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Review of application and implementation of the Set

Model Law on Competition (2010) – Chapter VIII

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Some possible aspects of consumer protection

In a number of countries, consumer protection legislation is separate from restrictive business practices legislation.

COMMENTARIES ON CHAPTER VIII AND ALTERNATIVE APPROACHES IN EXISTING LEGISLATION

Introduction

1. While consumer protection and competition policies share a common goal, which is the promotion of consumer welfare, the two policies address this goal from different perspectives, and there are important differences in how the two policies are executed.
2. Before dealing with the relationship between consumer protection and competition laws and policies, which is addressed by Chapter VIII of the Model Law on Competition, it appears useful to provide some basic information on consumer protection.

Rationale for and contents of consumer protection legislation

3. Consumer protection legislation is based on the finding that consumers often face imbalances in economic terms, educational levels and bargaining power, compared to the companies they deal with. Therefore, the typical consumer protection law seeks to correct or compensate for this weaker position and thereby contribute to consumer welfare. The ways to achieve this objective differ significantly between different countries. Indeed, it can be stated that consumer protection legislation is much more diverse than competition laws. According to the United Nations Guidelines for Consumer Protection,¹ which provide some guidance for the design of consumer protection legislation, it is recommended that such legislation address the following aspects:

- “(a) The protection of consumers from hazards to their health and safety;
- (b) The promotion and protection of the economic interests of consumers;
- (c) Access of consumers to adequate information to enable them to make informed choices according to individual wishes and needs;
- (d) Consumer education, including education on the environmental, social and economic impacts of consumer choice;
- (e) Availability of effective consumer redress;

¹ United Nations Guidelines for Consumer Protection (as expanded in 1999), available at: http://www.un.org/esa/sustdev/publications/consumption_en.pdf.

- (f) Freedom to form consumer and other relevant groups or organizations and the opportunity of such organizations to present their views in decision-making processes affecting them;
- (g) The promotion of sustainable consumption patterns.”

4. Below, we provide some examples of how these different aspects can be translated into consumer protection legislation.

Product safety regulation

5. For some time now, one of the key issues in consumer protection legislation has been product safety. Product safety regulation has grown out of consumers’ growing expectations about the quality of the products that are supplied to them. National safety regulations are complemented by national or international standards, voluntary standards, and the maintenance of safety records, to ensure that products are safe for either intended or normally foreseeable use. Australia may be quoted as an example of a country with a well-designed enforcement system for product safety regulation. Since 2008, the Australian Consumer and Competition Commission (ACCC) has enjoyed new powers to promote product safety, including the power to issue infringement notices, the power to rapidly publish product safety warnings, and the power to disqualify managers of corporations (for example) which sell or produce products that do not comply with mandatory safety rules.²

Protection from false or misleading information

6. Generally, the traditional purview of consumer protection legislation is the prevention of unfair trade practices. In this regard, there is much legislation preventing businesses or trade associations from disseminating false or misleading information about a product, whether on the label of the product or via a marketing campaign. For example, the Barbados Consumer Protection Act broadly states that “a person shall not, in trade or commerce as a supplier, engage in conduct that is, or is likely to be, misleading or deceptive.” The legislation goes on to list a number of situations that could be deemed “misleading” or “deceptive”, for example, falsely representing that goods are of a particular standard; falsely representing that goods have a certain performance characteristic; misleading representations about the existence of conditions, warranties, rights or remedies in relation to a good or service.³

Control of standard contract terms

7. In some industries, businesses use standard form contracts with mandatory terms included that essentially compel a customer to accept the terms; the freedom of the consumer to contract and exercise his or her choice is therefore limited. Some countries have adopted regulations, for specified sectors, that dictate the compliance of business with standardized/model contracts. Other jurisdictions provide for a specific procedure in order for those standard contract terms to be incorporated into a consumer contract, and allow for in-depth control of the respective terms by a judge. For instance, in line with the European Union’s Unfair Contract Terms Directive,⁴ the German Civil Code requires that, prior to concluding a consumer contract, the consumer be made

² Australian Trade Practices Act 1974, Act No. 51 of 1974 as amended. Also, for more information on how the reforms were introduced, see:

<http://www.productsafety.gov.au/content/index.phtml/tag/ChangesInLegislation>.

³ Barbados Fair Competition Act 2002-19, CAP.326C, Sections 12 and 13.

⁴ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, O.J. 1993 L95/29.

aware of the incorporation of standard terms into the contract, and that he or she be given the possibility to read the relevant standard terms. Furthermore, standard contract terms in consumer contracts can be examined by a judge and declared void if they are unfair.⁵ This control of contract terms constitutes a limitation on freedom of contract.

Information disclosure requirements

8. Given the need of consumers to have access to sufficient information in order to make an informed choice about the products and services they would like to purchase, and taking into account the imbalance of information between consumers and producers/distributors, it may be appropriate to mandate information disclosure by the latter. For example, a rule can be designed to ensure that specified, critical information is available to consumers, allowing consumers to make more informed decisions about which product or service to purchase. One example of a very common disclosure requirement is compulsory labelling of products. Food, in particular, often needs to be labelled in a very detailed way, providing information that is crucial for consumers' health.

9. If rules are focused on information availability, rules or systems must also be created so that the consumer can process the complex information that is available to him or her. In designing rules, it should be remembered that information is not always key, as information overload can simply promote confusion and inertia. To complement an information disclosure rule, lawmakers can design functional systems which help consumers to process the information, and which can also be used for getting tips and tools to consumers.

10. For example, the EU's Consumer Scoreboard is a system which investigates and monitors markets from the perspective of the consumer. An Annual Consumer Scoreboard Report is prepared, which provides information on price, complaints, safety, satisfaction and switching in consumer retail markets. Data and attitudes of consumers vis-à-vis cross-border trade with a view to tracking progress in retail market integration are catalogued; data are also catalogued on enforcement, redress, and the handling of complaints, with the aim of establishing consumer conditions at the EU level and the Member State level. The data are collected using EU-wide surveys and are then processed and analysed. The data from the scoreboard are expected to help in the enforcement of existing legislation and in the design of targeted codes of conduct for businesses, and will also be used to empower consumers with clear and manageable information, to make choices, avoid fraud and exercise their rights.⁶

Mandatory codes of conduct or rules of behaviour

11. In addition to mandating certain rules of behaviour, there appears to be a growing trend towards encouraging businesses to self-regulate, subject to the approval of the consumer protection agency.

12. For instance, the United Kingdom's Office of Fair Trading (OFT) Consumer Codes Approval Scheme (CCAS) grants its approval to groups of businesses, via their trade association, that voluntarily undertake a code of conduct that promotes or protects consumer interests, and which meets with the criteria set by the OFT to govern the scheme. Effectively, trade associations draft self-regulatory rules aimed at addressing specific consumer concerns, such as the need for pre-contractual information disclosure, truthful advertising and labelling, and fair contractual terms

⁵ See sections 305 to 310 of the German Civil Code (Bürgerliches Gesetzbuch).

⁶ Communication from the European Commission, "Monitoring consumer outcomes in the single market: the Consumer Markets Scoreboard", 29 January 2008, COM(2008) 31 final.

and conditions. The code is submitted to the OFT, and in order to secure the OFT's "seal" of approval, certain core criteria must be met; for example, membership must include a majority of the firms in a sector; observation and compliance with the code must be mandated for all members; code sponsors should have access to adequate funding and resources to accomplish the objectives of the code, and they must also be able to demonstrate that organizations representing consumers, as well as enforcement bodies, were consulted throughout the preparation of the code.⁷

13. In Japan, the Premiums and Representation Act also provides for self-regulation. Its Article 12 states that "[an] entrepreneur or a trade association may, upon obtaining authorization from the Fair Trade Commission pursuant to the Rules of the Fair Trade Commission, with respect to the matters relevant to premiums or representations, conclude or establish an agreement or a rule, aiming at prevention of unjust inducement of customers and securing fair competition. The same shall apply in the event alterations thereof are attempted."⁸

Functioning of competition and consumer protection legislation

14. As mentioned earlier, while competition and consumer protection legislation share a common goal, which is to promote consumer welfare, this goal is achieved in different ways. Competition law promotes a range of choices/options in services and goods available to the consumer through the protection of competition; whereas consumer protection law gives access and freedom to select among the available choices/options. The two policies address the same goal from different perspectives. Competition law uses a set of rules, in a general and uniform manner, to bring about benefit to the market as a whole; consumer protection law uses targeted rules, addressed at specific sectors sometimes, to create a more empowered and advantaged consumer. Whereas competition law prioritizes market competitiveness, consumer protection law is not preoccupied with the level of competition in a market.

15. Competition law rules are squarely directed at the market and are designed around regulating the way firms compete with each other in a market, with a view to promoting competition among firms and thereby enhancing consumer choice. Consumer protection law has a more diverse range of rules, which address the conduct of firms and the standards by which they operate, and the rules of engagement between individual businesses and consumers, with a view to promoting access to goods and services, promoting greater quality in the choice available, and ensuring consumer access to reliable and undistorted information to assist the consumer in making that choice. Whereas the benefit of competition law is usually quantified in economic terms, the benefit of consumer protection law can be economic, and it can also engender non-economic quantities of value such as the safety and health of the consumer. The subjects of the rules are therefore sometimes different.

16. As a matter of general application of the law, competition laws have an applicable limit in the sense that competition rules of exclusionary conduct and collusion cannot be manipulated to bring about change in a particular sector or in the structure of a particular market. The rules are generally applied uniformly across the board. Consumer protection laws, on the other hand, can be used to impose rules of behaviour on firms in a particular sector to give consumers better information on choice, access to safer goods, and redress in the case of misleading contract terms.

⁷ Office of Fair Trading "Consumer Codes Approval Scheme. Core Criteria and Guidance", OFT 390, March 2008.

⁸ Act Against Unjustifiable Premiums and Misleading Representations, Law No.134 of 1962.

In addition, consumer protection law is rights protection at the level of the individual transaction, providing rights protection against a range of abuses; whereas competition law occurs at the level of the marketplace, carrying out its agenda by promoting consumer interests not at the transactional level but at the level of firms in the relevant market.

17. With respect to the design of remedies, it is important to note that consumer protection law remedies can be far more targeted than competition law remedies; the remedies of consumer protection law, like the prescribed rules, can go beyond fines and prohibition of conduct. A wider array of tools can therefore be employed in this regard. For example, restitution via compensatory damages is one option; so too are prevention and deterrence via fines, punishment via imprisonment, and suspension of business licences. As regards restitution in particular, since consumer protection law is usually grounded in principles of fairness and balance of rights, restitution will be one of the more effective remedial tools. For example, restitution allows remedies to develop in a less rigid manner, allowing for the particular facts of the case to dictate an equitable outcome for both the firm and the consumer. As a general guide to remedy design, it should be noted that one key element in determining the choice of remedy in consumer protection law appears to be that the magnitude of the sanction must outweigh the opportunistic infringing conduct.⁹

18. While acknowledging the different modes of functioning of consumer protection and competition laws, it should be remembered that competition issues are closely related to protection of consumers' economic interests. In fact, Canada has acknowledged how the policies enhance each other:

19. "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 [...]"¹⁰

The interface between consumer protection and competition law

20. Given the common goals of consumer protection and competition policy and law, and taking into account their significantly different ways of functioning, the question arises of how to design their interface, both on the legislative and the enforcement level.

Legislative level

21. Chapter VIII of the Model Law on Competition states that in a number of countries, consumer protection legislation is separate from competition legislation. In fact, the present trend in countries adopting such legislation seems to be the enactment of two separate laws – one on

⁹ Cseres K (2009). Competition and consumer policies: Starting points for better convergence. Amsterdam Centre for Law and Economics working paper no. 2009-06. 1 April. Available at: <http://ssrn.com/abstract=1379322>.

And: Garoupa N (1997). The theory of optimal law enforcement. 11 *Journal of Economic Surveys*, 267–296.

¹⁰ OECD Global Forum on Competition (2008). The interface between competition and consumer policies. DAF/COMP/GF(2008)10. 5 June.

competition and the other on consumer protection. For example, in young competition regimes, such as those of Barbados and Jamaica, and at the Community level in CARICOM, competition law and consumer protection law are dealt with under separate legislation. The same applies to Switzerland. In some countries and regions, however, such as Australia, France, Hungary and Poland, and in CARICOM's regional law, the competition law contains a chapter devoted to consumer protection. This is also the case, for example, in Lithuania and in the Bolivarian Republic of Venezuela, where the competition laws contain regulations on "unfair trade practices". In Canada, the Competition Act contains provisions dealing with misleading advertising and deceptive marketing practices. These provisions are designed to ensure that consumers are provided with basic, uniform and accurate information on certain consumer products, and to proscribe deceptive and false representations.

Enforcement level

22. The approach reflected by the Model Law on Competition – that of drafting two separate laws – does not prevent a coordinated approach to policy development, and although consumer protection legislation may be developed separately from consumer protection legislation, the laws can be enforced in a coordinated way, which allows the policies to complement and enhance one another. Also, because of the links between the two bodies of law, the administration of these laws is often the responsibility of the same authority. This is the case, for example, in Algeria, Australia, Colombia, Costa Rica, Finland, France, New Zealand, Panama, Peru, Poland, the Russian Federation, Sri Lanka, the United Kingdom and the United States, and in Hungary and Italy¹¹ at least to a certain extent.

23. In other jurisdictions, the administration of competition and consumer protection laws is attributed to different authorities. For instance, in Estonia, consumer protection legislation and the Consumer Protection Authority are separate from competition legislation and the Competition Board. However, the Estonian Competition Act also contains provisions on unfair trade practices. Contraventions of these provisions are determined by a civil court. In Zambia, consumer protection legislation is covered under section 12 of the Competition Law. However, it does not deal with specific matters of consumer welfare, such as public health, standards, sales, and hire purchase. Therefore, in administering consumer protection, the Competition Commission works closely with other bodies such as local authorities, the Bureau of Standards, and the public health service.

24. The trend in institutional design seems to be to house the consumer protection agency with the competition authority. Indeed, there appear to be far more countries housing their competition authorities with their consumer protection agencies – even though a separate department is created for each agency in most instances, for example Australia, Barbados, Canada, France, Jamaica, Japan, Malta, Papua New Guinea, Poland, the Republic of Korea, and the United States, to name a few. Designing a competition authority of dual competence – competition law enforcement and consumer protection – could create synergies if there is effective coordination. For example, dual competence of an agency gives rise to centralized management, operational efficiencies, case teams with a range and diversity of disciplines, and the efficient use of available expertise. Of course, there are disadvantages, too, for while the two areas of law are similar, it is

¹¹ In order to protect the interests of consumers and to foster fair market practices, the Hungarian Parliament, in 2008, implemented the Unfair Commercial Practices Directive 2005/29, which was incorporated into Hungarian law by Act XLVII of 2008 on the Prohibition of Unfair Business-to-Consumer Commercial Practices. In accordance with the provisions of the Act, there are three different authorities that are responsible for consumer protection: the Hungarian Competition Authority (GVH), the Hungarian Financial Supervisory Authority (PSZÁF), and the Hungarian Consumer Protection Authority (NFH).

sometimes difficult to coordinate the procedures for a law that applies at the individual consumer level with those for a law that applies at the market level; and it is sometimes difficult to coordinate the laws at the case level.¹² Despite the trend towards dual competence, there is nothing to prevent lawmakers from housing the agencies separately. It should also be noted that even in cases where there are separate agencies, it is possible to coordinate the activities of both agencies through the establishment of an oversight committee or a central commission, which seats representatives from the competition authority and from the consumer protection agency, as well as individuals from other government departments and ministries.¹³

¹² OECD Global Forum on Competition (2008). The interface between competition and consumer policies. DAF/COMP/GF(2008)10. 5 June.

¹³ *ibid.*