

# Consumer interest in competition law cases

*Michael Hutchings OBE and Peter Whelan reflect on consideration and representation of 'consumer interest' in competition law cases*

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**Competition authorities often state that efficient competition law should promote consumer welfare. Nevertheless, UK and EC competition legislation and case law pay little regard to consumers and the harm they may suffer from so-called 'anticompetitive' conduct. The current state of both the consideration and the representation of the consumer interest in competition law must be improved if the promotion of consumer welfare both within the UK and at EC level is to be a reality.**

Competition between undertakings that vie for the custom of consumers is widely perceived as a good thing in terms of consumer welfare. When rational consumers with limited resources at their disposal are presented with choices in the market they will, by their very nature, attempt to consume those products from which they can derive maximum satisfaction, or, in economic terms, maximum 'utility'. If this desire to choose wisely is coupled with an ability to switch between competing products (or, if need be, competing retailers), consumers can, by the power of their feet so-to-speak, force competitors to compete vigorously in the market and thus compel them to deliver products which are the most attractive to them in terms of price, quality, range, frequency and innovation, among other things. In short, undistorted competition on a given market helps to deliver the best results to consumers.

The key word is 'undistorted'. If the competitive process is distorted, restricted or indeed completely destroyed, whether by anticompetitive agreements or unilateral action by the dominant firm in the market, then, so theory runs, consumers will not be able to force competitors to offer them the best product possible. This is where competition law has a role to play: it seeks to preserve the competitive process so that consumers will receive the benefits they are entitled to.

Industrial economists, competition lawyers and policy makers regularly attempt to underline the benefits that an efficient competition law regime can secure for consumers. Indeed, it is increasingly difficult to find a recent speech or policy statement that emanates from either the Office of Fair Trading (OFT) in the UK or from DG Competition (DG Comp) at European Commission level that does not mention the important role that competition law can play for the improvement of consumer welfare within a particular jurisdiction or that does not highlight the need for a pro-consumer competition policy that ensures lower prices, better quality goods and services, or improved access to innovative and quality products for consumers.

Such are the benefits that competition law can ensure for consumers that an efficient competition law regime is generally considered to be a necessity if one wishes to maximise consumer welfare: without it a healthy, competition-driven economy capable of delivering tangible gains to consumers will almost always be undermined by the activities of cartelists and dominant, abusive companies. According to Philip Collins, the current Chairman of the OFT:

*'Today, all around the world, policy makers recognise that a system of competition law is essential to the successful operation of a market economy and the protection of consumers.'*<sup>1</sup>

Competition authorities often state that competition policy and any analysis that is undertaken under the competition law rules should promote a consumer welfare standard:

*'Consumer welfare is now well established as the standard the [European] Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources.'*<sup>2</sup>

Words such as the above establish the maximisation of consumer welfare as one of the most important objectives in both the UK and European Community (EC) competition law regimes, at least in a theoretical sense.<sup>3</sup> Given the abundance of such statements in both the UK and at EC level, it would not be an exaggeration to state that the position of the consumer in competition law has never been stronger. Accordingly, the significance of the consumer within these competition law regimes has been constantly emphasised in the competition law debates that are currently taking place within the European competition law community, viz. private enforcement of competition law through the national courts of the Member States, and the reform of Article 82. These debates are intended to advance the position of consumers by improving their ability to sue for compensation in national courts (private enforcement) and by

making consumer welfare the focus of competition analysis in abuse of dominance cases (reform of Article 82). Consumer organisations have in general acknowledged the significance of these debates for the promotion of consumer interests.

It is true to say that the importance of a competition law for consumers is widely understood by both consumer organisations and the various European competition authorities. It is also true that competition authorities, policy makers, and politicians regularly place the consumer at the centre of competition policy, at least in theory. Having said that, an extremely pertinent issue remains to be addressed: in reality how important for competition law are consumers? In answering this question one must ask to what extent the interests of consumers are actually taken into account in competition law cases in practice. An important inquiry in this regard concerns whether the size or the nature of any actual or potential consumer detriment is in fact examined in a competition law analysis of allegedly anticompetitive conduct. One must also ask whether consumers have the necessary mechanisms at their disposal to make their claims heard effectively and convincingly at both national and European level.

## Adequate analysis of detriment?

While the regulators' consistent mantra is the centrality of consumer welfare, the reality is rather different. For a start the legislation is rather thin in this regard; both UK and EC competition legislation pay little regard to the consumer and the harm he/she may suffer as a result of certain conduct on the market.<sup>4</sup> Reference to the consumer is generally reserved<sup>5</sup> for those provisions that provide exemption for anticompetitive agreements that nonetheless produce important benefits for consumers.<sup>6</sup> Legislation does little then for the consumer in terms of protecting his/her welfare; one must ask, however, if the treatment of consumer welfare in competition law cases is any better. In other words, do the competition authorities interpret the competition law rules in a manner that is favourable to consumers and to the protection and maximisation of consumer welfare?

It should be obvious that the statement 'competition law seeks to preserve the competitive process so that consumers will receive the benefits they are entitled to' is capable of at least two interpretations and hence at least two different approaches in terms of applying competition law in any given case:

- finding certain conduct on the market to be anticompetitive and therefore concluding that consumers will be negatively affected if it is not prohibited; or
- finding conduct on the market to be anticompetitive because it has negative effects on consumers.

The first option would allow the authorities to condemn conduct as anticompetitive without having to consider how the conduct directly affects consumers in the market. It would allow, for example, the authorities to presume that consumers would be harmed by the conduct in question based on the sole fact that the competitive process has been (or is capable of being) distorted. The second option would, by contrast, require proof of actual or potential harm to consumers before a finding that the conduct in question is anticompetitive.

In general, the approach taken by the competition authorities in both the UK and at EC level is one that corresponds to the first option stated earlier. As the Court of First Instance (CFI) in Luxembourg has stated in the context of an abuse of a dominant position:

*'Article 82 EC does not require it to be demonstrated that the conduct in question had any actual or direct effect on consumers. Competition law concentrates upon protecting the market structure from artificial distortions because by doing so the interests of the consumer in the medium to long term are best protected.'*<sup>7</sup>

Consequently, there is no need to prove in court or in administrative proceedings direct harm to actual or potential consumers in order to find that either UK or EC competition law has been violated.<sup>8</sup> This approach may seem odd to those who are relatively unfamiliar with competition law; they may ask themselves why, if competition law is concerned with the protection of consumer welfare, proof that alleged anticompetitive conduct is harmful to consumers is not a prerequisite to a finding of infringement. This concern would not be unjustified. One could argue as a result, for example, that when it comes to actual cases, scant regard is in fact paid to consumer welfare or detriment. Herein lies a fundamental concern of many academics and practitioners.

At least three points can be made in relation to the above concern.

- There are cases, as the study undertaken by Dr Philip Marsden and Peter Whelan has highlighted, where consumer detriment is in fact considered by the authorities.
- There is an argument that the link between harm to the competitive process and harm to the consumer is logical and not too presumptuous.
- If one were to require proof of harm to consumers, it may not be wise to require detailed analysis of such harm in all cases and for all types of alleged anticompetitive behaviour.

We will deal with each of these arguments in turn.

## Definition of consumer detriment

Although the law allows for a competition analysis without proof of direct consumer detriment, nothing in law prevents the authorities from considering

the actual or potential effect of alleged anticompetitive conduct on consumer welfare if they so wish. In fact, there are a number of quite important cases where consumer detriment has been considered. In most of these cases, however, an in depth, comprehensive and well reasoned treatment of consumer detriment has been lacking. Different aspects of consumer detriment have been alluded to by the authorities in their decisions; yet, often the authorities will report a somewhat simplified analysis of the impact of conduct on prices.<sup>9</sup> While price is a very important aspect of consumer detriment, the authorities should be encouraged to examine other issues,<sup>10</sup> including:

- the importance of having a competitive choice of products or services;
- the importance of competing outlets for these products and services;
- innovation and responding to consumer demand; and
- the impact of anti-competitive behaviour on citizens who may not be consumers of the product or service in question but who may be directly affected by the behaviour (for example, a supermarket merger may not result in higher prices but it might result in reduced choice of local stores for non-car owners due to closures).

The issues raised in the final bullet point above are related to the idea of 'citizen welfare'. Commentators have recognised that the dividing line between 'consumer welfare' and 'citizen welfare' is often a difficult one to establish and that the use of citizen detriment models in competition law analysis may cause more problems than it solves. We therefore recognise that caution should be exercised with this concept. Given the dearth of literature dealing with this topic it is obvious that it is an area that deserves more research and debate.<sup>11</sup>

### Harm to the process and to the consumer

It is clear from a review of cases undertaken by Marsden and Whelan that the link between anti-competitive behaviour and consumer welfare/detriment is often tenuous, despite the regulators claiming that, fundamentally, consumer welfare is the driving force behind competition law enforcement. It could be argued that this may not matter because if the authorities make a finding of anticompetitive behaviour that harms competition – that is to say, it harms competitors, suppliers or trading customers – rather than consumers, it is likely that there would be knock-on implications for consumers, for example by traders passing on higher prices to consumers or reducing the choice of products or services.<sup>12</sup> Marsden and Whelan,<sup>13</sup> however, would argue that the present approach is indeed too presumptuous; for them the correct approach involves presentation of evidence proving a direct causal link between alleged anticom-

petitive behaviour and harm to the consumer, however it may manifest itself. Central to their thesis is the argument that if, as others argue, the link between these two concepts is indeed obvious and logical then evidence should be relatively easy to provide and is preferable to a formulaic assessment of conduct without consideration of direct consumer harm.<sup>14</sup> These arguments again present pertinent topics for debate.

### Proof of harm to consumers

Some forms of conduct, in any case, have such clear negative effects in terms of consumer welfare that a requirement to prove a direct link between the alleged anticompetitive behaviour and harm to the consumer would prove to be superfluous. One obvious example is a price-fixing cartel; this type of arrangement has no tangible benefits for consumers and if effected will only have a negative impact on consumer welfare, viz. a sale price higher than the competitive price. Another possible example would be a cartel agreement that sought to restrict output in a given market.

### Representing consumer interest

Various mechanisms can be developed within a given competition law regime that would enable consumers, either alone or collectively, to protect their interests. Consumers could for example be allowed to:

- lodge a formal complaint to the relevant national competition authority or to the European Commission alleging that an infringement of the competition laws has taken place;
- present their views to the competition authorities or to the national or European courts concerning an ongoing investigation or case (for example, by commenting on a provisional Statement of Objections or through the use of *amicus curiae* briefs<sup>15</sup>);
- intervene in an ongoing case; or
- sue for compensation in the national courts either collectively (that is, by a single claim being made by or on behalf of a group of affected consumers) or through a representative action (that is, an action brought by a representative organisation, such as a consumer organisation).

The European Union (EU) Member States have implemented the above mechanisms in various ways and to varying degrees of success.<sup>16</sup>

### Level of involvement

The level of involvement of European consumer organisations in competition law cases, either at national or EC level, has never been particularly high, especially in those countries that are relatively new to the EC competition law regime. In a survey undertaken by the Competition Law Forum

and Consumers International in May 2006,<sup>17</sup> for example, more than 40 per cent of the consumer organisations surveyed had never brought a complaint to their respective national competition authorities. This figure is attributable to various factors, chief of which are a lack of resources as well as a scarcity of information concerning anti-competitive behaviour. At EC level too consumer bodies are rarely involved in competition law procedures, except in high profile cases involving important and expensive consumer goods.<sup>18</sup>

Is this low level of involvement a worry for consumer organisations and those who advocate a consumer welfare standard in competition law? It is undeniably true that consumer organisations are more acutely aware of the problems consumers face in the market place than other organisations and institutions, including perhaps the national competition authorities in the Member States, and that consequently these organisations should be encouraged to liaise with their competition authorities and to bring forward cases where consumers are suffering because of anticompetitive behaviour. In the words of one commentator:

*'The Commission has to recognise that it is poorly placed and ill-equipped to connect competition issues to the everyday lives of consumers. In contrast, consumers' organisations are well-placed.'*<sup>19</sup>

That said, all too often the 'consumer angle' is only considered by the competition authorities if it is put to them by the parties to the merger or inquiry under consideration. It would be infinitely preferable for the competition authority to commission its own in-depth analysis of consumer welfare/detriment issues. If such analyses were commissioned by the competition authorities, concern over the lack of direct involvement of consumer bodies in the competition law regime would probably be assuaged, at least to a degree. Consumer bodies could, and should, be involved in these analyses in a consultative capacity, whenever need so arises. Budgetary constraints are an obvious obstacle to this recommendation; however, if a proportion of the income derived by the various competition authorities from fines in competition cases were allocated to consumer advocacy the potential for financial limitations to undermine such projects would be significantly reduced.

### **An EC super-complaint procedure?**

The UK Enterprise Act 2002 introduced the 'super-complaint' procedure into UK law. According to Section 11 of this act, certain designated bodies may complain to the OFT that any feature, or combination of features, of a market in the United Kingdom for goods or services is, or appears to be, significantly harming the interests of consumers. This provision captures a very broad range of conduct and not just conduct that is

prohibited under the competition law rules. The OFT must publish its response within 90 days of receiving a super-complaint; possible responses include: dismissal of the complaint; enforcement action under the competition or consumer laws; a market study; or a market investigation reference to the Competition Commission. According to most commentators this procedure has worked well in the UK and has not led to a proliferation of vexatious and/or weakly argued cases before the competition authority.

In fact, such is its perceived success that some argue that the same sort of system should be established at EC level. Phil Evans for example argues that if the Commission really wants to realise its promise that competition law is about protecting consumers then it should create an EC super-complaint procedure; it would be a '*relatively small administrative change*'<sup>20</sup> and, as the experience in the UK has proven, it can lead to more public discussion of consumer problems as well as providing competition authorities with a formal route for dealing with consumer organisations.<sup>21</sup> We agree that the 'super-complaint' is an option that should be encouraged at EC level. We also acknowledge that the lack of political will required within the Commission to see this recommendation work in practice – not to mention the limited financial resources available to consumer bodies – has the potential to undermine such a procedure.

### **Private enforcement**

'Private enforcement' refers to the use of the national courts by victims of anticompetitive behaviour to secure either damages for their loss or an injunction to prevent the harmful conduct from recurring. As has been stated above the European Commission is currently attempting to encourage private damages actions in the national courts; according to the Commission, if competition law is to better reach consumers and enhance their ability to protect their rights, '*it is desirable that victims of competition law violations are able to recover damages for loss suffered*'.<sup>22</sup> We agree with this assertion but recognise, as do the Commission and others, that there are serious obstacles to private enforcement within each and every Member State, including those relating to access to evidence, costs and the use of collective/representative actions.<sup>23</sup>

The following points are submitted in relation to collective and representative actions in the Member States:

**Collective actions:** The effectiveness of class actions launched by individual consumers, as opposed to a consumer organisation, is far from certain. Such class actions are allowed for in the USA; however, there may be difficulties in attempting to transpose such a procedure into the national systems of each and every Member State. It is also

not a given that the ability to bring class actions would overcome the most significant obstacles to the private enforcement of competition law by consumers (viz. difficulty of access to evidence, costs, the difficulty of quantifying the loss, and uncertainty as to whether the passing-on defence applies).

**Representative actions:** It is desirable to authorise designated consumer bodies to bring representative actions on behalf of consumers. Not only would this act as a further deterrent to cartel behaviour, it would also save time and money for consumers affected by anticompetitive behaviour. Concerns can however be expressed regarding whether this particular procedure would establish an effective means of providing genuine redress to affected customers. In the US, for example, under the Hart-Scott-Rodino Act a State Attorney General can sue for the aggregate overcharge resulting from a cartel. Sometimes there are unclaimed funds; courts have often awarded these to consumer organisations or indeed to universities in order to establish certain consumer orientated programmes. In such a scenario, if it is not possible to effectively distribute the awarded damages to those actually affected by the conduct in question, these funds could be allocated to different consumer organisations and thus reduce their financial burdens and improve their ability to advocate a pro-consumer competition policy.<sup>24</sup>

## Summary of Observations

The context of the debate surrounding the consumer interest in competition law can be briefly summarised as follows:

- Competition law seeks to preserve the competitive process so that consumers will receive the benefits they are entitled to.
- Competition authorities often state that competition policy and any analysis that is undertaken under the competition law rules should promote a consumer welfare standard.
- Both UK and EC competition legislation however pay little regard to the consumer and the harm he/she may suffer as a result of certain conduct on the market.
- Currently both UK and EC competition law allows the authorities to condemn conduct as anticompetitive without having to consider how the conduct directly affects final consumers in the market.
- Various mechanisms exist in different countries that provide consumer organisations with the possibility to complain to the authorities, to present their concerns regarding a given case, and to sue on behalf of consumers affected by particular conduct.
- Budgetary constraints are a major obstacle for

consumer organisations that wish to utilise these mechanisms in order to protect the interests of consumers.

- The current debate on the use of private enforcement in EC competition law has presented an ideal opportunity to discuss ways of improving the position of consumer bodies (and consumers in general) who wish to sue for damages in national courts for breach of the EC antitrust rules.

The following points summarise our thoughts on some of the issues raised in this article:

### Consideration of the consumer interest

- Proof of direct harm to consumers (or at least a direct causal link between the anticompetitive behaviour and harm to consumers) should be required in competition law cases in order for an infringement to be found, at least in cases where the link between harm to the competitive process and harm to the consumer may not be very clear.
- Analysis of consumer detriment in competition law cases is scant; when carried out it is generally done in a superficial and cursory manner.
- While price is an important aspect of any analysis of consumer detriment, authorities should be encouraged to examine other issues, including:
  - the importance of having a competitive choice of products or services;
  - the importance of competing outlets for these products and services;
  - innovation and responding to consumer demand; and
  - the impact of anti-competitive behaviour on citizens who may not be consumers of the product or service in question but who may be directly affected by the behaviour.

### Representation of the consumer interest

- Consumer bodies are rarely heard in competition cases, except in occasional very high profile cases; this situation must improve if the promotion of consumer welfare as an objective of competition law is to be a reality.
- All too often the 'consumer angle' is put to the competition authority by the parties to the merger or inquiry. It would be infinitely preferable for the authority to commission its own analysis of consumer welfare/detriment issues.
- Budgetary constraints are an obvious obstacle to the above recommendation; however, we find the suggestion that a proportion of the income derived by the various competition authorities from fines in competition cases be allocated to consumer advocacy to be particularly helpful.
- The development of an EC super-complaint procedure should be encouraged.
- Private enforcement of competition law should

also be encouraged; consumer groups should be able to bring actions for damages on behalf of consumers who have suffered harm because of anticompetitive conduct.

- Significant barriers to private actions, for example, costs, access to evidence, the prohibition of collective/representative actions, still exist within the EU resulting in suboptimal levels of compensation (and, indeed, deterrence).

- Unclaimed funds from representative actions could be used to support the activities of consumer bodies and to improve competition advocacy to the benefit of the consumer.

Comments from readers are welcome; e-mails: [mbh@dircon.co.uk](mailto:mbh@dircon.co.uk) and [p.whelan@biicl.org](mailto:p.whelan@biicl.org)

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- [2] Neelie Kroes, EC Commissioner for Competition, 'European Competition Policy – Delivering Better Markets and Better Choices', Speech, 15 September 2005. Available at: [http://ec.europa.eu/comm/competition/index\\_en.html](http://ec.europa.eu/comm/competition/index_en.html) (accessed 4 August 2006), p2.
- [3] It is arguable however that the achievement of market integration between the 25 Member States is an equally important objective of EC competition law.
- [4] See for example: Philip Marsden and Peter Whelan (2006), 'Consumer Detriment and its Application in UK and EC Competition Law', to be published in the October edition of the *European Competition Law Review*. Marsden and Whelan's article contains the results of their study on the treatment of consumer detriment in competition legislation, soft law and cases within the UK and at EC level. Their research provided a solid base for the opinions expressed in the section of this article dealing with the analysis of consumer detriment in competition cases.
- [5] Article 82(b) of the EC Treaty and the Chapter II prohibition contained in the UK Competition Act 1998 do however provide an example of an anticompetitive abuse where the impact on the consumer is mentioned: 'limiting production, markets, or technical development to the prejudice of consumers'.
- [6] For example: Article 81(3) EC or Section 9 of the UK Competition Act 1998. It should be noted at this stage that a detailed evaluation of the treatment of consumer benefits – as opposed to consumer detriment – under Article 81(3) EC or Section 9 of the Competition Act, or indeed in the assessment of mergers, for example, is outside the scope of this article.
- [7] *British Airways v. Commission* [2004] CMLR 1008, para. 264. See also: *Europemballage and Continental Can v. Commission* [1973] ECR 215, para. 26.
- [8] It should be remembered however that if an individual consumer, for example, attempts to sue an undertaking for damages for injury that resulted from its anticompetitive actions he/she will still have to prove the injury alleged. (Of course, a finding that the undertaking has engaged in illegal behaviour in the first place is not predicated on a finding of harm to consumers, but rather harm to the competitive process.)
- [9] On a reading of both EC and UK decisions and judgments relating to the competition law rules, it is arguable that the UK Office of Fair Trading is more concerned with price competition than the EC Commission/Courts. See for example: *Annual Report and Resource Accounts 2005-2006*, OFT, 11 July 2006, p82. Available at: [www.of.gov.uk](http://www.of.gov.uk) (accessed 4 August 2006). It must also be acknowledged however that the extent of the OFT's concern with price related detriment relative to non-price detriment may also be partly due to the fact that economists sometimes use the term 'price' as shorthand to cover both price and non-price aspects of consumer welfare.
- [10] The current Director General for Competition at the European Commission agrees with us, at least in theory: '[Consumer welfare] must be a measurement of dynamic effects. It must not simply look at price. It must look at the overall benefits to consumers': Philip Lowe, *Current Competition Law*, Vol. IV, (BIICL, 2005), p168.
- [11] Phil Evans does however attempt to address some of these concerns in his paper entitled 'Assessing Consumer Detriment' (paper presented at the British Institute of International and Comparative Law on 6 July 2006). In the section that deals with retailing, Evans divides the problems associated with this sector into four categories: *ibid.* pp14-15. Citizen welfare problems are considered to be more suitable for political resolution than for determination by the competition/regulatory authorities; by contrast, those problems that raise consumer detriment issues can be dealt with by the appropriate competition law rules. Evans argues that categories 1 and 2, demographic/market driven developments and the wider impact of such developments (for example, the impact of shopping patterns on the environment and wider societal distribution), are more classically citizen problems and are difficult to fit in to consumer detriment models. Likewise, he believes that category 3 problems, the emergence of entry and expansion restrictions (for example, buyer power, vertical

- supply chains, planning laws), although more likely to be dealt with in 'an economic regulation environment', are probably better suited to treatment under citizen detriment models rather than those relating to consumer detriment. Evans does however admit that category 4, the category containing behavioural/market power problems (for example, limited brand-to-brand competition), appears to be more directly related to consumer detriment problems.
- [12] Such an approach would be consistent with the first option set out by Phil Evans in the following paragraph: *'In competition analysis, the end consumer, or final consumer, is very often one step removed from the competitive process. This is particularly true in intermediate goods markets. There tend to be two options in such cases; firstly, to treat the customer as if they were the consumer and secondly, to make some vague statements about consumer impact and largely ignore the final consumer in the analysis'*, Phil Evans (2006), 'Assessing Consumer Detriment', op. cit., p1.
- [13] And therefore at least one of the authors of this article.
- [14] See also: 'The Reform of Article 82: Reactions to the DG-Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses', prepared by the Competition Law Forum's Article 82 Review Group. Available at: <http://www.biiicl.org/clf/research/> (accessed 4 August 2006), para. 5.
- [15] *Amicus curiae* is a Latin phrase, which literally translated means 'friend of the court'. Its use in legal procedure refers to the process whereby a non-party to a case volunteers to offer information on a point of law or some other aspect of the case in order to assist the court in deciding a matter before it. The decision whether to admit the information lies with the discretion of the court.
- [16] A detailed analysis of how these mechanisms are implemented within the EU Member States is outside of the scope of this short article. Rather the authors will reflect on a couple of pertinent issues concerning the representation of consumer interests in both UK and EC competition law. Although we recognise that involving consumers in the policy-making process is important, we do not comment on that issue here. For treatment of that argument see: Orit Dayagi-Epstein (2005), 'Furnishing Consumers with a Voice in Competition Policy'. Available at: [http://www.luc.edu/law/academics/special/center/antitrust/dayagi\\_epstein\\_consumers\\_voice.pdf](http://www.luc.edu/law/academics/special/center/antitrust/dayagi_epstein_consumers_voice.pdf) (accessed 4 August 2006).
- [17] This survey involved questioning consumer organisations from 14 different Member States on various aspects of their competition law regime and on the role of consumer organisations within these regimes. The results were presented by Peter Whelan at the British Institute of International and Comparative Law, London on 4 July 2006.
- [18] See for example the case involving motor cars (*Ford v. Commission* [1984] ECR 1129) where the consumer organisation BEUC intervened.
- [19] Phil Evans (2005), 'Making Competition Real: EU Super-complaints', *Consumer Policy Review* (2005) 15(15), 187-191, p191.
- [20] Involving at least: (i) the setting out of criteria that a consumer body must fulfil in order to be granted super-complainant status; (ii) the granting of super-complainant status; and (iii) the creation of a timeframe within which super-complaints must be responded to.
- [21] See Phil Evans (2005), 'Making Competition Real: EU Super-complaints', op. cit., p191.
- [22] *Commission Staff Working Paper, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM(2005) 672 Final, p6. The Commission's green paper on private enforcement only deals with damages actions; however this should not be taken to mean that the Commission is not also aware of the benefits that other forms of private enforcement (for example, injunctive relief) can have for the protection of consumers' rights.
- [23] A serious consideration of all of these issues is outside the scope of this paper. See however: 'The Competition Law Forum's Response to the European Commission's Green Paper on Damages Actions for Breach of EC Antitrust Rules', 21 April 2006, available at: <http://www.biiicl.org/clf/research/> (accessed 4 August 2006).
- [24] Another option would be the creation of a consumer trust fund like in Australia. Damages from competition law collective actions (under the Fair Practices Act 1974) automatically go into the fund; various consumer organisations apply for funds from this trust to develop projects. Two important issues would have to be addressed if this model was followed: (i) who controls such a fund; and (ii) the monitoring mechanisms that should be put in place to ensure that those who apply for funds intend to use them as claimed and that those awarded funds actually use them according to the terms under which they were granted.