

Setting the Agenda

Introduction	2-3
Executive Summary	4-8
Chapter 1 - Goal, Mission and Legislation	9-17
Chapter 2 - Definition	18-36
Chapter 3 - Quantification in Competition Cases	37-49
Chapter 4 - Impact and Outcome Assessments	50-58
Chapter 5 - Practice and Future Objectives	59-77
Chapter 6 - Non Governmental Advisors' View	77-89
Conclusion	90-94
List of Authors and Respondents	95-97

Competition Enforcement and Consumer Welfare – Setting the Agenda

Introduction

This ICN discussion document (Document) has been created in order to stimulate discussion on the role of consumer welfare in competition enforcement across the global competition community. It has been drafted utilizing the answers provided by 57 competition Authorities (Authorities)¹ and 19 non-governmental advisors to competition Authorities (NGAs) in response to a questionnaire sent out by the Netherlands Competition Authority (NMa) in 2010.

This Document seeks to provide a helicopter view of the prevailing attitudes regarding the role of consumer welfare in competition enforcement, by a broad range of respondents to the questionnaire (Respondents) at the time of the International Competition Network's (ICN's) 10th Jubilee year. The Document analyses how, and indeed whether, the promotion of consumer welfare is in fact reflected in national practice and case law around the world.

The impetus for this Special Project stemmed from the fact that in recent years, a growing number of Authorities refer to the role of consumer welfare in their competition law enforcement. However, interpretations of what should be included in the definition consumer welfare differ. Quantification of the changes in detriment to consumer welfare and the role of references to consumer welfare in competition law enforcement remain a challenge. There is a growing desire among ICN members to address some new and challenging topics, as the ICN enters its second decade. To facilitate discussion of this important and sometimes controversial topic, the NMa's Special Project seeks to provide clarity on the issues, and sets the agenda for future work on competition enforcement and promote consumer welfare.

It should be stressed that this Document is neither a compilation of best practices nor a set of guidelines; it also does not seek to present a unified view of Authorities' opinions on what role the promoting consumer welfare should play in competition analysis. Instead, this Document provides both background material which was discussed by the delegates at the

¹ For ease of reading, this Document generally uses only the country name to indicate the source of the comment and not the name of the Authority. As the ICN does not represent the views of individual countries, but of Authorities, the Appendix sets out the proper titles for the Authority to which the country titles refer. The names and titles of the NGAs that have contributed to Chapter 6 of this Document are also referred to in the Appendix.

Annual ICN conference, held on 17-20 May 2011 in the Hague (Conference) and gives an overview of the discussions held at the conference. In order to maximise the benefit of the discussions held at the Conference, the views expressed there are incorporated into this final document.

Enforcers of competition law often refer to the importance of promoting consumer welfare through the application of competition law. Indeed, during the research on this Special Project it was discovered that currently many Authorities carry out their enforcement duties on the presumption that ensuring the maintenance of competition in markets will ultimately benefit consumer welfare. However, the connection between consumer welfare and the practical enforcement of competition law is not always straightforward. In fact, there may be a considerable gap between policy statements and practice.

This Document first addresses how the promotion of consumer welfare is treated by Respondents.² This is done by reflecting on whether reference is made to the promotion of consumer welfare in an Authority's mission and/or legislation. The Document then goes into depth on how the Authorities define consumer welfare. In Chapter 3, the Document deals with the issue of burden of proof in relation to detriment to consumer welfare in individual cases. This chapter also considers whether Authorities believe such detriment to be quantifiable in practice. In Chapter 4, the Document looks at whether and how Authorities conduct outcome analyses, to assess the impact of intervention on consumer welfare. The answers to the questionnaire are then distilled in Chapter 5 to decipher the practical ways in which Authorities refer to consumer welfare in their enforcement of competition law. This is followed by a review of how Authorities may, if they so desire, choose to promote consumer welfare in their competition enforcement. The Document concludes with a brief synopsis of some NGA views on competition enforcement and consumer welfare in Chapter 6.

²Please note that not all Authorities answered all of the questions, for this reason specific figures and percentages have been provided to indicate the number of Authorities who have answered a question in a specific way. Furthermore, not all Authorities provided commentary to supplement their answers. This Document makes occasional use of specific quotations from the answers provided by Respondents.

Executive summary

What is consumer welfare?

Consumer welfare can mean many things to different people. Many Authorities have not adopted a formal definition of consumer welfare, though their practice is sometimes governed by principles in which a definition is indirectly incorporated.³ For those Authorities who see consumer welfare as the underlying goal of competition law, explicit references to consumer welfare in the Authority's enforcement activities may arguably be superfluous. In fact, they may see the very act of enforcement as beneficial for consumer welfare.

On examination of what Respondents understand consumer welfare to be, it becomes clear that there is some agreement among the Authorities. Many Respondents distinguish between consumer protection and consumer welfare.⁴ Most Respondents agree that an interpretation of consumer welfare includes quality, and other (mainly economic) criteria.⁵ Most Respondents do not generally use total welfare as a standard. Although they acknowledge that, theoretically, it may be more accurate to use total welfare in the long term, for practical purposes, most seem to regard consumer welfare as a more useful standard in the short term. Most Respondents seem to prefer a long-term approach, and favour a dynamic perspective over a static one.⁶ However, most Respondents also seem to admit that enforcement realities frequently oblige them to have regard to short-term effects, and often to use a static perspective.⁷ Finally, many Respondents look at the welfare of intermediate consumers as well as end consumers in at least some of their investigations.⁸

Can we calculate it?

The question whether one can calculate effects on consumer welfare can be examined on an individual and at an aggregate level. On an individual level, 33 Authorities⁹ believe it is possible to quantify the impact on consumer welfare in a specific case. Of that group of 33 Authorities, 20 Authorities state that they use a qualitative and/or quantitative assessment.

³ 30 Authorities: 58% of the Respondents to that question.

⁴ 38 Authorities: 81% of the Respondents to that question.

⁵ 37 Authorities: 73% of the Respondents to that question.

⁶ 47 Authorities: 90% of the Respondents to that question.

⁷ 30 Authorities: 56% of the Respondents to that question.

⁸ 38 Authorities: 75% of the Respondents to that question.

⁹ Total respondents that answered that question: 52 Authorities. 33 Authorities is 75% of the Respondents to that question.

The Respondents provided a variety of answers as to what they base their assessment on. However, all seem to recognise difficulties and limitations in practice. Some Authorities stated that due to these constraints the ability to quantify the detriment will usually depend on the specific circumstances of the case, this may mean that some assessments will largely be based on qualitative measurement. A majority of Respondents stated that the methodology of quantifying consumer harm had not yet been considered by the courts. This seems to suggest that there is no easy, non-contestable, practical method for quantifying harm to consumer welfare that will work for all cases. If detriment to consumer welfare is considered, this does not mean that this detriment is actually quantified, at least not in an exact or precise manner.

At an aggregate level, Authorities may refer to changes in consumer welfare to measure the effects competition Authorities' interventions may have. For some Authorities, measurement of outcome is required by law, while others do not have the resources to conduct such assessment or do not consider it their responsibility. The answers received show that among the Authorities that do conduct outcome assessments, no widely recognised method has been developed yet. In fact, only a limited number of Authorities calculate the outcome on an aggregate level, while others have developed their own methodology to calculate outcome (e.g. the assessment of enforcement impact, the number of cases or imposed fines and ex-post reviews). Most of Respondents that stated that they conduct outcome assessments,¹⁰ stated that the aim of the calculation is to account to lawmakers, politicians and society.

How important is it?

An important aspect to consider when discussing the relevance of consumer welfare in competition enforcement is whether Authorities have a burden to prove a detriment to consumer welfare. Although only few Authorities are required to bear such a burden as a general rule, a majority of the Authorities have a burden of proof at certain stages of some proceedings - especially in cartel and dominance cases. Such a burden is generally determined on a case-by-case basis.¹¹ The fact that the burden of proof is limited might be explained by legal presumptions (e.g. in case of hard-core cartels), though these are rebuttable in specific cases - implying that parties to the proceedings may confront an Authority with evidence on

¹⁰ Total Respondents that answered that question: 30 Authorities.

¹¹ 25 Authorities: 56% of Respondents to that question.

the effect on consumer welfare. Furthermore, 20 Authorities¹² state that the fact that they have no burden does not mean that they do not consider the interests of consumers at all, or make no reference to consumer welfare at any stage of the proceedings.

Most Authorities base their enforcement efforts on the premise that they enlarge consumer welfare. However, besides seeing promotion of consumer welfare as merely an outcome of enforcement, the majority of Authorities see increasing consumer welfare as the primary or at least one of the goals of competition law enforcement.¹³ Where Authorities differ is with regard to the assessment of the importance of this goal, and the extent to which the desire to achieve this goal has been translated into practice. Many Authorities stated that although promoting consumer welfare is an important end goal, economic growth in general and/or total welfare is the more specific (or more important) goal. In addition, depending on the legislation under which they operate, an Authority may be obliged to have regard to concepts of “fairness”, economic dependency, ordo-liberal theories of market power distribution or the preservation of national champions. These are all issues which may conflict with a goal of promoting consumer welfare through competition law.

A majority of Authorities state that their national legislation refers either directly or indirectly to consumer welfare.¹⁴ A majority of Authorities also refer to consumer welfare in their mission statements.¹⁵ In fact, of the 57 Authorities who sent responses, only one Authority answered that it does not refer to consumer welfare in its mission statement, legislation, or the goal of its Authority. Chapter 5 of this Document discusses how this is reflected in the practice of competition enforcement by Authorities world-wide.

Is consumer welfare reflected in enforcement practice?

Since the Authorities differ with regard to the assessment of the importance of consumer welfare as a goal of competition enforcement and since there is frequently no explicit legislative obligation to refer to consumer welfare, it could be seen as overly burdensome for an Authority to refer to consumer welfare in practice.¹⁶ However, 35 Authorities always and

¹² 45% of Respondents to that question.

¹³ 50 Authorities: 89% of the Respondents to that question.

¹⁴ 41 Authorities: 76% of the Respondents to that question.

¹⁵ 38 Authorities: 70% of the Respondents to that question.

¹⁶ See Chapter 4 for a discussion on the burden of proof.

15 occasionally use consumer welfare as a reference point for enforcement activities. Chapter 1 goes into more depth as to what the other reference points for enforcement may be.

In summary, although the majority of Authorities do seem to share a common general desire to promote consumer welfare in some way, there appears to be a lack of uniformity in how they do so. An explanation may be that consumer welfare does play a role in the practice of Authorities, but not in a way that can easily be measured. Besides this, it may be that Authorities simply see the ability to refer to consumer welfare as a useful tool to explain to the general public why anti-competitive practices are damaging. Indeed, some Authorities use changes in consumer welfare as a result of intervention by the Authority, to assess their outcome.

In Short

- It appears the promotion of consumer welfare is a common theme for most Authorities throughout the world, regardless of whether or not it plays a formal role in their legal framework. This Document discusses whether on the one hand, it may be sufficient to assume that by enforcing competition law, consumer welfare is already benefitted; or on the other hand whether defining the concept and referring to it explicitly in their decisions, Authorities will give better credence to this concept.
- Even though Authorities do not agree upon a formal definition of consumer welfare, there seems to be agreement on the main elements that define the concept. Respondents indicated that a definition will in any case always include changes in price and quality and the effect this may have on consumer surplus. It is important to note that differences in definition and what should be precisely included do not seem to prevent the concept of consumer welfare from being a common theme for enforcement activities.
- Due to theoretical differences between Authorities, as well as difficulties and limitations to the quantification of detriment to consumer welfare, at least to meet the requisite legal standards in a case-specific context, Authorities seem to agree that it is undesirable to make proof of detriment to consumer welfare a prerequisite for finding an infringement or imposing sanctions.

- It may transpire that quantifications will become more important as a yardstick for impact assessment studies in the future in order to better account to lawmakers and society.
- Authorities may find reference to consumer welfare a useful tool to be used in their advocacy efforts to expose the public to the benefits competition enforcement can obtain for consumers.

Comments from ICN Conference 2011, The Hague

This Document was discussed at the ICN conference on 17 – 20 May 2011. Views expressed have been incorporated into boxes throughout this final document.

Plenary session, Jarig van Sinderen (Netherlands) and Barbara Baarsma (NGA, Netherlands)

Overview of sessions and moderators

1. **Mission and Legislation**, Toshiko Igarashi (Japan) and Carmen Suarez (OFT)
2. **Economic Definition**, Jan-Kees Winters (Netherlands) and Christian Ewald (Germany)
3. **Quantification and Legal Burden of Proof**, Ewoud Saakers (EU) and Monique Van Oers (Netherlands)
4. **Practice and Future Objectives**, René Smits (Netherlands) and Francis Kariuki (Kenya)
5. **Consumer Perspectives**, Jacques Steenbergen (Belgium) and Kati Cseres (NGA, NL)
6. **Business Perspectives**, Anne Perrot (France) and Olavo Chinaglia (Brazil)

Chapter 1 - Goal, Mission and Legislation

1.1 Introduction

When analyzing the role of consumer welfare in competition enforcement, it is important to begin at the beginning and to focus on the question of whether Authorities believe their primary goal to be the promotion of consumer welfare. In addition, insight can be gained on how Authorities perceive the role of consumer welfare, by considering whether where and how reference is made to consumer welfare in Authorities' mission statements and competition law. This Chapter discusses various Authorities perceptions of consumer welfare considerations in competition enforcement.

1.2 Relationship Between Competition Law and Consumer Welfare

For many Authorities, competition law seeks to protect the process of free market competition in order to ensure the efficient allocation of scarce economic resources. Some Authorities ensure that the maximization of economic efficiency will ultimately create benefits for the consumer, including i) price and cost reductions, plus improvements and innovations in ii) quality; iii) choice; and iv) services.

It may be argued that promoting consumer welfare is inherent in the enforcement of competition and that consumer welfare is a natural result of (optimally implemented) competition law. For example, Bosnia states that the very fact that competition law is enforced, naturally leads to enhanced consumer welfare. In other words, by carrying out its legal mandate and ensuring that healthy competition exists, the Bosnian Competition Council enhances the welfare of end consumers on the market. In Israel, the Authority has a similar view, stating that through the prevention of harm to competition, Israel's competition law is invariably designed to benefit consumers. In Bulgaria, the Law on Protection on Competition has a similar objective, i.e. to ensure protection and to provide conditions for promotion of competition and free economic initiative, in the belief that effective competition ultimately enhances consumer welfare. In the view of the Bulgarian Authority, the purpose of competition policy is to ensure that through competition, consumers have the widest possible range of choice of goods and services at the lowest possible prices.

France states that consumer welfare is considered one of the main aims of competition law enforcement, although it is broadly construed. In France it is assumed that intermediate objectives (such as enhancing the competitive process, in some situations, as well as stimulating an efficient allocation of resources and preventing unchecked market power) foster consumer welfare in the long run.¹⁷ Competition is therefore not an end in itself but a means intended to make sure the market economy – alongside other public policies – works for the benefit of consumers. In Finland, the *Authority's* mission also places emphasis on the need for the development of productivity (as a result of well-functioning markets) the gains of which are (presumed) to be passed on to customers and consumers.

The US DOJ believes the promotion of consumer welfare is served by safeguarding the competitive process in the marketplace. In other words, safeguarding competitive market conditions serves as a means for promoting consumer welfare. Relevant forms of competition include competition on price, as well as on non-price dimensions such as quality, variety, and innovation. The US DOJ's policy is therefore aimed, in the first instance, at safeguarding competition in all these respects. Since US competition law does not incorporate non-competition objectives, and competition is seen as a proxy for consumer welfare, there are no tensions between consumer welfare and other competition agency objectives. Similarly, as stated by Spain, the Spanish CNC protects the competitive process as a means to enhance consumer/total welfare.¹⁸

In conclusion, most of the Respondents, whose answers are referred to above, expressed the view that they perceive the promotion of consumer welfare, in one way or another, to be the natural result of competition. Many of the Respondents indicated that consumer welfare may be considered a natural result of enforcement activities but not necessarily an underlying goal.

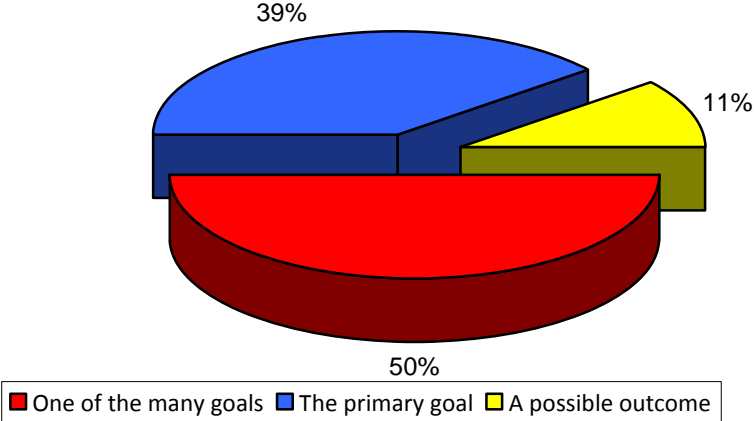
When considering the importance of consumer welfare, as some sort of standard within a particular jurisdiction, it is also important to look at the Authority's ultimate goal. Authorities

¹⁷ The French enforce a competition policy that aims at securing and enhancing the competitive functioning of markets, with a view to delivering tangible consumer welfare results. In a broad sense, consumer welfare is a standard which guides all aspects of the Autorité's action, from selection of cases and projects, to choice of instruments: advocacy, merger review, antitrust procedures, and of course substantive analysis.

¹⁸ Spain provided an overall comment on consumer welfare and competition law enforcement but did not answer the questionnaire.

were therefore asked whether they view consumer welfare to be the (or one of the many) goals of competition law enforcement.¹⁹ Authorities were also asked whether they perceive the promotion of consumer welfare to be simply a possible outcome of enforcement activities.

1.2 The Role of Consumer Welfare in Competition Enforcement



1.3 Consumer Welfare: A goal, the goal, or simply an outcome of an effective Authority’s work?

A majority of the Authorities responded to the questionnaire by stating that, in their jurisdiction, consumer welfare is treated as an underlying enforcement goal of competition law (whether the only goal, or one of many goals). Many Authorities do their utmost to promote consumer welfare at every stage of the enforcement process. For example, in the UK, consumer welfare appears to be at the heart of the OFT’s work, with its mission to “make markets work well for consumers”. Another example is the fact that although the term ‘consumer welfare’ cannot be found in the legislative history of the Netherlands Competition Act, the consequences of a lack of competition are listed as the absence of elements classically considered to constitute consumer welfare. One might therefore assume that consumer welfare was in the mind of the legislator.²⁰

¹⁹ Total Respondents that answered this question: 56 Authorities.
²⁰ “Lack of innovation of the tendering process, reduction in innovation, reduction of incentives to produce efficiently, upwards pressure on prizes, and a negative welfare effect”: Memorie van Toelichting bij de Mededingingswet (Explanatory Memorandum to the Dutch Competition Act), (Kamerstukken II (Proceedings of the Second Chamber of Parliament), 1995/1996, 24 707, no. 3). Quoted by Pieter Kalbfleisch, in article to be published in the Journal of Competition Law and Practice. “Aiming for Alliance: Competition Law and Consumer welfare”.

While a number of Authorities do mention long-term consumer welfare as the primary goal, many also mention other objectives. A considerable number of Authorities stated that, besides striving to promote consumer welfare, the primary goals of their competition enforcement are also, for example, in Hungary, to maintain effective competition and promote efficiencies;²¹ or, as in Canada, to maintain and encourage competition in Canada.²²

A few Respondents, such as Korea, Swaziland, Iceland and Uzbekistan mention that consumer welfare is one of many goals of competition law enforcement. Article 1 of Korea's Monopoly Regulation and Fair Trade Act (MRFTA), states that "this act seeks to promote free and fair competition such that creative business activities are fostered, to protect consumers, and to strive for the balanced development of the national economy by preventing the abuse of market dominance by enterprises and excessive concentration of economic power and by regulating unlawful coordinated interaction and unfair business practices". The general interpretation of Article 1 is that "promoting fair and free competition" is the first and direct goal of competition enforcement and "fostering creative business activities, protecting consumers and striving for the balanced development of the national economy" is the secondary or ultimate goal. Swaziland posits that besides consumers, there are other equally important stakeholders, such as competing businesses, and that this can lead to the importance of ensuring welfare of groups other than consumers. Iceland notes that according to the Competition Act, the object of the Act is to promote effective competition and thereby increase the efficiency of the factors of production of society. The strategic goal of the Competition Authority is to promote active competition for the public benefit.

Many Authorities stated that although consumer welfare is an important end goal, economic growth in general and total welfare is the more specific goal. For example, in Ireland, the Authority stated that while the primary goal of its work is to ensure competitiveness in the Irish economy, this also ultimately benefits the consumer (although the benefits of this might not always be immediately clear to consumers). The main goal of Switzerland's Cartel Act is to prevent the harmful economic or social effects of cartels and other restraints of competition

²¹ Hungary answered that the competitive process is generally presumed to maximise long-term consumer welfare. Consumer welfare is kept in mind, but only comes into explicit play in situations where there is a good reason to believe that this presumption is likely to seriously fail.

²² In order to promote the efficiency and adaptability of the Canadian economy, to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, and to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy.

and, by doing so, to promote competition in the interests of a liberal market economy. In Poland, consumer welfare may be seen as a benchmark for the success of the competitive process, and thereby a goal for which to strive.

A few Authorities such as Australia²³, Norway²⁴, South Africa and New Zealand²⁵, stated that they consider the promotion of total welfare as their primary goal. Some Authorities, however, such as South Africa, qualify this statement by saying that they consider the promotion of consumer welfare to be an important end goal in itself. In Kenya competition law sometimes seeks to maximise producer and consumer surplus, not just consumer surplus alone.

Finally, some Authorities view consumer welfare solely as a possible beneficial outcome of effective competition enforcement. For example, in Turkey the Competition Act sets the aim of "protection of competition". The promotion of "consumer welfare" is considered as a possible outcome of competition law enforcement.

It is interesting to note the variety of ways in which Authorities incorporate the goal of promoting consumer welfare into their daily work. The answers provided above give a broad geographical cross-section of the perceived importance of consumer welfare as viewed by Authorities across the globe. For the most part, it seems that most Authorities responding to the questionnaire do see the promotion of consumer welfare as a goal to be achieved; whether that should be a "hard" or "soft" goal is analysed in the next section of this Chapter. The next section considers the extent to which consumer welfare is referenced in the Authorities' mission statements and legislation. The answers received from respondents are also analysed in order to ascertain whether the mission statements and legislation of Authorities, who do not see consumer welfare as the primary goal, nevertheless promote consumer welfare.

²³ Australia states that it applies a total welfare standard. The ACCC has powers to grant exemption from competition law in certain circumstances, such as where benefits to the public from the anti-competitive conduct outweigh the detriment that the conduct may cause. In these circumstances, the ACCC may have regard to total welfare effects.

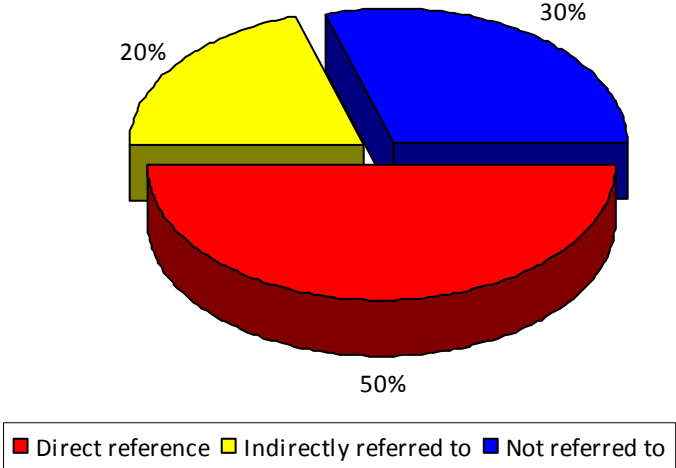
²⁴ The Norwegian Authority has, according to the law, a total welfare standard for its work. The purpose of the Competition Act is stated as : "...to further competition and thereby contribute to the efficient utilization of society's resources." However, it is also stated that when applying the Act, "special consideration shall be given to the interests of consumers."

²⁵ New Zealand notes in this regard that the purpose of the Commerce Act is "to promote competition in markets for the long-term benefit of consumers within New Zealand."

1.4 Consumer Welfare: Its place in Authorities’ Mission Statements and Legislation

Respondents to the questionnaire were asked whether consumer welfare is referred to directly or indirectly in their mission statements and national legislation. These questions were asked, in addition to the question regarding an Authority’s perceived goals, in order to discern whether the promotion of consumer welfare is an official mandate of the Authority, or simply a desired outcome. This Document therefore considers whether, when Respondents state that consumer welfare is a goal of their Authority, it also appears in their mission statements and/or legislation. In this way, the Document attempts to distil whether the goal of achieving/protecting consumer welfare is a “soft” goal, or a mandated goal, either by the government in legislation²⁶, or by the Authority itself in its mission statement²⁷.

1.4.1 Reference to Consumer Welfare in Mission Statements

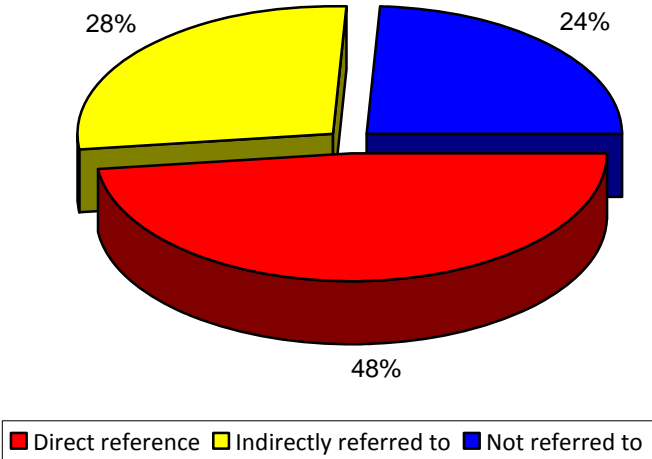


Most respondents referred to consumer welfare directly in their mission statement.²⁸ Three examples of direct references in the mission statements are those of France, Korea and the UK OFT. In France, the Authority enforces a competition policy that aims at securing and enhancing the competitive functioning of markets, with a view to deliver tangible results for consumers. The mission statement of the Korean Authority reads: “to promote free and fair competition and enhance consumer welfare”. Of the jurisdictions with a direct reference, five stated that consumer welfare is a primary goal and fourteen that it was one of many goals. In order to determine the relationship between mission and goal this Document also considers whether consumer welfare is mentioned in the Respondent’s national legislation.

²⁶ Total Respondents that answered this question: 55 Authorities.
²⁷ Total Respondents that answered this question: 54 Authorities.
²⁸ 27 Authorities: 50% of Respondents to that question.

It is interesting to note that of the 38 Authorities (see graph 1.4.1) who do refer (directly or indirectly) to consumer welfare in their mission statement, five of these 38 have no reference to consumer welfare either directly or indirectly in their legislation.²⁹ Conversely, of the Authorities - that do not refer to consumer welfare in their mission statement - four Respondents directly (and three Respondents indirectly) have references to consumer welfare in their national legislation.³⁰

1.4.2 Reference to Consumer Welfare in National Legislation



Graph 1.4.2 above provides information on those Authorities who refer to consumer welfare in their national legislation (irrespective of whether they include such a reference in their mission).³¹

Some Authorities’ mission statements and legislation only indirectly refer to consumer welfare. For example, in the US, although the FTC’s stated mission does not specifically refer to consumer welfare, this goal is implied from its stated mission of benefiting and protecting consumers. This is reflected, for example, in the FTC’s “Competition Counts” brochure “[Competition] benefits consumers by keeping prices low and the quality and choice of goods and services high”; “The FTC enforces antitrust laws by challenging business practices that could hurt consumers by resulting in higher prices, lower quality, or fewer goods or services.” The FTC’s website also notes that “the stated mission of the FTC’s Bureau of Competition

²⁹ 38 Respondents answered this question. Of the five Respondents that do mention consumer welfare in their mission statement, but not in their legislation, two Respondents stated that consumer welfare was a primary goal, one stated that it was one of many goals and one stated that it was an outcome, rather than a goal.
³⁰ Total Respondents to question on legislation: 54 Authorities.
³¹ Total number of Respondents to this question: 28

champions the rights of American consumers by promoting and protecting free and vigorous competition”.

It is interesting to note that of the 57 Authorities surveyed, only seven answered that they do not refer directly or indirectly to consumer welfare in either their mission statement or their legislation.³² Of these seven Respondents, two have mentioned consumer welfare as the primary goal of their Authority, yet it appears in neither their legislation nor their mission statement. In fact, of all the Authorities surveyed, only one country does not refer to consumer welfare in its mission statement, legislation, or the goal of its Authority.

Of the Authorities surveyed, 11 jurisdictions do not refer to consumer welfare in their mission statement at all. For example, the mission of Romania is efficient measures for a normal competitive environment, while the Turkish mission statement refers to total welfare. Twelve jurisdictions do not refer directly or indirectly to consumer welfare in their legislation.

There may be various reasons why consumer welfare is not referred to directly in the legislation, mission statement and goals of an Authority’s work. It may simply be that other goals have a higher priority, as mentioned above; however, it may also be that consumer welfare is seen as a soft goal, rather than a hard and fast rule, of the Authority. This may be related to the fact that it can be difficult to quantify detriment to consumer welfare. Accordingly, problems of quantification may help explain why public references to the importance of maintaining consumer welfare are therefore missing from the stated mission of the Authority, or indeed from its legislation. This issue is further discussed in Chapters 3 and 5 of this Document.

Although some Respondents make explicit reference to the goal of promoting consumer welfare, it does seem to be lacking from the mission statements and/or competition legislation of a number of Respondents. Chapter 5 will consider the fact that consumer welfare may alternatively be considered as a public policy with which they may (statutorily) be required to hold reckoning with.

³² Of these Respondents, four actually do state that consumer welfare is one of the many goals of their Authority.

Depending on the legislation under which they operate, Authorities may need to have regard to concepts of “fairness”, economic dependency, ordo-liberal theories of market power distribution or the preservation of national champions. These are all issues which may conflict with a goal of promoting consumer welfare through competition law. It would be helpful in such situations if the legislator had decided on the order in which several, possibly conflicting objectives needed to be met. However, even absent such specification, it may assist the Authority to strive for transparency in its decision-making as regards these various objectives. It is interesting to note that a number of Respondents indicated that although they do not refer to consumer welfare in their mission statement and neither is consumer welfare mentioned in their legislation, they do consider it to be a goal of competition enforcement.³³ Chapter 5 will discuss the issues surrounding consumer welfare and its inclusion as a public policy goal in more depth.

1.5 Conclusion

This chapter has distilled some general conclusions from the answers to the survey questions received from Authorities as to the perception of the importance of consumer welfare within Authorities around the world.

For the most part, it seems that many Authorities do see the promotion of consumer welfare as a goal to be achieved, although these Authorities may differ in their assessment of the importance of this goal, and the extent to which the desire to achieve this goal has been translated into practice. Some Authorities refer to consumer welfare in their mission statements, some report that they are directly bound by statute to promote consumer welfare, and others report that to the contrary, they see consumer welfare as no more than a possible outcome of competition enforcement. This chapter has considered whether the goal of promoting consumer welfare is mentioned in the mission statements and in legislation: subsequent chapters will consider whether this goal can be found in the investigatory techniques and decisional practices of Authorities across the globe.

³³ 8 Authorities.

Chapter 2 - Definition of Consumer Welfare in Competition Law Enforcement

2.1 Introduction

Consumer welfare can mean many things to different people. Indeed, the original impetus for this Special Project was to discern what ICN members mean by consumer welfare, in order to facilitate further discussion of how it can best be used in competition law enforcement. The answers to the questionnaire as analysed in Chapter 5 of this Document reveal that consumer welfare is widely used by Authorities worldwide in competition enforcement. As is clear in Chapter 1, the starting point for most Respondents seems to be to ensure effective competition on the markets in their jurisdictions. The importance they place on consumer welfare as a primary goal or an underlying goal of competition enforcement varies considerably among Respondents. This in turn may affect the flexibility of their approach to defining consumer welfare. Nevertheless, reaching a clearer understanding of how Authorities define consumer welfare can only be helpful to the discussion.

Comments from session on Consumer Perspectives : Market failure and consumer welfare
Moderated by Jacques Steenberg (Belgium) and Kati Cseres (NGA, Netherlands)

Some participants of the breakout session said that their enforcement policy requires them to take market failure into consideration. Detriment to consumers may be one of the effects of market failure. Therefore, in assessing market failure, authorities are actually looking at assessing changes in consumer welfare. So in that sense, consumer welfare is an underlying goal of competition enforcement.

In this chapter, the definition of consumer welfare is explored in three sections. First, a general discussion of consumer welfare is presented. Second, the discussion of the definition of consumer welfare is sub-divided into four issues relating to consumer protection, consumer surplus, total welfare, and short-term and long-term effects. Third, the discussion focuses on when consumer welfare relates to intermediate consumers and end-consumers. Finally, the conclusion outlines where the main agreements and divisions lie. All these issues are related to each other. The focus of the chapter is on competition policy and law enforcement and consumer welfare in a broad sense.

2.2 Definition of Consumer Welfare

In order to streamline the debate on this topic, the Netherlands provided a general definition of consumer welfare in the questionnaire.³⁴ Some Authorities³⁵ agreed with the sample definition provided by the Netherlands, while many Authorities³⁶ pointed out that they do not use a formal definition. Denmark, for example, agreed that its vision is to provide consumer access to a wide range of goods and services at the lowest prices possible, given the quality.

Many Authorities worldwide stated that they had no explicit definition of consumer-welfare.³⁷ Various reasons were given. Australia pointed out that the term ‘consumer welfare standard’ has a variety of uses and meanings in the broader economic and legal literature. In static analysis it is synonymous with consumer surplus. In dynamic analysis it is more closely aligned with total surplus (i.e. consumer and producer). Although consumer welfare plays an important role in Germany’s work, it is not the primary goal under their legislation and so a conscious choice was made not to make an operational target of consumer welfare by using a written definition. Nevertheless, consumer welfare has always been an important underlying issue for German competition law. Nor does Hungary officially have an exact definition and Hungary points out that in any case, the concept of consumer welfare provides general, underlying, conceptual guidance rather than a technical test for enforcement in practice.

Some Authorities stated that although they do not use an explicit definition of consumer welfare, their practice is governed by (for example, constitutional³⁸) principles in which a definition is indirectly incorporated.³⁹ Others, such as El Salvador, state that, in the absence of a formal definition, the concept refers, in general terms, to the value consumers receive from the goods and services they consume – including price, quality, and consumer choice.⁴⁰ Ireland adds that in most cases, the effect on consumer welfare can be measured by whether the price in the market will rise. Some Authorities, such as Lithuania, state that they see

³⁴ “Consumer welfare in competition law enforcement is not synonymous with consumer protection. Consumer welfare in competition law enforcement relates only to consumer surplus – which also encompasses quality/range/innovation; we do not look at non-economic considerations. We also do not look at total welfare. We focus on long-term consumer welfare. We use both a static and dynamic analysis as appropriate, given the specific facts of the case”.

³⁵ 7 Authorities.

³⁶ 30 Authorities.

³⁷ 38 Authorities. 5 Authorities did not answer the question, and 1 said it was not applicable.

³⁸ Brazil’s Antitrust Law requires that antitrust measures be guided by constitutional principles regarding free enterprise, open competition, the social role of property, consumer protection and restraint of abuses of economic power.

³⁹ For example, Croatia mentions the benefits of effective competition for consumers in several documents such as annual reports on the work of the Agency or expert articles prepared by the employees of the Agency.

⁴⁰ 4 Authorities.

consumer welfare as the natural result of competition (and/or competition law enforcement) in markets.⁴¹

Some European Authorities, and the European Commission, stated that they follow the practice of the European courts.⁴² Mexico and Poland say that they use the term as it is commonly understood in the economic literature, as consumer surplus. While Turkey explicitly cites and takes into account consumer welfare in its decisions, it is not defined in a clear manner in those decisions, nor in the legislation. To the extent that consumer welfare is considered in one Authority's merger cases, it is in the context of efficiencies at the remedies stage.

Some Authorities suggested alternative definitions of consumer welfare.⁴³ Taiwan considers "consumer interests" to be synonymous with "consumer welfare" or "consumer surplus". Norway agrees that consumer welfare relates to consumer surplus, in short, medium and long term, and encompasses quality, range and innovation.

It seems therefore that many Authorities have not adopted a formal definition of consumer welfare. As stated earlier, the importance placed on consumer welfare as a primary goal or an underlying goal of competition enforcement varies considerably among Respondents. This approach may affect the flexibility of their approach to defining consumer welfare. Nevertheless, reaching as clear a definition as possible can only be helpful to the discussion.

⁴¹ 7 Authorities.

⁴² The European Commission stated that benefits to consumers include low prices, high quality products, a wide selection of goods and services, and innovation, and referred to EC Merger Guidelines on non-horizontal mergers (OJ C 265, 18.10.2008, pages 6-25, paragraphs 10-16), for an example on how consumer benefits are considered. See also judgments of the European Court of Justice, 6 October 2009, *GlaxoSmithKline*, Joined Cases C-501/06, C-513/06, C-515/06 and C-519/06, [2009] ECR I-09291. In that case, the Court made it clear that "there is nothing in Article 81 EC [currently Article 101 TFEU] to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object". The Court went further to observe that "it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, Article 81 EC [currently Article 101 TFEU] aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price (see, by analogy, *T-Mobile Netherlands and Others*, cited above, paragraphs 38 and 39)." (ECJ, 4 June 2009, *T-Mobile Netherlands and others*, Case C-8/08, [2009] ECR I-04529).

⁴³ 14 Authorities.

Comments from session on Economic Definition : Unified consumer welfare standard needed – plea for a common standard

Moderated by Jan-Kees Winters (Netherlands) and Christian Ewald (Germany)

Participants expressed the view that there is a growing appetite among competition authorities for a unified consumer welfare standard. This standard must be distinguished from the policies of individual competition authorities, which can be influenced by national political and business pressure and therefore differ considerably from member state to member state.

Although there is disagreement on the content of a possible standard for consumer welfare, the majority of competition authorities agreed that dynamics - the way that future consumer surplus is considered - must be part of the standard.

Some competition authorities suggested that there is a need for a 'benchmark', since there will always be positive and negative effects and benefits and costs. The presence of a benchmark would allow these effects to be balanced and for a competition authority to make a choice based on a trade-off. The question remains whether this implies that a unified consumer welfare standard is needed.

The next section of this chapter breaks down the definition of consumer welfare into categories to facilitate further examination and outline a clearer picture of the areas of agreement and disagreement between the Respondents.

2.3 Further examination of the definition

To further delineate the term consumer welfare, the questionnaire split the definition into different categories; the relationship between consumer protection and consumer welfare, whether consumer welfare is synonymous with consumer surplus, combined with the regard Authorities pay to non-economic considerations, short-term and long-term consumer welfare, and welfare of end-consumers or intermediate consumers.

2.3.1 Consumer protection and consumer welfare

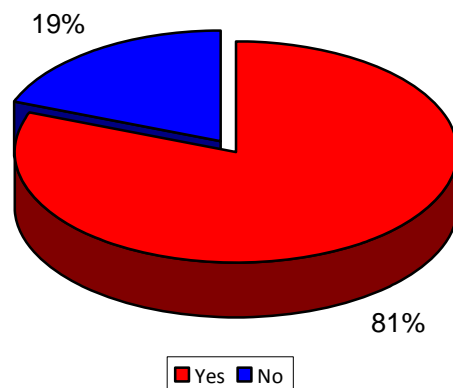
The Netherlands distinguishes between consumer protection and consumer welfare, seeing consumer protection as a separate, though probably complementary field of law to competition law.⁴⁴ Competition law keeps consumer options open, while consumer law protects the ability of consumers to choose among those options.⁴⁵ Consumer protection is a broader, and more general, concept than consumer welfare, and may describe all types of government regulation to inform and safeguard consumers. Consumer welfare when

⁴⁴ Kovacic, W.E., Competition Policy, consumer Protection, and Economic Disadvantage (2007) 25 *Journal of Law & Policy* 101, 114.

⁴⁵ "The Interface between Competition and Consumer Policies", OECD Global Forum on Competition, 5 June 2008, 17ff.

understood in the context of competition law enforcement in the Netherlands is a concept based on consumer surplus.

2.3.1 Distinction consumer welfare and consumer protection



The majority of Authorities stated that they distinguish between consumer welfare and consumer protection.⁴⁶ Some explain the distinction, indicating that consumer protection powers fall outside their remit,⁴⁷ or are the responsibility of a separate agency.⁴⁸ Mexico points out that consumer protection policy is seen as complementary to competition policy, as both are aimed at increasing (consumer) welfare. Similarly, the US DOJ and the Netherlands commented that although consumer protection is not part of the Antitrust Division's mission, by protecting competition, the Antitrust Division does, in turn, protect consumers.

For many Authorities, who have competencies in consumer protection and in competition enforcement, the distinction is grounded in principle. For example, Hungary states that consumer welfare and consumer protection are conceptually not identical. The Authority has both competition enforcement and consumer protection functions and they believe that ideally both public policies should ultimately serve consumer welfare (by different means), and should share the same world view in terms of the fundamental role of markets, efficiency and consumer choice. Australia refers to the fact that its legislation contains a number of consumer protection provisions, and their enforcement, while aiming to maximise total welfare, will coincidentally have the effect of protecting/increasing consumer surplus. Korea states that consumer welfare and consumer protection can be distinguished, in that the

⁴⁶ 38 Authorities. Total Respondents to this question: 47 Authorities.

⁴⁷ 3 Authorities.

⁴⁸ 6 Authorities.

former is achieved by providing many kinds of high quality goods at lower prices through enhanced competition, whereas the latter aims to prevent consumer harm resulting from unlawful business activities. Some Authorities point out that consumer protection can be seen as focused upon an activity usually carried out under consumer enforcement powers, while consumer welfare is a measure or a goal.⁴⁹

Some Authorities do not distinguish between consumer protection and consumer welfare, as the benefits aimed at by their competition legislation also provide benefits for consumer protection.⁵⁰ Consequently, it may not always be possible to draw a clear demarcation line between consumer welfare and consumer protection.

For some Authorities, the relationship between consumer protection and consumer welfare can relate to their powers. The US (FTC) has both competition and consumer protection mandates. Its response explains that the consumer welfare standard used for antitrust enforcement includes an element of consumer protection.⁵¹ The US (FTC) response notes that although functionally related, antitrust and consumer protection enforcement are distinct. Both contribute to the maintenance of a free market economy in which consumer welfare is maximized. However, competition enforcement protects the array of options that are available in the marketplace, whereas consumer protection ensures purchasers' ability to make an informed and effective selection from among those options. Keeping these functions clearly defined will help in devising policies that can best advance each of them.

Many Respondents seem to see the relationship between consumer protection and competition enforcement, and accord it with varying degrees of importance. The majority of responding Authorities do distinguish between consumer protection and competition enforcement, and this distinction seems to apply regardless of whether the Authority has a mandate to apply the law only in competition enforcement, or also in consumer protection.

⁴⁹ 2 Authorities.

⁵⁰ 9 Authorities.

⁵¹ In the US (FTC)'s consumer protection mission, consumer surplus is maximized insofar as purchasers can choose among non deceptively-described products that satisfy their needs, and consumer surplus is diminished insofar as consumers make different choices in the market than they would have absent deception.

Comments from session on Economic Definition : Calculating consumer welfare does not include consumer protection – Consumer protection is a different creature.

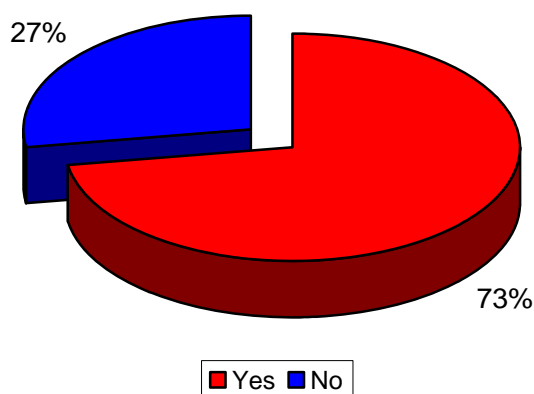
Moderated by Jan-Kees Winters (Netherlands) and Christian Ewald (Germany)

Participants in the breakout session generally agreed that consumer welfare is not consumer protection. If consumer protection is the goal of competition enforcement, then many aspects of consumer protection are being overlooked. Some participants noted that consumer protection is already regulated by other means and feared the potential of over-regulation to actually bring more harm than benefit to consumers.

2.3.2 Consumer welfare and consumer surplus and the relevance of non-economic criteria

Consumer welfare is defined, in economic terms, as consumer surplus.⁵² Consumer surplus, loosely speaking, is the difference between the amount the consumer would be willing to pay for the product and the price of the product. Focusing on low price may be guiding when assessing consumer surplus, however, low prices may not always be good for consumers.⁵³ Practically speaking therefore, consumer welfare is interpreted, to include the quality of the product, the range, the service etc., all of which are of course, related to the price.

2.3.2 Consumer welfare is confined to economic criteria



One of the first issues to address is whether the definition of consumer welfare focuses on consumer surplus (when referred to in a competition law enforcement context). For the majority of Respondents, this is the case.⁵⁴ A related issue is the degree to which consumer welfare is interpreted by Authorities as being confined to economic criteria and not extending to other public policy criteria.

⁵² It should be noted that not all economists or lawyers may accept this definition, for example, Bork defined consumer welfare as “merely another term for the wealth of the nation”. Bork R., *The Antitrust Paradox*, (New York, Basic Books, 1978), p. 90.

⁵³ Orbach, B.Y., *The Antitrust Consumer Welfare Paradox*, (2010) *Journal of Competition Law & Economics*, 7 (1), pp. 133-164.

⁵⁴ 39 Authorities: Total Respondents that answered this question: 47

Australia has a total welfare focus. However, in considering total welfare Australia has regard to total surplus (i.e. consumer surplus + producer surplus). Consistent with standard economic welfare analysis, changes in quality are reflected in shifts in a demand curve. All other things equal, an improvement in the quality of a good or service (e.g. an airline alliance leading to greater choice of flights) leads to an outward shift of the demand curve for that good or service and, hence increase in total surplus (including consumer surplus). Australia's interpretation of "economic criteria" encompasses a wide range of environmental, health, safety and other 'social' considerations in addition to economic efficiency. New Zealand makes it very clear that they define consumer welfare as consumer surplus and long-term consumer welfare as being promoted in markets that maximize total welfare.

The majority of Respondents agreed that the interpretation should be confined to economic criteria.⁵⁵ France makes it quite clear that its mandate is exclusively to make markets work in the best interest of consumers. Promoting other public policies and, if need be, reconciling those with consumer welfare, is a task which may best be achieved by Government and Parliament. Mauritius would seem to agree but adds that in assessing remedies, it can consider a number of possible offsetting benefits, including safety, which are arguably non-economic, but must relate to consumers or businesses more widely to be considered. In this regard, Finland states that much of the essence of consumer welfare can be translated into economic terms. Safer or improved products, for example, enter the demand via consumer preferences. One Authority states that when applying competition law, it does not look at non-economic considerations' (environmental considerations, media plurality), except in mergers, where in special cases, 'public interest' issues are considered.

Some of the Respondents stressed that quality in particular is also reflected in the definition of consumer surplus.⁵⁶ Others agree that consumer welfare should be interpreted to mean consumer surplus insofar as consumer surplus is not restricted to a preference for lower prices but extends to fostering quality, choice of products, variety, service and sustained and potential innovation.⁵⁷

⁵⁵ 37 Authorities: Total Respondents that answered this question: 51.

⁵⁶ 6 Authorities. Pakistan gives a hypothetical example of where an acquisition that was expected to lead to a decline in product quality by some proportion, with the nominal price remaining unchanged, a proportional rise in the quality-adjusted price would result. This situation would then be comparable to an increase in the nominal price by that proportion, with quality being held constant.

⁵⁷ 8 Authorities.

Although Hungary accepts that other public policies intend to serve the public interest, welfare or even consumer welfare in their own way, Hungary does not interpret its own mission, and the consumer welfare objective, in a way which would effectively integrate other public policies or their specific objectives into competition policy. Hungary adds that consumer surplus is a useful conceptual bench-mark and can provide intellectual discipline. It is also more embedded into the standard empirical competition policy framework, a comment echoed by Swaziland. Nevertheless, Hungary stresses that a narrow technical approach may ignore economic aspects that are sometimes very important and that, therefore, have to be a part of the picture, even if they are difficult to compare with those connected to consumer surplus. In that light, Korea's definition of consumer welfare includes both non-economic benefits such as the right to choose and additional conveniences, as well as consumer surplus measured by economic criteria. That is, it considers that consumer welfare can be undermined by lower product quality, decreased product varieties, sluggish innovation and infringement of the right to choose, not just by excessive price hikes.

Comments from session on Economic Definition : Competition legislation and economic goals

Moderated by Jan-Kees Winters (Netherlands) and Christian Ewald (Germany)

The justification for considering only economic criteria in the assessment of consumer welfare is the reality that most competition law is related to economic goals. One might risk neglecting these legislative goals if non-economic criteria were taken into account in the assessment of consumer welfare.

Some Authorities disagreed with excluding non-economic criteria from their interpretation of consumer welfare.⁵⁸ Jordan stated that it could extend, for example, to social and financial policies. In the opinion of some agencies, it is not clear how the two differ, as consumer welfare is a broad term. However, the focus of the Authorities' work is competition and while consideration of the impact on consumers is permitted in limited circumstances (relating, for example, to merger remedies), the Authority's consideration is confined to economic criteria.⁵⁹ Some Respondents disagree that consumer welfare can be equated to consumer surplus.⁶⁰ Malta and Mauritius stated that the definition should not necessarily be so interpreted, but should be left more open. Some Respondents point out that the question is

⁵⁸ 15 Authorities.

⁵⁹ 1 Authority.

⁶⁰ 6 Authorities.

not applicable as they do not use a formal definition of consumer welfare.⁶¹ The European Commission explained that the issue is case specific and may be subject to pending court proceedings.

Comments from session on Economic Definition : A call for a flexible definition of consumer surplus
Moderated by Jan-Kees Winters (Netherlands) and Christian Ewald (Germany)

During the breakout sessions, there was general agreement that consumer welfare can be confined by economic criteria if one uses a loose definition of consumer surplus (i.e. the price related to the quality, the range, the service, the variety etc.). If one uses a strict definition in which consumer surplus only includes the price in a strict sense, one should include non-economic criteria as well when assessing consumer welfare.

Generally, Respondents do not seem to wish to be tied to a formal definition of consumer welfare as consumer surplus, and certainly not if consumer surplus is given a narrow definition and confined to price, without due consideration for quality, and other economic criteria.

2.3.3 Consumer welfare and total welfare

From an economic perspective, for many Authorities competition enforcement is a means to make markets work and achieve economic efficiency. As such, from an economic perspective, the choice of a total welfare standard generates the most for society as a whole because it takes into account both allocative and productive efficiency. Total welfare is the combined welfare of the consumer and producer, that is, consumer surplus plus producers' gross profit on the product.⁶² This total welfare standard, in line with the Chicago school, treats the distribution of wealth between consumers and producers neutrally.

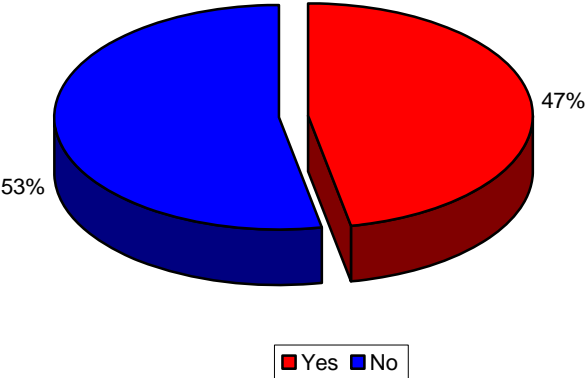
The view of the Netherlands is that in practice, total welfare and consumer welfare go hand in hand when the focus is on dynamic aspects. In the long-term, more competition is always to the benefit of producers, labour and consumers. However, total welfare and consumer welfare will not always go hand in hand in the short-term. A restriction of competition, which leads to an increase in price, generates a deadweight loss. This implies that total welfare decreases, and that decrease is to the disadvantage of the consumer in the short-term.

⁶¹ 2 Authorities.

⁶² Motta, M., *Competition Policy: Theory and Practice* (Cambridge University Press, 2004), 18.

Authorities may be reluctant to accept the total welfare standard as a guiding principle, for example, because of the sensitive issue of wealth distribution.⁶³ Because a total welfare standard does not automatically result in a “fair” share of benefits for consumers, the Authority may need to use a consumer welfare standard which allows for a redistribution of the benefits between consumers and producers.

2.3.3.1 Focus on total welfare in addition to consumer welfare



A discussion on the selected welfare standard is therefore important because the selection of the welfare standard affects decisions in the enforcement of competition rules.⁶⁴ Respondents were split equally on the issue of whether they considered total welfare in addition to consumer welfare.⁶⁵ The reason for such an equal split probably lies in the answer given by the US DOJ which pointed out that the distinction between “Total Welfare” and “Consumer Welfare” is only clear enough for a yes/no answer in the most abstract, static models of textbook economics. The US DOJ considers the welfare of consumers as the primary goal of antitrust enforcement. In doing so, it recognizes that cost savings or other benefits which may accrue most immediately to a producer in a marketplace can, through one mechanism or another, be passed through to consumers if the marketplace is generally competitive. The concept of weighing or sorting benefits to one group or another or over time is further complicated by the unpredictability of events far enough in the future. So, in practice, the DOJ tends to give most weight to effects on consumers that are direct and immediate and to consider other, indirect, implications for the welfare of consumers to the extent that those can be reasonably predicted or proven. Similarly, other Authorities stressed

⁶³ Kalbfleisch, P., “The Assessment of Interests in Competition Law: a Balancing Act” in *Economic Law and Justice in Ties of Globalisation*, (Monti et al ed.s), (Nomos Verlagsgesellschaft, Baden-Baden, 2007), 455, 462.
⁶⁴ Van Sinderen, J. and Kemp, R., “The Economic Effect of Competition Law Enforcement: the Case of the Netherlands”, (2008) *De Economist*, Vol. 156, Nr. 4, 365.
⁶⁵ 24 Authorities. Total respondents that answered this question: 51 Authorities.

that they do not consider total welfare when carrying out pure enforcement activities, but might when looking at advocacy interventions, market studies or evaluations of the impact of their work. Their ultimate objective is the enhancement of consumer welfare and they believe that the pursuit of short run consumer welfare and long run total welfare are intrinsically linked.⁶⁶

Some Authorities apply a total welfare standard.⁶⁷ Australia and New Zealand make it clear throughout the questionnaire that they apply a total welfare standard. Australia sees long run or dynamic consumer welfare often as a good proxy for total welfare, which is its welfare standard. The legislation of Swaziland and also that of Taiwan and Kenya require a broad definition of consumer welfare.

One Authority stated that while they mainly apply a consumer welfare standard, in practice total welfare is what truly matters. Another said they are excluded from evaluating total welfare due to limited resources. Although competition policy in Bulgaria is primarily concerned with the effects of competition on consumers, its legislation also contains unfair competition provisions which aim to protect the interests of individual competitors. Some Authorities point out the need to consider both producer and consumer surplus in the context of assessing efficiencies under their merger rules.⁶⁸ Finland qualifies its answer by pointing out that reducing the deadweight loss of imperfect competition does not directly require an assessment of how the gained deadweight loss is divided, at least in the short term.

Of those Respondents that state they do not consider total welfare in addition to consumer welfare,⁶⁹ the following comments are illustrative of their answers. Korea explains that from a practical perspective, their decisions and those of their courts indicate that consumer welfare, rather than total welfare, is a criterion for examining anticompetitive effect of a behaviour; they give examples of cases stipulating that the alleged benefits of the behaviour in question must be passed on to the consumer. Poland points out that an increase in total welfare will usually not stop the condemnation of a practice harmful to consumers. Mauritius agrees that while they can consider "the efficiency and adaptability of the economy as a whole" and can

⁶⁶ 2 Authorities.

⁶⁷ 2 Authorities and respectively 3 and 2 Authorities.

⁶⁸ 2 Authorities.

⁶⁹ 26 Authorities.

take account of some other things in assessing remedies, their guidelines make clear that the main parties' profits cannot be considered a benefit of a breach of the Act, so there is no total welfare criterion. In the long run, they agree, as do all Respondents, that total and consumer welfare converge. Taiwan gave an example of a merger review case between the two biggest Karaoke companies in 2008, where Taiwan considered both expected changes in consumer surplus as well as total welfare when prohibiting the merger.

Comments from session on Economic Definition : Dynamics

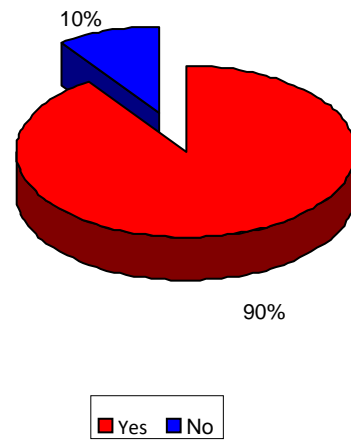
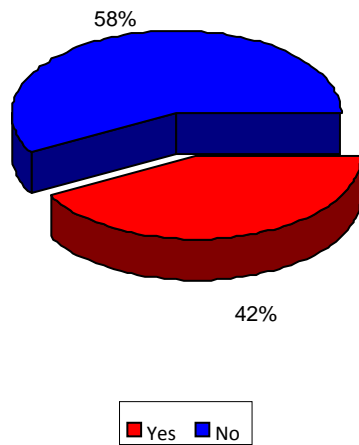
Moderated by Jan-Kees Winters (NL) and Christian Ewald (Germany)

During the breakout session the participants agreed that total welfare includes an evaluation of dynamic aspects.

In the opinion of the Netherlands Authority, competition enforcement aims not to maximise welfare, but to promote welfare.⁷⁰ Total welfare may well be preferred as a standard, at least from a theoretical perspective. However, in many cases, consumer surplus may be the best option available to Respondents, as it fits best with the ultimate goal of the Authorities.⁷¹ Part of the solution to the total welfare question may lie in the answers Respondents gave to the questions on short-term and long-term consumer welfare. According to the Netherlands Authority, it would seem that when taking a long-term focus, total welfare should be of most importance, and in the short-term, it is more practical to focus on short-term consumer welfare. However, a focus on short-term consumer welfare should not be at the expense of investment and innovation by producers.

⁷⁰ NMa Agenda 2010-10011, p. 25.

⁷¹ Farrell J., and Katz M.L., the Economics of Welfare Standards, (2006) *Antitrust Competition Policy International* 2 (2), pp. 29-54.



2.3.4 Short-term and long-term consumer welfare

For the purpose of the questionnaire, short-term consumer welfare is defined as the consumer surplus after a period of 1 to 3 years following a transaction subject to competition law scrutiny. Long-term consumer welfare is the consumer surplus that can be expected after that period. Arguably, a short-term consumer welfare standard can be damaging to firms' incentives to invest.⁷² Consumer welfare may be examined from a static or a dynamic perspective. Static efficiency is based on the short term and relates to the optimal distribution of scarce resources among alternative production targets. Static efficiency concerns resource allocation at a certain point in time. Dynamic efficiency is based on the long term and focuses on increasing welfare over time. Dynamic efficiency concerns the incentive to innovate and renew processes and products. The questionnaire asked Authorities about their focus on short-term versus long-term consumer welfare.

Some Respondents focus on short-term consumer welfare.⁷³ Some Authorities consider both.⁷⁴ For some Authorities, the time frame of consumer welfare will depend on a particular case and market concerned. New Zealand gives specific examples of legislative provisions, under which it is obliged to take short-term consumer surplus into account.⁷⁵ Finland points out that in the prioritization of case handling, the magnitude of short-term gains in consumer welfare (surplus) plays a key role. Although cases that are important as a matter of principle,

⁷² Cseres K., "The Controversies of the Consumer Welfare Standard" (2007) *The Competition Law Review* 121, 150.

⁷³ 22 Authorities. Total respondents that answered this question: 52 Authorities.

⁷⁴ 14 Authorities.

⁷⁵ New Zealand cites that short-term consumer surplus can be used in cases concerning prohibiting contracts, arrangements, or understandings substantially lessening competition, certain provisions of contracts, etc, with respect to prices deemed to substantially lessen competition, prohibiting the taking advantage of market power, and in cases where the Commission may grant clearances to business acquisitions.

such as hard-core restrictions, may not yield imminent consumer gains, due to the limited size of the market affected, addressing such cases nevertheless adds to the credibility of antitrust enforcement, and thus contributes to long-term consumer welfare.

Most Authorities do not focus exclusively on short-term consumer welfare.⁷⁶ The vast majority of Respondents focuses on long-term consumer welfare.⁷⁷ The very purpose of New Zealand's competition legislation is “to promote competition in markets for the long-term benefit of consumers within New Zealand.” Australia points out that in the short run, consumer welfare can be a poor proxy for total welfare since it does not take into account the need for firms to earn sufficient returns to invest and innovate.

For the Netherlands, although focusing on long-term consumer welfare is the norm, immediate damage to short-term consumer welfare will be relevant. For example, when selecting which case to prioritise, one criterion which is taken into account is the degree to which intervention will be beneficial to consumers. If intervention would prevent immediate damage (in addition to being beneficial to consumer welfare in the long term), then that is a reason to prioritise such a case. Poland has done predatory pricing cases where the focus is long-term. One Authority states that although it recognises that there may be short term gains to consumers resulting from a merger, its focus in mergers and markets is on long term effects, including efficiencies that benefit customers in the medium to long-term.

France focuses on long-term consumer welfare, both when reviewing mergers, where a dynamic approach must be taken, and in antitrust enforcement since, under article 101(3) TFEU, the issue of whether an anti-competitive practice yielded economic efficiencies must be addressed.⁷⁸ Mauritius focuses on long-term consumer welfare, but not explicitly. More generally, Mauritius is concerned with assessing competition itself as a process of rivalry, rather than necessarily considering its effects.

One Authority says that the decision to look at short-term or long-term consumer welfare depends upon the context in which they are operating. For instance, they will not intervene in

⁷⁶ 30 Authorities.

⁷⁷ 47 Authorities. Total respondents that answered this question: 52 Authorities.

⁷⁸ France provides an illustration of the latter in their recent case of collusion in the banking sector (decision 10-D-28 of 20 Sept. 2010).

favour of static competition where this is to the detriment of dynamic competition. However, although the Authority does not in principle focus exclusively on short-term consumer welfare, in practice, it is often hard to do more than this. Hungary agrees, and its comment seems to sum up the issue very clearly: “long-term consumer welfare does not only seem more appropriate as a goal than short-term consumer welfare, and more consistent with a dynamic approach, but in principle it also reduces some of the dilemmas discussed above. Short-term producers’ surplus and quality may translate into consumer surplus in the long term, via dynamic efficiencies and the operation of the competitive process, if conditions are given. However, in reality, the time horizon of reliable analysis often does not make it plausible to take into consideration long term effects, even if the broader conceptual framework would allow that”.

One Authority stated it does not distinguish the short-term from the long-term when enforcing the law. Several Authorities made it clear that they will not intervene in favour of static competition where this is to the detriment of dynamic competition.

2.4 Welfare of end-consumers or intermediate consumers

It is not the intention of the special project to delve into definitional issues of who is, or is not, a consumer, or whether it is a national or international consumer. Such a definition may tend to be more political than economic in nature. However, it is helpful to reach at least a technical definition of whose welfare is being taken into account. In this regard, it may be that the “consumer” in “consumer welfare”, refers to all direct and indirect users who are affected by the anticompetitive agreements, behaviour or mergers in question,⁷⁹ or the focus may be more exclusively on the end-consumer.⁸⁰ These questions were answered in considerable detail by most Respondents. Indeed, one Respondent reported having recently performed an in-house review in which three related issues arose in this context: the dilemma of intermediate (direct) versus end consumer’s welfare; the different approaches applied to abuse of dominance allegations, to merger control and to cartel investigations (i.e. whether in one way or another all of them are ultimately aimed at maximizing long term welfare of final consumers as a consequence of differing implicit presumptions reflecting underlying

⁷⁹ According to the European Commission, “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”, European Commission Notice on the Application of Art. 81(3).

⁸⁰ Where end-consumer refers to those persons who are acting for purposes outside their trade, business, or profession.

differences between major cases types); and whether such differences are consistent with the letter of the applicable competition law and with international best practice.

Comments from session on Economic Definition : Considering solely national consumers or international consumers too

Moderated by Jan-Kees Winters (NL) and Christian Ewald (Germany)

The question about which group of consumers is taken into account in the applied assessment of consumer welfare was consciously not inserted into the questionnaire. However, in the break-out session it emerged that the subject of whether we should consider solely national or also international consumers invites keen discussion. It could therefore be interesting to examine further the question of which specific group of consumers ought to be taken into account.

Some Respondents look at the welfare of both intermediate and end-consumers.⁸¹ Some Respondents note that consumers include all actual and potential, direct and indirect customers (e.g. clients, distributors, possibly competitors, as well as end-customers), in an economic sense. One Authority stated it considered the welfare of both consumers and producers. Many Authorities say they do not exclusively look at end consumers in all types of cases.⁸² Logically, many Authorities also say they do look at welfare of the intermediate consumer in all types of cases.⁸³ Some Authorities note that they look at intermediate consumers in all cases, but assume pass through to end consumers.⁸⁴

Comments from session on Economic Definition : Consumer Welfare and intermediate consumers

Moderated by Jan-Kees Winters (NL) and Christian Ewald (Germany)

Some participants in the break-out session were in favour of legislators making the choice on whether consumer welfare includes the welfare of immediate consumers. Other participants preferred a broad formulation in their legislation, since they did not consider it the role of the legislator to decide on such economic questions.

It was observed that a broad formulation of consumer offers a pragmatic solution, since it is sufficiently flexible to accommodate future economic arguments.

Approximately 15% of the Respondents said they do not look at consumer welfare at the intermediate level in merger, cartels and dominance cases.⁸⁵ Malta notes that ensuring fair competition among undertakings is also given due importance. Some Authorities have interesting provisions in their national legislation on this topic. In Swaziland, "Consumer"

⁸¹ 3 Authorities.

⁸² 39 Authorities.

⁸³ 38 Authorities. 1 Authority looks at intermediate consumers in mergers, cartels and dominance cases.

⁸⁴ 2 Authorities.

⁸⁵ 8 Authorities.

includes any person- (a) who purchases or offers to purchase goods otherwise than for the purpose of resale but does include a person who purchases any goods for the purpose of using them in the production and manufacture of any other goods or articles for sale; (b) to whom a service is rendered. Although the question was not asked in the questionnaire, some Authorities mentioned definitions restricting the concept of consumer welfare to national consumers, and excluding favouring one group of consumers over another.⁸⁶

Comments from session on Economic Definition : Buyer Power, a necessary evil?

Moderated by Jan-Kees Winters (Netherlands) and Christian Ewald (Germany)

During the breakout session a discussion arose on the matter of buyer power. Some participants were of the opinion that buyer power is not problematic from a consumer welfare point of view, since it enhances the consumer surplus. Others saw buyer power as problematic insofar as it can limit competition and therefore consumer welfare should not be a primary goal of competition enforcement. Due to high barriers to entry, buyer power can result in only one cheap brand being left over, with little chance of market entry, whereas some consumers want real choice. One participant in the break-out session indicated that whereas some consumers want choice, others simply want the cheapest product.

It seems that most Authorities presume that harm to intermediate consumers generally causes harm to end consumers. Some see the end consumers as the only true consumers.⁸⁷

2.5 Conclusion

Some general conclusions can be drawn from the often detailed and informative answers provided by Respondents on the issue of defining consumer welfare. The starting point for most Respondents seems to be to ensure competition on the markets in their jurisdictions. The importance they place on consumer welfare as a primary goal or an underlying goal varies considerably among Respondents. Perhaps partly because of this, many Respondents do not seem to utilize a formal definition of consumer welfare.

On examination of what Respondents understand consumer welfare to be, it becomes clear that many Respondents distinguish between consumer protection and consumer welfare, seeing the former as broader than the latter.⁸⁸ Many Respondents interpret consumer welfare, to include quality, and other (economic) criteria.⁸⁹ Many Respondents acknowledge

⁸⁶ 2 Authorities.

⁸⁷ Akman P., "Consumer versus Customer: The Devil in the Detail" (2010) *British Journal of Law and Society* 37 (2), pp. 315-344.

⁸⁸ 38 Authorities. 81 % of the Respondents to that question.

⁸⁹ 37 Authorities. 73 % of the Respondents to that question.

that, it may be more accurate to use total welfare, most seem to regard consumer welfare as a more useful standard in most cases, for practical purposes.⁹⁰ Many Respondents seem to prefer a long-term approach in theory, and favour a dynamic perspective over a static one. However, many Respondents seem to admit that enforcement realities frequently oblige them to have regard to short-term effects, and often to use a static perspective.⁹¹ Finally, many Respondents look at the welfare of intermediate consumers in at least some of their investigations.⁹²

The answers to the questions on the definition of consumer welfare were among the most elaborate of the questionnaire. It seems that Respondents hold strong views on defining consumer welfare, yet agree with each other on more issues than might be expected.

⁹⁰ See discussion at paragraph 2.3.3.

⁹¹ See discussion at paragraph 2.3.4.

⁹² 39 Authorities. 76% of the Respondents to that question.

Chapter 3 - Quantification in Competition Cases

3.1 Introduction

The purpose of the questions relating to the quantification of detriment to consumer welfare in individual competition cases is to provide a survey of what Authorities think is possible in terms of quantification of detriment and if and how they apply this in practice. It was also asked, if applicable, whether the quantification methods used were reviewed by courts. A preliminary question is whether or not there is a burden of proof for competition Authorities to establish a detriment to consumer welfare in competition cases. This partly determines the relevance of methods for quantification of detriment to consumer welfare.

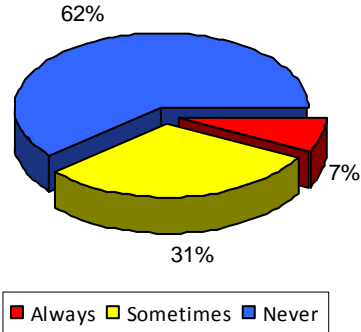
The kind of quantification of detriment to consumer welfare that is dealt with in this section, must be distinguished from the type of quantification of the effects competition Authorities' interventions may have at a more macro level. The latter kind of quantification, also referred to as outcome, is the subject matter of Chapter 4 of this Document. This Chapter looks at quantification at the more micro level of specific competition cases. Firstly, a survey of the answers received is provided, on both the burden of proof and the issue of how detriment to consumer welfare is or may be quantified. Each part is then followed by some reflections on these answers supplemented with observations on experiences in the Netherlands. The section concludes with some remarks on quantification of detriment to consumer welfare and the use (and limitations) of it in optimizing effective competition law enforcement.

3.2 Burden of proof

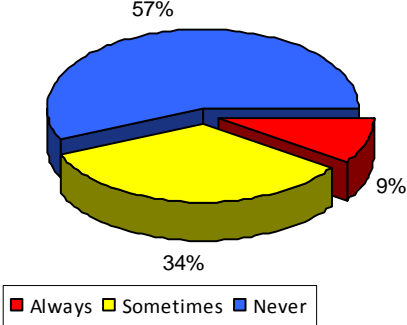
A majority of the Respondents state that situations may arise in which they are required to prove detriment to consumer welfare. The requirement to prove detriment may occur at different stages of the proceedings, in different types of cases. For some Authorities, it seems that the existence or absence of a burden of proof in an individual case is determined by case-specific aspects, this will be discussed further at 3.2.2 below.

3.2.1.1 - 3.2.1.3 Burden of Proof in Merger,⁹³ Cartel,⁹⁴ and Dominance Cases⁹⁵

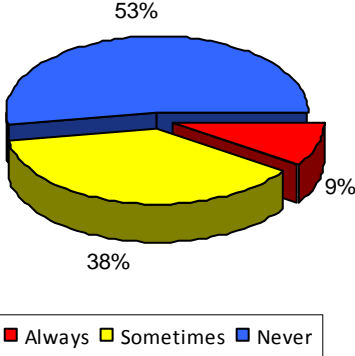
3.2.1.1 Burden of Proof in Merger Cases



3.2.1.2 Burden of Proof in Cartel Cases



3.2.1.3 Burden of Proof in Dominance Cases



The answers suggest that a burden of proof is most likely to exist in a specific case, when the flaw obliges, or the Authority chooses, to demonstrate the (negative) effects of a certain conduct/alleged infringement. However, many Authorities also mentioned that detriment to consumer welfare may also need to be proven during the decision and/or establishing the theory of harm.

Therefore, although a few Authorities are required to bear the burden of proof as a general rule (at some stage of the proceedings), a majority of those responding to the survey only have to do so at certain stages of some proceedings, and this is generally determined on a case-by-case basis.

⁹³ 54 Authorities responded to this question.
⁹⁴ 53 Authorities responded to this question.
⁹⁵ 53 Authorities responded to this question.

3.3 No Burden

In response to the question of whether Authorities are (sometimes) required to prove a detriment to consumer welfare at any stage of the proceedings, 22 Authorities responded negatively.⁹⁶

However, 20 Respondents often note that the fact that they have no such burden does not mean that they do not consider the interests of consumers at all, or make no reference to consumer welfare at any stage of the proceedings. In fact, the potential effects on competition or consumer welfare may play a role in the context of i) the internal process of determining which cases to investigate; ii) in establishing the theory of harm; iii) the assessment of or permitting of exceptions; iv) the assessment of the gravity of an infringement; or of v) determining the sanction/fine. Norway notes that while applying the competition act special consideration is given to the interests of consumers, but there is no explicit burden of proof on the Authority in individual cases. Poland also notes that in cases that go beyond the realm of presumptions (not in hard core cartels or restrictions), consumer welfare may be explicitly taken into account at more or less all stages of the proceedings.

The Netherlands note that if the Authority states that consumer welfare is harmed, it must prove such detriment, regardless of the type of case at hand. Another Authority notes that in merger cases the emphasis is on establishing a ‘substantial lessening of competition’ (SLC) to the requisite level (i.e. ‘expect’) and when making exemptions it will need to ‘expect’ that the efficiencies will arise and passed on to the consumers. Yet another Authority notes that it always refers to consumer welfare when establishing a theory of harm, when drafting a decision and when determining the sanction in merger cases. The reference to consumer welfare is also always made in dominance cases and sometimes in cartel cases. However, the said Authority does not consider such reference to amount to a burden of proof.

3.4 Case-by-case Burden

In contrast, some Authorities state that a burden of proof may exist in all three types of cases at one or more stages of the proceedings. For example, Australia states that there is a burden in merger, cartel and dominance cases to establish ‘substantial lessening of competition’ (SLC)

⁹⁶ 57 Authorities responded to this question.

and adds that this test has many elements in common with a total welfare test, except that it does not take into account potential efficiency benefits. Nine Respondents have a burden of proof in all three types of cases at several stages of the proceedings. France notes that consumer welfare necessarily has to be considered in merger and dominance cases and also at some stages in cartel cases. Hungary notes that it does not have to prove effects in cartel cases where an anticompetitive objective can be established. There is no burden when drafting the decision, but the Competition Council of the Authority sometimes includes “messages” (either of an educative or advocacy nature) in the written decision. These are observations beyond the scope of the legal purpose of the decision and do not have to be substantiated by hard evidence. There is also no burden while arguing the case in court. The European Commission says the burden of proof is case-specific and may be subject to court proceedings. South Africa also notes that it sometimes has a burden.

US DOJ states that it does not carry a formal burden of proof prior to the initiation of court proceedings, although it does consider the impact of investigated activity on consumer welfare in initiating enforcement action in the courts, as well as in issuing public statements where appropriate in closing investigations without enforcement action. DOJ reported that it does have a burden to establish consumer detriment when it initiates court proceedings and related litigation in mergers and dominance cases. However, cartels are conclusively presumed to be unreasonable under the Sherman Act, and thus presumed to harm consumer welfare. In a cartel case, DOJ must prove that the cartel agreement existed and the defendants entered it, but DOJ is not required separately to demonstrate harm. Similarly, the US (FTC) notes that, at stages where there is no formal burden of proof, consumer welfare is nevertheless considered informally.

Other Authorities have a burden of proof either in cartel or dominance cases or in both types of cases. Finland indicates that the burden of proof depends on each case at hand.⁹⁷ Five other Authorities stated that they also have a burden in cartel and dominance cases at certain stages of the proceedings. Vietnam and Zambia state that they only have a burden of proof in cartel cases. Jordan and Mauritius only have a burden in dominance cases. Mauritius states that in dominance cases, there is a burden of proof in establishing the effects, when making

⁹⁷ Moreover, with the new law that is to be adopted, the Finnish Authority shall set forth all the essential facts or matters which it considers relevant in terms of evidence, in the statement of objection-phase.

an exception and when determining the sanction, but only if the Authority chooses to demonstrate effects. Besides this, the Mauritian Authority has a list of relevant benefits that may be considered when assessing remedies, among which is consumer welfare. Kenya and Malta both only have a burden of proof, at several stages, in cartel and in merger cases when making an exception (efficiencies). Swaziland has a burden of proof at several stages in dominance and merger cases. Canada states that in merger cases a formal legal burden (with respect to establishing consumer harm) does not exist prior to the initiation of proceedings before the Competition Tribunal; nevertheless, Canada considers impacts of a merger on consumer welfare when developing and assessing theories of harm.

In merger cases, most Respondents do not have a burden of proof (see graph 3.2.1). In contrast, Israel states that it only has a burden of proof in merger cases when drafting the decision. Some, like Croatia, Kenya and Malta have a burden of proof in merger cases, but only when making exceptions (accepting efficiency defences). Furthermore, 11 Respondents have a burden of proof in merger cases at some stages of the proceedings. Korea indicates that when assessing anticompetitive effects in merger review, detailed anticompetitive effects, i.e. detriment to consumer welfare of the transaction, must be proven. While, when assessing efficiency defences, the potential increase in consumer welfare must be proven. Korea adds that in this respect, the process of proving the potential consumer harm is conducted when assessing the anticompetitive effect of a merger transaction rather than being conducted separately.

3.5 Burden of Proof: Possible Interpretations

The fact that a burden on many Authorities to prove detriment to consumer welfare seems to only exist in a limited number of the competition cases that Respondents deal with, and/or only at limited stages of the proceedings, might be explained by the existence of (implicit) legal presumptions. A common legal presumption is, for example, that ‘hard core’ cartels have or are intrinsically capable of having, anti-competitive effects and have a negative effect on consumer welfare. In such cases, it is not necessary to prove case-specific anti-competitive effects in order to establish an infringement. Such legal presumptions are based on generally-accepted economic theory and supported by empirical studies. Therefore, it is considered justified that it is not necessary to prove that in each individual case, the economic theory is

correct, nor therefore necessary to quantify the exact harm to consumer welfare. It could be argued that such quantification is not in the interests of effective enforcement of competition law and prevention goals.

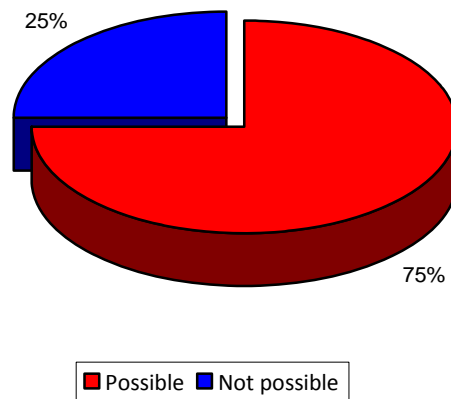
However, in many jurisdictions legal presumptions and/or the validity of general economic theories are rebuttable in individual cases using case-specific economic evidence. This implies that - even if the Authority has no burden to prove negative effects on competition and consumer welfare - parties to the proceedings may confront Authorities with economic evidence to the contrary. The more convincing this submitted evidence is, the more an Authority might be forced to assess this or conduct a closer examination of the potential effects on competition or consumer welfare in order to decide on an infringement or sanction, or to uphold an infringement or sanction in court. In The Netherlands, it is possible to observe a development in jurisprudence from a form-based approach towards a more effects-based approach, although this is more apparent in merger and dominance cases than in hard core cartel cases. In cartel cases, although the courts accept the intrinsic capability of a cartels' negative effects on competition and consumer welfare, the courts may take the intended or potential negative effects of the specific case into account when considering the proportionality of the (level of the) fine. Especially high fines might require a higher level of substantiation, in qualitative terms, of the intended or potential harmful effects of the infringement to competition.

3.6 The possibility to quantify consumer harm and actual practice

A minority of 28% of the Respondents believe it is not possible to quantify detriment to consumer harm.⁹⁸ When stating that they do not believe it possible to quantify the detriment to consumer welfare, Authorities cited such reasons as: i) scarce human resources; ii) limited data/information in cases; and iii) it had never tried - two Authorities did however note that they apply the concept generally during the course of their investigation. Five other Authorities noted that although some aspects of consumer detriment may be possible to quantify - such as overcharge - it is much more difficult to quantify aspects of quality and range/extent of choice, especially because these factors play out in the long run and should therefore not be reduced to a simple matter of a short run welfare triangle.

⁹⁸ 15 Authorities; 28% of Respondents to this question.

3.6 Possibility to quantify detriment



Although a large majority of the Respondents do consider it possible to quantify detriment to consumer welfare, it is observed that they nonetheless all seem to recognize difficulties and limitations to such quantification.⁹⁹ Indeed, some Authorities who stated that they believed it possible to quantify the detriment to consumer welfare, also commented that it is only possible to assign an order of magnitude or a range of feasible values, rather than a point estimate (Finland and Australia), or that no full and perfect quantification is possible due to strong constraints in terms of data, time/dynamic with reference to the detriment to consumer welfare and the presence of quality or other non-price aspects (Hungary, Korea, the Netherlands New Zealand, US (FTC)). Some Authorities stated that due to these constraints the ability to quantify the detriment usually depended on the specific circumstances of the case (the European Commission, France), or the assessment will largely be in qualitative terms (Kenya, the Netherlands and another Authority).

Many Authorities indicated that although quantification of possible detriment to consumer welfare is possible, they either believe conducting qualitative or quantitative assessments to can be difficult in practice (Sweden, Italy, US (FTC and DOJ), or stated that they had never applied it in practice (Bulgaria, Honduras (lack of data availability), Malta, Cyprus and Swaziland (lack of human resources)). In this respect, a majority of Respondents stated that they did not provide a qualitative and/or quantitative assessment of detriment to consumer welfare for many of the reasons given above.¹⁰⁰ Indonesia stated that the assessment of detriment decisions in their jurisdiction is still limited to possible detriment to consumer

⁹⁹ 39 Authorities; 75% of Respondents to this question.

¹⁰⁰ 30 Authorities.

surplus, not consumer welfare. Taiwan noted that it used difference of price after and before the cartel times the quantity and the time period. Yet other Authorities focus on the effect on competition and attempt to assess (either qualitatively or quantitatively) the likely harm to competition, often using the impact on customers as a proxy. This assessment is often taken into account when considering the proportionality of a particular remedy or sanction.

A few Respondents' comments referred to the need to conduct such an assessment or the purpose of it, rather than just the ability, as discussed above. For example, Bosnia and South Africa stated that such quantification is a private enforcement issue in their jurisdiction. In seven jurisdictions, the law does not require such an assessment and there is no burden of proof.

Comments from session on Quantification and Legal Burden of Proof : Quantification not really an issue in administrative cases, as purpose of fine is punishment and deterrence not compensation.

Moderated by Ewoud Sakkers (EU) and Monique Van Oers (Netherlands)

In terms of financial penalties, quantification may be less important because its goal is compensation, while the objectives of a fine are generally punishment and deterrence. The increase in the size of fines reflects competition authorities' emphasis on deterrence. Quantification may be more important in a system of criminal enforcement. For example, when demanding a custodial sentence, an Authority might have to convince the jury that the cartel has clear negative effects on a particular market.

3.7 The use of a qualitative and/or quantitative assessment

Where detriment to consumer welfare is considered by Authorities, the question often arises if, and how, Authorities actually quantify this detriment in practice. Of the Authorities which stated that they quantify consumer detriment, 20 stated that they also actually use a qualitative and/or quantitative assessment. For example, Australia and Canada use such assessments in a variety of circumstances. In Australia the qualitative and quantitative assessment of the potential benefits is weighed against the potential detriment to total welfare (not consumer welfare) in authorization and notification matters. Also in cartel, monopolization and merger cases qualitative and quantitative assessment is used in order to determine whether the offending conduct is likely to substantially lessen competition, which is a proxy for assessing likely (total) welfare detriment. Bulgaria only undertakes qualitative assessments when analysing vertical agreements in order to determine their actual or potential effects on the relevant markets, as well as their effects on end consumers.

The Respondents also provided a variety of answers as to what they base their assessment on. Korea, for example, bases its assessments of consumer harm on price hikes and lost opportunities for developing new products/drugs. This was recently carried out in a case concerning unlawful allurement of customers (provision of rebates) by pharmaceutical companies. Korea also provided an example of a quantitative assessment which it had carried out by multiplying the number of domestic passenger flights by the increase in fuel surcharge in a dominance case. France, Latvia, Luxemburg, Norway, Turkey and US (FTC and DOJ) stated that they conduct qualitative assessments on whether, for example i) prices increased; ii) a tendency for prices to increase exists, and/or iii) incentives for innovation were hampered. The US FTC and DOJ note that quantitative assessments are attempted (insofar as the evidence will support them). Also New Zealand and Turkey attempt to use quantitative assessments. New Zealand notes that such assessment is preferred for the purpose of determining the fine, but can only be approximate at best. Jordan makes an assessment by conducting related studies. One other Authority noted that as the evaluation of harm to competition is not required in that jurisdiction's competition law, the Authority does neither routinely engage in an analysis of the aggregate harm to the economy nor of the detriment to consumer welfare flowing from any anticompetitive conduct.

3.7.1 Qualitative and Quantitative Assessment: Possible Interpretations

It follows that if detriment to consumer welfare is considered by competition Authorities, this does not mean that this detriment is actually quantified, at least not in an exact or precise manner. Despite the fact that a majority of the Respondents considers it possible to quantify detriment to consumer welfare, they all seem to recognize difficulties and limitations to such quantification. Moreover, many Authorities do not consider it possible to conduct quantification in all cases and seem to apply it only in exceptional or specifically suited cases. In many cases, Respondents stated that the assessment seems to be of a qualitative rather than a quantitative nature. In this respect, Respondents point to factors such as limited data availability and/or human resources (disproportionate investment of time/human resources related to the results). Authorities also refer to limitations to quantifying non-price components, such as quality, range/variety, innovation, and dynamic effects (long run versus

short run effects). These limitations result in a relatively high degree of uncertainty in estimations or assumptions used for quantification of detriment to consumer welfare.

It may be possible in particular cases to show, for example, that a particular behaviour or agreement, will likely lead to a price increase. However, this raises two problems. Firstly, it is not clear at which stage such a likelihood would amount to “proof” in the legal sense. Secondly, showing that a price increase is not likely, is hardly sufficient to assume no damage to consumer welfare. It would also be necessary to show that there was no damage to innovation/range/quality, and other factors affecting consumer welfare. There may be methods of determining effects on such criteria. However, such methods are unlikely to be sufficiently specific to amount to legal proof that the price is thus non-reflective of the quality/range/innovation.

It is the experience of the Netherlands that in order to make such measurement of these criteria possible, it would be necessary to determine assumptions that could be made in relation to such qualitative measurements. Such determinations would have to be accepted by the business community and upheld by the courts. Otherwise there would be no possibility of legal certainty. Moreover, none of this resolves the considerable problem of an absence of data, which is prevalent in most cases.

3.8 Review by courts

Almost half of the Respondents who answered this question stated that the methodology of quantifying consumer harm had not yet been considered by the courts.¹⁰¹ Israel noted that in some cases there had been attempts to quantify the overcharge to the consumer. They are however aware that the overcharge does not equal consumer harm.

Six of the larger jurisdictions indicated that the methodology used for quantifying the detriment to consumer welfare had been considered by their courts. Australia noted that consumer welfare has been considered by the Australian Competition Tribunal in eight separate cases. Canada indicated that a quantification methodology was considered by the

¹⁰¹ 27 Authorities.

Competition Tribunal in the *Superior Propane* case.¹⁰² The US FTC stated that courts have considered the methodology for assessing effects on the price component of consumer welfare, for example, by noting the importance of considering entry barriers when assessing the risk of a price increase. Price effects may coexist with non-price effects (such as reduced product quality, reduced product variety, reduced service, or diminished innovation). The methodology for assessing the non-price components of consumer welfare is less fully developed.

3.9 Role of Authorities quantification of consumer harm/detriment: Possible Interpretations

It seems that, without prejudice to the soundness and usefulness of economic theory in the quantification of effects to consumer welfare, solid economic evidence of detriment to consumer welfare in the context of a specific case cannot be based on economic theory or models alone. In addition, there is no easy, non-contestable method for quantifying harm to consumer welfare that will work for all cases. It should be recognized that to some extent, these methods – including empirical studies or analysis – are dependent on subtle variations in the underlying nature of the competitive model being used (that might not perfectly fit the reality of the market at hand) and the accuracy and quality of the data being used. In a case-specific context, economic evidence must at least be related to, and tested against, the case-specific evidence and data, i.e. market facts and facts on past or present behaviour or effects, to meet the requisite legal standard of proof. Authorities point out that this is not an easy task and that it requires a lot of resources to properly collect the necessary data/facts and make a proper assessment. Moreover, it will not always be possible to meet the requisite standard of proof due to a lack of (good quality) empirical data or complex market mechanisms that are hard to predict in an economic model.

It could be argued that a precise determination of harm to the level of (individual) customers or consumers is primarily relevant for private damage actions rather than for the purpose of public enforcement of competition rules. Indeed, some Respondents indicated that they do not consider it a task for public enforcers. In this respect it should be considered that direct harm to customers or consumers is only part of the harm to consumer welfare. This does not include the so-called dead weight loss and dynamic effects. Furthermore, it is acknowledged

¹⁰² Canada (The Commissioner of Competition) v. Superior Propane Inc., [2003] 3 F.C. 529 (C.A.), aff'g (2002), 18 C.P.R. (4th) 417 (Comp. Trib.) (redetermination decision following [2001] 3 F.C. 185 (C.A.), rev'g (2000), 7 C.P.R. (4th) 385 (Comp. Trib.)).

that to some extent, public enforcement and private damages actions are interrelated. On the one hand private actions for damages may strengthen the working of competition rules and so support public enforcement. It forms an extra deterrence to undertakings (and is indicated as private enforcement in that respect). Therefore, Authorities might have an incentive to support private damages actions by providing insight in the harmful effects of an infringement in their decisions. On the other hand, making a quantification of harmful effects, at the level of detail of (individual) customers or consumers a precondition for public enforcement will probably diminish the effectiveness of public enforcement significantly - or at least raise the workload for Authorities significantly. In its turn, this will negatively affect private enforcement, as without an effective public enforcement of competition rules, it will be much harder or even impossible to prove an infringement of competition rules in private damages proceedings. The challenge here is to strike the right balance between the two and not to, in fact, diminish effective enforcement of competition rules.

Considering the above, it seems undesirable to make proof of detriment to consumer welfare a prerequisite for finding an infringement or imposing sanctions, at least not for all competition cases. There are limitations to the quantification of such detriment, at least to meet the requisite legal standards in a case-specific context. Furthermore, efficiency aspects and the benefits of legal certainty should also be considered. Especially in cases, like hard core cartels, where generally accepted economic theories exist that that kind of behaviour is intrinsically capable of harming consumer welfare and will normally have such an effect. In other cases, quantification of detriment might contribute to the quality of the basis for constructing a theory of harm (i.e. based on behaviour that is from a competition perspective most harmful and even more tailored to the specifics of the behaviour at hand), for instance by requiring the establishment of a certain level of 'proof' of detriment to consumer welfare. However, this should not require legal proof of the exact or quantifiable loss of consumer welfare, but rather 'proof' of a more qualitative nature related to the case-specific context. Here, the challenge is to strike the right balance between the gains of a more effects-based approach and a higher degree of tailor made decisions, on the one hand and the extra resources that are needed to achieve this - especially regarding the terms of legal proceedings on the aspects of the economic evidence used - and less legal certainty on the other hand.

In summary, it may be said that many Authorities believe it might be useful to make an effort to better obtain or provide insight in the effects of competition enforcement on consumer welfare. Firstly it can be useful to prioritize investigations/cases in order to maximize the effects on consumer welfare of the enforcement activities of Authorities from the outset. Secondly it can be helpful, when providing an account of the successes of an Authority to the political arena, or in the context of advocacy activities. Thirdly, in a more case-specific context, it can help to better explain or substantiate why the Authority intervenes or to justify exceptions or sanctions imposed, e.g. in court proceedings. Finally, it might play a role in communicating on the activities of the Authority towards society. For example on aspects such as whether the focus of competition law should be on the benefits of competition for society as a whole, or rather the benefits for the consumer, or on the direct effects on the purse of consumers or rather on the dynamic effects of competition and good working markets as such that can not always be directly translated into short run effects on the purse of consumers. Such debate can improve the understanding of the importance of competition law enforcement and the public support for it. In the end, this will also contribute to the incentive to comply with competition rules.

Comments from session on Quantification and Legal Burden of Proof: Measuring the detriment to consumer welfare as a possible parameter for enforcement.

Moderated by Ewoud Sakkers (EU) and Monique Van Oers (Netherlands)

Delegates agreed that consumer welfare should not be *the* parameter for enforcing competition law, but rather *a* parameter, since some competition authorities do not have the necessary discretionary powers to prioritise their enforcement in such a way.

It was commented that consumer welfare as the sole parameter is too price-driven. It was suggested that cost efficiency and innovative efficiency should also be parameters. Others preferred the proposition that consumer welfare is *the* parameter, but indicated the importance of defining a standard to ensure cohesion in application. They favoured the view that there should be a standard definition and that this should be published.

Chapter 4 - Impact and outcome assessments

4.1 Introduction

Previous chapters of this Document have considered whether consumer welfare is used as a reference point by Authorities when carrying out their daily activities. This Chapter will focus on how Authorities estimate the effects of their activities and how the NMa calculates the effects of its activities on, for example, consumer welfare. This chapter is based on NMa publications and differs from the other chapters in that fewer Respondents answers were available for this chapter than the other chapters. This chapter looks at the increased attention which is being paid to the importance of measuring outcome generally and then turns to a distillation of the answers received from Respondents in order to analyse whether and how Authorities across the globe measure outcome. Finally, it concludes with some practical experiences of the Netherlands Authority on measuring outcome.

4.2 Impact and Outcome Assessments

In the last decade, several Authorities have started calculating the outcome effects of their activities. For some Authorities, measurement of outcome is required by law. For example the Government Performance and Results Act in the US or as a performance indicator (as in the case of the UK OFT's estimates of direct financial benefits arising from its interventions) Other Authorities also voluntarily calculate and report their outcome (the Netherlands and European Commission).

The Netherlands began outcome calculations in 2002, when it estimated the price effects of the construction cartel and a number of mergers¹⁰³ and again in 2004, when the Netherlands carried out an analysis of the outcome of the Authority's work for the period 2002-2004. Since 2004, the Netherlands Authority has published its outcome every year, in its annual reports. The UK OFT publishes annual average estimates of impact in terms of monetary savings to consumers in its annual report and Positive Impact notes.¹⁰⁴ The UK CC also calculated and

¹⁰³ Published in the NMa Annual Report 2002.

¹⁰⁴ The OFT's Positive Impact note for 2009-10 (OFT1251), which provides the annual estimates for direct financial benefits to consumers from OFT's work on competition enforcement, consumer protection, mergers and markets work over the period 2007-10, is available at www.of.gov.uk/OFTwork/publications/publication-categories/reports/Evaluating/oft1251. The OFT has also published a guide to its impact estimation methods, available at www.of.gov.uk/OFTwork/publications/publication-categories/reports/Evaluating/oft1250. Competition advocacy is not currently covered by this yearly estimate. However, in 2010, the OFT commissioned a report from London Economics on 'Evaluation of OFT Competition Advocacy' (OFT 866), available at www.of.gov.uk/shared_of/reports/Evaluating-OFTs-work/oft866.pdf.

reported on its outcome in 2006 for the period 2005–2006. In the table below, an overview is given of the outcome calculations of the various Authorities who indicated that they calculate outcome in responding to the questionnaire.

	Explicit outcome assessment ¹⁰⁵				Implicit outcome assessment ¹⁰⁶			
	Merger	Advocacy	Abuse of dominance	Cartel	Merger	Advocacy	Abuse of dominance	Cartel
Australia						X		
Belgium			X	X				
Bulgaria					X	X	X	X
Denmark	X		X	X				
EC	X		X	X				
Honduras				X				
Indonesia		X						
Japan	X	X	X	X				
Korea							X	X
Netherlands	X	X ¹⁰⁷	X	X				
New-Zealand	X		X	X				
Norway						X		X
Romania	X			X		X	X	
Slovakia		X	X					
Sweden					X	X	X	X
UK OFT	X	X ¹⁰⁸	X	X				
Zambia	X							

Most of the Authorities that responded that they conduct outcome assessments, stated that the aim of the calculation is to account to lawmakers and society, especially in order to demonstrate the directly quantifiable social benefits of the Authority's activities. Most Respondents that reported conducting outcome assessments stated that their calculations also concentrate on consumer benefits.

Of the Authorities who responded to this question, only a limited number reported that they calculate the outcome on an aggregate level comparable to the activities of the Netherlands and the UK OFT. The New Zealand and South African Authorities have also developed a methodology in line with the UK OFT's, which looks at the consumer savings of interventions

¹⁰⁵ Explicit outcome assessment formulated as outcome calculations similar to the method used by NMa i.e. consumer welfare is proxied by quantitative measures.

¹⁰⁶ Implicit outcome formulated as outcome assessment in terms of surveys, overview of enforcement, certain market inquiries and annual reports i.e. no quantitative measures are used.

¹⁰⁷ The results of the Advocacy study of 2011 (SEO (2011), Anticipatie op kartel- en concentratieoetzicht, SEO-rapport nr. 2010-076, Amsterdam: SEO, available at www.nmanet.nl) were not sufficiently definitive to be included in the official outcome results as published by the Authority.

¹⁰⁸ The OFT's assessment of advocacy is not part of their annual estimates. See footnote 105 above.

in mergers, cartels and abuse of dominance.¹⁰⁹ The New Zealand Authority also carries out ex-post reviews of a selection of mergers, cartels and abuse cases. In 2010, The European Commission (DG Competition) based its estimates of consumer benefits for 2010 on a new methodology and found that the estimated (observable) consumer benefits from cartel decisions were between €7.2 billion to €10.8 billion, and the estimated benefits derived from merger control decisions are between €4.2 billion and €6.3 billion. Belgium implements the same methodology to measure outcome as DG Comp for abuse of dominance and cartel cases. Both use rules of thumb for the analysis of outcome when it concerns cartels, whereby the economic effect of a cartel is assumed to be 10% of the value of goods in the specific markets affected by the infringements.

Other Authorities, such as Bulgaria, Indonesia, Japan, Norway, Romania and Sweden also assess outcome based on calculations of consumer surplus. However, in answer to the questionnaire, these Authorities mentioned that such assessment is carried out in a less systematic way. In Bulgaria and Romania, annual reports are published which reflect the results of the work and the main achievements of the Authorities. Romania is very determined to improve the in-house analysis of the theory of harm. In two cases, they calculated the outcome, in total ranging from €18 million to € 48 million. The quantifications will become more important in the future for the impact assessment studies, in relation to decisions adopted by the Romanian Authority. Some Authorities such as Indonesia, the outcome is calculated in terms of the impact the enforcement has had; the number of cases; and on the number and magnitude of fines imposed. Every year, Japan reports on the extent to which consumer welfare has, in their view, been protected. For Fiscal Year 2009, consumer welfare corresponding to about EUR 1.85 billion has been protected. In order to assess the impact, the Japanese Authority takes into account the size of the market and such other factors that they have assessed. Japan also evaluates the impact of merger remedies in some specific cases by estimating the consumer welfare which was protected by the remedies. It also measures the results of its advocacy activities - based on questionnaires on advocacy activities for the general public via an internet questionnaire and lessons on antitrust for high school and university students.

¹⁰⁹ This number should not be considered in isolation given the fact that New Zealand uses a total welfare approach.

In other jurisdictions, the calculations are carried out on a less regular basis, and are often combined with case assessments and interviews with stakeholders. Sweden notes that it occasionally carries out ex-post assessments, in order to evaluate specific cases. Norway calculates the outcome of at least “one merger case, one cartel or abuse case, and an advocacy case every year”. Zambia currently performs an ex-post merger analysis. While Honduras must calculate the economic gains (damages to the consumers) by the offenders in order to impose pecuniary punishments, it has no experience in assessing the effects of merger cases and advocacy efforts. Many Authorities, such as Slovenia, claim the lack resources to do the calculations. However others (Jordan) think that an impact analysis is not a primary responsibility of an Authority. This will be discussed further in Chapter 5.

In this chapter below, the Netherlands’ experiences in measuring outcome are used to describe a possible method of calculating the economic effects of a competition law violation. The method used has recently been revised, in line with the conclusions of the conference organized in 2007 on outcome measurement. As a result of this conference, in 2008 *De Economist*’ published a special issue dealing with several questions concerning outcome calculation.¹¹⁰ Based on this method, the outcome calculation proved not to be as labour intensive as some Authorities might have thought.

Comments from session on Practice and Future Objectives: Calculating outcome is resource-intensive yet important for the growth of an authority

Moderated by René Smits (Netherlands) and Francis Kariuki (Kenya)

It was generally agreed that calculating outcome is an important tool for the improvement of working methods and for general discussions on the usefulness of competition.

It was commented that despite its advantages, calculating outcome is ultimately resource-intensive. When undertaking outcome investigations, authorities will frequently have to rely on undertakings’ goodwill to overcome the information barrier, and undertakings are usually under no obligation to offer up information.

Outcome analysis should not underpin the necessity of future funding for the Authority, since the deterrent effects of its activities should lead to full compliance - in other words, the Authority should strive to achieve agency redundancy(!)

¹¹⁰ Don, H., R.G.M. Kemp and J. van Sinderen (2008), Measuring the economic effects of competition law enforcement, *De Economist*, 156 (4), pp 341-348.

4.3 Method: conservative estimation of future economic effects

In the Netherlands, the method of determining the outcome of the Competition Authority's enforcement action is to estimate, in a broad and relatively simple way, the prospective economic effects of decisions taken in a calendar year.¹¹¹ Conservative principles are applied in determining the scope of the separate effects.

The formal decisions taken by the Board of the Netherlands Authority (NMa) form the basis of the calculation. These decisions are a product of the statutory duty of the Authority to ensure that markets work.

In the case of competition enforcement (cartels and abuse-of-dominant-position cases¹¹²), the NMa's actions consist of sanction decisions, commitment decisions and binding instructions. In calculating the outcome, the NMa always takes account of sanction decisions because their effects are the most certain. In the other cases, it must be quite clear that economic effects occur as a result of the commitment decision or binding instruction concerned.

In the case of calculating the outcome of the NMa's activities in the field of merger control, the calculation focuses on cases where the Authority has prohibited a merger or approved a merger subject to conditions. When calculating outcome, the withdrawal of a notification/license application or the abandonment of a license application may also be taken into consideration, where it is clear that the retraction or abandonment is connected with objections expressed by the Authority.

The outcome of the NMa's actions, in terms of consumer welfare, is estimated on the basis of the expected effects on prices, sales and productive efficiency. The expected price effect of closing down a cartel is to push down prices, which represents a gain for consumers. In the

¹¹¹ The Netherlands Competition Authority (NMa) is also responsible for the regulation of the energy and transportation sector. The NMa also estimates the effects of its regulatory actions. For a discussion of the calculation method for regulation see Kemp, R.G.M., M. Mulder en J. Van Sinderen (2010), *Outcome van Nma-optreden: Een beschrijving van de berekeningsmethode*, NMa Working Papers, no 1., Den Haag: NMa.

¹¹² The outcome of competition enforcement is mainly based on cartel cases.

case of merger control, the effect is that the parties to the merger are prevented from being able to unilaterally raise prices or minimise innovation or quality after merger.

As the price is higher in a market where a cartel exists, some consumers will not buy products which they would have bought if the price had been lower. This is known as an allocative or 'deadweight loss' effect. This is a direct welfare loss for the consumer concerned. In the case of mergers, such detriment to consumer welfare is prevented, as the NMa will either ensure that parties carry out the remedies necessary to remove any doubts or will block those mergers which restrict competition.

The outcome of the work that the Authority carries out may also be passed on to other parts of the economy if the customer buying a particular product or service is not the final consumer but merely a link in the chain. In the case of the outcome calculation, the NMa is concerned exclusively with the direct effect (in other words the effect for the direct customer). This may be the final consumer, but it may also be another producer. The extent to which the interventions of the Authority are passed on to the final consumer depends on the degree of competition in the intermediate market(s). The NMa assumes, for the calculation, that these intermediate markets work effectively, so that the direct effect for the customer is the same as that for the final consumer.

Finally, productive efficiency relates to the amount of costs necessary to make one product unit. More intense competition by dismantling a cartel or blocking mergers which are likely to restrict competition, creates extra incentives to enhance productive efficiency, the benefits of which, in a sector with healthy competition, will be passed on to consumers.

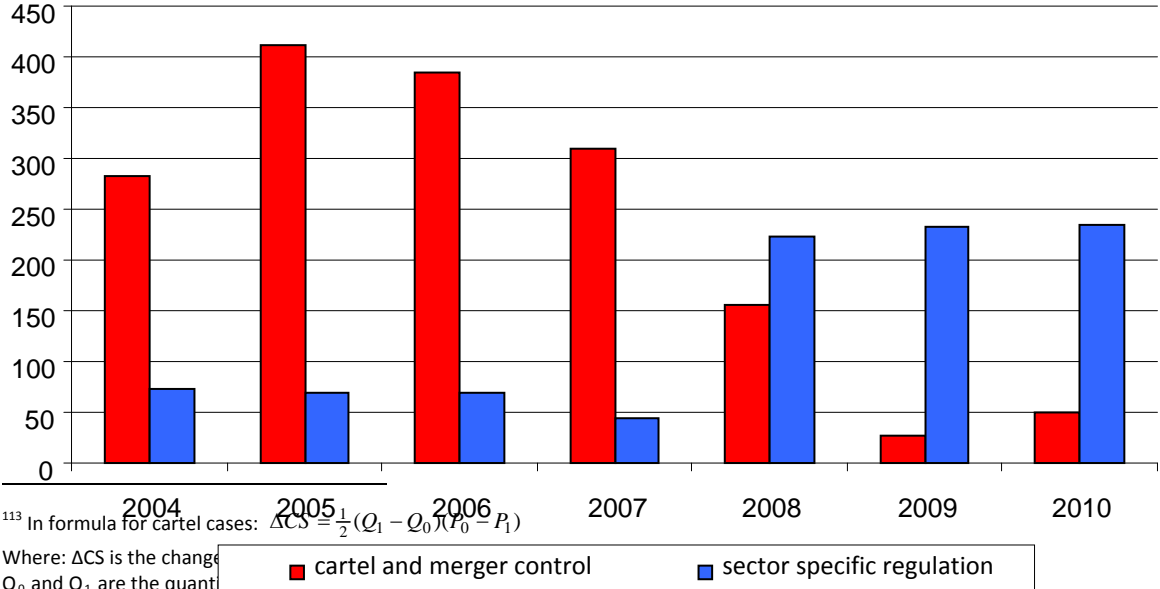
In estimating the outcome, two principles are of importance. The first is that the calculations must be conservative, i.e. the NMa only takes into account effects about which there is little uncertainty. This means that the outcome which is presented in the NMa's annual report is likely to be an underestimate of the actual economic effect. Secondly, it must be possible to make the calculation fairly easily. The objective of the calculation is, after all, merely to obtain a rough picture of the economic effect. The NMa bases its calculation on information available from the cases. If the necessary information is not available (for instance, the exact price

effect), for cartel and abuse-of-dominant-position cases, the Authority uses a threshold price effect of 10%. The relevant turnover is the turnover of the cartel participants / dominant company in the relevant market. For merger cases, the Authority uses a threshold value of a 1% price effect. This price effect is used for the whole relevant market. For calculating the deadweight loss effect, the NMa uses the “rule of one-half” method.¹¹³ And finally for the productive efficiency effect, the NMa uses a threshold effect of 1% price effect.

The NMa presents the outcome as a three-year moving average since the outcome for an individual year can fluctuate greatly. These fluctuations are partly due to the variation in the number and scope of merger requests over time. Likewise, the number of (large) abuse-of-dominant-position or cartel cases can vary greatly from year to year. Taking the moving average reduces the impact of such fluctuations.

In order to obtain the moving average, the NMa calculates the first-year effects for decisions in each calendar year. Often an intervention will have an impact over a longer period, but the length of the period is not known in advance. Given the aim of making a conservative estimate, only the effects for the first year are calculated. In this way, the necessity to estimate, for each individual decision, how long the effect of the intervention by the Authority may last, is avoided. In the graph 4.3, the outcome of cartel cases, merger control and sector specific regulation activities of the Netherlands are presented.

**4.3 Outcome (*€ 1,000,000)
3 years moving average**



¹¹³ In formula for cartel cases: $\Delta CS = \frac{1}{2}(Q_1 - Q_0)(P_0 - P_1)$

Where: ΔCS is the change in consumer surplus, Q_0 and Q_1 are the quantities during and after a cartel, P_0 and P_1 are the prices during and after a cartel.

In addition to these direct forms of intervention, the Authority also influences the functioning of the markets indirectly, namely through anticipation by market participants.

A recent study, SEO (2011)¹¹⁴, has shown that for every sanction decision taken by the NMa there are almost five cases in which, unknown to the NMa, prohibited behaviour has been terminated or modified in response to legal advice on competition law. The results are in line with previous studies of Twynstra Gudde¹¹⁵ and the UK OFT¹¹⁶. As the extent of this anticipatory effect is uncertain, however, no data concerning this aspect are presented in the outcome calculations.

In summary, in the Netherlands, the outcome calculations are:

- a proxy for the main goal of the Netherlands: ensuring that markets work;
- simple and easy to perform;
- only carried out in cases in which the Netherlands has fined the offender (cartels) or in merger cases which are forbidden, remedied or withdrawn;
- forward looking (for one year) and published as a three years moving average;
- conservative estimates;
- not labour intensive;
- published as an aggregated figure in order to avoid publishing case specific information.

To conclude, no widely recognized method of calculating outcome has been developed yet. Only a limited number of Authorities calculate the outcome on an aggregate level, while others have developed their own methodology to calculate outcome. These methods include the assessment of enforcement impact, the number of cases or the number of imposed fines. Ex-post reviews of mergers, cartels and abuse of dominance are also in use. It should be noted

¹¹⁴ SEO (2011), *Anticipatie op kartel- en concentratietoezicht*, SEO-rapport nr. 2010-076, Amsterdam: SEO, available at www.nmanet.nl.

¹¹⁵ Twynstra Gudde (2005), *Research into the Anticipation of Merger Control*, a report prepared for the Netherlands Competition Authority (NMa), available at www.nmanet.nl.

¹¹⁶ OFT (2007), *The deterrent effect of competition enforcement by the OFT – discussion document*, OFT 963, London: OFT. It should be noted that the OFT has since then produced a more recent report on the impact of competition interventions on compliance and deterrence “The impact of competition interventions on compliance and deterrence” OFT 1391 <http://www.of.gov.uk/OFTwork/publications/publication-categories/reports/Evaluating/>

that not all Authorities have the same resources and expertise to conduct impact assessments. Some Authorities do not think it is their responsibility to analyse impacts at all. It is expected that quantifications will become more important for impact assessment studies in the future.

Comments from session on Practice and Future Objectives : Elements of behavioural economics

Moderated by René Smits (Netherlands) and Francis Kariuki (Kenya)

It was suggested that more important than outcome analysis was the 'felt experience' of consumers: do they see prices going down or quality going up?

Jarig Van Sinderen, Chief Economist at the NMa, explained that different responses might be elicited from consumers, depending on the manner in which outcomes are expressed. For example, presenting savings per household might look modest, whereas expressing savings to the economy as a whole tends to have a greater impact

Caution was urged, during the session, at expressing such statistics as 'savings per household', since it can be difficult to calculate and incorrect calculation can damage the credibility of the Authority.

Chapter 5 - Practice and future objectives

5.1 Introduction

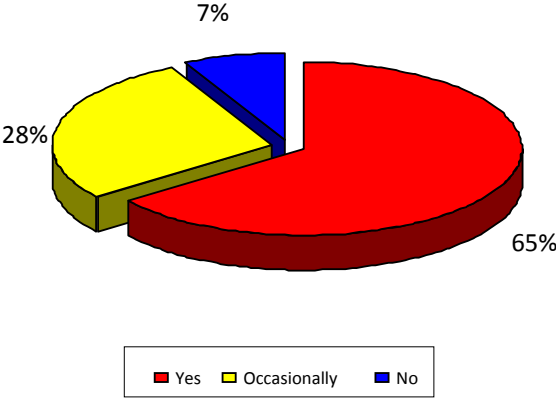
This chapter explores the practicalities of competition law enforcement with a view to promoting consumer welfare, and aims to provide an overview of the law “in action”. This chapter considers to what degree the role attributed by Respondents to consumer welfare, as outlined in Chapter 1, has trickled down into the practical assessments of mergers, cartels and abuse of dominance cases by Authorities. Of course, for those Authorities who see consumer welfare as the underlying goal of competition law, explicit references to consumer welfare in the Authority’s enforcement activities may arguably be superfluous. This may be because they see the very act of enforcement being of itself beneficial for consumer welfare. Even then, there may be stages of investigation, such as prioritisation or the imposition of sanctions, where for such Authorities explicit reference to consumer welfare may nevertheless be useful or necessary, in terms of fostering understanding for the Authorities’ decisions.

This chapter discusses the areas in which the links between competition enforcement and consumer welfare may be strongest, and of particular interest to Authorities.

5.2 Referring to consumer welfare

A first point of inquiry is whether consumer welfare is used by Authorities as a reference point, at any stage of their enforcement activities. Analysis of the responses¹¹⁷ indicates that a majority of the responding Authorities always or occasionally use consumer welfare as a reference point when carrying out its enforcement activities. Only four Authorities state that they never use consumer welfare as a reference point. It therefore appears that the promotion of consumer welfare may be seen as a significant area of commonality in competition enforcement throughout the world.

5.2 Using consumer welfare as a point of reference for enforcement activities



To set this in context, Chapter 1 indicates that, with respect to references to consumer welfare in mission statements, goals, and national legislation, although there are similarities between Authorities, there is no clear line. Chapter 3 shows that most Authorities do not seem to have a consistent let alone heavy (if any) burden of proof as regards consumer welfare. It is interesting to consider therefore why such references may be made at all.

To explore this further, it is necessary to consider the use of consumer welfare in the day-to-day investigations of the Authorities. The questionnaire set out the five main procedural moments of the investigation (be it mergers, cartels or dominance) during which consumer welfare can come into play: i) when choosing which case to investigate; ii) while establishing the theory of harm; iii) when drafting the decision; iv) when determining the sanction; v) in press releases. In undertaking this analysis, this chapter compares Authorities' answers from three perspectives. Firstly, the chapter looks at where Authorities use consumer welfare in prioritisation and in establishing a theory of harm, and referring to Chapter 1, it considers

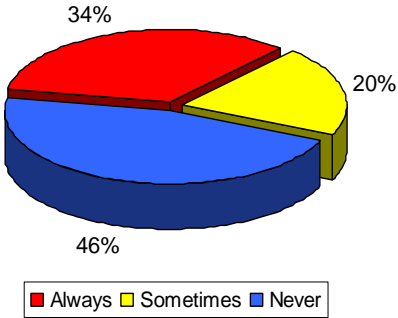
¹¹⁷ Total respondents that answered this question: 54 Authorities.

whether this may be linked to consumer welfare’s being seen as a goal of competition enforcement, or mentioned in mission statements. Secondly, this chapter looks at where Authorities refer to consumer welfare in their decisions and when imposing sanctions, and compares these answers to those given on references to consumer welfare in competition legislation. Finally, the chapter examines where consumer welfare is referred to by Authorities in press releases.

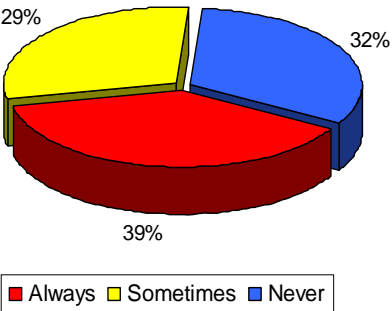
5.3 Consumer Welfare when Prioritising Decisions/ Constructing Theory of Harm

5.3.1 Prioritisation¹¹⁸

5.3.1.1 Considering Effect on Consumer Welfare in Prioritization of Merger Cases



5.3.1.2 Considering Effect on Consumer Welfare in Prioritization of Cartel and Dominance Cases



Several Authorities note that considering consumer welfare when deciding which case to take up is not so much a legal prerequisite, as something to be decided on a case-by-case basis, during which consumer welfare is sometimes one of the determining factors. Some Authorities, like the Netherlands, considers consumer welfare across the board of cartel and dominance cases when prioritising a case. The UK OFT also considers consumer welfare among other factors when prioritizing a case. Korea pointed out that even though it could be tempting to regard a full-blown analysis of consumer welfare as a hurdle that takes up much time and effort, its limited resources are actually one of the reasons to examine the relevance of the case based on its direct impact on consumers.

With respect to merger control, 23 Authorities report that they never consider consumer welfare when choosing to investigate a merger because of the mandatory nature of merger review, irrespective of the initial assessment of possible consumer harm. In these cases, Authorities need to review a merger on the basis of thresholds or other ‘objective’ data.

¹¹⁸ 50 Respondents to questions relating to prioritization.

Although these thresholds (e.g. the relevant turnover) may often serve as a proxy for consumer welfare, such a quasi-automatic obligation to investigate normally obviates the need to examine consumer detriment. For some Authorities, consumer welfare may play a role (arguably similar to a prioritisation role) in the decision whether to move to a phase two investigation.

Similarly to merger cases, with reference to cartels, as pointed out by France and South Africa, a formal complaint may also trigger a legal obligation for the Authority to investigate a case, obviating the need to consider consumer welfare. For the US DOJ, the classification of cartels as per se infringements, which are presumed to harm consumer welfare, means that consumer welfare is not a category that requires extra consideration when choosing to fight cartels.

In Germany, the Bundeskartellamt may consider consumer welfare as a factor while exercising its discretionary powers when selecting which dominance cases to pursue. In Korea, the Authority sometimes starts an investigation when there seems to be an abnormal price change or when prices are excessively high. The Netherlands points out that on the one hand the effect on consumers will be taken into account more often than in cartel cases, but on the other hand the number of cases is very limited and consumer welfare is not always explicitly considered.

Comments from session on Mission and Legislation : Take notice of political impact but do not become overly political.

Moderated by Toshiko Igarashi (Japan) and Carmen Suarez (OFT)

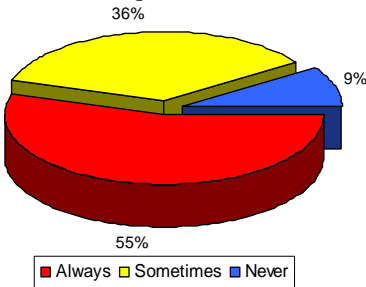
Cautious competition authorities are aware of changes and developments in government policy. Participants generally supported the view that authorities should carry out their tasks and adapt their policy and behaviour on 'the edges'. In other words, that authorities should take notice of the political impact of their decisions, without becoming political.

Being aware of what is happening outside may help an authority in prioritising cases, since cases that cause the largest detriment to consumers may attract attention from politicians and government, who may ask for intervention. Such an approach may enhance the legitimacy of the work of the authority. By taking all these aspects into account when prioritising its approach, an authority should also strive not to become political.

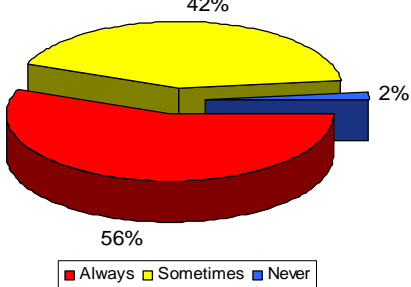
5.3.2 Theory of Harm

Graph 5.3.2.1 makes clear that the majority of Respondents includes consumer welfare considerations in their investigation of mergers either always, or sometimes.¹¹⁹ Further, as graph 5.3.2.2 illustrates, a majority of respondents also consider consumer harm when establishing a theory of harm in cartel and dominance cases.¹²⁰ Some Authorities state that cartels are restrictions ‘by object’ and therefore assume consumer harm. This includes, for example, the EU member states. Irrespective of this assumption, however, the ‘object’ restriction does allow a possibility to consider efficiencies; which include the condition that customers must receive a fair share of the potential efficiency benefits. Similarly, in other jurisdictions such as Australia and the United States, cartel offences, such as price fixing, are per se violations of the competition rules.¹²¹

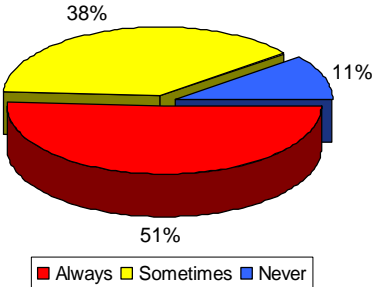
5.3.2.1 Consideration of Theory of Harm in Merger Cases



5.3.2.2 Consideration of Consumer Welfare in Theory of Harm in Dominance Cases



5.3.2.3 Consideration of Consumer Welfare in Theory of Harm in Cartel Cases



A similar situation emerges in (other) jurisdictions with legislation containing criminal sanctions on cartel behaviour. As the UK Authorities make clear, British criminal proceedings do not require consideration of the effects of behaviour but rather focus on the dishonest

¹¹⁹ Total Respondents that answered this question: 50 Authorities.
¹²⁰ Total Respondents that answered this question: 50 Authorities.
¹²¹ See e.g., United States v. McKesson & Robbins, Inc., 351 U.S. 305, 309-10 (1956); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218, 229 (1940).

conduct in forming a cartel. The specific wording of the cartel offence in criminal law may thus determine whether Authorities can take consumer welfare into account in their assessment.

98% of the Respondents either always¹²² or sometimes¹²³ take consumer welfare into account when establishing the theory of harm in dominance cases.¹²⁴ Some Authorities (such as France) note that consumer welfare is particularly important in dominance cases, rather than in cartel cases. Only one Respondent suggests it never takes it into account. One Authority states that it explores the harm that may be caused to customers or consumers, but that it depends upon the level of the market referred.

There may be several explanations for different treatment of consumer welfare in different types of cases. It could be that as hardcore cartels are usually thought to be contrary to consumer welfare by their very nature, there is therefore very little room for prioritisation. Whereas in dominance cases, it may be more difficult to pigeonhole the allegedly anti-competitive behaviour in terms of its actual effect on competition, making reference to consumer welfare more necessary. Another factor for the influence of consumer welfare in dominance cases is that the decision of which dominance case to pursue may have a lasting impact on an Authority's resources given that such cases may be particularly long-running and heavy on resources. Different treatment could also be related to the perceived point in time the detriment to consumer welfare occurs. In hardcore cartel cases the consumers will almost by definition have suffered some sort of harm. In contrast, in cases involving certain abuses of dominance (e.g. predation) although no immediate negative effects may be evident, a long-term analysis of consumer welfare will reveal the likely exit of various competitors and the potential for price rises that may result.

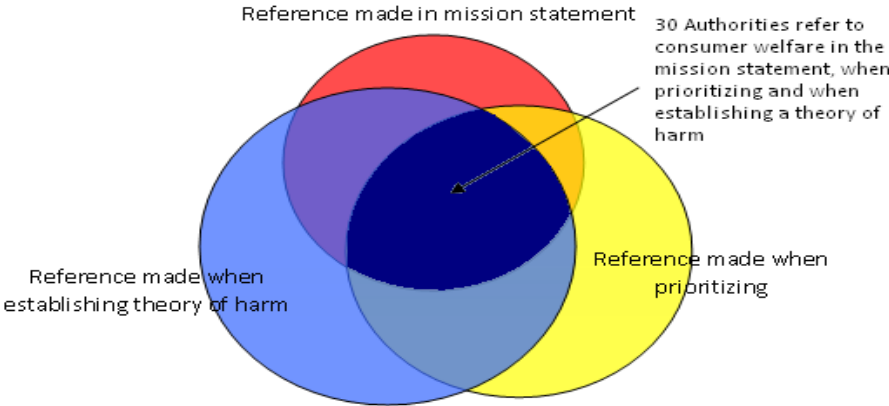
When Graph on prioritisation and theory of harm are compared to the Graphs in Chapter 1, referring to whether Authorities see the promotion of consumer welfare as an underlying goal of consumer law, and/or refer to it in their Agency mission, the following becomes apparent.

¹²² 30 Authorities.

¹²³ 22 Authorities.

¹²⁴ Total respondents that answered this question: 53 Authorities.

Graph 5.3.2.4 Mission, prioritization and theory of harm overlap¹²⁵



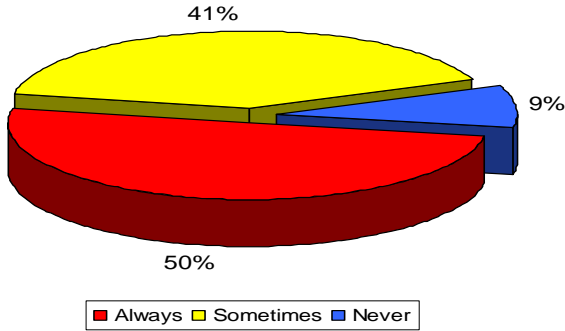
The number of Authorities discussing consumer welfare when prioritising cases and constructing a theory of harm, is similar to the number of Authorities that refer to consumer welfare in their mission. In fact, there is an overlapping group of 30 Authorities which refers to consumer welfare in i) mission; ii) prioritisation; and iii) theory of harm.¹²⁶ An overlapping group of 37 Authorities see consumer welfare as the goal, or one of the goals underlying competition enforcement, and either refer always or sometimes to consumer welfare in prioritisation and theory of harm.

5.4 Reference to consumer welfare in Authorities’ decisions and when imposing sanctions

5.4.1 Decisions

A small majority of Authorities reports that direct references are made to consumer welfare in their decisional practice.¹²⁷ In this way consumer detriment can function as a main justification for the government’s intervention.

5.4.1 Reference to Consumer Welfare in Decisions



¹²⁵ Mission (referred to directly or indirectly): 43 Authorities; Prioritization (consumer welfare referred to always or sometimes): 30 Authorities; Theory of harm (consumer welfare referred to always or sometimes): 45 Authorities.

¹²⁶ These 30 Authorities were tallied by counting Authorities which stated that they directly/indirectly or always/sometimes referred to consumer welfare.

¹²⁷ This graph represents an aggregate of the answers provided to this question (as the figures for merger, cartels and dominance cases varied only very slightly). The total number of Respondents, as an average was : 48 Authorities.

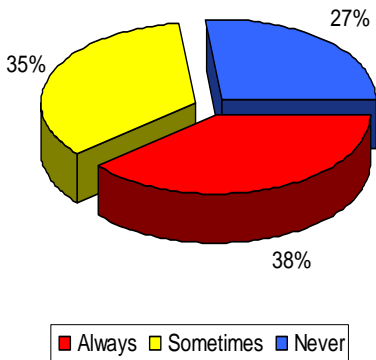
The answers given do not reveal whether consumer welfare is merely referred to as a form of providing context, or if it takes centre stage. In fact, there may be quite a gap between the two. The US FTC attaches great weight to the existence of consumer detriment. For example, the US FTC has stated in a rule of reason analysis: *“a plaintiff must show that the challenged restraints have resulted in, or are likely to result in, anticompetitive effects, in the form of higher prices, reduced output, degraded quality of products or services, retarded innovation, or other manifestations of harm to consumer welfare”*.¹²⁸

In the Netherlands, consumer welfare is a priority for the Authority, and is an underlying theme of its enforcement, but is not directly referred to in its legislation. Generally, official references to consumer welfare are therefore confined to decisions in which the damage caused to the consumer is relevant in the assessment of the gravity of the infringement when determining the fine.

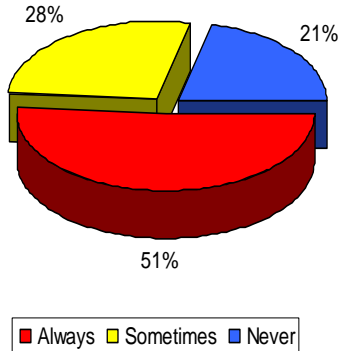
Similarly, in Spain, in line with its legislation, the CNC protects the competitive process as a means to enhance consumer/total welfare, and as a result, in its cases there are references in its decisions to that “competitive process” and not so many to “consumer or total welfare”.

5.4.2 Sanctions and Remedies¹²⁹

5.4.2.1 Reference to Consumer Welfare when Determining Sanctions in Merger Cases



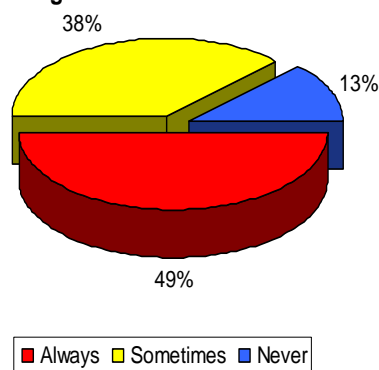
5.4.2.2 Reference to Consumer Welfare when Determining Sanctions in Cartel Cases



¹²⁸ See RealComp II, Ltd., slip op. at 34 (2009).

¹²⁹ 42 Authorities answered this question.

5.4.2.3 Reference to Consumer Welfare when Determining Sanctions in Dominance Cases



Most Authorities report that they consider consumer welfare when determining the sanction, either always or sometimes. France and Korea refer to their (draft) fining guidelines which, indirectly, refer to consumer harm in determining the severity of the sanction. In only a few cases Authorities never do so, either because they lack the power to impose sanctions (Israel, Ireland; in both jurisdictions, imposing sanctions is up to the courts) or for other reasons (the UK's Competition Commission and the US Federal Trade Commission).

Generally, two types of 'sanctions' can be distinguished in merger cases. First, the possibility that an Authority does not allow a notified merger. A second possible sanction is the possibility to accept remedies.¹³⁰ The answers from several jurisdictions specifically mention taking consumer welfare into account when accepting remedies.¹³¹

The Netherlands refers to consumer welfare when determining the sanction in cartel cases. In the fining code of 2009, hard-core restrictions are considered to be severe infringements, vertical agreements are considered moderate. No reference is made to consumer welfare. Therefore, until recently, we could have said that damage to consumer welfare would never be relevant in this context.

However, in the light of the recent judgment of the Dutch final court of appeal,¹³² the Netherlands Authority must take into consideration the context in which a particular breach of the Competition Act has occurred, when determining the gravity of the offence. This does

¹³⁰ Even though formally, as recognised by several Respondents, these may not be seen as sanctions. The merger total likely also refers to the acceptance of remedies, rather than purely sanctions for procedural or even substantive infringements of merger control law.

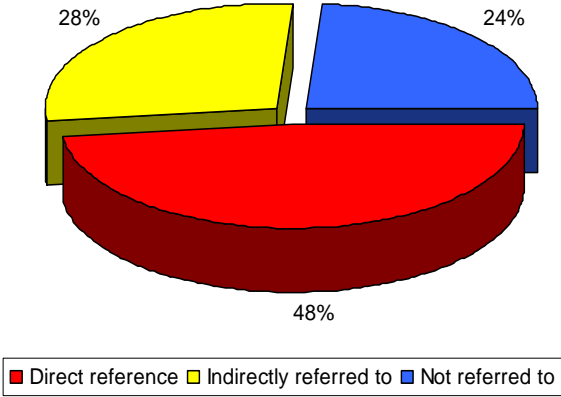
¹³¹ 8 Authorities.

¹³² *Mobiele Operators*, Dutch Trade and Industry Appeals Tribunal, 12 August 2010.

not imply that the Authority has to determine the actual effects of a particular behaviour or agreement. However, the Authority does have to consider the potential effects of the behaviour or agreement, in the given legal and economic context in which that behaviour or agreement takes place.

In several jurisdictions (such as Hungary) the Competition Act identifies a set of considerations to be taken into account when imposing a fine. Those considerations often include the degree of consumer detriment. Interestingly, the number of Authorities¹³³ that never refer to consumer welfare when determining the sanction in a dominance case is higher than when establishing the theory of harm. The reasons for this may relate to the difficulty of proving or quantifying consumer welfare in court, to the level of certainty required by the appeal court, as discussed in Chapter 3.

5.4.2.3 Reference to Consumer Welfare in National Legislation



Referring to graph 5.4.2.3 above,¹³⁴ also discussed in Chapter 1, on Authorities whose national legislation refers to consumer welfare, various issues become apparent. It may be argued that for competition Authorities which prefer an economic approach, i.e. enforcement action to be based explicitly on consumer welfare considerations, the wording of the applicable legal texts may be a point of focus. The reasoning may be that including consumer welfare considerations in legal instruments which govern Authorities may assist these Authorities in performing their tasks and in accounting for them. However, the difficulties that such explicit legal reference would raise for Authorities, as outlined in Chapter 3, would seem to outweigh such superficial advantage.

¹³³ 8 Authorities.
¹³⁴ Total Respondents: 54 Authorities.

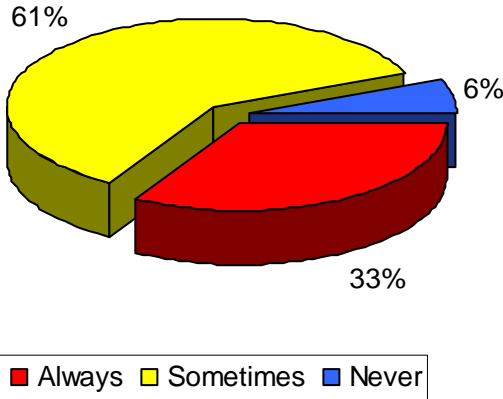
Such an approach may seem less helpful to an Authority that is faced with conflicting issues of public policy in its legislation. For example, an Authority may be obliged to have regard to concepts of “fairness”, economic dependency, ordo-liberal theories of market power distribution or the preservation of national champions. These are all issues which may conflict with a goal of promoting consumer welfare through competition law. It would be helpful in such situations if the legislator had decided on the order in which several, possibly conflicting objectives needed to be met. However, even absent such specification, it may assist the Authority to strive for transparency in its decision-making as regards these various objectives. In this way, it may be held accountable for its activities and foster understanding for its specific decisions.

In addition, explicit legislative reference to consumer welfare may lead to extensive problems for Authorities, as it would likely be interpreted by non-experts as an assumption that detriment to consumer welfare can be always or easily quantified, which, as discussed in Chapter 3, is not the case. This would imply that legislators should avoid inserting quantification requirements into legislation.

5.5 Press Releases

If consumer welfare plays a role in prioritising or establishing a theory of harm or drafting the decision, including the sanction, one might expect reference to consumer welfare in press releases and other publications emanating from the Authority.¹³⁵ Indeed, most Authorities sometimes refer to consumer welfare in press releases, and some will always do so.

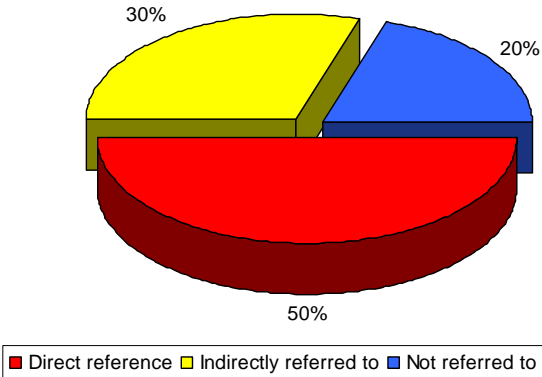
5.5.1 Reference to Consumer Welfare in Press Releases



never).

The Finnish and Hungarian responses provide some explanation. The Finnish competition Authority acknowledges that it struggles with bringing over the message of what its merger review activities actually achieve for consumers. Therefore, it “attempts to at least briefly describe effects on consumers”. The Hungarian Authority specifies that while its press releases may not include the term ‘consumer welfare’, as that may not be user-friendly, Hungary focuses on the consumer benefits following from a merger that is approved. It would seem, therefore, that issuing well-drafted explanations of the effects on consumers upon completion of a merger review may help underscore the importance of consumer welfare. This is not to say that consumer welfare is necessarily quantified, either generally in terms of ‘outcome’, or in specific cases. In Hungary, press releases dealing with cartel decisions emphasise the harm caused to final consumers. If the cartel in question involves intermediary goods/services, an effort is made to highlight the harm to final consumers.

5.5.2 Reference to Consumer Welfare in Mission Statements



Referring to whether Authorities talk about consumer welfare in their mission, as discussed in Chapter 1, it becomes apparent that even Authorities who do not refer to consumer welfare in their mission statement¹³⁶, do refer to consumer-welfare in their press releases.

Comments from session on Practice and Future Objectives : Communicate openly with consumers

Moderated by René Smits (Netherlands) and Francis Kariuki (Kenya)

It emerged during the breakout session, that an impact assessment of consumer welfare in the Authority’s work is relevant in the context of accountability. Authorities should reveal to consumers how they assess their welfare in the decisions, sanctions and remedies. Authorities may often only refer to the complexity of issues in their communications and this may be considered as “unsustainable arrogance” on the Authorities’ part. Authorities should learn to speak the language of consumers and should have an open channel to consumers and engage with them more profoundly.

¹³⁶ Total respondents: 54 Authorities.

On the one hand, an Authority may choose not to mention consumer welfare in their advocacy and press communications, even if it is mentioned in their legislation, because of the difficulties they experience in practice with quantifying consumer welfare, or in reconciling consumer welfare with other competing goals in their legislation. As noted by Poland, the possible tensions between consumer welfare and other goals of the Authority, or of government, may be a reason to mention, or not to mention, consumer welfare in the Authority's mission statement and press releases.¹³⁷

On the other hand, an Authority may mention consumer welfare in their advocacy and press communications, precisely because although they do see promoting consumer welfare as their main goal, it is not mentioned in their legislation. It may be omitted from their legislation because of parliamentary disagreement on the issue at the time the legislation was adopted, or because of quantification difficulties, as discussed in Chapter 3. While formal reference by the Authority to consumer welfare may thus be excluded, it may be that the Authority nevertheless refers to consumer welfare informally, in its press releases or in its advocacy, because consumer welfare may be a useful tool to explain to the general public the benefits that competition can bring to the economy.

Alternatively, as is the case in the US, the great importance attached to consumer welfare throughout a competition procedure is neatly reflected by the fact that carrying out competition enforcement is meant to strive towards a single goal (namely consumer welfare). US domestic competition law and policy require such a focus. In such cases, it makes sense that consumer welfare takes centre-stage, as it embodies the very essence of why the Authority exists. The US (FTC) has in the past referred to consumer welfare for its advocacy work.¹³⁸ A difficulty attached to using consumer welfare in an Authority's advocacy efforts may relate to the fact that, as noted by one Authority, interpretations of consumer welfare

¹³⁷ For example, such tensions may be particularly conspicuous in case of exploitative abuses of dominance, which are often approached from a rather imprecise perspective of fairness, such as "unfair prices", "unfair discrimination" and "unfair trading conditions". If, according to courts, fairness demands, for example, uniformity of trading conditions, applying competition law (thus construed) to exploitative abuses may sometimes lead to paradoxical results, where "fairness" takes precedent over consumer welfare.

¹³⁸ For example, In March 2006, the FTC filed a comment with a member of the Ohio State Senate stating its support for Senate Bill 179, which would allow the direct shipment of wine to Ohio consumers from manufacturers either inside or outside the state. The comment focused on the increased welfare for Ohio's consumers.

may differ between different governmental bodies. Institutional design may also play a role in such tensions.

Some Authorities consider consumer welfare to be an intrinsic part or natural result of the performance of the task attributed to them by the legislator. However, it is not stated as such in the Authority's legislation. There may be various reasons for this, as discussed above, relating to legislative intention or relating to difficulties of quantification and burden of proof. Nevertheless, for these Authorities, such as the Netherlands, the promotion of consumer welfare is an intrinsic part of competition law enforcement.

Some Authorities, such as Bosnia and Mexico, refer to the importance of procedural limitations in this regard. In principle, competition policy goals cannot override other pieces of legislation. In Taiwan legislation is clear on this subject, Article 1 of the domestic Competition Act states that "consumer interests" are only one of the policy goals to be achieved.

The remark of the Mauritian Authority, that it is "strictly limited to intervening and advising in the area of competition," brings into focus the issue regarding the extent to which the remit of Authorities extends to advocating the promotion of consumer welfare. In many instances, Authorities may be competent to implement competition legislation but will not have standing to propose regulation or give advice on draft legislation. In other instances, such an advisory role has specifically been granted to the Authority, such as is the case in Poland.¹³⁹ Not all Authorities will have such wide explicit powers. However, some Authorities may nevertheless take a bold interpretation of their statutory competences and will consider advocacy an implied power. A special case is the European Commission, which acts as executive body of the European Union and has political responsibilities and direct parliamentary accountability, features absent at other Authorities.¹⁴⁰ Within the European Commission, it is however the Directorate-General for Competition that is primarily responsible for the exercise of competition enforcement powers and decisions are subject to appeal before the Court of Justice of the European Union.

¹³⁹ See section 31 of the Polish Act of 16 February 2007 on competition and consumer protection, available at: http://www.uokik.gov.pl/competition_protection.php.

¹⁴⁰ Within the European Commission, it is however the Directorate-General for Competition that is primarily responsible for the exercise of competition enforcement powers and decisions are subject to appeal before the Court of Justice of the European Union.

Some Authorities refer to consumer welfare in their advocacy and publicity.¹⁴¹ “Increased interaction with media and competition stakeholders” is mentioned by the Authority of Romania, which also prioritizes intervention in respect of economic sectors of high impact for consumer welfare. Slovakia mentions sector inquiries as another tool, which is used to promote consumer welfare. Many Authorities referred, at various stages in their answers, to the usefulness of being able to refer to consumer detriment in issuing guidance to the business community and to consumers themselves. As was stated by Mexico, in the ICN Advocacy Teleseminar in 2011, using the detriment to consumer welfare that will likely result from a particular anti-competitive behaviour or agreement, as an example, can help the Authority to express competition law in terms “that even your grandmother can understand”.

5.6 Other references to consumer welfare

Given the difficulties relating to the quantification of detriment to consumer welfare in case-specific calculation of consumer harm, as discussed in Chapter 3, it may be interesting to examine whether consumer welfare is useful as a general measure of enforcement success.

In its answers to the questionnaire, the European Commission mentions its encouragement of private enforcement. Many Authorities may have a role to play here to encourage civil litigation as a supplement to public enforcement, which remains central in many jurisdictions. Ongoing consultation exists on a possible EU initiative for a consistent approach to collective redress across the European Union.¹⁴² There are some difficulties, but in spite of these,¹⁴³ fostering civil enforcement may be a practical means of furthering consumer welfare in times of budgetary restraints for competition Authorities. The example of the OFT may be inspiring: in 2007, it submitted specific proposals to the UK government on how to encourage private enforcement.¹⁴⁴

¹⁴¹ 3 Authorities.

¹⁴² Commission Staff Working Document - Public Consultation: Towards a Coherent European Approach to Collective Redress Document SEC(2011)173 final, Brussels, 4 February 2011, available at: http://ec.europa.eu/justice/news/consulting_public/0054/ConsultationpaperCollectiveredress4February2011.pdf.

¹⁴³ Promotion of civil enforcement encompasses issues concerning the interplay between public and private enforcement, such as the binding nature of decisions of Authorities in follow-on litigation, the availability of documents in files held by Authorities and the protection of leniency applicants against litigation on the basis of their leniency application. A case is pending before the European Court of Justice (ECJ) on the extent of protection to be afforded to documents emanating from leniency applicants in the context of the coherent application of Union competition law: Case C-360/09 (*Pfleiderer*), notably on the protection of self-incriminatory statements.

¹⁴⁴ Private actions in competition law: effective redress for consumers and business, Recommendations from the Office of Fair Trading, November 2007, OFT916resp, available at: http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft916resp.pdf.

Comments from session on Practice and Future Objectives : Non-economic interests are better pursued in a private enforcement action

Moderated by René Smits (NL) and Francis Kariuki (Kenya)

During the break-out session it was remarked that detriment to consumer welfare is hard to prove before a court. Non-economic interests are better to be pursued via private enforcement.

Russia seeks to promote consumer welfare by non-enforcement means, primarily by its competition development programs and advocating competition principles with other government bodies, including competition advocacy in the course of liberalization of former state created monopolies. While doing so Russia seeks to create a competitive environment in various sectors of the economy that eventually would result in an increase of consumer welfare.

Only the US FTC mentions litigation as one of its means of promotion of consumer welfare, next to advocacy. This latter instrument is also used to promote specific legislation, such as in the case of combating anticompetitive “pay for delay” practices in the pharmaceutical industry. Through such practices, pharmaceutical enterprises seek to keep generic drugs off the market, thus limiting consumer choice and raising prices.

As discussed in Chapter 4, even in jurisdictions where consumer welfare does not play an open role in identifying the objectives of the Authorities, it may play its part in other areas of the Authority’s work. It seems that when carrying out enforcement action and when reporting on their activities, whether in the form of precise outcome calculations or otherwise, Authorities frequently require a measuring rod or yardstick. Consumer welfare is an obvious and useful tool in this respect. However, as emerges in Chapter 4, no widely recognized method of calculating outcome has yet been developed. A limited number of Authorities calculate the outcome on an aggregate level, while others have developed their own methodology to calculate outcome. Not all Authorities have the same resources and expertise to conduct impact assessments. It is, however, important to note that using consumer welfare to measure outcome may not be as expensive and difficult as some may perceive. It may therefore transpire that quantification will become more important for impact assessment studies in the future.

Comments from session on Practice and Future Objectives: Short and long-term impact

Moderated by René Smits (Netherlands) and Francis Kariuki (Kenya)

Participants discussed the influence of the timeframe in outcome findings and the importance of distinguishing between short- and long- term impact. Due to judicial review, decisions of competition authorities can sometimes become binding only after several years. It follows that there will be a delay between the decision and its impact. Since consumers often take a short-term view, research-based impact assessments may not be congruent with their perspective.

5.7 Conclusion

In summary, it can be stated that consumer welfare is highly important for many different Authorities across the globe. However, consumer welfare is not always explicitly referred to at all stages of Authorities' work. Authorities seem, depending on their competencies, to further consumer welfare by a variety of means, where they deem appropriate rather than consistently, across the board. Specific and transparent reference by an Authority to how consumer welfare has been taken into account when explaining its objectives and findings, could benefit competition law enforcement.

Some Authorities are firm believers that advocacy, or proposing statutory provisions which specify that consumer welfare is an objective to be pursued in enforcing competition law, is an excellent means of explaining to the public to the benefits competition enforcement can obtain for consumers. Further suggestions by Respondents included assisting governments, through advocacy efforts, in the adoption of regulation which is in conformity with well functioning markets (markets in transition, public tendering procedures, and so on); conducting sector inquiries; and promoting civil enforcement of competition law.

Respondents state they usually refer to consumer welfare in some form or another. This is interesting in light of academic criticism that, for example, European jurisdictions take too little notice of consumer welfare, and all too often employ a rather formalistic reasoning in their decisions. Perhaps this can be partly explained by the possibility that such jurisdictions do take consumer welfare into account, but do not refer to it explicitly in their decisions or press releases. It could also reflect a policy shift, on the basis of which Authorities have (recently) started infusing their case handling with consumer welfare considerations. As is well known, competition cases tend to have a long lifespan from inception to final judicial ruling. Perhaps this explains why a more recent policy shift may not yet have been fully

observed by academic commentators. An alternative explanation is that consumer welfare does play a role in the practices of Authorities, but not in a way that can easily be measured.

There appears to be no clear geographic delineation based on the deference paid to consumer welfare. On every continent there are differences between how Authorities deal with this topic. Nevertheless, common law jurisdictions (such as Australia, the UK and the US) seem more inclined to refer to consumer welfare. In addition, it seems that many emerging markets are more likely to refer to consumer welfare explicitly than most continental European Authorities. Some Authorities (such as Brazil, Vietnam and South Africa) appear to refer explicitly to consumer welfare, whereas the practice in other jurisdictions (such as Austria and Switzerland) seems to mention consumer welfare less frequently. Other Authorities (such as Honduras and Indonesia) are particularly interesting, as they seem to have a mix of both: sometimes consumer welfare is explicitly mentioned, and sometimes it is not referred to at all. Perhaps it is mainly a matter of expediency. If there is no explicit legislative obligation to include consumer welfare, it could be seen as overly burdensome to include it in the decision, as is explained in Chapter 3.

Consistent use of consumer welfare in competition enforcement, whether as an explicit objective and criterion or more as a background reference value, would seem more conducive to creating legal certainty.

Outcomes of the 2011 ICN conference : Advantages of interaction of competition authorities, regulators, and consumer authorities.

Presentation by Henk Don (Member of the Board, NMa)

In November 2011 Henk Don, Member of the Board at the NMa, delivered a speech at the European Competition and Consumer Day conference in Poland, in which he discussed the outcomes of the 2011 ICN conference. He observed that competition enforcers are moving towards a greater emphasis on the promotion of consumer welfare, which adds legitimacy and provides enforcers a goal to strive towards in their daily work. Also discussed was institutional design and the advantages of integrating competition and consumer authorities in light of the upcoming merger of the NMa (Netherlands Competition Authority), CA (Netherlands Consumer Authority) and OPTA (Netherlands Post and Telecommunications Regulator) into an Authority for Consumers and Markets in 2013.

Chapter 6 – Non Governmental Advisors’ Views

Introduction

Answers to the questionnaire were received from 19 NGAs from different jurisdictions and disciplinary backgrounds. This chapter will discuss the answers of the NGAs to the questionnaire and compare the outcome to the answers provided by the Authorities. These NGA perspectives, while obviously representative of only a small group of the ICN’s NGAs, complement the overall goal of this Document: to provide a helicopter view of the prevailing attitudes towards the role of consumer welfare in competition enforcement. This chapter will follow the layout of the five previous chapters of this Document.

6.1 Goal, Mission and Legislation

The first topic of this chapter corresponds to Chapter 1 of this Document and discusses how this cross-section of NGAs view the relative importance of consumer welfare in competition law. Three possible perspectives are presented in the questionnaire: one can view consumer welfare as the primary goal, one of the many goals or as a possible outcome of competition law enforcement. An interesting question is whether the proclaimed view of consumer welfare in a particular jurisdiction, is also reflected in the references made to it in, for example, the mission statement of Authorities and national legislation.

With regard to the relationship between consumer welfare and competition law enforcement, more than half of the NGAs state that promoting consumer welfare is the primary goal. Hilke opines that although total welfare may also be a separate goal of competition law, it only rarely conflicts directly with consumer welfare.¹⁴⁵ A minority of the NGAs state that promoting consumer welfare is one of the many goals of competition law, but not (necessarily) the primary one. According to Reynolds, consumer welfare is more of an EU concern than it is a concern of other Authorities outside the EU. Baarsma mentions another possible perspective, namely, that perhaps, the practice of competition law may even lower consumer welfare in specific cases. In this respect, she presents consumer welfare and

¹⁴⁵ See Chapter 2 of this Document for a further discussion on total welfare.

competition not always as complementary but sometimes as contrary goals.¹⁴⁶ It is therefore relevant to differentiate between consumer welfare vis-à-vis competition law enforcement.

Almost all of the NGAs recognize that consumer welfare is either the primary or one of the many goals of competition law enforcement. A small majority of the NGAs that states that promoting consumer welfare is the primary goal of competition law, also states that there is either a direct or an indirect reference to consumer welfare in the mission statement of the Authority in their jurisdiction. On the other hand, according to more than half of this group of NGAs, no reference is made to consumer welfare in their national legislation, although they see promoting consumer welfare as the primary goal of competition law enforcement.

Of the minority group of NGAs (33%) stating that promoting consumer welfare is one of the many goals of competition law, all but one also state that consumer welfare is not referred to in the mission statement. Half of the NGAs in this category answer that there is also no reference made to consumer welfare in national legislation. A number of NGAs propose that, despite the fact that consumer welfare is considered to be one of the many goals of competition law, there is only limited reference to it in legislation and almost no reference to it in mission statements of the Authority. Bagnoli mentions the Brazilian Nestlé case as an example of a decision of an Authority where direct reference is made to consumer welfare¹⁴⁷ and the decision of a Brazilian court in the “gas cartel” case as an example of a direct reference to consumer welfare in a court decision.¹⁴⁸

The answers received from the NGAs seem to suggest that in some jurisdictions, the role of consumer welfare is more prominent than the mission statement and national legislation might suggest. Baarsma considers the lack of explicit reference in much of the relevant legislation to be problematic.

This outcome is similar to the answers provided by the Authorities. Although most Authorities see the promotion of consumer welfare as a goal to be achieved, they have different opinions

¹⁴⁶ Baarsma, B, *Rewriting competition law from an economic perspective*, SEO Economic Research/University of Amsterdam.

¹⁴⁷ CADE decision of March 15, 2002.

¹⁴⁸ The Justice of the State of Minas Gerais Brazil granted the first decision that orders companies condemned by cartel to reimburse prejudiced consumers because of higher prices. The decision benefits 260 public and private hospitals of the State that would have paid more expensive for industrial gases due to the illegal performance of the companies, that were condemned by CADE.

with regard to the importance of this goal and whether the desire to achieve this goal has been translated into practice.

6.2 Defining Consumer Welfare in Competition Law Enforcement

Consumer welfare can mean different things to different Authorities and NGAs.¹⁴⁹ The main question in this section is how best to define consumer welfare. As discussed in Chapter 2 of this Document, the concept is often described in economic terms as consumer surplus, and many Authorities would include quality, range and service as elements of consumer surplus.

A minority of the NGAs (22%) completely agrees with the definition given in the questionnaire.¹⁵⁰ Hawk describes it as a general definition and a majority of the NGAs (72%) state that in their belief, the definition of consumer welfare focuses on consumer surplus. Bloom for example, takes the view that consumer welfare consists of maximizing consumer surplus. Van Gerven adds to this that quality should be reflected through consumer surplus. Lugard stresses that a proper definition and analysis of consumer welfare should also take account of dynamic effects, in particular innovation. Sims notes that the definition was historically more focused on total welfare, but is today similar to the given definition.

Not all national legislation provides for a formal definition of consumer welfare, however, a definition may sometimes be derived from case law. One NGA notes for example that, although there is no single definition of consumer welfare in the US, case law suggests that it means maximization of wealth through efficiently allocating resources. According to Power, there is a similar situation in Ireland, where the Supreme Court has stated that:

*“The entire aim and object of competition law is consumer welfare. Competitive markets must serve the consumer. That is their sole purpose.”*¹⁵¹

¹⁴⁹ See e.g. Cseres, K., “The Controversies of the Consumer Welfare Standard”(2007) *The Competition Law Review* 121.

¹⁵⁰ Which is the following: “Consumer welfare in competition law enforcement is not synonymous with consumer protection. It relates only to consumer surplus – which also encompasses quality / range / innovation; we do not look at non-economic considerations. We also do not look at total welfare. We focus on long-term consumer welfare. We use both a static and dynamic analysis as appropriate, given the specific facts of the case.”

¹⁵¹ The Court goes on to consider that: “Competition law, as is often said, is about protecting competition not competitors even if it is competitors who most frequently invoke it. Its guiding principle is that open and fair competition between producers of goods and services will favour the most efficient producers who will thereby be encouraged to satisfy consumer demand for better quality products, wider choice and lower prices. (...) It is obvious that these principles are in frequent and general tension and that competition Authorities must strike a balance between competing considerations. Complex economic relationships need analysis before a conclusion may be reached as to whether particular impugned behaviour is injurious to or beneficial to competition and to the consumer.”

Opinions differ among the NGAs as to what the main elements of the definition of consumer welfare should be. A small majority of the NGAs believes that the concept is confined to economic criteria and that the focus is (or should be) on consumer surplus.¹⁵² Power states that this is a difficult question because it seems heartless to fail to take other considerations into account, but it is also unclear as to where the boundaries lie in terms of what is included in the concept of economic criteria. Blumenthal points out that in principle, consumer welfare could apply to other measurable criteria. He claims it is basically a maximization concept. Henry also makes a side note stating that economic criteria include innovation and quality. As mentioned previously, Van Gerven considers quality to be part of consumer surplus.

According to one NGA, consumer welfare emphasizes real price effects, however cases often include discussions of quality, customer choice and innovation. Sometimes these are dealt with by examining price equivalents, but not necessarily. He goes on to say that both short-term and long-term effects are examined where there is a difference in the certainty between them. Potentially, consumer information effects or deception effects could be considered in a merger or other matter, however this approach is uncommon. Oxenham takes a different perspective, describing consumer welfare as the result of the creation of an efficient, competitive environment, balancing the interests of workers, owners and consumers and focused on development. Bagnoli's definition of consumer welfare also focuses on consumer welfare as a result of enterprises exposed to free competition (which tends to be more attuned to consumer desires and expectations because firms are under a constant threat of losing their market share to new and higher quality products).

6.2.1 Consumer Welfare and Consumer Protection

When considering definitions, another point of discussion is whether or not one should differentiate between consumer welfare and consumer protection. Some see consumer protection as a separate, though complementary field of law to competition law: competition law keeps the options open, while consumer law protects the ability of consumers to choose between those options.

¹⁵² 56% of NGA responses.

In line with this, a large majority of the NGAs (78%) states that the Authority in their jurisdiction does distinguish between consumer welfare and consumer protection. One NGA opines, for example, that consumer welfare generally refers to the economic notions of consumer and producer surplus, whereas consumer protection usually refers to protection from misleading advertising and fraud. Consumer protection typically implies a broad category of laws separate from competition. In the US, consumer protection statutes involve concepts more akin to fraud than to competition. This divergence is seen, for example, at the FTC, where there is both a Bureau of Competition and a Bureau of Consumer Protection. Hilke notes accordingly that consumer protection matters are generally dealt with separately from competition matters, although links between theory and practice exist. Although many Authorities are also Consumer Protection Authorities, some Authorities do not have an explicit consumer protection function.¹⁵³

6.2.2 Consumer Welfare and Total Welfare

As noted previously, a large majority of the NGAs state that their definition of consumer welfare focuses on consumer surplus. The question then arises as to whether total welfare, i.e. the combined welfare of the consumer and producer, is also considered. Debate exists as to whether total welfare or consumer welfare, should be the competition law standard.

Half of the NGAs that answer this question state that their Authority considers total welfare in addition to consumer welfare. However, one NGA notes that total welfare does, on occasion, directly conflict with consumer welfare. He goes on to state that when healthy competition exists, consumers will ultimately benefit from total welfare enhancements. Where the two may potentially conflict is in the area of geographically based market power. Indeed, he posits that it may be tempting for governments to adopt a total welfare standard in defence of a national monopoly that raises prices to domestic consumers but facilitates extracting consumer surplus from foreign customers to such an extent that the nation where the monopoly exists, benefits as a whole. Although wrapped in a mantle of total welfare, this approach is really a mercantilist policy.

¹⁵³ Power and Ojeda Cárdenas.

Baarsma points to a useful general definition of total welfare which she states consists of consumer welfare and producer welfare. The part commonly termed consumer surplus arises because consumers are willing to pay more for goods than they actually pay. Producer surplus arises because the market price is higher than what the manufacturer would want to be paid for his goods and services. She further notes that, according to the standard model, in which a monopolist sets a single price for all consumers, the monopolist will sell a lower quantity of goods at a higher price than would firms under perfect competition. The focus of competition can either be on the prevention of a deadweight loss (that is to protect total welfare) or the maximization of consumer surplus.¹⁵⁴

Where total welfare differs from consumer welfare, internal considerations sometimes draw the distinction to the attention of decision makers. In line with this, one NGA states that an argument can be made that Authorities try to maximize total welfare by focusing on consumer surplus. The NGA further expresses the view that US Authorities focus on consumer surplus rather than total wealth, in the context of merger control. Ojeda Cárdenas notes that in her jurisdiction, when total welfare and consumer welfare differ, consumer surplus seems to prevail. Lugard states that the Authority in his jurisdiction seems to focus on consumer welfare, albeit in an implicit manner.

6.2.3 Short Term and Long Term Consumer Welfare

Half of the NGAs answer that the Authority in their jurisdiction focuses on short-term consumer welfare. Furthermore, a majority of the NGAs also state that the Authority focuses on long-term consumer welfare.¹⁵⁵ According to Hilke, protecting or enhancing competition often has long-term as well as short-term benefits for consumers. Furthermore, Authorities will also tend to focus on short-term effects when they are more certain. One NGA adds that long term consumer welfare arguments would likely not be enough to overcome evidence that conduct will lead to a short term price increase.

6.2.4 Concluding Remarks

With regard to questions of definition, the overall opinions given by NGAs are similar to the answers provided by the Authorities. Like the Authorities, some NGAs interpret consumer

¹⁵⁴ See also Baarsma, B., *Rewriting competition law from an economic perspective*, SEO Economic Research/University of Amsterdam.

¹⁵⁵ 80% of NGA responses.

welfare, to include quality, and other (mainly economic) criteria. Finally, and also in line with the Authorities, most NGAs prefer a long-term approach in theory, while some admit that enforcement realities frequently oblige them to have regard to short-term effects.

6.3 Quantification in Competition Cases

There are many difficulties in measuring the effects of competition law cases on consumer welfare. Although it is relatively straightforward to measure the effects on price and output, it can be very difficult to measure quality, consumer choice, and innovation effects, though they too are of critical importance to the analysis of consumer surplus effects (that many Authorities focus on according to a majority of the NGAs¹⁵⁶). There are limits as to what Authorities can measure in terms of quantifying impact on consumer surplus in an individual case. This section analyses the answers of the NGAs that relate to the quantification of detriment to consumer welfare as an economic concept.

Session on Business Perspectives: Quantification of detriment is the problem of private enforcement

The questionnaire shows that both NCAs and NGAs regard quantification as a problem for private enforcement, since the amount of harm can form the basis of the amount of damages awarded. However, damages in private actions might not reflect the loss to consumer welfare or total welfare, since they do not take account of deadweight loss or dynamic effects.

Moderated by Anne Perrot (France) and Olavo Chinaglia (Brazil)

Delegates agreed that there can be benefits to quantifying consumer welfare. Quantification creates more comfort for the parties, since they have something concrete. In jurisdictions with class actions, there is a need for such calculations. For in-house lawyers, quantification can be used as an ethical basis for fostering a culture of compliance.

It was also observed that the importance of the accountability and credibility of enforcement agencies demands that authorities can rationally explain why a high fine is imposed. This is particularly desirable given the advent of excessive fines which are no longer in proportion to penalties for other crimes more serious than cartel infringements. Quantification of damages is one way in which this might be accomplished, although simply referring to fining guidelines is not enough.

¹⁵⁶ See section 6.2 of this Document.

6.3.1 Burden of Proof

As a preliminary matter, It is interesting to note that, on the one hand, a majority of the NGAs answer that there is no burden for the Authority to prove a detriment to consumer welfare in the first three stages mentioned or when drafting the decision.¹⁵⁷ On the other hand, however, a minority of the NGAs answer that there is no burden in the other stages at all.¹⁵⁸

One NGA notes that technically, the Authority in his jurisdiction is required to prove harm to competition at any stage of production and not harm to ultimate consumers per se. Therefore although the Authority seeks to show consumer harm, this is not required, it is simply an extra means of giving a full justification for government intervention.

The outcome of the NGA answers is in line with answers of the Authorities, who, in general, state that a burden to prove detriment to consumer welfare only exists in a limited number of competition cases and/or only at limited stages of the proceedings, as explained in Chapter 3.

6.3.2 The Possibility to Quantify Consumer Harm and Actual Practice

Moving to the question of whether or not one believes it is possible to quantify consumer welfare, exactly half of the NGAs believe this is possible. One NGA makes a reservation stating that this is not the case in every situation. Quantification of detriment to consumer welfare effects is most common in merger cases. Six NGAs believe it is not possible to quantify consumer welfare. Angland believes it is impossible, given all the variables. Foer is not sure whether it is possible or not, but he does believe that it is usually possible to provide an estimate in rule of reason cases.

Whereas half of the NGAs state they believe quantification is possible, only one third also state that the Authority in his or her jurisdiction actually conducts a qualitative and/or quantitative assessment of the possible detriment to consumer welfare. According to one NGA, the Authorities use economic analysis in merger and dominance investigations, in order to determine the competitive effects of the matter on a relevant market. The Authorities use this analysis to attempt to predict how much prices are likely to rise in the relevant market

¹⁵⁷ 92% of NGA responses indicated that when choosing which case to investigate, 100% during an investigation, 75% during the analysis and 56% when determining the sanction.

¹⁵⁸ 36% of Respondents stated that this occurred while establishing the theory of harm, 33% in establishing effects, 40% when making an exception (efficiencies), 30% when drafting the decision, 36% while arguing the case in court.

after the merger or as a result of the monopoly. Both Sims and Hilke make a reservation by stating that this only happens in some cases. According to Sims this only happens occasionally on the basis of econometric analysis and modelling.

Bagnoli answers that the Authority must prove the existence of an infringement of competition law by showing that some behaviour (intentionally or not) produces anti-competitive effects in the relevant market. Victims of that infringement, i.e. society at large, have a claim to recover any damages. The question of the quantification of the detriment to consumer welfare will only come into play when a civil action is lodged. These quantifications will then be verified by the courts.

Though Bagnoli believes the Courts should review the quantification, only 17 % of the NGAs answer yes to the question of whether the methodology of identifying and/or assessing consumer welfare has ever been considered in court. One NGA specifies by stating that courts are often presented with such analyses and sometimes mention them in decisions. Where the defence presents a quantitative estimate of efficiency benefits, courts often comment on the validity of these estimates.

Session on Business Perspectives : Difficulties with quantification

Moderated by Anne Perrot (France) and Olavo Chinaglia (Brazil)

Delegates agreed that quantification can be very difficult and sometimes impossible under the current (high) standard of proof. It was noted that quantification should take account of long-term effects. However, delegates recognized that these can be hard or impossible to measure accurately.

It was also commented that there is often little focus on consumer welfare in practice, since private parties focus on the damage caused by their actions or to their business and not the damage to consumer welfare or society at large.

6.3.3 Concluding Remarks

From the answers provided it follows that, although half of the NGAs believe quantification is possible, only 33% answer that they believe that Authorities actually do this and only 17% say the courts have considered the methodology. This seems to suggest that Authorities and the judiciary are more hesitant to consider the quantification of the detriment to consumer welfare than one might expect. This may have something to do with the fact that, as

mentioned in Chapter 3 of this Document, there may be serious limits to the quantification of the detriment to consumer welfare and that the determination by an Authority of potential anticompetitive effects of undertakings' behavior and agreements may, as the law stands, also lead to legal uncertainty.

Comparing this outcome to the answers of the Authorities, it is interesting to note that the number of Authorities that believe quantification is possible (75%) is higher than the number of NGAs that believe it is possible (50%), although, as with the NGAs, most Authorities recognize difficulties and limitations to such quantifications and only evaluate a quantification in exceptional or specifically suited cases. The reason for this given by the Authorities is limited availability of data and/or human resources and limitations to the possibility of quantification. The majority of the answers of the Authorities seem to suggest that quantification is more relevant for private enforcement. This is in line with what Bagnoli suggests. However, as argued in Chapter 3, it is acknowledged that to some extent, public enforcement and private damages actions are interrelated.

Overall, the answers of the NGAs support the conclusion that can be drawn for the answers of the Authorities, namely that although the belief that quantification is possible exists, there does not seem to be an easy non-contestable method for quantification that works in all cases. A case cannot be based on economic theory alone. It therefore does not seem desirable to make proof of detriment to consumer welfare a prerequisite for finding an infringement in all competition cases.

6.4 Impact and Outcome Assessments

The subject of this section is how Authorities calculate the effects of their activities on, for example, consumer welfare.¹⁵⁹ Since only a limited number of answers were received from the NGAs, the scope of this section will differ from Chapter 4 of this document and focus only on the question of whose welfare the Authorities take into account when conducting an impact or outcome analysis.¹⁶⁰

¹⁵⁹ See in this regard Chapter 4 of this Document.

¹⁶⁰ See also Chapter 2 of this Document on the definition of consumer welfare.

A majority of the NGAs answers that the Authority in their jurisdiction does not solely take the welfare of end consumers into consideration when conducting an investigation.¹⁶¹ However, this generalization is subject to qualifications. Foer notes that in buyer power or monopsony cases, the issues do not always turn on end consumers but on the suppliers' right to a competitive buyer market. Hilke states that the Authority in his jurisdiction predominantly takes the welfare of end consumers into consideration, but not exclusively.

In merger cases, according to one NGA, Authorities would consider the welfare of purchasers of a product from the merging firms, even if the purchasers are not final end users. Henry adds to this by stating that some court cases suggest that reference to competition at the level of intermediate customers is appropriate in merger cases. He goes on to say that in cartel cases, Authorities only look at the welfare of the end-consumer when deciding. Another NGA adds that cartels are a strict liability offense in the US, therefore consumer welfare is not ordinarily the immediate consideration.

Of the group of NGAs who answer that the Authority in their jurisdiction not only looks at the welfare of the end-consumer, almost all also answer that the Authority also considers the welfare of intermediate consumers.¹⁶² One NGA says the welfare of intermediate consumers is considered when it is distinctly different from the welfare of the end users. Ojeda Cárdenas notes that the Authority in her jurisdiction does not differentiate between intermediate and end consumers. This is in line with the answers of the Authorities, where many Respondents also look at the welfare of intermediate consumers in at least some of their investigations.

6.5 Practice and Future Objectives

The final section of this chapter, which corresponds to Chapter 5 of this Document, explores the practicalities of competition law and consumer welfare, with the aim of providing an overview of the law “in action”.

As a starting point, the answers received show that a majority (78%) of the NGAs states that the Authority in their jurisdiction uses consumer welfare as a reference point when carrying out its enforcement activities. The question then is when is this reference made in day-to-day

¹⁶¹ 83% in merger cases, 72% in cartel cases, 78% in dominance cases and 83% in other (e.g. advocacy).

¹⁶² 92% in merger cases, 80% in cartel cases, 75% in dominance cases and 91% in other (e.g. advocacy).

investigations. Krauskopf mentions that due to high consumer prices and still existing (contractual) barriers to foreign imports, the Swiss Competition Authority focuses on consumer goods. In doing so, it takes consumer welfare into account in its enforcement activities. In fact, Krauskopf points out that the Swiss Authority pays a lot of attention to consumer welfare in its activities regarding vertical restraints.

The questionnaire set out the five main procedural moments of the investigation (be it mergers, cartels or dominance) during which consumer welfare can come into play: i) when choosing which case to investigate; ii) while establishing the theory of harm; iii) when drafting the decision; iv) when determining the sanction; and v) in press releases. The answers are presented in the two following tables (the outcome for merger and cartel cases were the same).

Mergers and Cartels:

	When choosing which case to investigate	While establishing the theory of harm	When drafting the decision	When determining the sanction	In press releases
Always	23%	22%	15%	9%	22%
Sometimes	62%	57%	62%	58%	65%
Never	15%	21%	23%	33%	3%

Dominance:

	When choosing which case to investigate	While establishing the theory of harm	When drafting the decision	When determining the sanction	In press releases
Always	54%	36%	42%	36%	29%
Sometimes	38%	58%	50%	46%	64%
Never	8%	6%	8%	18%	7%

This seems to suggest that more reference is made to consumer welfare in dominance cases¹⁶³ than in merger and cartel cases¹⁶⁴ and mostly in press releases and when prioritizing cases. The general outcome of the NGA answers is in line with the answers of a majority of

¹⁶³ An average of 39% of the answers state that reference is always made and an average of 51% that reference is sometimes made in dominance cases.
¹⁶⁴ An average of 17% of the answers state that reference is always made and an average of 61% state that reference is sometimes made in merger and cartel cases.

the Authorities, which state that they usually refer to consumer welfare in some form or another.

6.5.1 Promotion of Consumer Welfare

All but one of the NGAs that answer the part of the questionnaire relating to this topic answer that the Authority in their jurisdiction does not treat consumer welfare similar to other public policies. Hilke explains that the focus of the Authority is on competition effects and not, for example, on consumer health, in that even though smoking may have detrimental effects, cases have been brought against mergers that would increase market power in the sale of cigarettes.

On the question of how consumer welfare may be promoted, Lugard mentions various activities the Authority undertakes to promote competitive markets, such as public speeches. Hilke notes that the Authority's research supports advocacy activities. Sometimes actions are taken to protect privacy or to provide information directly to consumers through, for example, public announcements and pamphlets. Officials frequently participate in media and professional events that aim to encourage consumers to be careful, get full information and avoid scams.

In line with the answers of the Authorities, the NGA answers suggest that consumer welfare is highly important for many Authorities across the globe. Authorities use different means to further consumer welfare, depending on their competencies.¹⁶⁵

¹⁶⁵ See Chapter 5 of this Document.

Conclusion

This document aims to set an agenda for future discussions and work on the role of promoting consumer welfare in competition enforcement. It is based on responses from 57 Authorities and 19 NGAs and raises various issues which are ripe for further discussion.

This Discussion Document begins with an initial analysis of the various approaches Authorities take to referring to the promotion of consumer welfare with respect to mission statements; goals; and national legislation. A majority of Authorities refer to consumer welfare in their mission statements. A majority (although not the same majority) also report that they are directly bound by statute to promote consumer welfare; however, others report that to the contrary, they see consumer welfare as no more than a possible outcome of competition enforcement. The broad spectrum of Respondents' replies on the question of whether they see consumer welfare as a goal of competition enforcement, gives a good indication that there is formally no identical view on competition enforcement and consumer welfare across the globe.

It is obvious from a comparison of Chapters 1 and 2 that Authorities are more inclined to agree on the definition of consumer welfare than on whether an Authority should promote it. Although most Respondents seem to agree on the general concept of consumer welfare, they do not seem to utilize a single definition of consumer welfare, nor do they seem to find such a definition desirable. On examination of what Respondents understand consumer welfare to be, most Respondents agree that there is a distinction between consumer welfare and consumer protection. Moreover, most Respondents do not use a total welfare standard (often for practical reasons). Furthermore, they state that they prefer a long-term dynamic approach over a short-term static approach (although sometimes enforcement activities oblige them to take a short-term static perspective). A majority of Authorities reports that they look at intermediate consumers, in at least some of their investigations, and not solely at the welfare of end users.

Chapter 3 discusses what Authorities think is possible in respect of the quantification of detriment to consumer welfare and if and how they apply this in practice. The answers received show that there is no easy, non-contestable, method for quantifying harm to

consumer welfare that will work for all cases. Solid economic evidence of detriment to consumer welfare in the context of a specific case cannot be based on an economic theory or on theoretical models alone, since it must at least be related to, and tested against, the case-specific evidence and data in order to meet the requisite legal standard of proof. This naturally requires many resources. Moreover, it will not always be possible to meet the requisite standard of proof due to a lack of empirical data or complex market mechanisms that are hard to predict in an economic model.

From a different perspective, some Respondents indicate that they do not consider quantification of specific cases to be a task for public enforcers. Respondents seem to agree that making a quantification of harmful effects a precondition for public enforcement will raise the burden of proof for Authorities significantly and probably therefore diminish the effectiveness of public enforcement generally. The challenge is to strike the right balance between the two whilst maintaining legal certainty.

Answers from Respondents showed that when reporting on their activities, whether in the form of precise outcome calculations or otherwise, many Authorities cite changes in consumer welfare as a benchmark.

In fact, as Chapter 4 indicates, in the last decade, several Authorities have started calculating the outcome effects of their aggregated activities. This chapter showed that although some Authorities do not think it is their responsibility to analyse impact at all, for others measurement of outcome is actually required by law. From the answers received it follows that no widely recognized method of calculating outcome has been developed yet. Only a limited number of Authorities calculate the outcome on an aggregate level, while others have developed their own methodology to calculate outcome (including the assessment of enforcement impact, the number of cases, the number of imposed fines and ex-post reviews of mergers, cartels and abuse of dominance cases). In most of the jurisdictions surveyed, the aim of the calculation is to account to lawmakers and society, especially in order to demonstrate the directly quantifiable social benefits of the Authority's activities.

Chapter 5 explores the practicalities of competition law enforcement with a view to promoting consumer welfare. This chapter aims to provide an overview of the law “in action”. The answers from Respondents show that although consumer welfare is important for many different Authorities around the globe, it is not always directly referred to in the decisions of Authorities or national courts. One comparison of interest is that, in general, Authorities in common law jurisdictions and emerging markets seem more inclined to refer to consumer welfare explicitly than most European Authorities.

Authorities may further consumer welfare by a variety of factors. First of all, by increasing transparency as to their objectives and findings in investigations and sanctions. Some Authorities accomplish this by specifically and transparently referring to consumer welfare when establishing efficiencies in merger reviews. Prioritizing activities on the basis of consumer welfare or prioritizing *ex officio* investigations on the basis of consumer welfare, is another way to further consumer welfare. Respondents also indicated that advocacy is a useful tool for promoting consumer welfare. Particularly in areas such as: assisting governments in the adoption of regulation which is in conformity with well functioning markets; conducting sector inquiries; and promoting civil enforcement of competition law.

In the final chapter, the answers received from some of the ICN NGAs are discussed. Overall, the answers received from the NGAs were very similar to the answers of the Authorities. For instance, the NGAs have similar views on the definition of consumer welfare. Similar to the Authorities, the NGAs also seem to believe that in some jurisdictions, the role of consumer welfare is more prominent than the mission statement and national legislation might suggest. With regard to quantification, the belief among the NGAs surveyed that quantification of the detriment to consumer detriment is possible seems to be lower than among the Authorities. Finally, in line with the answers of the Authorities, the NGA answers suggest that consumer welfare is highly important for many Authorities across the globe and that Authorities use different means to further consumer welfare.

Final observations and further point of discussion

There seems to be a gap between the promotion of consumer welfare as the (or one of the) goals of competition law enforcement and the extent to which this has been actively

translated in practice. While most Authorities seem to agree that promotion of consumer welfare is a goal to be achieved, they differ with regard to references to consumer welfare in their mission statements and national legislation. If consumer welfare is in the mission statement or declared the goal, or even simply one of many goals of an Authority, a first point of discussion is whether the lack of explicit reference in much of the relevant legislation and decisions is problematic.

In 1987, consumer welfare was described as ‘the most abused term in modern antitrust analysis’,¹⁶⁶ the question is whether today, consumer welfare continues to be abused by being over-cited but under-used. Given the fact that many Authorities believe the promotion of consumer welfare to be important, and state so in their missions; the first point of discussion is whether should they also define it and refer to it explicitly in their decisions. Or is it sufficient that enforcing competition law to benefit consumer welfare be a consistent underlying implicit goal of Authorities.

The need for unambiguous standards and consistency and uniformity among these standards worldwide is gaining importance as transactions more frequently take place in global dimensions. A clearly set and uniformly enforced standard is, therefore, of utmost relevance for enforcement agencies, the business community and final consumers.¹⁶⁷ Chapter 2 provides a first framework for such a definition. The second point of discussion is whether we need a uniform definition of consumer welfare, and if so what this definition should be. Though most Respondents do not seem to agree on one general definition, they do seem to agree on the several specific elements of consumer welfare. It includes at least the impact of price changes and changes in quality on the change in consumer surplus. This might suggest that there is room for a general definition. However, the answers received show that there is no easy, non-contestable, method for quantifying harm to consumer welfare. The third point of discussion is how to strike a balance between the gains of a more effects-based approach and a higher degree of tailor-made decisions on the one hand, and the extra resources that are needed to achieve this and less legal certainty on the other hand.

¹⁶⁶ Brodley, JF, ‘The economic goals of antitrust: efficiency, consumer welfare, and technological progress’, (1987) 62 NYUniv LR 1020, p 1032.

¹⁶⁷ Cseres, KJ, ‘The Controversies of the consumer Welfare Standard’, March 2007, *Competition Law Review* Vol. 3 Is. 2, pp. 121-173.

Since the Respondents do not seem to agree on the necessity of outcome calculations and, more specifically, on one unified method of calculating outcome. A fourth point of discussion is whether outcome analysis are a responsibility of an Authority and, if so, what the proper methodology for such an assessment should be and whether this should include an assessment of the effects of competition enforcement on consumer welfare.

There appears to be a lack of uniformity on the role of consumer welfare plays in the practice of Authorities. A more economics-based competition law enforcement might be able to contribute to a better monitoring of what exactly the effects will be or have been of a certain trade practice on final consumers. A final point of discussion is whether Authorities can use the insights gained as a result of this Special Project to sharpen up their act on references to consumer welfare in their law enforcement and advocacy efforts. Discussion of these points can assist in building a more complete picture of the effects on consumer welfare of competition enforcement across the globe – thereby setting the agenda for future work on this topic, as the ICN enters its second decade.

ICN Conference 17-20 may 2011, the Hague

Special Project: Competition Enforcement and Consumer Welfare - Setting the Agenda

This special project followed the plenary session, breakout sessions and made use of an electronic poll to obtain the views of the ICN delegates throughout the discussion.

Jarig van Sinderen, Chief Economist at the NMa and Professor at the Erasmus University, reported that, from his observations during the breakout sessions, competition agencies considered consumer welfare to be important. He concluded that consumer welfare is the ultimate goal of competition economic analysis and, since it lies at the heart of competition, the topic should be included on the ICN agenda.

Barbara Baarsma, Professor at the University of Amsterdam, offered some concluding remarks on consumer welfare. She suggested that economists regard consumer welfare as the key concept, whereas lawyers maintain the key is restriction of competition. She suggested that a distinction must be drawn between protecting competition and consumer welfare, since competition cannot be assessed and the application of competition law relies on formal legal criteria, to the exclusion of welfare effects. To resolve the situation, Dr Baarsma recommended amendments to the Treaty on Functioning of the European Union to consider only consumer welfare.

A vote was taken by the audience on whether or not consumer welfare should be included as a goal in the law or competition agency guidelines. The result:

Yes	65%
No	29%
No vote	6%

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Responding Competition Authorities

Australia	Australian Competition and Consumer Commission (ACCC)
Austria	Austrian Competition Authority (BWB)
Belgium	Belgian Competition Authority
Bosnia Herzegovina	Council of Competition of Bosnia Herzegovina
Brazil	Council for Economic Defence (CADE)
Bulgaria	Commission on Protection of Competition
Canada	Canadian Competition Bureau
Croatia	Croatian Competition Agency (AZTN)
Cyprus	Commission for the Protection of Competition (CPC)
Czech Republic	Office for the Protection of Competition
Denmark	Danish Competition and Consumer Authority
El Salvador	Competition Superintendence of El Salvador (CS)
Estonia	Estonian Competition Authority
European Union	European Commission, Directorate General for Competition
Finland	Finnish Competition Authority (FCA)
France	Autorité de la concurrence
Germany	Bundeskartellamt
Honduras	Honduran Commission for the Defense and Promotion of Competition (CDPC)
Hungary	Hungarian Competition Authority (GVH)
Iceland	Icelandic Competition Authority
Indonesia	Commission for the Supervision of Business Competition (KPPU)
Ireland	Irish Competition Authority (TCA)
Israel	Israel Antitrust Authority (IAA)
Italy	Italian Competition Authority
Japan	Japan Fair Trade Commission (JFTC)
Jersey	Jersey Competition Regulatory Authority (JCRA)

Jordan	Competition Directorate at the Ministry of Industry and Trade
Kenya	Monopolies and Prices Commission (MPC)
Korea	Korea Fair Trade Commission (KFTC)
Latvia	Competition Council of the Republic of Latvia (KP)
Lithuania	Competition Council of the Republic of Lithuania
Luxemburg	Conseil de la Concurrence et l'Inspection de la concurrence
Malta	Office of Fair Competition (OFC)
Mauritius	Competition Commission of Mauritius (CCM)
Mexico	Federal Competition Commission (CFC)
Netherlands	Netherlands Competition Authority (NMa)
New Zealand	New Zealand Commerce Commission
Norway	Norwegian Competition Authority (NCA)
Pakistan	Competition Commission of Pakistan (CCP)
Poland	Office of Competition and Consumer Protection
Romania	Competition Council of Romania
Russia	Federal Antimonopoly Service of the Russian Federation
Slovak Republic	Antimonopoly Office of the Slovak Republic (AMO SR)
Slovenia	Competition Protection Office
South-Africa	Competition Commission
Spain	Spanish Comisión Nacional de Competencia
Swaziland	Swaziland Competition Commission
Sweden	Swedish Competition Authority
Switzerland	Competition Commission (COMCO)
Taiwan	Fair Trade Commission (FTC)
Turkey	Turkish Competition Authority
United Kingdom	Competition Commission (CC)
United Kingdom	Office of Fair Trading (OFT)
United States	Department of Justice Antitrust Division
United States	Federal Trade Commission (FTC)
Uzbekistan	State Committee on Demonopolization, Support of Competition and Entrepreneurship
Vietnam	Vietnam Competition Authority (VCA)
Zambia	Zambia Competition Commission

NGAs

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