protection des consommateurs : si une solution visant à protéger les consommateurs est justifiée, elle doit être cohérente avec les principes de concurrence.

Pakistan

Le délégué du Pakistan tire la sonnette d'alarme quant à la complémentarité des deux politiques. De son point de vue, ces dernières présentent de nombreuses différences, tant en termes de domaine de compétence que d'instruments et d'objectifs. Il estime qu'il ne faut pas attendre de l'autorité de la concurrence qu'elle soit en mesure de répondre pleinement aux objectifs et aux attentes en matière de protection des consommateurs.

Hongrie

La Hongrie fait brièvement référence au document soumis en préparation de ce débat, qui contenait une étude de cas consacrée à une enquête sur l'absence de concurrence dans le secteur financier. Les premiers résultats de cette enquête menée par l'autorité de la concurrence révèlent que cette situation est principalement le fruit des difficultés enregistrées par les consommateurs pour changer de fournisseur pour ces produits, ce qui s'explique par un manque d'informations leur permettant de prendre des décisions éclairées. Les solutions proposées pour remédier à cette situation étaient des recours visant à protéger les consommateurs. Ce cas illustre l'interaction entre les politiques de la concurrence et de la consommation : ce qui apparaît comme une affaire de concurrence peut être résolue à l'aide d'outils de protection des consommateurs.

Suisse

Les intérêts des consommateurs varient puisqu'ils couvrent les sphères de l'économie, de la politique, de la législation, de la santé et de la sécurité. Alors que la politique de la concurrence cible principalement les intérêts économiques, la protection des consommateurs est mieux adaptée pour répondre aux besoins

observés dans les autres domaines. En Suisse, si les deux politiques sont administrées séparément, elles sont toutes deux placées sous la tutelle du ministère de l'Économie et coopèrent entre elles. Il convient aussi de noter que les intérêts des consommateurs sont également représentés dans la commission de la concurrence suisse.

Corée

En Corée, les deux politiques étaient administrées séparément à l'origine mais, en 2006, la politique à l'égard des consommateurs a été placée sous la responsabilité de l'autorité de la concurrence, la KFTC. Cette décision avait été précédée de longues discussions sur l'opportunité de regrouper ces deux entités. Elles ont abouti à la conclusion selon laquelle ce regroupement générerait des gains de productivité et permettrait d'intégrer plus facilement ces deux politiques clés.

Irlande

Il existe deux entités distinctes en Irlande, ce qui n'a pas servi au mieux les intérêts des consommateurs du point de vue historique, comme en témoigne le Groceries Order (réglementation sur les produits de consommation courante), qui a rendu illégale la concurrence sur les prix dans le secteur de la distribution. Depuis, ce décret a été aboli et l'autorité nationale de protection des consommateurs a été restructurée en 2007. À terme, les pouvoirs publics irlandais estiment que la coexistence de deux autorités se révélera utile. L'autorité de la concurrence est moins efficace pour défendre les vertus de la concurrence que ne l'est l'organisme de protection des consommateurs et l'alliance de ces deux entités peut être plus efficace pour cette tâche importante.

Russie

En Russie, la commission de la concurrence, le Federal Antimonopoly Service (FAS), a été chargée de veiller au respect du droit de la protection des consommateurs pendant environ 10 ans. En 2004, ce rôle a été transféré à une autre entité mais la FAS demeure au fait des enjeux dans ce domaine. Une affaire récente relative au crédit à la consommation en témoigne : il a été déterminé que les établissements de crédit diffusaient des informations incomplètes à leurs clients sur le coût réel de leur emprunt. Le FAS a toutefois estimé qu'il ne pouvait pas appliquer efficacement le droit de la concurrence et les législations connexes dans ce cas, qui impliquaient plusieurs centaines de dossiers. Il a donc travaillé aux côtés de la banque centrale pour élaborer des recommandations volontaires concernant la transparence de l'information fournie par les organismes de crédit et s'est fortement engagé pour la défense des principes de la concurrence. Résultat : la banque centrale a adopté une nouvelle réglementation en matière de transparence et la loi sur la protection des consommateurs a récemment été amendée dans ce sens.

Gabon

Au Gabon, les deux fonctions étaient centralisées au sein d'une même entité. Toutefois, en l'absence d'antécédents réels en matière de protection des consommateurs dans ce pays, cette autorité a été soumise à une forte pression en termes de respect de l'application des lois. Aujourd'hui, le Gabon est confronté à des pratiques abusives dans plusieurs secteurs, comme l'eau, l'électricité et la téléphonie mobile. Une assistance technique pour l'autorité de tutelle et les divers organismes nouvellement créés pour la protection des consommateurs sera nécessaire. À cet égard, le Gabon bénéficie de l'accord de coopération noué avec la France.

Australie

En Australie, politique de la concurrence et protection des consommateurs sont mises en œuvre par la même entité. Aucun conflit ne devrait apparaitre puisqu'il signifierait que les autorités de la concurrence ont une conception trop étroite du bien-être du consommateur. L'efficacité de cette mise en œuvre repose non seulement sur les gains de productivité classiques mais également sur l'équité, la suppression des risques et difficultés inutiles et la mise à disposition des outils nécessaires pour prendre des décisions pertinentes et éclairées. Ainsi, les deux politiques sont totalement cohérentes.

Allan Fels

Le Professeur Fels conclut en quelques mots. Il est évident que les deux politiques sont interdépendantes et que leur regroupement au sein d'une même entité présente des avantages. C'est le mode d'organisation qu'il privilégie lui-même, car il estime qu'il favorise une démarche plus cohérente. Néanmoins, cette organisation entraîne également des risques : l'une des deux politiques peut prendre le pas sur l'autre en termes de ressources ou de priorité et l'on ne peut pas nier que le champ d'application de la politique à l'égard des consommateurs est bien plus étendu que celui de la politique de la concurrence en termes de secteurs et d'activités, qui ne peuvent probablement pas tous être regroupés au sein d'une seule entité.

Le Professeur Fels répond également aux commentaires d'Allan Asher au sujet de l'étude de référence. Cette étude fournit des exemples illustrant la manière dont les marchés ont réagi au manque d'information des consommateurs sans nécessité d'intervention à l'aide de recours visant à protéger l'intérêt du consommateur. Mais elle reconnaît aussi que les entreprises peuvent chercher à exploiter leur avantage dans certaines situations au détriment des consommateurs et que le marché n'est parfois pas apte à fournir des solutions efficaces.

Le Président Kovacic clôt le débat en remerciant tous les participants et recommande à ceux qui souhaitent approfondir la question de lire les documents soumis dans le cadre de la table ronde.