

Unclassified

DAF/COMP/GF/WD(2008)34



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

11-Mar-2008

English - Or. French

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Cancels & replaces the same document of 13 February 2008

Global Forum on Competition

THE INTERFACE BETWEEN COMPETITION AND CONSUMER POLICIES

Contribution from France

-- Session IV --

This contribution is submitted by France under session IV of the Global Forum on Competition to be held on 21 and 22 February 2008.

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JT03242093

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THE INTERFACE BETWEEN COMPETITION AND CONSUMER POLICIES

-- France --

1. 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

2. 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.

3. 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.

4. Ensuring a high degree of competition is the way to attain this objective.

5. 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.

6. 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 segments¹.

¹ Losses which are offset by various mechanisms, such as state subsidies or tariff equalisation with profitable segments.

7. 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.

2. Synergies between competition law and consumer protection in practice

2.1 *An economic approach*

8. 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.

9. 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.

10. 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).

11. 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.

12. 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*

13. 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.

14. 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*

15. 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.

16. 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.

17. 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.

18. 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.

19. 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

20. 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.

21. 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.

22. 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.

23. 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.

24. 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.