

Unclassified

DAF/COMP/GF/WD(2008)37



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

13-Feb-2008

English - Or. English

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

DAF/COMP/GF/WD(2008)37  
Unclassified

## **Global Forum on Competition**

### **THE INTERFACE BETWEEN COMPETITION AND CONSUMER POLICIES**

#### **Contribution from BIAC**

-- Session IV --

*This contribution is submitted by the Business and Industry Advisory Committee (BIAC) under session IV of the Global Forum on Competition to be held on 21 and 22 February 2008.*

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**JT03240371**

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## THE INTERFACE BETWEEN COMPETITION AND CONSUMER POLICIES

-- BIAC --<sup>(\*)</sup>

1. 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

2. 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.<sup>1</sup>

3. 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,”<sup>2</sup> and when competitive remedies are pursued “without sufficient regard to consequential consumer protection issues.”<sup>3</sup>

4. 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.

5. 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

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<sup>(\*)</sup> Paper prepared by William MacLeod, Kelley Drye & Warren LLP, with substantial contribution from BIAC Competition Committee members.

<sup>1</sup> Directorate For Financial and Enterprise Affairs, OECD (2008), Background Note, p. 3.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

consumer protection laws can inhibit the flow of information. Either consequence can prevent consumers from finding and rewarding the best competitors.

6. 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 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.

7. 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.

8. 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**

9. Competition policy seeks to maximize 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.

10. 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.”<sup>4</sup>

11. 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.”<sup>5</sup> A recent Chairman of the U.S. FTC has voiced similar observations.<sup>6</sup> In Canada, consumer

<sup>4</sup> 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).

<sup>5</sup> See e.g., MacLeod (1988), 'Federal And State Enforcement Agencies: Current Activities and Priorities: FTC Consumer Protection Activities' 57 *Antitrust L.J.* 163.

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 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"<sup>7</sup>.

12. 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.<sup>8</sup> Encouraged by agencies in member countries, commentators continue to document progress in theory and practice.<sup>9</sup>

13. 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 reorganization echoes the economic theory in the literature:

Our view is that it 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.<sup>10</sup>

In France, the enforcement authority, *Direction Générale de la 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.

14. 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.<sup>11</sup> The comments examined

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<sup>6</sup> 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.

<sup>7</sup> Ordinary Price Provisions of the Competition Act, <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00844e.html>

<sup>8</sup> OECD, Joint Meeting of the Competition Committee and the Committee on Consumer Policy on Cross-Border Enforcement Cooperation, October 13, 2004.

<sup>9</sup> 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;.

<sup>10</sup> Office of Fair Trading Annual Plan 2007-2008, p. 6 available at [http://www.oft.gov.uk/shared\\_oft/about\\_oft/349517/ap08.pdf](http://www.oft.gov.uk/shared_oft/about_oft/349517/ap08.pdf).

<sup>11</sup> 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

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 estimated that the Commission's comments have saved consumers more money annually than the agency's entire budget.<sup>12</sup> 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.

15. 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.<sup>13</sup> 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.<sup>14</sup>

16. While the benefits of cross fertilization 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.<sup>15</sup> Therefore, finding the best method of benefiting consumers is often largely within the discretion of the competition regulators.

17. 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.<sup>16</sup> Finding that neither consumers nor competitors had suffered under the Associations rules, the court ordered dismissal of the action.

18. 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.

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Policy, Charles River Associates, *available at* <http://www.ftc.gov/speeches/majoras/050208currebtopics.pdf>.

<sup>12</sup>

*Id.*

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*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).

<sup>14</sup>

*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](http://europa.eu.int/eur-lex/en/consleg/pdf/1997/en_1997L0055_do_001.pdf)>.

<sup>15</sup>

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.

<sup>16</sup>

*California Dental Association v. F.T.C.*, 224 F.3d 942 (9<sup>th</sup> Cir. 2000).

### 3. Application of the Principles Across Disciplines Requires Due Consideration of the “Consumer”

19. 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 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.

20. 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.

21. 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.<sup>17</sup>

22. 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.<sup>18</sup> 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.<sup>19</sup>

23. 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 misled, 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,

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<sup>17</sup> 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](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0427(07):EN:HTML)

<sup>18</sup> 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).

<sup>19</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

vertical restraints, information exchanges, aggressive tactics and many other issues of competitive analysis cannot be assessed without taking into account the characteristics of customers.

24. Proper characterization 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 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.

25. 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.<sup>20</sup> This may be counterbalanced by other factors in each case, but failure to correctly categorize the consumer in the context of competition enforcement has the potential to harm the very consumers that the regulators are trying to protect.

26. 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.<sup>21</sup>

27. 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**

28. 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

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<sup>20</sup> 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.

<sup>21</sup> *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.shtml> (\$100 million in redress for customers allegedly injured by price fixing).

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.

29. Useful mechanisms for intervention can include:

- Industry Guidance
- Policy Statements
- Enforcement Actions
- Regulations
- Legislation

30. 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.

31. 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 scrutinize the claims of advertisers based on some fundamental “red flag” principles.<sup>22</sup> 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.

32. Enforcement actions are a useful mechanism but can be an 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.

33. 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

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<sup>22</sup> 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>.

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.

34. 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:

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.<sup>23</sup>

35. 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.

36. 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. Recognizing 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.<sup>24</sup> The Office of Communications in the UK (OfCom), however, decided to ban advertisements for many foods to children and teenagers.<sup>25</sup> 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.

37. 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.

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<sup>23</sup> United Kingdom (2008) 'The Interface Between Competition And Consumer Policies,' Contribution from the United Kingdom.

<sup>24</sup> 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](http://ec.europa.eu/health/ph_determinants/life_style/nutrition/platform/platform_en.htm).

<sup>25</sup> 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/>.

38. 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.<sup>26</sup> 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.<sup>27</sup> The Court dismissed arguments that the restraints were 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.

39. 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.

40. 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.

41. 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 modeling 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?

42. 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 realization 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.

43. 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.

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<sup>26</sup> See, e.g., MacLeod (2005) 'Three Rules And A Constitution: Consumer Protection Finds Its Limits In Competition Policy, 72 *Antitrust L.J.* 943.

<sup>27</sup> *Granholm v. Heald*, 544 U.S. 460 (2005).

## 5. Conclusion

44. 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 recognize efficiencies of horizontal restraints, network effects or economies of scale. To the extent that consideration of consumer policy can help authorities recognize 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.

45. 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.