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**‘CONSUMER DETRIMENT’ AND ITS APPLICATION IN EC AND UK
COMPETITION LAW**

By

Dr Philip Marsden

and

Mr Peter Whelan

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‘CONSUMER DETRIMENT’ AND ITS APPLICATION IN EC AND UK COMPETITION LAW*

INTRODUCTION

Modern competition law usually seeks to protect the process of free market competition in order to ensure efficient allocation of scarce economic resources.¹ It is commonly believed that the pursuit of this objective helps to ensure that both allocative and productive efficiency is maximised;² and that these efficiencies ultimately create tangible benefits for the consumer, including *inter alia* lower costs and prices; improvements in quality, choice, and services; and the introduction of new and innovative products. Competition law, while ultimately concerned with the interests of consumers and with consumer welfare in general, does not require proof of direct harm to consumers in order for its prohibitions to bite. In fact it is arguably enough to state that competition law is concerned with the protection of the ‘competitive process’. Protecting this process in itself, so the theory runs, ensures that the interests of consumers are safeguarded. As a consequence of this theory, consumer detriment (however it may manifest itself) is generally presumed to be present whenever the competitive process is damaged. While such a presumption can

* The authors are Dr Philip Marsden and Peter Whelan, respectively Director and Senior Research Fellow, and Junior Research Fellow, at the Competition Law Forum, British Institute of International and Comparative Law. Please note that this article will appear in the October 2006 edition of the *European Competition Law Review*. The authors would like to thank Margaret Bloom, Phil Evans, Michael Hutchings, Alena Kozakova and John Noble for their helpful comments. Any errors of course remain the responsibility of the authors. Comments from readers are welcome; e-mails: p.marsden@biicl.org and p.whelan@biicl.org.

¹ See for example paragraphs 12 and 23 respectively of the *European Commission Notice on the Application of Article 81(3) EC*, OJ C 101, 27.04.2004, 97-118: ‘the objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources’; and ‘the aim of the Community competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources’. EC competition law also views single market integration as a method of ensuring the efficient allocation of resources throughout the Community for the benefit of consumers: see for example paragraph 12, *ibid*.

² It could also be argued that dynamic efficiency may also be stimulated by the process of free market competition. This view however has been questioned. See: Whish, *Competition Law* (LexisNexis Butterworths 2003), at 4; and Galbraith, *American Capitalism: The Concept of Countervailing Power* (Houghton Mifflin, 1952).

indeed be questioned,³ it appears for the moment at least to be an established element of both EC and UK competition law. That said, however, it is still possible to find direct references to the concept of ‘consumer detriment’ in European and UK legislation, jurisprudence and soft law.

The purpose of this short article is to highlight the most important legal references to consumer detriment (and benefit)⁴ under both of these competition law⁵ regimes in order: (i) to come to a basic understanding of the concept of ‘consumer detriment’ as interpreted by the relevant EC and UK legal authorities; and (ii) to highlight any points of comparison or contrast between the respective approaches of the EC and UK competition authorities and courts on this issue.⁶ This article is divided into three parts: Part I identifies direct references to the concept of consumer detriment (and benefit where relevant) under EC and UK legislation and soft law;⁷ Part II considers direct references to such concepts in EC and UK jurisprudence; and Part III provides some basic observations on the EC and UK approaches to both consumer detriment and consumer benefit.

³ See for example the speech given by Philip Collins, Chairman of the Office of Fair Trading, at the British Institute of International and Comparative Law on the reform of Article 82 EC where he suggests that in Article 82 cases it may be appropriate to require competition authorities to put forward a plausible theory as to why the elimination of an ‘as efficient competitor’ in the particular market in question would or could result in consumer harm; available online at the following website: <http://www.offt.gov.uk/News/Speeches+and+articles/2006/0206.htm>, at 3.

⁴ It is perhaps wise to state at this point that this article is concerned primarily with the concept of ‘consumer detriment’ in both EC and UK competition law. We are however conscious of a potential inverse relationship between consumer detriment and consumer benefit. This article will thus deal with references to consumer benefit where they add to understanding of what is meant by consumer detriment.

⁵ This article details the treatment of consumer interests under the competition (i.e. antitrust and merger) law of both the EC and the UK; it does not consider how these interests are dealt with under the consumer protection law of either of these jurisdictions. We recognise, and wish to highlight here, that both competition law and consumer protection law often pursue different goals, sometimes through different enforcers, and usually with different sanctions. (See for example: Pomar, ‘EC Consumer Protection Law and EC Competition Law: How Related Are They? A Law and Economic Perspective’, Barcelona, January 2003, available at: www.indret.com; and Jenkins, ‘Protecting Consumers: Does Competition Policy Help’ [2005] Comp Law 283.) Although we have not studied EC or UK consumer protection law as part of this project, we do acknowledge that the interface between consumer protection legislation and competition law is an area that may need to be explored in the future.

⁶ It must be stated at the outset that this short article does not purport to be a definitive statement on the definition of consumer harm within either the EC or the UK; indeed, due to constraints of time and resources, this article can only claim to be a reflection of perceived general trends.

⁷ By ‘soft law’ we mean legal provisions that are weakened by an absence of sanctions, precision, or delegation of authority. See Marsden and Whelan, ‘The Contribution of Bilateral Trade or Competition Agreements to Competition Law Enforcement Cooperation between Canada and Costa Rica’, London: CEPR, 2005, available at <http://www.biiicl.org/clf/research>, at 29.

**PART I: DIRECT REFERENCES TO CONSUMER DETRIMENT/BENEFIT IN EC AND UK
COMPETITION LEGISLATION AND SOFT LAW**

This section will detail direct references to consumers and consumer detriment/benefit in competition legislation and competition soft law. Legislation in this context refers to Article 81 EC, Article 82 EC, the European Community Merger Regulation (ECMR) and related regulations for the EC, and the Competition Act 1998 and the Enterprise Act 2002 for the UK regime. Soft law may take the form of notices or guidelines; it is a feature of both EC and UK competition law. The legislation and soft law set out in this section will facilitate deeper understanding of the context in which consumer detriment/benefit is discussed in the section on jurisprudence (Part II).

EUROPEAN COMPETITION LAW

Legislation

Article 81(1) EC prohibits agreements between undertakings, decisions of associations of undertakings, and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. This provision provides a non-exhaustive list of agreements which may be prohibited. Article 81(1) EC does not directly mention ‘to the detriment of consumers’, ‘to the prejudice of consumers’ etc. However, it does not take too much effort to appreciate to some degree how consumers may be adversely affected if the examples detailed in paragraphs (a) to (d) are proven in a given situation. For example: prices may be fixed at an artificially high level (paragraph (a)); there may be less choice for the consumer (paragraph (b)); or prices may be excessive in relation to the prices charged to other consumers (paragraph (c)). Article 81(3) provides a limited exemption from Article 81(1):

The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
 - (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
 - (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Two positive and two negative conditions need to be fulfilled for the above exemption to apply. An important (positive) condition is that the benefit created by an agreement is shared with consumers. In the words of the article, one of the cumulative conditions for exemption is that the consumer must be allowed ‘a fair share of the resulting benefit’.

Article 82 EC prohibits an abuse by one or more undertakings of a dominant position within the common market. The non-exhaustive list of examples in this article resembles almost word-for-word the examples set out in Article 81(1). The exception is paragraph (b). Here an abuse may consist in ‘limiting production, markets, or technical development *to the prejudice of consumers*’.⁸ This is the only direct reference to ‘consumer’ in this article; there is no equivalent to Article 81(3) for Article 82.

The European Community Merger Regulation prohibits as incompatible with the common market those concentrations with a community dimension which significantly impede effective competition on the common market or a substantial part thereof, in particular through the creation or strengthening of a dominant position. Recital 29 of the ECMR states that it ‘is possible that the efficiencies brought about by a concentration [may] counteract the effects on competition, and *in particular the potential harm to consumers*, that it might otherwise have’ and that, as a consequence, the concentration may not violate the substantive test.⁹ In making its appraisal under

⁸ Emphasis added. ‘Consumer’ in Article 82 EC encompasses both the intermediate and the ultimate consumer. See the paragraph dealing with the definition of consumer *infra*.

⁹ Emphasis added.

the ECMR the Commission shall take into account *inter alia* ‘the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition’: Article 2(1)(b) ECMR.

The entity ‘consumer’ is not defined in EC competition legislation. Jurisprudence and soft law do however ensure that the concept is given a broad definition whenever it is alluded to in EC competition law: a ‘consumer’ may not only mean a member of the public who purchases goods for personal use but also those who purchase goods in the course of their trade.¹⁰ According to the *European Commission Notice on the Application of Article 81(3)*

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.¹¹

In relation to mergers an expansive approach to the concept of ‘consumer’ is also followed: the Commission takes into account *inter alia* the interests of both the ‘intermediate’ and ‘ultimate’ consumers when appraising a concentration with a community dimension under EC law.¹²

It should be noted from the above that neither ‘consumer detriment’ nor ‘consumer benefit’ are defined in the EC antitrust provisions¹³ or in the European Community Merger Regulation.¹⁴ As will become apparent below, the UK Enterprise Act 2002, by contrast, contains a definition of consumer detriment that may be applied in relation to mergers and to market investigation references.

¹⁰ See for example: *Re ACEC/Berliet Agreements* JO [1968] L 201/7, [1968] CMLR D35; and *Kabel-und Metallwerke Neumeyer AG and Etablissements Luchaire SA Agreement* OJ [1975] L 222/34, [1975] 2 CMLR D40. See also Whish, *op. cit.*, at 156.

¹¹ *European Commission Notice on the Application of Article 81(3)*, *op. cit.*, at paragraph 84.

¹² Article 2(1)(b) ECMR.

¹³ Likewise, the *Guidelines on Article 81(3) EC* do not contain substantial guidance of importance on this issue.

¹⁴ Although ‘consumer benefit’ is not defined in Article 81(3) EC it appears from the wording of this article that the benefit itself must result from the improvement in production or distribution or the economic or technical progress that constitutes the first condition for exemption.

Soft Law

There are only a few direct references to consumers and consumer detriment/benefit in EC competition soft law. For example, the Commission believes that restrictions of competition by object such as price fixing and market sharing ‘*reduce output and raise prices*, leading to a misallocation of resources, because goods and services demanded by customers are not produced’.¹⁵ This is a form of consumer detriment. According to the Commission such practices result in a reduction in consumer welfare as consumers must pay higher prices for the goods and services in question.¹⁶ Fining policy and leniency have been informed by the concept of harm to consumers. In assessing the gravity of the infringement—and thus the level of fine to be paid—it is necessary to consider ‘the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers’.¹⁷ This is an express recognition of an important role of competition law, *viz.* the protection of consumer interests through effective competition. It should be noted however that despite the potential of consumer detriment to affect the level of fines paid for EC competition law violations, there is no mention of consumer harm in the list of aggravating (or mitigating) circumstances which can influence the fine. The amended Commission notice on leniency states that, as well as harming European industry, secret cartels between two or more competitors aimed at fixing prices, production or sales quotas, sharing markets including bid-rigging or restricting imports or exports ‘are among the most serious restrictions of competition encountered by the Commission and ultimately result in *increased prices and reduced choice for the consumer*’.¹⁸ Again harm to consumers is highlighted.

The *European Commission Notice on the Application of Article 81(3) EC* contains some interesting statements relating to consumers, consumer detriment and consumer

¹⁵ *European Commission Notice on the Application of Article 81(3) EC*, *op. cit.* at paragraph 21 (emphasis added).

¹⁶ *Ibid.*

¹⁷ *Guidelines on the Method of Setting Fines Imposed Pursuant to Article 15(2) of Regulation No. 17 and Article 65(5) of the ECSC Treaty*, OJ 1998, No. C9/3, at paragraph 1.A.

¹⁸ *European Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases*, (2002, Amended), at paragraph 1, available online at the following website: <http://europa.eu.int/comm/competition/antitrust/legislation/leniency.html>.

benefit. We have already seen how this notice places the notion of ‘consumer welfare’ in the hierarchy of competition law analysis.¹⁹ The notice also asserts that the more substantial the impact of the agreement on competition, the more likely it is that consumers will suffer in the long run.²⁰ Further, the following rule is established: the greater the restriction of competition found under Article 81(1) the greater the efficiencies and pass-on to consumers must be in order for an exemption to be granted.²¹ According to this notice the Commission expressly considers price rises to be a consumer detriment; they can be offset by increases in quality or other benefits.²² Increases in output and the production of better quality goods are expressly considered to be possible benefits that can result from improvements in efficiency.²³

The *Horizontal Merger Guidelines* also contain references to consumer detriment (and consumer benefit). Anticompetitive mergers increase the market power of the merging firms and thereby increase their ability to ‘profitably increase prices, reduce output, choice or quality of goods and services, diminish innovation, or otherwise influence parameters of competition’.²⁴ According to the guidelines these results are all forms of consumer harm; the Commission throughout the document uses the shorthand ‘increased prices’ to cover these situations.²⁵ It is possible according to these guidelines that efficiencies brought about by a merger counteract the effects on competition and in particular the potential harm resulting to consumers.²⁶ In order for a merger to be cleared in this scenario the efficiencies generated must benefit consumers, be merger-specific and be verifiable.²⁷ Possible consumer benefits resulting from efficiencies include reduction in prices and benefits resulting from cost reductions.²⁸

¹⁹ See footnote 1, *supra*.

²⁰ *European Commission Notice on the Application of Article 81(3), op. cit.*, at paragraph 92.

²¹ *Ibid.* at paragraph 90.

²² *Ibid.* at paragraph 86.

²³ *Ibid.*

²⁴ *Horizontal Merger Guidelines*, Official Journal C 31, 05.02.2004, 5-18, at paragraph 8.

²⁵ *Ibid.*

²⁶ *Ibid.* at paragraph 78. Consumers in this context refers to both intermediate and ultimate consumers: *ibid.* at paragraph 78, footnote 105: ‘[p]ursuant to Article 2(1)(b) [of the ECMR], the concept of “consumers” encompasses intermediate and ultimate consumers, i.e. users of the products covered by the merger. In other words, consumers within the meaning of this provision include the customers, potential and/or actual, of the parties to the merger’. See also Recital 29 of the European Community Merger Regulation (‘ECMR’), OJ L 24, 29.01.2004, 1-22.

²⁷ *Horizontal Merger Guidelines, op. cit.*, at paragraph 78.

²⁸ *Ibid.* at paragraph 80. Cost reductions which result solely from anticompetitive reductions in output cannot be considered a benefit for this purpose: *ibid.*

It should be obvious from the foregoing that despite the soft law references to consumers and the harm/benefit arising from certain conduct on a given market, EC competition soft law has not established a comprehensive definition of consumer detriment or benefit. Indeed, as the above demonstrates, neither hard nor soft law has established a comprehensive definition of either of these concepts. Given that one of the fundamental objectives of EC competition law relates to the maximisation of consumer welfare, we find it undeniably odd that neither consumer benefit nor consumer detriment have been given comprehensive treatment under either hard or soft EC competition law.

UK COMPETITION LAW

Legislation

The substantive provisions of the UK Competition Act 1998 resemble significantly Articles 81 and 82 of the EC Treaty. The Chapter I prohibition of the Competition Act applies to agreements between undertakings, decisions by associations of undertakings or concerted practices which (a) may affect trade within the United Kingdom, and (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom. Like Article 81, the Chapter I prohibition contains a non-exhaustive list of examples of possible violations: Section 2(2) (a) to (e). Again like Article 81, neither of these examples expressly mention the consumer, consumer detriment or consumer benefit. Section 9 of the Act provides a limited exemption procedure for activity caught by the Chapter I prohibition. There are four conditions to be fulfilled. The second condition is pertinent for our purposes, *viz.* ensuring that consumers receive a fair share of the resulting benefit.

The Chapter II prohibition is the UK equivalent to Article 82 EC: it prohibits the abuse by one or more undertakings of a dominant position on a market which affects trade within the UK. The examples of abuses listed match those in Article 82. Again

the consumer is mentioned under paragraph (b): an abuse may consist of ‘limiting production, markets or technical development *to the prejudice of consumers*’.²⁹

The modern UK merger regime was created by the Enterprise Act 2002. According to this act concentrations caught by its jurisdiction will be cleared by the authorities if they do not cause a significant lessening of competition.³⁰ Under the Enterprise Act some concentrations create a duty of referral for the OFT.³¹ The OFT may decide not to refer a completed merger to the Competition Commission if ‘any relevant customer benefits in relation to the creation of the relevant merger situation concerned outweigh the substantial lessening of competition concerned and any adverse effects of the substantial lessening of competition concerned’.³² Similarly in relation to an anticipated merger, the OFT will consider customer benefits relative to the anticompetitive effects of the proposed merger.³³ Further, when considering remedies for both completed and anticipated mergers the Competition Commission should have regard to the effect of any action on any relevant consumer benefits resulting from the merger under investigation.³⁴ The UK merger regime has an interesting feature for our present purposes: unlike the ECMR the Enterprise Act actually defines the concept of customer benefit.³⁵ According to Section 1(a) of the Enterprise Act, customer benefit can take the following two forms: (i) lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom; or (ii) greater innovation in relation to such goods or services.³⁶

It is submitted here that the ‘customer benefit’ exception is a concept that will be rarely relied on in practice. We believe that if a substantial lessening of competition is established in a particular case it would be highly unlikely that it would be offset by

²⁹ Section 18(2)(b) of the Competition Act 2002 (emphasis added).

³⁰ See Section 35 of the Enterprise Act 2002.

³¹ See Section 22(1) for completed mergers and Section 33(1) for anticipated mergers. A discretion not to refer may arise in certain circumstances: see Section 22(2) for completed mergers, and Section 33(2) for anticipated mergers.

³² *Ibid.* at Section 22(2)(b).

³³ *Ibid.* at Section 33(2)(c).

³⁴ *Ibid.* at Section 41(5).

³⁵ It should be noted that the Enterprise Act refers to ‘customer’ as opposed to ‘consumer’ benefits. While all ‘customers’ are indeed ‘consumers’ of the good or services in question, not all ‘consumers’ are necessarily ‘customers’ in the commercial sense. ‘Customer’ then is by definition a more limited concept than ‘consumer’.

³⁶ The EC *Horizontal Merger Guidelines* by contrast list possible consumer benefits that may result from efficiencies; these may include reduction in prices and benefits resulting from cost reductions: *ibid.* at paragraph 80.

any customer benefits.³⁷ The OFT also believes that the practical value of this exception is low:

to count as customer benefits, by definition, customers need to be better off with the merger, despite the fact that the OFT believes that the merger might lessen competition substantially. These cases will be *rare cases* since, ordinarily, the OFT would expect competition to deliver lower prices, higher quality and greater customer choice.³⁸

We consider therefore the customer benefit exemption a theoretical concept, a fact that is underlined by the lack of cases where customer benefits have been used to offset the reduction in competition effected by the (completed or anticipated) merger.

The Enterprise Act also created the UK market investigation reference regime, whereby the OFT has the power to refer markets to the Competition Commission for further investigation where it has reasonable grounds for suspecting that any feature, or combination of features, of a market is preventing, restricting, or distorting competition.³⁹ Under this system the Competition Commission will decide whether competition is indeed prevented, restricted or distorted, and if so what, if any, action should be taken to remedy the adverse effect on competition or any detrimental effect on customers arising from the adverse effect. According to the legislation ‘detrimental effect’ can take two forms: (a) higher prices, lower quality or less choice of goods or services in any market in the United Kingdom (whether or not the market to which the feature or features concerned relate); or (b) less innovation in relation to such goods or services.⁴⁰

³⁷ See for example Paragraph 4.35 of *Market Investigation References: Competition Commission Guidelines*: ‘Customers are unlikely to enjoy any relevant benefits as a direct result of entry barriers, although some entry barriers may secure other kinds of benefit, for example regulations that limit entry to persons of proven competence or with adequate capital resources. The Commission will have regard to the wider purpose of such regulations in determining whether they have an adverse effect on competition. Generally, customers might be expected to benefit from any reduction of entry barriers’.

³⁸ *Mergers: Substantive Assessment Guide*, OFT, May 2003, at Paragraph 7.10 (emphasis added).

³⁹ See Part IV of the Enterprise Act 2002.

⁴⁰ *Ibid.* at Section 134(5). It should be obvious that these two ‘effects’ are the opposite of those defined as benefits under Section 1(a) of the same act; see *supra*. Section 134(8) also defines customer benefit as (i) lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom; or (ii) greater innovation in relation to such goods or services.

Like the EC antitrust and merger provisions, the UK Competition Act 1998 does not define the concept of ‘consumer’⁴¹ or ‘consumer detriment’. *Customer* benefit (due to a merger) is however expressly defined in the Enterprise Act. Both customer benefit and customer detriment in the context of a market investigation reference are also defined in this Act. As explained above however, these provisions may be more theoretical than practical; to date they have not been used, and in fact it is a distinct possibility that they may never be used.

Soft Law

Like its European equivalent, UK competition law includes soft law sources with some (albeit relatively limited) references to consumers, consumer detriment and consumer benefit. This soft law takes the form of guidelines on the Chapter I and II prohibitions, mergers and market investigation references.

According to the OFT’s *Guidelines on Chapter I*, the views of customers and consumers are ‘likely to be important’ in the consideration of the case for exemption, and they will be sought in ‘appropriate circumstances’.⁴² In other words, there is scope for the consumer to highlight any perceived detriment (or indeed benefit) when an undertaking claims the exemption criteria are satisfied under the Competition Act.⁴³ The ‘benefits’ in the second positive exemption condition are likely to be those which flow from improvements in production or distribution.⁴⁴ For example an agreement may lead to the ‘faster development of new products or of new markets or better distribution systems’.⁴⁵ This example highlights the fact that the benefits to consumers under the exemption criteria may lie significantly in the future;⁴⁶ presumably any consumer detriment identified could also lie in the future. The OFT

⁴¹ However, like under EC law, the concept of consumer has been given a broad definition by the UK authorities. Like EC law consumers can mean both trade purchasers as well as final consumers. See Whish, *op. cit.*, at 335. Despite this broad definition, cases where the concept of consumer has been stretched to include for example employees, shareholders, and even those who are not necessarily consumers of the product or service in question but who are affected by competition in the market, were not found in the course of our study.

⁴² OFT *Guidelines on Chapter I*, at paragraph 4.13, available at: www.oft.gov.uk.

⁴³ Of course there is no longer any formal exemption procedure for those agreements which are caught by the Chapter I prohibition: if an agreement fulfils the criteria of Section 9 of the Competition Act the legal exception will automatically apply.

⁴⁴ *Ibid.* at paragraph 4.14.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

Guidelines on Chapter II expressly confirm that an ‘abuse’ of a dominant position may occur when, as a result of the effects of conduct on the competitive process, it either: (i) adversely affects consumers directly (for example through price increases); or (ii) adversely affects consumers *indirectly* (by, for example, creating barriers to entry or by increasing competitors’ costs).⁴⁷ This is the only reference to the consumer in the Chapter II guidelines.

Under the Enterprise Act the OFT has a discretion not to refer mergers to the Competition Commission in various circumstances.⁴⁸ This includes where any ‘relevant customer benefits’ in relation to the creation of the relevant merger situation outweigh the substantial lessening of competition concerned and any adverse effects following from it.⁴⁹ OFT 516 states that these benefits may include: (i) lower prices;⁵⁰ (ii) greater innovation;⁵¹ and (iii) greater choice or higher quality.⁵² Further, efficiencies may be taken into account where they increase rivalry in the market so that no substantial lessening of competition would result from a merger.⁵³ These efficiencies must be (a) demonstrable; (b) merger-specific; and (c) likely to be passed onto consumers.⁵⁴ Paragraphs 4.41 to 4.44 of the Competition Commission’s guidelines on mergers detail examples of possible customer benefits resulting from the mergers it investigates. *First*, a merger may lead to economies of scale, which reduce costs and may result in prices being lower than the case if the merger did not go ahead.⁵⁵ *Second*, innovation may be enhanced through economies of scale, specialisation in R&D and/or the pooling of risks.⁵⁶ *Third*, network industries may provide other types of benefits, e.g. wider choice of routes, service times or

⁴⁷ OFT *Guidelines on Chapter II*, at paragraph 4.2, available at: www.of.gov.uk.

⁴⁸ See Sections 22(2) and 33(2) of the Enterprise Act 2002.

⁴⁹ *Ibid.* at Section 22(2)(c).

⁵⁰ ‘A may, despite leading to a substantial lessening of competition, give clear scope for large cost savings through a reduction in marginal costs of production. In these circumstances, the merged firm—even if it is a monopolist—is likely to pass on some of this reduction in the form of lower prices to its customers’: OFT 516, at paragraph 7.8, available at: www.of.gov.uk.

⁵¹ ‘A merger might, in rare cases, facilitate innovation through R&D that could only be achieved through a certain critical mass, especially where larger fixed (and) sunk costs are involved. Exceptionally, the benefits likely to be passed through to customers from such innovation might outweigh the substantial lessening of competition’: OFT 516, at paragraph 7.8.

⁵² ‘One situation in which benefits of this kind might arise is where a merger increases the size of a network, and thus its value to consumers’: OFT 516, at paragraph 7.8.

⁵³ See OFT 516 at 4.30.

⁵⁴ See OFT 516 at paragraph 4.34.

⁵⁵ Paragraph 4.41 of *Merger References: Competition Commission Guidelines*, available at: http://www.competition-commission.org.uk/rep_pub/rules_and_guide/index.htm.

⁵⁶ *Ibid.* at paragraph 4.42.

frequencies.⁵⁷ There is no definition of consumer detriment in either the OFT or Competition Commission's guidelines.

The market investigation reference regime in the UK has produced two sets of guidelines that contain important references to consumers and to the concept of consumer detriment: the OFT *Guidelines on Market Studies*⁵⁸ and the OFT *Guidelines on Market Investigation References*. According to these guidelines the OFT seeks to make markets work well for consumers by promoting and protecting consumer interests throughout the UK.⁵⁹ When markets do not work, so the OFT believes, consumers are adversely affected; competition by contrast helps to ensure innovation, diversity of offerings, and improvements in price and quality of customer service.⁶⁰ For the OFT, protecting consumer interests often involves identification of the consumer harm which has impacted on the relevant market: in selecting a market to review the OFT will consider *inter alia* 'the scale and significance of the possible problems or *consumer detriment* in the market, or significance to productivity and economic growth'.⁶¹ As explained above the OFT will only make a reference to the Competition Commission when it has reasonable grounds to suspect that the adverse effects on competition of features of a market are 'significant'.⁶² In making this assessment it will consider 'whether these suspected adverse effects are likely to have a significant detrimental effect on customers through *higher prices, lower quality, less choice or less innovation*'.⁶³ Finally, in assessing undertakings in lieu of a reference the OFT may look at the benefits to customers of such undertakings; these benefits

⁵⁷ *Ibid.* at paragraph 4.43.

⁵⁸ Strictly speaking market studies are different from and not part of a market investigation. However, a market investigation reference to the Competition Commission is often preceded by an OFT market study. For that reason we include the concept of market study here.

⁵⁹ Paragraph 1.1 of the *Guidelines on Market Studies*, available online at: <http://www.offt.gov.uk/Business/references/default.htm>. There is a form for suggesting to the OFT markets that should form the basis of a market study. One of the sections on the form is 'Nature of the problem for consumers or working of the market'.

⁶⁰ *Ibid.* at paragraph 1.7.

⁶¹ *Ibid.* at paragraph 2.5 (emphasis added).

⁶² Note also that OFT guidelines state that 'it will not make a market investigation reference to the Competition Commission if it suspects that the effect on competition and the detriment to customers are not significant enough to justify the burden on business and public expenditure involved in a Competition Commission market investigation': *Classified Directory Advertising Services*, Market Investigation Reference, 5 April 2005, at paragraph 59 of the OFT Report, available online at: <http://www.offt.gov.uk/Business/references/reference+cases.htm>.

⁶³ Paragraph 2.27 of the *Guidelines on Market Investigation References*, available at: <http://www.offt.gov.uk/Business/references/default.htm> (emphasis added). See also *ibid.* paragraph 1.11.

may comprise ‘*lower prices, higher quality or greater choice* of goods or services in any UK market, or *greater innovation* in relation to such goods or services’.⁶⁴

Once a market investigation reference has been made it is entirely for the UK Competition Commission to decide how any adverse effects on competition or detrimental effects on customers should be remedied.⁶⁵ Remedial action taken by the Competition Commission can be directed at the adverse effect of a market feature on competition or at the detrimental effects on customers of the adverse effect on competition.⁶⁶ In other words, remedial action may deal with the source of the problem or with the consequences.⁶⁷ The Commission is prevented from taking action to address future detrimental effects on customers if no detrimental effects on customers currently exist and it is not in the process of remedying the adverse effect on competition.⁶⁸ Customer benefits of a feature or features of a market under investigation are also taken into account before any remedial action is imposed.⁶⁹

The OFT will also consider, along with many other factors, the (direct and indirect) harm caused to consumers when determining the level of fines for antitrust violations.⁷⁰

PART II: DIRECT REFERENCES TO CONSUMER DETRIMENT/BENEFIT IN EC AND UK COMPETITION JURISPRUDENCE

⁶⁴ *Ibid.* at paragraph 2.22 (emphasis added).

⁶⁵ See paragraph 1.10 of the Competition Commission’s *Guidelines on Market Investigation References*, available online at the following website: http://www.competition-commission.org.uk/rep_pub/rules_and_guide/index.htm. It should be noted that the guidelines use the word ‘customers’ and not ‘consumers’.

⁶⁶ *Ibid.* at paragraph 4.6.

⁶⁷ *Ibid.* Note also: ‘In general, the Commission will seek to implement (or recommend) remedies that address the cause of the problem. It may also choose to address the detrimental effect on customers in addition or as an alternative....In practice, the Commission will seek remedies that would both ameliorate the competition problem and mitigate its effects on customers’ *ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.* at paragraphs 4.32 to 4.41.

⁷⁰ OFT’s *Guidance as to the Appropriate Amount of a Penalty*, OFT 423, paragraph 2.5.

This section will set out a number of the most important direct references to consumer detriment and consumer benefit under both EC and UK competition case law. These references will be drawn from the decisions of the European Commission ('the Commission'), the Office of Fair Trading ('OFT') and the Competition Commission ('CC') and from the jurisprudence of the Court of First Instance ('CFI'), the European Court of Justice ('ECJ'), and the Competition Appeal Tribunal ('CAT'). These references are taken from a wide number of cases that formed the basis of our study, provide illustrative examples of how the authorities view consumer detriment under both of the competition regimes examined and constitute a solid basis for the observations that form Part III of this paper.

EUROPEAN COMPETITION LAW

Article 81 and 82 Cases

EC competition law does not require proof of harm to the consumer in order for either Article 81 or 82 to apply. As stated above, the preservation of effective competition on a relevant market is considered adequate to protect the interests of consumers.⁷¹ As the Court of First Instance explains in relation to the abuse of a dominant position:

Article 82 EC does not require it to be demonstrated that the conduct in question had any actual or direct effect on consumers. Competition law concentrates upon protecting the market structure from artificial distortions because by doing so the interests of the consumer in the medium to long term are best protected.⁷²

⁷¹ See: Jenkins, 'Protecting Consumers: Does Competition Policy Help?' [2005] Comp Law 283, at 283: 'Law enforcement and proactive policy aimed at promoting rivalry and effective competition and effective competition are...seen as crucial aspects of providing tangible benefits to consumers'. See also: *British Airways v. Commission* [2004] CMLR 1008, at paragraph 89: 'an indirect detriment to consumers can be assumed where it is shown that the conduct of a dominant undertaking is likely adversely to affect the structure of competition, unless there is an objective economic justification for it'.

⁷² *British Airways v. Commission* [2004] CMLR 1008, at paragraph 264. See also the comments of the Advocate General in this case: 'loyalty rebates and loyalty bonuses can in practice bind business partners so closely to the dominant undertaking (the 'fidelity-building effect'), that its competitors find it inordinately difficult to sell their products ('exclusionary', or 'foreclosure' effect), with the result that competition itself can be damaged and, *ultimately, the consumer can suffer*', at paragraph 26, (emphasis added). See also *Europemballage and Continental Can v. Commission* [1973] ECR 215, at paragraph 26. Article 82 abuses may consist of practices that injure consumers both directly and indirectly: 'Article 82 of the Treaty is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure such as is mentioned in Article 3(f) of the Treaty. Abuse may therefore occur if

The indirect protection of the consumer by preserving the competitive process (using both Article 81 and 82) is also explained by the Advocate General in this case:

Article 82 EC, like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the *structure of the market* and thus *competition as such (as an institution)*, which has already been weakened by the presence of the dominant undertaking on the market. In this way, consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared.⁷³

That said, the EC authorities have regularly stated what they believe are the adverse effects of prohibited conduct in terms of its impact on consumers.⁷⁴ The impact of anticompetitive behaviour on consumer choice is often stressed by the European Commission and Courts. In *Microsoft* for example the Commission believed that Microsoft's refusal to supply had the consequence of 'stifling innovation' in the impacted market and of 'diminishing consumers' choices' by locking them into a homogenous Microsoft solution.⁷⁵ In *United Brands*⁷⁶ the ECJ held (i) that the fact that an undertaking forbids its duly appointed distributors to resell the product in question in certain circumstances is an abuse since it *limits markets to the prejudice of consumers* (e.g. it restricts the choice of consumers);⁷⁷ and (ii) that a refusal to sell (with a discriminatory effect which might in the end eliminate a trading party from the

an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one': *Europemballage and Continental Can v. Commission* [1973] ECR 215, at paragraph 26.

⁷³ *British Airways v. Commission* [2004] CMLR 1008, at paragraph 68 (emphasis added).

⁷⁴ Sometimes, it has to be stated, the EC authorities' mention of consumers in its decisions seems to be an afterthought rather than a theme that is developed throughout. In the European Commission's decisions concerning the application of Article 81 EC to the French energy market, for example, the following paragraph appears: 'This clause aims at compartmentalising the European market and preventing the consumers of natural gas established in France purchasing from [ENI or ENEL] gas which is the subject-matter of the Contract of Transit. In doing that, the clause contributes to the isolation of the French market, which is incompatible with the establishment of a European integrated gas market': *GDF/ENI, GDF/ENEL*, Commission decisions, 26 October 2004, COMP/38662 (paragraphs 69 and 89 respectively, authors translation). Detriment to 'le consommateur' is not developed in any other part of the decision and no evidence is discussed or analysed with regard to actual or potential effects on consumers; this suggests to us that the paragraph above may have been inserted into both decisions more as a boilerplate to try to appear to satisfy consumer interests, and as such does not represent serious consideration of direct consumer harm in the French energy market. A similar approach is reflected in paragraph 282 of the Commission's decision in *Raw Tobacco (IT)*, COMP/C.38.281/B.2, 20 October 2005.

⁷⁵ *Microsoft*, Commission Decision, 24 March 2004, COMP/C-3/37.792, at paragraph 782.

⁷⁶ *United Brands v. Commission* [1978] ECR 207.

⁷⁷ *Ibid.* at paragraph 159.

relevant market) would *limit markets to the prejudice of consumers*.⁷⁸ Freedom of choice and freedom of action for the consumer in a market is also an important aspect of EC competition policy:

It can also be regarded as an abuse if an undertaking holds a position so dominant that the objectives of the Treaty are circumvented by an alteration to the supply structure which seriously endangers the *consumer's freedom of action* in the market, such a case necessarily exists if practically all competition is eliminated.⁷⁹

The interests of consumers are also considered by the EC authorities when evaluating whether a dominant company has a duty to supply, especially in relation to intellectual property rights. One of the requirements that need to be established in order for a duty to licence intellectual property rights to exist concerns the appearance of a new product for consumers. Essentially, if the refusal to licence ensures the prevention of the appearance of a new product for which there was a potential consumer demand—and provided other exceptional circumstances exist (e.g. indispensability, lack of objective justification, elimination of competition)—then IPR holders may be required under EC competition law to licence their rights.⁸⁰ The application of this particular rule in EC law underlines the authorities' interest in ensuring that consumers' desires are fulfilled and that consumers are able to benefit from adequate levels of choice in any relevant market. In other words the authorities do not wish consumers to suffer detriment, in terms of a reduction in choice or innovation,⁸¹ that such refusals to licence may, in certain circumstances, entail.

⁷⁸ *Ibid.* at paragraph 183. See also: *Liptons Cash Registers/Hugin* [1978] OJ L22/23, Commission Decision, at paragraph 65: 'from the moment ... that a cash register user purchases a Hugin cash register, the result of Hugin's refusal to supply is to make the user in question totally dependent on Hugin AB for the supply of spare parts and in effect, for the maintenance and repair of that machine. Purchasers and users are thereby prevented from purchasing such spare parts from any other source and are in addition thereby also *deprived of their freedom to choose* where they will obtain the maintenance and repair of their machines' (emphasis added). See also: *Hoffmann La Roche* [1979] ECR 461, at p. 463.

⁷⁹ See: *Europemballage and Continental Can v. Commission* [1973] ECR 215, at paragraph 26 (emphasis added).

⁸⁰ See for example: *RTE and ITP v Commission* ('Magill') [1995] ECR I-743, at paragraph 54; *Oscar Bronner v. Mediaprint* [1998] ECR I-7791; *IMS Health v. NDC Health* [2004] 4 CMLR 1543; and *Microsoft, op. cit.*

⁸¹ Note: *IMS Health v. NDC Health* [2004] 4 CMLR 1543 (ECJ), at paragraph 49: 'the refusal by an undertaking in a dominant position to allow access to a product protected by copyright, where that product is indispensable for operating on a secondary market, may be regarded as abusive only where the undertaking which requested the licence *does not intend to limit itself to duplicating* the goods or services already offered on the secondary market by the owner of the copyright, but intends to produce

The direct impact of conduct on prices paid by consumers may also constitute a consumer detriment. Indeed, as the Commission itself has highlighted the ‘most likely’ detriment to consumers resulting from an abuse of a dominant position is the payment of a higher price than that which would be found on a market subject to effective competition.⁸² In relation to Article 81, the ECJ has held that collusion may lead to stabilised (excessive) prices; these prices help consolidate the positions of the colluding parties and limit the freedom of consumers to choose their suppliers.⁸³ As explained by the Commission in *Austrian Banks*,⁸⁴ collusion may result in excessive prices (as well as the preservation of inefficient market structures):

Competition which leads to declining margins, to the point where prices fall below average costs, is normally considered by the undertakings concerned to be ‘destructive’. In such circumstances the undertakings are faced basically with two alternatives. Either the steady decline in earnings leads to a shakeout (exit from the market or capacity reduction as a result of a merger) or the various players on the market try to restrict, as far as possible, the competition induced by the oversupply and thus to slow down or even stop the collapse in prices. The upshot is *excessive prices* and the artificial maintenance of inefficient market structures.⁸⁵

In *Eurofix-Bauco* the Commission also found consumer harm in the form of excessive prices. In that case the Commission held that the offering of special conditions to some of its customers resulted in an abuse of its dominant position as it ensured that those customers who did not receive these special offers were discriminated against

new goods or services not offered by the owner of the right and for which there is a potential consumer demand’ (emphasis added).

⁸² ‘Consumers can suffer from a dominant company exploiting [its] position, *the most likely through prices higher than would be found if the market were subject to effective competition*. However, the Commission in its decision-making does not normally control or condemn the high level of prices as such. Rather it examines the behaviour of the dominant company designed to preserve its dominance, usually directed against competitors or new entrants who would normally bring about effective competition and the price level associated with it’: *The XIV Report on Competition Policy*, European Commission, 1994, at part 207 (emphasis added).

⁸³ See for example: *ICI v. Commission (Dyestuffs)* [1972] ECR 619, at paragraph 8: ‘[Parallel behaviour may be evidence of a concerted practice, especially if] the parallel conduct is such as to enable those concerned to attempt to *stabilize prices* at a level different from that to which competition would have led, and to *consolidate established positions* to the detriment of effective freedom of movement of the products in the common market and of the *freedom of consumers to choose their suppliers*’ (emphasis added).

⁸⁴ Case COMP/36.571/D-1: *Austrian Banks — ‘Lombard Club’*, Commission Decision, 11 June 2002.

⁸⁵ *Ibid.* at paragraph 5 (emphasis added).

and ‘effectively [bore] the cost of the lower prices to the other customers’.⁸⁶ The authorities have also held that consumer detriment may result from a lost opportunity to pay a lower price.⁸⁷ Thus, consumer detriment under EC law may consist of higher prices, lost opportunities to pay lower prices, reduction in choice, prevention of the appearance of goods that consumers desire, and reduction in innovation.⁸⁸

Article 81(3) EC

The exemption clause of Article 81(3) EC may also be useful when considering the concept of consumer detriment in EC competition law. As explained above, one of the conditions required in order for this clause to apply states that consumers must receive a ‘fair share’ of the benefits derived from the (prohibited) agreement. As there is a possible inverse relationship between benefit and detriment, in the interest of completeness some case law and literature concerning ‘consumer benefit’ in the EC context will now be considered.

According to the text of Article 81(3), benefits (of which consumers must receive a fair share) include those resulting from improvements in production and distribution of goods or technical or economic progress.⁸⁹ On a literal interpretation of Article 81(3) improvements in production or distribution only apply to goods and not services;⁹⁰ technical or economic progress however applies to both goods and

⁸⁶ *Eurofix-Bauco* [1988] OJ L65/19, at paragraph 80.

⁸⁷ See for example: *VBBB and VBVB* [1982] OJ L54/36.

⁸⁸ The prevention of inefficiency and its impact on consumers has also been pursued in a small number of EC cases. For example, the ECJ has held that an undertaking with the exclusive right to organize dock work at Genoa, which refused to use modern technology and thus *raised costs and caused delays*, was in breach of Article 82: *Port of Genoa* [1991] ECR I-5889. See also: *P and I Clubs* [1999] OJ L125/12. Also, improved frequency of service has been held to be a benefit for the purposes of Article 81(3); reduced frequency of service would thus presumably constitute a detriment: *P&O/Stena Line* [1999] OJ L163/61, [1999] 5 CMLR 682, at paragraph 63.

⁸⁹ The benefit referred to in Article 81(3) should be an objective public/Community benefit and not one confined to the private parties themselves: *Consten and Grundig v. the Commission* [1966] ECR 299, at p. 348. It should be noted that consumers may benefit from a wide variety of economic conduct/results; the benefits referred to in Article 81(3) are however limited to those resulting from improvements in production and distribution or economic or technical progress. As should be obvious from the foregoing, the *detriment* consumers may suffer as a result of anticompetitive conduct under EC or UK competition law is not confined to the *converse* of these conditions, i.e. to detriment resulting from a decline in production or distribution or from a reduction in technical or economic progress. Although it is not expressly limited to such conditions, it does include detriment caused by such factors.

⁹⁰ Section 9 of the UK Competition Act 1998 also includes improvements in the production or distribution of goods or services.

services.⁹¹ In *Consten and Grundig* the ECJ held that the particular benefits generated by the agreement (i.e. those resulting from improvements in production/distribution...) must outweigh its detrimental effects in order for Article 81(3) to apply:

[Improvements in production/distribution] must in particular show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition.⁹²

It appears that the Commission may consider non-price benefits even when the consumer detriment to be counterbalanced is related to price competition, i.e. increased prices, excessive prices, lost opportunity to pay lower prices etc.⁹³ However, where the resultant limitation of price competition is particularly severe an Article 81(3) exemption will not be appropriate.⁹⁴

To date the Commission has not attempted to provide an exact definition of ‘fair share’ in the context of Article 81(3) EC. According to Professor Whish it is doubtful if a precise definition could be provided in any case.⁹⁵ Although consumers must benefit from the gain, the general expectation is that in competitive markets these benefits will inevitably be passed on as part of the competitive process.⁹⁶ That said, there are cases where the Commission has refused to grant an exemption on the grounds that the agreement in question has not allowed consumers a fair share of its resultant benefits.⁹⁷ In *Re VBBB and VBVB Agreement*⁹⁸ for example the Commission held that resale price maintenance (RPM) in the books market did not provide

⁹¹ See: Whish, *op. cit.*, at p. 151.

⁹² *Consten and Grundig v. the Commission* [1966] ECR 299, at p. 348.

⁹³ See for example: *VBVB and VBBB v. Commission* [1985] 1 CMLR 27. In this case, although the applicants’ arguments that the requirements of Article 81(3) were fulfilled were ultimately unsuccessful on the facts, the Commission did consider the non-price benefits for consumers of the agreement in question.

⁹⁴ *Ibid.* On the facts of that case the ECJ, in quoting the Commission, held that the effect on price competition was particularly severe: ‘the resale price maintenance system totally eliminates price competition at retail level’: *ibid.* at paragraph 43.

⁹⁵ Whish, *op. cit.*, at p. 156.

⁹⁶ See: Furse, *Competition Law of the EC and UK*, Oxford University Press, 4th Edition, at 178-179.

⁹⁷ See for example: *Vichy* OJ [1991] L 75/57; and *Screensport/EBU* OJ [1991] L 63/32, [1992] 5 CMLR 273.

⁹⁸ OJ [1982] L 54/36, [1982] 2 CMLR 344.

consumers with a fair share of its alleged benefits,⁹⁹ and that as a result of the RPM consumers would in fact be deprived of improved choice and lower prices.

Mergers

Like other aspects of EC competition law, merger control does not require a finding of direct consumer harm. For a merger to fall foul of the rules there must be a significant impediment of effective competition on the common market, in particular through the strengthening of a dominant position. Direct consumer harm does not need to be proved. Nevertheless, EC merger review cases however reveal that the European authorities, chiefly the Commission, have considered a wide variety of different types of consumer detriment when assessing a concentration's compatibility with the common market. Increased prices,¹⁰⁰ passing-on of costs,¹⁰¹ the imposition of unfavourable sales conditions on consumers,¹⁰² reductions in innovation,¹⁰³ service¹⁰⁴ and choice¹⁰⁵ have all been alluded to in the jurisprudence.

UK COMPETITION LAW

Chapter I and II Prohibitions

The OFT's first decision under Chapter II of the Competition Act resulted in the imposition of a £3.2 million fine on Napp Pharmaceuticals (Napp) for abuse of its dominant position in the market for the supply of sustained release morphine tablets and capsules in the United Kingdom: *Napp Pharmaceutical Holdings Ltd.*¹⁰⁶ Napp was found to have supplied its sustained release morphine product to patients in the community at excessively high prices while supplying hospitals at discount levels;

⁹⁹ The alleged benefits included increases in the range of books published as well as the number of outlets in which they could be purchased.

¹⁰⁰ For example: *Aerospatiale-Alenia/de Havilland*, Case No. IV/M053, Commission Decision, 2 October 1991, at paragraph 69.

¹⁰¹ For example: *Kværner/Trafalgar*, Case No IV/M.731, at paragraph 17.

¹⁰² For example: *Courtaulds/SNIA*, Case No. IV/M113, Commission Decision, 19 November 1991, at paragraph 36.

¹⁰³ For example: *DSM / Roche Vitamins*, Case No COMP/M.2972, 23 July 2003, at paragraph 67.

¹⁰⁴ For example: *Newscorp / Telepiù*, Case No COMP/M. 2876, Commission Decision, 2 April 2003, at paragraph 190.

¹⁰⁵ For example: *Gillette/Duracell*, Case No IV/M.836, Commission decision, at paragraph 10.

¹⁰⁶ *Napp Pharmaceutical Holdings Ltd*, DGFT Decision, 5 April 2001.

this had the effect of eliminating competition in the relevant market. The OFT held that Napp had violated section 18(2)(b) of the Competition Act; for the UK authorities Napp's conduct constituted an abuse as it limited production, markets or technical development 'to the prejudice of consumers'. In particular the pricing behaviour of Napp was abusive as it consisted of: (a) '(i) selectively supplying sustained release morphine tablets and capsules to customers in the hospital segment at lower prices than to customers in the community segment; (ii) supplying sustained release morphine tablets and capsules to hospitals at excessively low prices'; and (b) [charging] 'excessive prices to customers in the community segment of the market for the supply of sustained release morphine tablets and capsules in the UK'.¹⁰⁷ Thus in this case the OFT considered the excessive prices paid to be harmful to consumers in the community segment of the market.

The Competition Appeal Tribunal subsequently upheld the OFT ruling. The CAT's judgment is worth quoting at length:

The 'benefit' that some consumers (in this case hospital purchasing authorities) receive from below-cost predatory prices is wholly outweighed by the 'disbenefit', in terms of *high costs and lack of choice*, which flows from the monopoly (in this case in the community segment) that the predatory pricing is designed to protect or strengthen. Unless predatory pricing, and especially pricing below average variable cost, by dominant undertakings is rigorously penalised by competition law, new competitive entry may be thwarted, with the result that *consumers never receive the benefit of competitive conditions, and the lower long-run price levels, wider choice and better quality which, in general, competition brings*.¹⁰⁸

In the above paragraph the CAT considers not only price related consumer detriment ('disbenefit'), but also harm to the consumer in terms of choice and quality. On the facts of the case, the CAT found that Napp's conduct, in practice, 'tended to limit the choice of prescribing doctors and in some cases to deny their seriously ill patients alternative oral sustained release morphine products'.¹⁰⁹ Moreover, Napp by its

¹⁰⁷ *Ibid.* at paragraph's 142 (a) and (b).

¹⁰⁸ *Napp Pharmaceutical Holdings Ltd v. Director General of Fair Trading* [2001] CAT 1, judgment of the CAT, at paragraph 518 (emphasis added).

¹⁰⁹ *Ibid.* at paragraph 525.

conduct had also made it more difficult for competitors to bring new products to the market, thus further restricting the potential choice of both doctors and of patients.¹¹⁰

In *Hasbro Toys and Games*¹¹¹ the Director General of Fair Trading concluded that Hasbro UK Ltd, one of the largest toy and games suppliers in the UK, entered into several price fixing agreements in violation of Section 2 of the Competition Act. In this decision the Director highlighted his belief that agreements that fix price are among the most serious infringements caught under the Chapter I prohibition. For the Director General these agreements are not capable of enhancing consumer welfare; in fact they result in consumer detriment in the form of higher prices:

Price fixing does not contribute to improving the production or distribution of goods. Also there are no resulting benefits of which consumers receive a fair share. Indeed they would have to *pay more for the toys and games* subject to price fixing.¹¹²

Consequently these types of agreements fail to meet the exemption criteria for Chapter I prohibitions and thus will always fall foul of Section 2.¹¹³ Again it should be noted that the UK competition authority was concerned with the impact of anticompetitive activity on the prices paid by consumers.¹¹⁴

Not long after the decision in *Hasbro Toys and Games* the OFT held that a number of sportswear retailers had entered into price-fixing agreements in relation to replica football kits in violation of Section 2 of the Competition Act: *Price-fixing of Replica*

¹¹⁰ *Ibid.*

¹¹¹ *Agreement between Hasbro UK Ltd and Distributors Fixing the Price of Hasbro Toys and Games*, DGFT Decision, December 2002.

¹¹² *Ibid.* at paragraph 49 (emphasis added). Paragraph 49 was used verbatim in the OFT decision *Agreements between Hasbros UK Ltd, Argos Ltd and Littlewoods Ltd Fixing the Price of Hasbro Toys and Games*, 21 November 2003.

¹¹³ *Ibid.* See also the decision of the Director General in *Lladró Commercial S.A.*, 31 March 2003, at paragraph 111 (emphasis added): '(i) the fixing of prices of Lladró merchandise does not contribute to improving the production or distribution of goods; and (ii) the agreements do not allow consumers a fair share of any resulting benefit. *Consumers are instead deprived of discounts on Lladró merchandise which might otherwise have been available*, thereby obliging them to *pay more than would otherwise have been the case*'.

¹¹⁴ Another interesting point about this case is that the UK authorities expressly stated that in calculating damages, 'the damage caused to consumers whether directly or indirectly will...be an important consideration': paragraph 64 of *Agreement between Hasbro UK Ltd and Distributors Fixing the Price of Hasbro Toys and Games*, OFT Decision, December 2002; and paragraph 377 of *Agreements between Hasbros UK Ltd, Argos Ltd and Littlewoods Ltd Fixing the Price of Hasbro Toys and Games*, OFT Decision, 21 November 2003. See also OFT's *Guidance as to the Appropriate Amount of a Penalty*, paragraph 2.5, *op. cit.* Cf. *Napp Pharmaceutical Holdings Ltd v. Director General of Fair Trading* [2001] CAT 1, judgment of the CAT, at paragraph 511.

Football Kit.¹¹⁵ For the OFT, ‘the evidence [showed] that a number of the retailers involved adopted *retail prices that were higher* than would have been the case in the absence of the agreement’.¹¹⁶ Here again the OFT was primarily concerned with price related consumer detriment. Relying on the CAT’s judgment in *Napp*¹¹⁷ the OFT also stated that it is not necessary to measure the damage caused to consumers, and that furthermore it would not necessarily be very useful in any case.¹¹⁸ This approach to consumer detriment was explained further by the OFT in the case involving the collective selling of media rights by the UK horse racing courses:

[w]hile the OFT aims to use its powers to ensure that markets work well for consumers, a finding of direct detriment to final consumers is not a condition of finding an infringement of the Chapter I prohibition.¹¹⁹

Likewise, a finding of direct detriment to final consumers is not required for a Chapter II prohibition to be established.¹²⁰

Section 9 of the Competition Act 1998

The exemption clause of Section 9 of the Competition Act 1998 may also be useful when considering the concept of consumer detriment in UK competition law. As explained above, one of the conditions required in order for this clause to apply provides that consumers must receive a ‘fair share’ of the benefits derived from the (prohibited) agreement. As Section 9 is the UK equivalent of Article 81(3) EC, the

¹¹⁵ *Price-fixing of Replica Football Kit*, OFT Decision, 1 August 2003.

¹¹⁶ *Ibid.* at paragraph 495. In its annual report the OFT stated that their action in this case averted an estimated £58 million of consumer detriment: *Annual Report 2005-2006*, OFT, 11 July 2006, at p. 82, available at: <http://www.of.gov.uk>. This estimate was based on a 10%+ price rise that was expected to last an estimated length of time of 6 years. According to the OFT: ‘At the start of Euro 2000, before the OFT began its investigation into allegations of price-fixing of replica kit in June 2001, it was very difficult to buy an adult short-sleeved England shirt for less than £39.99. The OFT issued its decision in August 2003, and by the time of Euro 2004, England shirts were widely available for as little as £25’: *ibid.*

¹¹⁷ *Op. cit.*, at paragraph 508 *et seq.*

¹¹⁸ ‘Damage Caused to Consumers: It is not possible to measure this accurately and this is not necessarily useful’: *Price-fixing of Replica Football Kit, op. cit.*, at 580. *Cf. Annual Report 2005-2006*, OFT, 11 July 2006, at p. 82, available at: <http://www.of.gov.uk>.

¹¹⁹ *Notification by Arena Leisure plc/Attheraces Holdings Limited / British Sky Broadcasting Group plc/Channel Four Television Corporation/The Racecourse Association Limited*, OFT Decision, 10 May 2004, at paragraph 303. The OFT decision was ultimately set aside by the CAT; it is submitted however that the above dictum still stands.

¹²⁰ See footnote 42 *supra*.

above comments in relation to that particular article may also be relevant in a UK context.

Mergers

It is not standard practice for the UK authorities, in exercising its powers of merger review to systematically assess the direct negative impact of a merger on consumers, as opposed to competition. In fact, it is often assumed that if competition is adversely affected by a merger then the consumer inevitably suffers. It should of course be remembered that the substantive merger test in the UK involves evaluation of whether or not the merger would lead to a substantial lessening of competition—and not whether it would directly affect consumers. The following quote best describes the approach of the authorities to this issue:

We treat these local mergers as the Competition Commission treats any merger—with the presumption that a loss of rivalry results in adverse effects for consumers unless presented with strong evidence to the contrary.¹²¹

There are some cases however where direct consumer detriment resulting from the substantial lessening of competition is expressly considered.¹²² One such case is *The Acquisition by Vue Entertainment Holdings (UK) Ltd of A3 Cinema Limited*.¹²³ Here the Competition Commission held that the acquisition by Vue Entertainment Holdings (UK) Ltd of A3 Cinema Limited resulted in a substantial lessening of competition in the Basingstoke cinema exhibition market and that this may be expected to result in

¹²¹ *Somerfield plc and Wm Morrison Supermarkets plc*, Competition Commission Report, 2 September 2005, at 7.52.

¹²² The Competition Commission recently published a note which sets out estimates of the costs that consumers might have been expected to incur as a result of four mergers if the Competition Commission had not imposed remedies. These mergers involved concentrations in relation to which the Competition Commission took remedial action between March 2005 and 2006. The CC attempted to identify and quantify the likely price rises or other consumer detriment that might have been caused by the substantial lessening of competition resulting from the merger if the Competition Commission had not imposed its remedies. The CC sought to determine a ‘best guess’ of the price rises and other consumer detriment derived from all the information available to it for each case. In making their estimates, the Competition Commission recognised that their approach is partial in scope and subject to considerable uncertainties in its application. The note ‘*Estimated costs to consumers of the mergers against which the CC took action between March 2005 and March 2006*’ (hereafter ‘CC Note’) can be found at: http://www.competition-commission.org.uk/our_role/analysis/index.htm.

¹²³ *The Acquisition by Vue Entertainment Holdings (UK) Ltd of A3 Cinema Limited*, Competition Commission Report, 24 February 2006. The CC Note states that this merger would have resulted in an estimated cost to consumers of £0.3m per annum: CC Note, *op. cit.*, at p. 4.

(i) higher prices for cinema tickets;¹²⁴ (ii) a reduced incentive to maintain the quality of the offer at the Basingstoke cinemas;¹²⁵ and (iii) and a reduction in choice for consumers in Basingstoke.¹²⁶ Another example concerns the acquisition by Somerfield plc of 115 stores from Wm Morrison Supermarkets plc.¹²⁷ Here the Competition Commission was worried that the merger would result in a worsening of price, quality, range and service as a result of weakened competitive constraints arising from the local mergers.¹²⁸ In the event the Competition Commission found that the proposed acquisition would reduce competition and would result in ‘higher prices (including fewer local promotions), or reduction in quality, range or service compared with that available in other stores’.¹²⁹ So as is evident from these cases, detriment in a merger case may include reduction in price, quality and choice for consumers. Reduction in innovation may also be considered a detriment to consumers.¹³⁰

More often than not however, if consumers are directly considered by the authorities in merger review, it is at the stage of assessing the benefits of efficiencies and whether improvements in efficiency will result in an increase in consumer welfare. Indeed, the UK authorities have regularly admitted that mergers may give rise to benefits for consumers.¹³¹ The following comment from the OFT is not atypical:

the authorities do not want to block mergers unnecessarily, particularly if there are efficiencies associated with the merger that are likely to benefit consumers.¹³²

¹²⁴ *Ibid.* at paragraph 10.

¹²⁵ *Ibid.* at paragraph 11.

¹²⁶ *Ibid.* at paragraph 12. According to the Competition Commission this reduction in choice would take the form of ‘having only one cinema to visit, and having fewer screens on which to see films’:
ibid.

¹²⁷ *Somerfield plc and Wm Morrison Supermarkets plc*, Competition Commission Report, 2 September 2005.

¹²⁸ *Ibid.* at 7.52.

¹²⁹ *Ibid.* at 8.1. The CC Note states that this merger would have resulted in an estimated cost to consumers of £5.5m per annum: CC Note, *op. cit.*, at p. 3.

¹³⁰ See for example: *Anticipated Joint Venture between LINK Interchange Network Limited and Transaction Network Services (UK) Limited*, OFT Report, 27 January 2005, at paragraph 31. The UK jurisprudence does not however offer any helpful comments concerning how one can measure reductions in innovation in practice.

¹³¹ In fact most mergers that are examined by the OFT will not be referred to the Competition Commission. According to the *OFT Annual Report*, the OFT examined 257 mergers in 2004-2005; 35 of these raised more complex competition issues, while only 18 were referred to the Competition Commission: <http://www.of.gov.uk/News/Annual+report/2004.htm>, at 55.

¹³² ‘Innovation and Competition Policy’, OFT Report, March 2002, at paragraph 7.31; available at: www.of.gov.uk.

Benefits from mergers may include ‘synergies that result in lower costs, which may then be passed on to customers in the form of lower prices’.¹³³ In other words, the merged entity can reduce costs and thus prices as it can achieve economies of scale from the merger:

Synergies generally arise as a result of economies of scale, which allow a merged company to reduce unit costs below those of the individual entities. The increased scale gives an opportunity for the acquiring company to spread fixed and semi-fixed costs across a larger business.¹³⁴

These synergies are only a benefit of the merger if the lower costs cannot be realized in any other way.¹³⁵ According to the Competition Commission relevant customer benefits are ‘benefits that accrue to customers within a reasonable time period in the form of *lower prices, higher quality, greater choice or more innovation* and which would not occur without the merger’.¹³⁶

Market Investigation References

In *Store Cards* the OFT referred the supply of store card services to the Competition Commission following its conclusion that there are features of the sector, both in the supply of store card credit to consumers and in the supply of store card services to retailers, that appear to prevent, restrict or distort competition.¹³⁷ In paragraph 1.13 of its report the OFT stated that ‘there is insufficient competition to ensure that consumers get *good value* from store cards and that such lack of competition may lead to increased profits for retailers and store card providers’.¹³⁸ For the OFT then, the possible harm to consumers resulting from the perceived lack of competition in this sector revolved around the concept of value for money. The idea of ‘good value’

¹³³ *Acquisition by March UK Ltd, an associate of Littlewoods Ltd, of the Home Shopping and Home Delivery Businesses of GUS plc*, OFT Merger Reference to the Competition Commission, 18 September 2003.

¹³⁴ *Ibid.*, Competition Commission Report, at paragraph 3.123.

¹³⁵ *Ibid.* at paragraph 3.122.

¹³⁶ *Deutsche Börse AG, Euronext NV and London Stock Exchange plc*, Competition Commission Report, November 2005, available at www.competition-commission.org.uk, at paragraph 6.86 (emphasis added).

¹³⁷ *Store Cards*, OFT Reference to the Competition Commission, 18 March 2004.

¹³⁸ Emphasis added.

brings to mind the definition of an ‘unfair price’ in the case *United Brands Co. v. Commission*; it concerns a price that is ‘excessive in relation to the economic value of the product supplied’.¹³⁹ In other words the OFT appears to be formulating the possible consumer detriment in this sector in terms of unfair or excessive prices for consumers.¹⁴⁰ In its investigation the Competition Commission tried to quantify this consumer detriment by comparing the prices actually paid by cardholders who pay interest and insurance charges on store cards with the prices they would have paid had these reflected costs, including the cost of capital.¹⁴¹

Subsequent market investigation references submitted to the Competition Commission have also concerned the impact of (weak) competition on prices paid by consumers; see for example *Supply of Liquefied Petroleum Gas*¹⁴² or *Northern Ireland Banking*¹⁴³. In the former case the OFT suspected that ‘the high switching costs [between different gas companies in the market for the supply of domestic bulk liquefied petroleum gas] may form a barrier to entry, so that competition is restricted and many consumers face higher prices overall than they would in a similar market without switching costs’.¹⁴⁴ In the latter case, the OFT held that the conditions for a referral were met as high levels of concentration, significant entry barriers, price parallelism and consumer inertia appear together to result in *limited price competition* and weak switching competition between the big four banks in Northern Ireland.¹⁴⁵ Both investigations are ongoing.

In *Home Collected Credit*¹⁴⁶ the Competition Commission actually attempted to quantify the overcharge suffered by customers in the relevant market; according to the CC customers suffered from ‘substantial overcharging’:

¹³⁹ *United Brands Co. v. Commission* [1978] 1 CMLR 429, at paragraph 235.

¹⁴⁰ At paragraph 6.1 of the report of the OFT underlined its suspicions that excess prices were being paid by some consumers for certain store cards: ‘the provision of store card credit may not be working well for consumers. It is possible...that the difference between the interest charged on store cards and other credit cards is not fully explained by the offsetting benefits and the differences in the cost of providing these services’.

¹⁴¹ See Paragraph 1 of Annex 9.1 of the Competition Commission Report, available at: http://www.competition-commission.org.uk/rep_pub/reports/2006/509storecards.htm.

¹⁴² *Supply of Liquefied Petroleum Gas*, Market Investigation Reference, 5 July 2004.

¹⁴³ *Northern Ireland Banking*, Market Investigation Reference, 26 May 2005. See also: *Home Collected Credit*, Market Investigation Reference, 20 December 2004.

¹⁴⁴ At paragraph 3 of the OFT Report (emphasis added).

¹⁴⁵ See paragraph 75 of the OFT Report.

¹⁴⁶ *Home Collected Credit*, Market Investigation Reference, 20 December 2004.

[overcharging] may have amounted to as much as £100 million a year over the last five years across the whole market, which would imply that a home credit customer pays over £25 too much for an average loan, or £9 per £100 borrowed, and that home credit lenders have been able to earn more than £500 million in profits in excess of the cost of capital in the last five years.¹⁴⁷

This case thus highlights that the Competition Commission: (i) considers overcharging as a form of consumer detriment; and (ii) is willing to quantify the extent of the overcharge when possible. *Home Collected Credit* also demonstrates that the CC will consider the effects of weak competition on particular categories of consumers as well as consumers in general. Indeed, on the facts before it the Competition Commission expressed its belief that the overcharge may have more of an effect on single mothers under 35:

Home credit customers were more likely than the population as a whole to be female, to be under 35, to have young families, to fall into socio-economic groups D and E, to live in a low-income household and to live in housing rented from a local council or housing association.¹⁴⁸

Prices paid by consumers are not the only concern of the OFT when it refers markets to the Competition Commission for further investigation. In *Home Collected Credit* for example the OFT considered a super-complainant's¹⁴⁹ claim that 'the high market concentration of the home credit market may *reduce consumer choice* and limit the extent of competition'.¹⁵⁰ The Competition Commission will also consider different forms of consumer detriment where relevant:

¹⁴⁷ *Ibid.*, Competition Commission News Release, 27 April 2006, available at: <http://www.competition-commission.org.uk/inquiries/current/homecredit/index.htm>, at p. 1. It should be noted that these findings are only provisional and that the Competition Commission intends to discuss them further with home credit companies before making its final conclusions on the matter: *ibid.*

¹⁴⁸ *Ibid.* at p.2.

¹⁴⁹ The Secretary of State for Trade and Industry can designate certain bodies ('super-complainants') which represent consumers to make super-complaints to the OFT; such super-complaints can be made by a designated consumer body when it thinks that a feature, or combination of features, of a market is, or appears to be, significantly harming the interests of consumers. See Section 11 of the Enterprise Act 2002. The OFT has considered seven super-complaints since 2002. These were received by Consumers Association, the National Association of Citizens Advice Bureau, Postwatch, the National Consumer Council, the General Consumer Council of Northern Ireland, Which? and Citizens Advice. The super-complaints received led to six market studies and three market investigation references.

¹⁵⁰ *Home Collected Credit*, Market Investigation Reference, 20 December 2004, at paragraph 8 of the OFT Report.

We shall determine whether any effect on advertisers or users [i.e. consumers] in the form of *higher prices, lower quality or less choice of goods and services, or less innovation* has resulted from, or may be expected to result from, any adverse effects on competition in the relevant market or markets.¹⁵¹

Indeed, as the OFT has stressed, if the Competition Commission decides that there is an adverse effect on competition it must ‘take action to “remedy, mitigate or prevent” the adverse effect on competition and to “remedy, mitigate or prevent *any detrimental effects* on customers” so far as those effects have resulted from the adverse effect’.¹⁵² By definition ‘any detrimental effects’ must also include those detrimental effects which cannot be classed solely as effects on the prices paid by consumers.

PART III: OBSERVATIONS ON THE CONCEPT OF CONSUMER DETRIMENT/BENEFIT **UNDER EC AND UK COMPETITION LAW**

Some brief observations can now be made on the concept of consumer detriment/benefit as it is (or should be) interpreted by the EC and UK authorities.

First, the scarcity of cases where both the EC and UK authorities *directly* refer to the impact of anticompetitive behaviour on the interests of consumers is surprising. Consumers are generally only directly considered in two situations: (i) when defining the relevant product or geographical market; and (ii) when examining whether an undertaking is dominant on that market.¹⁵³ The direct actual or potential effect of conduct on consumer welfare is generally not considered. As has been explained above the primary concern of the competition authorities is the protection of the

¹⁵¹ *Classified Directory Advertising Services*, Market Investigation Reference, 5 April 2005, Competition Commission, Issues Statement, Paragraph 17 (emphasis added).

¹⁵² *Northern Ireland Banking*, Market Investigation Reference, 26 May 2005, at paragraph 83 of the OFT Report (emphasis added). See also Section 138 of the Enterprise Act 2002.

¹⁵³ In this regard the following dictum of the ECJ should be remembered: ‘the dominant position referred to in [Article 82] relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and *ultimately of its consumers*’: *United Brands v. Commission* [1978] 1 CMLR 429, at paragraph 65 (emphasis added). This approach to dominance is followed by the UK authorities.

competitive process; it is presumed that this process will bring benefits to the consumer. For them preservation of the competitive process ensures that consumer welfare is maximised.¹⁵⁴ That said, there are cases, as noted above, where consumer detriment has been directly examined (or at least commented on), although these are by far the exceptions rather than the rule.

Second, there are some forms of abuse of a dominant position where the interests of consumers are consistently considered by the authorities, *viz.* refusal to licence intellectual property rights, and exploitative abuses (e.g. the imposition of excessive prices). This difference in approach however is due to the particular form of abuse itself rather than to any fundamental belief that consumer harm should be proven in order for Article 82 or Chapter II to apply.

Third, and subject to comment four below, when examined by the authorities, the concept of consumer detriment has been acknowledged as taking many different forms. As is evident from the jurisprudence detailed above, consumer detriment includes: increased prices; missed opportunities to pay lower prices; passing-on of costs; the imposition of unfavourable sales conditions on consumers; and reductions in innovation, service, quality and choice.

Fourth, some general trends in the respective approaches of the EC and UK authorities to the definition of consumer detriment were evident:

The European authorities: The European authorities take a very dynamic view of the market, concentrating not only on price competition but also on improvements in innovation, improvements in quality, choice and service for consumers. In fact, the authorities seem to be as concerned with quality and choice as much as with price

¹⁵⁴ As the Director General of Competition has commented: ‘the competitive process is ultimately what we are trying to improve in order to produce in our view better results for consumers’: Philip Lowe, speech at the British Institute of International and Comparative Law, 10 May 2005, available at *Current Competition Law*, Vol. V, BIICL, 2005, at p. 167. See also the comments of the current European Consumer Liaison Officer: ‘competition Policy pursued by the European Commission has a direct impact on the daily lives of the European Union citizens: requiring firms to compete with each other *fosters innovation, lowers costs and prices, and increases choice and quality*. This benefits each consumer. The consumer welfare-orientated approach has been reflected both in the enforcement activities and policy field’: Juan Antonio Riviere Marti, *Current Competition Law*, Vol V, BIICL, London, 2005, at p. 215.

whenever they do actually consider the extent of consumer detriment in a particular market. This approach is consistent with the views of the Director General of Competition, who argues that:

it is absolutely necessary not just to look at cost reduction, immediate price effects, immediate access conditions, but also the dynamics of competition which produces results which are better or worse for the consumer. The competitive process is ultimately what we are trying to improve in order to produce in our view better results for consumers.¹⁵⁵

The UK authorities: Although all of the UK authorities have considered consumer detriment in its many different forms, it appears that the Office of Fair Trading, at least, seems to concentrate primarily on price related consumer detriment.¹⁵⁶ The Competition Commission, by contrast, will consider more readily the other aspects of consumer harm (*viz.* the negative impact of conduct on innovation, quality and choice for consumers) especially when considering a particular market in the context of a market investigation reference. The Competition Appeal Tribunal also takes a more dynamic approach to the market. For the CAT consumers may be harmed through the higher long-run price levels, reduction in choice and decreases in quality which, in general, significant distortion of competition brings.

Fifth, the present approach of presuming that consumer harm will inevitably result from exclusionary conduct appears to be too presumptuous. For exclusionary conduct to constitute an abuse under Article 82, for example, the correct approach should be to show that this leads to likely consumer harm; this harm must be demonstrated and not presumed. As the Competition Law Forum's Article 82 Review Group has noted:

¹⁵⁵ Philip Lowe, speech at the British Institute of International and Comparative Law, 10 May 2005, available at *Current Competition Law*, Vol. V, BIICL, 2005, at p. 167. See also: '[Consumer welfare] must be a measurement of dynamic effects. It must not simply look at price. It must look at the overall benefits to consumers': *ibid.*

¹⁵⁶ It is acknowledged however that the extent of the OFT's concern with price related detriment relative to non-price detriment may also be partly due to the fact that economists sometimes use the term 'price' as a shorthand to cover both price and non-price aspects of consumer welfare. See for example in an EC context: *Horizontal Merger Guidelines*, Official Journal C 31, 05.02.2004, 5-18, at paragraph 8.

If it is indeed true that the abuse so clearly leads to consumer harm, then that evidence should be easy to provide, and would be preferable to a formalistic presumption with no regard for evidence of likely consumer welfare harm.¹⁵⁷

Indeed, conduct should not be held to be abusive under Article 82 until its actual or potential effects on competition have been examined and they have been proven to lead to likely consumer harm.¹⁵⁸ This examination should also include consideration of any resulting efficiencies, if relevant.

Sixth, some forms of (anticompetitive) behaviour so obviously result in consumer detriment that an examination of their actual or potential effects on both competition and consumer welfare should not be required in order for a violation of the antitrust laws to be found. Although the list of such offences would necessarily be quite short it would undoubtedly include, for example, the creation and maintenance of a price-fixing cartel.

Seventh, consumer policy in the competition field is inextricably tied up with other policy areas, including, among others, environmental policy, social policy, trade and planning laws. It is obvious from the above that the existing EC and UK competition legislation, case law and literature does not adequately address the interaction between these policy areas and their impact on the concept of consumer detriment under the relevant competition laws.

Finally, it is clear that a comprehensive definition of consumer detriment has not been established in either EC or UK competition law, although the EC *Horizontal Merger Guidelines* and the UK Enterprise Act come close and are significantly similar. We believe that in further research a list of consumer detriment facets should be developed and should form the basis of this comprehensive definition of ‘consumer detriment’.

¹⁵⁷ ‘The Reform of Article 82: Reactions to the DG-Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses’, prepared by the Competition Law Forum’s Article 82 Review Group, at paragraph 5, available at: www.competitionlawforum.org.

¹⁵⁸ See *ibid.* at paragraph 6.