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The Interplay between Consumer Protection and Competition Law in India

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Abstract

The protection of the interests of consumers is a central aspect of all modern competition laws as well as a direct aim of consumer protection laws. However, despite being complementary in many ways, competition and consumer protection laws cover different issues and employ different methods to achieve their goals. Whilst consumer protection rules are built upon the premise that consumers are the weaker party to transactions and should be directly protected for this reason in their dealings with traders through certain consumer rights, competition law only indirectly protects the consumers' economic well-being by ensuring that the markets are subject to effective competition. This article explores the interplay between consumer protection and competition law in the Indian context with some comparison with the EU position, where relevant. After an examination of the relevant legislation and case law, the article finds that given that the mandate of the Competition Commission of India is to prevent practices having an adverse effect on competition, in cases of overlap between consumer protection and competition laws, the Authority should act only on the basis of adverse effects on *competition*. The treatment of 'unfair trade practices' is used to demonstrate the appropriateness of this approach.

I. Introduction

Around the world, many jurisdictions continue to explore the optimal relationship between competition law and consumer protection law. To this end, policy choices are made in some countries to unite the legal rules as well as the enforcement of these two areas of law whilst other countries choose to separate the rules as well as the enforcement of these two closely related but distinct areas of law. More often than not, choices made at a given point in time are reversed at a later point as was observed, for example, in the case of the UK which first combined competition and consumer powers at the Office of Fair Trading to later divest them when a new competition authority (Competition and Markets Authority) was formed. India has similarly been exploring the optimal relationship between its competition law and consumer protection law. After initially combining competition and consumer protection rules in a singular Act (Monopolies and Restrictive Trade Practices Act, 1970) with the enactment of the Consumer Protection Act in 1986 and the enactment of the Competition Act in 2002, there was a division both in the rules and also in the enforcement functions. However, given that both areas of law are concerned with the interests of consumers, albeit indirectly in competition law and directly in consumer law, getting the relationship

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between these areas of law right is still pivotal for ensuring that there is no confusion between the application of the rules. Despite their close proximity, competition law and consumer protection law are distinct areas of law with different underlying theories of harm and objectives. Whereas consumer protection rules are built upon the premise that consumers are the weaker party to transactions and should be directly protected for this reason in their dealings with traders by the enforcing of certain consumer rights, competition law only indirectly protects the consumers' economic well-being through ensuring that the goods and services are produced and priced competitively.

Competition enforcement world over is predicated on two identifiable theories of harm. It considers harm to consumers and harm to competition as pivotal. However, this dual association with consumer welfare and protection of competition often requires the competition regulator to re-prioritize enforcement measures - at times in the interests of consumers and at times in the interests of business. As we enter the seventh year of enforcement of Indian competition law, two questions assume a high level of importance: Are these priorities well defined? Does adopting one measure mean the absence of the other? This paper primarily considers the differences and similarities between competition and consumer protection law and considers what combination of these presents a mechanism to address these identifiable theories of harm. This is done by exploring the state of the relationship between competition law and consumer protection law in India while contrasting this with the same relationship under EU law to the extent relevant. In pursuit of this aim, this article examines the relevant rules as well as the enforcement regime. In this examination, the prohibition of 'unfair trade practices' is used as an example that demonstrates the interplay between these different areas of law.

We proceed with a fundamental premise: both competition and consumer protection law embrace the interests of the consumer, albeit in different ways. In the Indian context, the Consumer Protection Act, 1986 ("Consumer Act") does so explicitly, while the Competition Act, 2002 ("Competition Act") does so by necessary implication since any trade or business ultimately results in the provision of goods or services to the consumer. The legislative history of these enactments shed considerable light on the overlaps and differences between the statutes. In the EU context, the question whether consumer welfare and more broadly, consumer interests should guide the decisional practice in the application of competition law is a hotly debated one after more than fifty years of enforcement. In fact, it reveals a potential area of tension between the enforcement actions of the European Commission and the judgments of the Court of Justice of the European Union in this area of the law. It is also a question that reveals conflicting views on what the goals of competition law are and should be.

The paper is organised as follows. Section II presents the legislative background in India as well as the EU. Section III assesses the interplay between consumer protection and competition in the context of 'unfair trade practices' and 'restrictive trade practices' in India. Section IV demonstrates the importance of correctly demarcating

'unfair trade practices' and 'restrictive trade practices' in a discussion that is mainly focussed on India but that also draws on the experiences from the EU and to a degree the United States. Section V concludes by finding that despite being a young competition law jurisdiction, due to the specificities of the legislation and other factors, India is in fact in a good position to correctly separate consumer protection issues from competition law issues. In this respect, much depends on the Competition Commission of India's making the right call in specific enforcement decisions.

II. The Legislative background

(a) India

The approach of the Consumer Act was to create a new law to protect the interests of the consumer and to fill the gap in the field of consumer protection. The Law Commission of India explains this in its 199th Report that in spite of various provisions providing protection to the consumer in different enactments like CPC 1908, Indian Contract Act 1872, Sale of Goods Act 1930, etc. very little could be achieved in the area of consumer protection. Though the MRTP Act, 1969 has provided relief to the consumers, yet it became necessary to protect consumers from exploitation and to save them from adulterated and substandard goods and deficient services and unfair business practices. The Consumer Protection Act, 1986 (CPA) was thus framed to protect consumers from unfair and undesirable practices of business community. The Act came into force in 1987 and was further amended from time to time.

As the Law Commission explained, the gap was not the availability of a statutory framework as much as the existence of a specialized body that dealt exclusively with practices harming the interests of consumers. The then existing Monopolies and Restrictive Trade Practices Commission (MRTP) established under the Monopolies and Restrictive Trade Practices Act, 1969 (MRTPA) with a dual mandate to deal with both anti-competitive and anti-consumer practices was found to be too broad in its mandate. It dealt with unfair trade practices (UTP) that concerned harm to consumers as well as monopolistic and restrictive practices (RTP) that threatened competition and consumer welfare.

Generally, UTPs refer to any unfair method or unfair or deceptive practice employed to promote the use, sale or supply of any goods or provision of services.[1] RTPs are

[1]Section 2(r) of the Consumer Protection Act, 1986. It defines UTPs as:
"unfair trade practice" means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely;—
(1) the practice of making any statement, whether orally or in writing or by visible representation which,—
(i) falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model;
(ii) falsely represents that the services are of a particular standard, quality or grade;
(iii) falsely represents any re-built, second-hand, reno-vated, reconditioned or old goods as new goods;
(iv) represents that the goods or services have sponsor-ship, approval, performance, characteristics, accesso-ries, uses or benefits which such goods or services do not have;
(v) represents that the seller or the supplier has a spon-sorship or approval or affiliation which such seller or supplier does not have;
(vi) makes a false or misleading representation concern-ing the need for, or the usefulness of, any goods or services;

understood to be trade practices that have or may have the effect of preventing, distorting or restricting competition. The term monopolistic practice is often used interchangeably with restrictive practices.[2]

UTPs were included within the scope of the MRTP only in the year 1984 pursuant to recommendations of a Committee under the Chairmanship of Justice Rajinder Sachar ("Sachar Committee").[3] This Committee recognized that curbing monopolistic and restrictive trade practices (RTP) would only partially resolve consumer grievances by eliminating the effects of such practices. The Sachar Committee's report proposed a framework to deal with practices that aimed at harming the consumer directly and equalise the consumer's position vis-à-vis the business. The Committee's recommendations were incorporated into the MRTPA by an amendment in the year 1984.[4]

UTPs were defined as "practices that were directed at misleading or deceiving a consumer by making representations regarding the price, quality or use of goods or services or by misleading advertisements or by any misleading offer of gifts". Further, the Act proscribed the practice of hoarding or destruction of goods or a *refusal to sell* intended at raising the price of the same or similar goods.

Simultaneously, the MRTPA also disallowed RTPs that aimed at obstructing the flow of capital or resources into the market or which brought about price manipulation or conditions of delivery or practices that affected the flow of supplies in the market relating to goods or services in such manner as to impose unjustified costs or restrictions on consumers.

(vii) gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof;

Provided that where a defence is raised to the effect that such warranty or guarantee is based on adequate or proper test, the burden of proof of such defence shall lie on the person raising such defence;

(viii)makes to the public a representation in a form that purports to be—

(i) a warranty or guarantee of a product or of any goods or services; or

(ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result, if such purported warranty or guarantee or prom-ise is materially misleading or if there is no reasonable prospect that such warranty, guaran-tee or promise will be carried out;

(ix) materially misleads the public concerning the price at which a product or like products or goods or services, have been or are, ordinarily sold or provided, and, for this purpose, a representation as to price shall be deemed to refer to the price at which the product or goods or services has or have been sold by sellers or provided by suppliers generally in the relevant market unless it is clearly specified to be the price at which the product has been sold or services have been provided by the person by whom or on whose behalf the representation is made;

(x) gives false or misleading facts disparaging the goods, services or trade of another person. [Explanations omitted.]

[2] The Indian Monopolies Inquiry Commission, 1965.

[3]Report of the High Powered Expert Committee on Companies and MRTP Act, August 1978. Taking into account the experience of the working of the MRTP Act in this country and the Monopolies and Anti-Trust Legislations in other countries of the world, we are suggesting the broadening of the scope of the Act. Thus, while all modern .legislations on the subject accept the need for providing, protection to the consumers, the present Act does not deal at all with what is commonly known as unfair, trade practices namely, misleading advertisements, false information to dupe consumers etc., it also does not provide for any remedy against such practices by manufacturers or dealers. We are, therefore, suggesting the need for introducing a new chapter defining these practices and also providing for definite remedy to the, consumers against .these unfair trade practices. [Sachar Committee Report]

[4]MRTP (Amendment) Act, 1984, w.e.f 01 August 1984.

In the year 1991, the Parliament had a relook at UTP provisions in the MRTPA and broadened their scope.[5] It did so by inserting the words "adopts any unfair method or unfair or deceptive practice including any of the following practices" into the section header. This essentially made the practice to deceive a consumer paramount (and not the form) and rendered the list of UTPs provided under the MRTPA non-exhaustive. A telling effect of this amendment came with the decision of the Supreme Court of India in *Om Prakash vs. Assistant Engineer, Haryana Agro Industries Corporation Limited and Anr*.[6] The Court was hearing an appeal from the National Commission established under the Consumer Act. In those years, the Consumer Act relied upon the MRTPA to define an UTP. The appellant was aggrieved by a 'pick and choose' delivery policy of the respondent that resulted in an increase in price of the tractor he purchased from the respondent. The Supreme Court noted that prior to the 1991 amendment, the list of UTPs under the MRTPA was exhaustive. Since the MRTPA (at the time of sale of the tractor) only proscribed the practice of 'hoarding or destruction or refusal to sell goods or services with the object of raising their price', the Court noted that mere delay in delivering the tractor, notwithstanding that the delay was intentional, would not constitute a UTP. However, pursuant to the 1991 amendment, all unfair methods or unfair or deceptive practices (including those assailed in this case) would constitute UTPs.

Two years after the recommendations of the Sachar Committee which brought UTPs in the fold of the MRTP, the Parliament enacted the Consumer Act. The Consumer Act was to become a parallel legislation for regulating UTPs. Its principle object was the "better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consum-ers' disputes and for matters connected therewith". It established district, state and national level forums to deal with consumer disputes. The Consumer Act and MRTPA prohibited similar UTPs and defined them identically. As originally enacted, the Consumer Act did not cover RTPs.[7] By an amendment in the year 1993,[8] the Consumer Act was amended to include RTPs in the nature of 'tie-in' sales. By another amendment in the year 2002,[9] delays in the supply of goods or services intended to inflate the price were covered as RTPs under the Consumer Act. The scope of the Consumer Act in regulating RTPs was much narrower than the MRTPA, which regarded RTPs as practices which had the effect of preventing, distorting or restricting competition. In particular, the MRTPA proscribed practices which tend to obstruct the flow of capital or resources into the stream of production as an RTP. Likewise, manipulation of prices, conditions of delivery or flow of supply in the market which may have the effect of imposing on the consumer unjustified costs or restrictions were regarded as RTPs.[10]

[5]MRTP (Amendment) Act, 1991 w.e.f 27 September 1991.
[6]1994 (2) SCALE 530, *alt*(1994) 3 SCC 504, 1994 3 SCR 463.
[7]Consumer (Protection) Bill, 1986.
[8]Consumer Protection (Amendment) Act, 1993.
[9]Consumer Protection (Amendment) Act, 2002.
[10] Section 2(o) of the Monopolies and Restrictive Trade Practices Act, 1969.

A significant similarity between the MRTPA and the Consumer Act on the issue of UTPs was the status of consumers. The Consumer Act did not protect buyers who purchased goods or services for a 'commercial purpose' from petitioning the Consumer Forums. Consequently, commercial purchasers who purchased to resell were not included within the ambit of a consumer. While the MRTPA did not define a consumer, given the similarity of UTP provisions with the Consumer Act, Indian courts relied on the definition of consumers in the latter statute.[11] Thus, neither statute protected consumers against UTPs practiced by commercial purchasers/ buyers.

With the liberalisation of the Indian economy in the year 1991 and trade liberalisation in the domestic market and trade protectionism under the World Trade Organisation, the scope of the existing market regulation law – the MRTPA – was found to be insufficient to deal with the needs of the domestic industry and competition from a globalised trade. The Government of India set up a Committee under the Chairmanship of Mr. S.V.S. Raghavan in the year 1999 to suggest measures to adopt a more robust competition policy ("Raghavan Committee").[12] This Committee suggested the repeal of the MRTPA by a comprehensive competition statute modelled in line with the Committee's suggestions. Significantly, the Committee proposed that the Competition Commission of India (CCI), to be established under the new statute, would deal with monopolistic and RTPs while UTPs were to be transferred to the adjudication machinery under the Consumer Act. The Committee set the agenda for a new competition policy in the following terms:

> The ultimate raison d'être of competition is the interest of the consumer. The consumer's right to free and fair competition cannot be denied by any other consideration. There is also a need for supportive institutions to strengthen a competitive society notably, adequate spread of information throughout the market, free and easy communication and ready accessibility of goods…Competition policy should thus have the positive objective of promoting consumer welfare.[13]

(b) The European Union

In the EU, the competition rules are found in the Treaty on the Functioning of the European Union (TFEU) and have been a cornerstone of the European integration project from the start. Article 101 TFEU prohibits all anticompetitive agreements, concerted practices and decisions of association of undertakings that have as their object or effect the prevention, restriction or distortion of competition within the internal market to the extent that they affect trade between Member States. Article 102 TFEU, in contrast, prohibits the abuse of a dominant position on the internal market or on a substantial part thereof to the extent that it may affect trade between Member States. Relevant for the purposes of the current article, Article 102 (a) TFEU prohibits, as an example of abuse, the direct or indirect imposition of unfair purchase or selling

[11] AIR 1989 Delhi 329, 1988 64 CompCas 884 Delhi.
[12] SVS Raghavan Committee on Competition Policy and Law.
[13] *Ibid,* ¶1.1.9 - ¶1.2.1.

prices or other unfair trading conditions. This prohibition of unfair practices raises the question, similar to the Indian context, of what the relation between UTPs and anticompetitive abusive practices is.

In terms of consumer protection rules, it is noteworthy that such rules were not included in the original Treaties of Rome that established the European Economic Community. This is not entirely surprising, however, since it is generally thought that the 'consumerist society' emerged from the economic and social developments after World War II.[14] Arguably, in Europe, consumer interests were barely recognised until the 60s and 70s and initially, consumer protection rules only played a supporting role in the market integration process unlike the competition rules which took the central stage.[15] It was the Single European Act in 1987 when consumer protection first became part of Treaties as an autonomous policy aim.[16] Currently, consumer protection is a general objective of the EU and a high level of consumer protection is guaranteed in both the Charter of Fundamental Rights of The European Union and by means of several provisions in the TFEU.[17] Numerous Directives have been adopted in the EU tackling numerous issues of consumer protection as well as some Directives that are general in nature in terms of applicability such as the Unfair Commercial Practices Directive, Unfair Contract Terms Directive and the Consumer Rights Directive.[18] Similar to the Indian legislation, in the EU, 'consumer' refers to any natural person who is acting for purposes which are outside his trade, business, craft or profession.[19] In contrast, in EU competition law, 'consumer' is more broadly defined and essentially means 'customer' which does include other businesses.[20] It is also notable that consumer protection in the EU aims not only at providing a high level of consumer protection as such but also balancing this against ensuring the competitiveness of enterprises.[21] For example, the Unfair Commercial Practices Directive explicitly stipulates that by directly protecting consumers' economic interests from 'unfair business-to-consumer commercial practices', the Directive thereby 'indirectly protects legitimate businesses from their competitors who do not play by the rules in this

[14]K Cseres *Competition Law and Consumer Protection* (Kluwer Law International 2005) 152.
[15]Cseres (n 14) 160, 193.
[16]See Cseres (n 14) 193-202 for the historical development of consumer protection rules in the EU.
[17] See eg Art 12 TFEU, Art 169(1) TFEU, Art 169(2) (a) TFEU.
[18]See Directive 2005/29/EC of the European Parliament And of The Council of 11 May 2005concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council('Unfair Commercial Practices Directive') [2005] OJ L149/22;Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts ('Unfair Contract Terms Directive') [1993] OJ L95/29; and the Directive 2011/83/EU of the European Parliament And of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council ('Consumer Rights Directive') [2011] OJ L304/64.
[19]Article 2(1) Consumer Rights Directive.
[20]See eg Communication from the Commission 'Guidelines on the application of Article 81(3) of the Treaty' [2004] OJ C101/97, n 55; Communication from the Commission 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ c45/7, n 15. See P Akman 'Searching for the Long-Lost Soul of Article 82ED' (2009) 29 (2) Oxford Journal of Legal Studies 267 on the legislative intent. See P Akman '"Consumer" versus "Customer": the Devil in the Detail' (2010) 37 (2) Journal of Law and Society 315on the implications of treating customers as consumers.
[21]See eg Recital 4 of CRD.

Directive, and thus guarantees fair competition in fields coordinated by it'.[22] Similarly, the Consumer Rights Directive explicitly notes that the objective of the Directive is to contribute to 'the proper functioning of the internal market' through the achievement of a high level of consumer protection.[23] According to Protocol 27 annexed to the TFEU and the Treaty on European Union (TEU)the internal market, as set out in Article 3 TEU, includes a system ensuring that competition is not distorted. Thus, in the EU context, the competition rules and consumer protection rules are intricately linked by the common objective of ensuring the proper functioning of the internal market. The precise relationship between these areas of law, particularly when it comes to enforcement action in individual cases, however, is as much an issue in the EU context as it is in the Indian context.

III. The Interplay between Consumer Protection and Competition in the Context of UTPs and RTPs in India

The treatment of RTPs and UTPs in India in the enforcement of the Consumer Act and the Competition Act presents an interesting overlap in terms of functions.

(a) Restrictive trade practices

The treatment of RTPs displays the intersection between the substance and enforcement of the two Acts as well as the potential issues that can follow from this intersection. The Consumer Act proscribes RTPs which tend to bring about *manipulation of price* or *conditions of delivery or to affect flow of supplies in the market* relating to goods or services in such a manner as to *impose on consumers unjustified costs or restrictions* and include 'tie-in' sales and 'delayed supplies' – with a view to raising the price of goods or services. While the Raghavan Committee identified the minor overlap between the two Acts in terms of 'tie-in' sales,[24] the definition of RTPs under the Consumer Act is undeniably broad and would include within its scope any trade practice that tends to bring about manipulation of price or conditions of delivery or to affect flow of supplies in the market relating to goods or services in such a manner as to impose on the consumers unjustified costs or restrictions. Another amendment to the Consumer Act in the year 2002,[25] expressly prohibited any "delay beyond the period agreed to by a trader in supply of such goods or in providing the services which has led or is likely to lead to rise in the price". It is likely that because this amendment came in a year after the Raghavan Committee Report and at the same time as the notification of the Competition Act, its effect was not examined by the Raghavan Committee. As such, there does exist a significant an overlap in terms of regulation of RTPs between the Competition and Consumer Act.

But how does this overlap play out in terms of regulation of RTPs? The Competition Act requires, as a condition precedent, the existence of an agreement between traders.

[22]See Recital 8 of Unfair Commercial Practices Directive.
[23] Recital 65 CRD.
[24]*Ibid*, ¶7.3.9
[25] See Section 2(5) of the Consumer Protection (Amendment) Act, 2002.

It applies a *per se* standard in relation to horizontal agreements[26] and a rule of reason standard for vertical agreements.[27] This is somewhat similar to the enforcement history under the MRTPA. In its initial years the MRTPA distinguished the RTPs within its scope to be actionable only where they *eliminated* or *restricted* competition.[28] By an amendment in the year 1984, the Parliament included a *per se* standard for RTP contravention in the MRTPA.[29] However, even after this amendment, some RTPs remained subject to a rule of reason analysis.[30]

With regard to regulation of dominant entities, the Competition Act prohibits RTPs to the extent that they amount to an abuse of dominant position. Materially, the CCI's enforcement history under the Competition Act does not shed much light on whether RTPs in the form of abuse of dominance require a rule of reason or *per se* analysis. In *NSE*,[31] the CCI *inter alia* considered whether a transaction fee waiver in the currency derivates segment by the National Stock Exchange breached Section 4[32] of the Competition Act. The CCI held that

> the term "unfair" mentioned in section 4(2) of the Act has to be examined either in the context of unfairness in relation to customer or in relation to a competitor. The CCI observed that [NSE's] contention that there is no observation on harm to consumers in the Commission's order dated 25.05.2011 and hence there is no element of abuse deserves to be dismissed because section 4 does not require it to be established. The section first and foremost requires that it be established that an enterprise or group is in dominant position in the relevant market. Thereafter, it is required to establish that it has engaged in a conduct as specified in clauses (a) to (e) of the section. Once both are established, there is no statutory requirement to examine any other additional impact on competitors or consumers or the market. The Commission, in its order has amply established the aforementioned two questions. Section 4 of the Act, unlike section 3 does not require evaluation of appreciable adverse effect on competition (AAEC) or evaluation of the factors mentioned in section 19(3), which include accrual of benefits to consumers.

Given the CCI's interpretation of absence of a requirement to demonstrate elimination or restriction of competition under the Consumer Act, the decision in *NSE* naturally calls for a re-examination of the co-extensive treatment of RTPs under the Consumer and Competition Acts (with the caveat that in *NSE*, the complainant MCX was a competitor and not a consumer). From the CCI's decision in *NSE*, it would appear that neither statute employs a strict effects based standard. While this is certainly true for the Consumer Act, which requires direct harm to a consumer for issuance of cease and desist and compensation orders, the CCI's decisional practice on Section 4 of the

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[26] Agreements between players engaged in an identical trade.
[27] Agreements between players at different levels of the production chain.
[28] Rajasthan Housing Board v. Parvati Devi (Smt.) and others; Appeal (civil) 14994 of 1996 judgment dated 03 May 2000.
[29] *Ibid.*
[30] M/s. Voltas Limited Bombay vs. Union of India AIR 1995 SC 1881.
[31] MCX Stock Exchange Ltd. Vs. National Stock Exchange of India Ltd., DotEx International Ltd. and Omnesys Technologies Pvt. Ltd., CCI Case No. 13 of 2009, Order dated 03 June 2011.
[32] Section 4 of the Competition Act prohibits an abuse of dominant position.

Competition Act does not appear to suggest an effects based standard for enforcement either as stated in *NSE*. Thus, it appears that both the Consumer Act and the Competition Act are enforced in the context of RTPs without requiring a demonstration of harmful effects on competition or consumers. While it was never the intent of the Consumer Act to look at any potential harm to a body of consumers, the broad mandate laid on the CCI under Section 18 of the Competition Act, which requires the CCI to *eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India,* makes a strong case for a rule of reason approach to Section 4 of the Competition Act. In section X below we discuss whether the Competition Act supports such a construction.

(b) Interests of consumers

Another important difference between the two Acts is the treatment of the consumer. Under the Competition Act, consumers include persons who buy goods or services irrespective of whether they use it for a 'commercial purpose'[33], resale or for personal use. This is in line with the preamble to the Act which requires the CCI to

> ...prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India.[34]

Unlike the MRTPA, there is also no requirement that the adjudication machinery under the Competition Act should be triggered by a consumer.[35]Under the Consumer Act, a consumer is a person who purchases goods or services, but not for a commercial purpose. This demonstrates that the purpose of the Consumer Act is to protect the interests of final consumers and not other traders engaged in a different trade. This distinction is clear from the grievance redress functions under both statutes and the addressability of their orders. The Consumer Act addresses consumer disputes against traders directly, while the Competition Act addresses consumer welfare indirectly by ensuring that efficiencies are promoted and more choices are available to consumers. In practice we see that this distinction is often very blurred. A significant example of direct regulation in favour of the consumer is the *DLF* case.[36] It involved a complaint by an association of apartment owners assailing certain terms and conditions in DLF's standard form Apartment Buyer's Agreement and alleging abuse of dominance by DLF. These terms included DLF's discretion to change the layout and nature of use of the apartment complex without the consent of apartment allottees, its right to change the super area of the complex without consulting allottees and other clauses including

[33]*Ibid.*
[34]Preamble to the Competition Act, 2002.
[35]'Information' can be filed by any person under Section 26(1) of the Competition Act. However, the Competition Appellate Tribunal has stressed on the need to evaluate the *locus standi* of informants; L.H. Hiranandani Hospital Vs. Competition Commission of India and Ors. Order of the Competition Appellate Tribunal in Appeal No. 19 of 2014 dated 18 December 2015.
[36]Belaire Owner's Association vs. DLF Limited, CCI Order dated 12 August 2011 in Case No. 19 of 2010.

additional payments. Additionally, the complaint charged DLF with imposing unfair terms in its conduct against apartment allottees. In a final order penalizing DLF with a penalty of 6.3 billion rupees, the CCI directed DLF to cease and desist from 'formulating' and 'imposing' 'unfair' terms in its agreements with buyers in Gurgaon. The CCI also directed DLF to modify its agreements with buyers. The order characterised the abuse practiced by DLF as 'unfair' and 'even exploitative.'

The DLF case presents an interesting example of how the lines between competition and consumer processes are blurred. The CCI held that DLF's real estate malpractices distorted competition in the real estate market in Gurgaon - a narrow geographic coverage of a satellite town in the National Capital Region of Delhi. The CCI held that such practices reduced the ease of shifting between services or offerings. It therefore suggested that for those consumers who had exercised an option to purchase an apartment from DLF, the incremental cost of switching to another real estate developer and absence of adequate information to the consumer to understand the value and cost of his investment, distorted competition for other real estate players. According to the CCI

> [i]n such cases the buyer who could have made a choice to go to other real estate service providers, gets locked in with DLF having paid a substantial amount, with no free exit option, without even being aware of the sweeping terms and conditions being imposed through the Agreement. The high switching cost not only destroys the choice, it also reduces mobility in the market. Information asymmetry created by such lock-in, in absence of the knowledge of terms and conditions of the Agreement is having distortionary effect not only on the competition in the market but also on consumer welfare.[37]

While arguably the CCI did identify a theory of harm in the competition space, whether these measures resulted in increased choice, quality and price competition in the real estate space for consumers is debatable. The CCI answers these questions in the part where it considers the effects of DLF's conduct on other players in the real estate space and particularly in the real estate market it found that other players are likely to imitate the terms and conditions employed by DLF; a consequence that would impede consumer welfare.

While affirming the CCI's decision in appeal, the Competition Appellate Tribunal noted that "the order of CCI as well as this judgment is expected to go a long way to ameliorate all the conditions of the customers".[38] To date DLF remains the only case in the real estate sector that has passed two levels of antitrust scrutiny. If the flurry of cases[39] that were brought before the CCI on real estate practices following the CCI verdict is anything to go by, the consumer remedies granted in DLF would not benefit consumers who are dealing with smaller real estate developers. The CCI's recommendations to the Government of India in the *DLF* case on the prevalence of

[37]Ibid, at ¶12.93.
[38]DLF Limited vs. Competition Commission of India; COMPAT Order dated 09 May 2014 in Appeal No. 20 of 2011.
[39]Case No. 43 of 2012, Case No. 24 of 2014, Case No. 97 of 2014, Case No. 101 of 2014, Case No. 89 of 2015, Case No. 103 of 2015, Case No. 14 of 2016, Case No. 59 of 2016, Case No. 60 of 2016 among others.

'unfair trade practices' in the real estate sector are perhaps a testament to the regulator's laudable attempt to balance equities in a first of its kind direct consumer harm case. The Parliament has since notified the Real Estate (Regulation and Development) Act, 2016[40] for regulation and promotion of the real estate sector and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy resolution of disputes. It remains to be seen whether this Act will result in lesser competition scrutiny in the real estate space and whether the CCI will renounce this jurisdiction.

(c) Regulation of unfair trade practices

The deletion of UTPs from the scope of the Competition Act is also significant. The Sachar Committee had originally recommended the retention of UTPs in the MRTPA since these "practices were likely to cause grave loss or damage to many consumers".[41] However, there is no concept of UTPs as understood in the MRTPA sense, in the Competition Act. While the term "unfair" has been employed in the Competition Act, it is used in the context of restrictive trade practices by a dominant entity under Section 4. The Competition Act defines a 'dominant entity' as one who enjoys a position of strength in a relevant market which enables it to (i) operate independently of competition forces and (ii) affect its competitors, consumers or the relevant market in its favour. Under Section 4, the Competition Act prohibits the imposition of an *unfair* price or condition in the purchase or sale of goods or services. The Consumer Act also does not define the term 'unfair,' but it follows an 'effects' over 'form' approach in regulating UTPs. Illustratively, in the *Unitech* cases,[42] the National Consumer Disputes Redressal Forum has held that practices may be termed to be UTPs even while they may not be expressly covered in Section 2(r)[43] of the Consumer Act but relate to adopting unfair means and methods in relation to the consumer. As we have brought out in the *NSE* case above, the CCI's enforcement practice does not suggest an 'effects over form' approach. But this definition of the word 'unfair' came up for consideration before the Competition Appellate Tribunal in a different case. In *Schott Glass,*[44] the Competition Appellate Tribunal considered whether the application of unfair and discriminatory terms of price and conditions of supply contravened Section 4(2)(a) of the Act. The Appellate Tribunal held that in the absence of any effect on the market or effect on consumers, the imposition of terms by a dominant entity could not be held to be unfair. The interpretation of the term "unfair" under the Competition Act therefore necessarily diverges from the inclusive 'effects over form' treatment of UTP's under the Consumer Act. The CCI's decisional practice has distinguished several UTP cases in the past. In *Sanjeev Pandey v Mahendra & Mahendra & Ors,*[45] the complainant alleged that a certain model of vehicle was introduced by the opposite

[40]The Real Estate (Regulation And Development) Act, 2016 No. 16 of 2016 notified on 26 Mach 2016.
[41]*Ibid.*
[42] Parvinder Singh vs. Unitech Limited, Consumer Case No. 449 of 2013 Decided On: 12.02.2016; Satish Kumar Pandey v. M/s. Unitech Ltd., Consumer Case No. 427/2014 Decided On: 08.06.2015
[43] *Id.*
[44]Schott Glass India Private Limited vs. Competition Commission of India, COMPAT Appeal Nos. 91 and 92 of 2012, Order dated 02 April 2014.
[45]Case No 17 of 2012.

parties in certain states, denying the benefit of increased sales to distributors. The CCI closed the inquiry noting that the Consumer Act sets a more appropriate course to assail UTPs. Similarly, *Subhash Yadav v. Force Motor Ltd and Ors*[46] related to a consumer's grievance arising out of a purchase of a vehicle from the opposite party. The informant alleged that the engine started overheating when the air-conditioning was on. It was stated by the informant, that the opposite party had used Daimler engine in the said vehicle which is normally used in the Mercedes SUVs which is priced at three hundred thousand rupees, but was used in a Force One car priced at more than a million rupees. It was also alleged that the opposite party created a dominant position by cutting into the market in India by pricing the vehicle at a very competitive price compared to other manufacturers. The CCI declined to intervene in the matter and concluded that the essential difference between the Consumer and Competition Acts is that the former provides a direct grievance redress mechanism to the consumer, while the later ensures that markets remain competitive thereby indirectly ensuring consumer benefit. These cases really presented core consumer issues before the CCI.

IV. The Need for Correct Separation of UTPs and RTPs

This section aims to demonstrate why it is important to correctly distinguish between UTPs and RTPs in practice to achieve the optimal separation between consumer protection and competition laws. Let us assume for a moment the existence of an UTP practised by a dominant entity. What should be the degree of antitrust enforcement in such situations? For example, courts in the United States have preferred an effect based approach to this question. In *Official Airline Guides* (*OAG*),[47] the FTC challenged the refusal by a monopolist/publisher of airline schedules to include in its compendium schedules of commuter airlines, before a U.S. Court of Appeals. This refusal to deal was discriminatory, unjustified, and injurious to commuter airlines in their competition with certificated airlines. The monopolist, however, did not act coercively, did not compete in the commuter airlines' market, where the antitrust injury occurred, and did not seek or have any prospect of gaining power in that market. Although the court acknowledged that FTC determinations as to what practices constitute an "unfair method of competition" deserve great weight, it declined to uphold the Commission's order. In explaining its decision, the court expressed concern that declaring such conduct unlawful would give the Commission too much latitude to substitute its own judgement for a respondent's independent business decisions that were taken without any anticompetitive purpose or prospect. In essence, although the challenged conduct was discriminatory and harmful, it did not violate the policies underlying the antitrust laws.[48] Similarly, in *Boise Cascade*,[49] a U.S. Court of Appeals, 9th Circuit, was considering an industry-wide delivered pricing system. The case related to the introduction of an artificial freight factor in the price charged to customers. The FTC alleged that such practices tend to stabilize prices and therefore

[46]Case No. 32 of 2012.
[47] Official Airline Guides, 630 F.3d at 927
[48] Extract from the Concurring Opinion of Commissioner Jon Leibowitz in the Matter Of Rambus, Inc. Docket No. 9302, FTC.
[49]Boise Cascade, 637 F.2d at 581.

violated the Sherman and FTC Acts. The court negatived this contention and held that the use of delivered pricing was in the nature of price parallelism in response to customer preferences. The court found that the issue of whether consciously parallel conduct on its own could ever violate Section 5 of the FTC Act was non-sequitur since in the case at hand, persuasive evidence of an anticompetitive effect was lacking. The Court concluded that this history had resulted in a requirement that "the Commission must find either collusion or actual effect on competition to make out a Section 5 violation for use of delivered pricing"[50]. More recently, in 2015, the FTC issued a Statement of Enforcement Principles regarding the Agency's use of 'stand alone' Section 5 authority to address unfair methods of competition.[51] The mere issuing of such a statement over a hundred years after the FTC received the powers to enforce Section 5 is telling in that the relation between UTPs and anticompetitive practices is a complicated one even for such a mature jurisdiction. In its statement, the FTC clarified that in deciding whether to challenge a practice as an unfair method of competition in violation of Section 5 on a standalone basis, the FTC will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare; the practice will be evaluated under a framework similar to the rule of reason (ie an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any relevant efficiencies and business justifications); and the FTC is less likely to challenge a practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the practice. Although this statement goes some way in explaining that the exercise of the powers to control unfair methods of competition is driven by an inquiry into whether there is harm to competition, in her dissenting Opinion, Commissioner Ohlhausen notes that this policy statement leaves too much discretion to the FTC in allowing it to potentially apply Section 5 in situations where there is no substantial harm to competition.[52]In contrast to the developments in the US, the relation between unfair trade practices and anticompetitive practices remains a complicated one in the EU.

In the EU, the issue represents a thorny one particularly given the stipulations of Article 102 TFEU concerning unfair trading conditions which are sufficiently broad to cover many types of unfair practices some of which can also constitute 'unfair commercial practices' under the existing consumer protection legislation. There is a danger, therefore, in the EU as well that Article 102 TFEU is applied to prohibit unfair practices (such as those that might harm the interests of a competitor) where there is no harmful effects on competition. This is coupled by the fact that in EU competition law, it is debateable whether harmful effects of competition are required for the Article

[50] Boise Cascade, 637 F.2d at 581 ¶¶35.
[51]See Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, 13 August 2015, available at https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.
[52]See Dissenting Statement of Commissioner Maureen K Ohlhausen: FTC Act Section 5 Policy Statement, 13 August 2015, available at https://www.ftc.gov/system/files/documents/public_statements/735371/150813ohlhausendissentfinal.pdf.

102 TFEU prohibition to be applicable and in any case, what sort of effects would suffice in this inquiry. It is clear that actual effects on competition are not required: what is sufficient is, at most, likely effects.[53] However, even in this pursuit of effects, it is debatable whether, for example, effects on a dominant undertaking's competitor would suffice as the requisite effects or whether effects on consumer welfare are necessary.[54] This is particularly an issue concerning so-called exploitative practices which do not require an immediate distortion of competition but represent themselves in mainly the demonstration of harmful effects on the customers – including final consumers - of the dominant undertaking. Akman has argued elsewhere that although it is indisputable that Article 102 TFEU prohibits exploitative conduct, in order to ensure that Article 102 TFEU is enforced as a competition rule – which it is intended to be – it must be coupled with exclusionary conduct that harms *competition* before it can be found abusive.[55] This has not been the case so far in the EU decisional practice. Although the enforcement of Article 102 TFEU by the Commission has mostly focussed on exclusionary abuses, in the few cases where exploitation was an issue, such exploitation was not necessarily – demonstrably – coupled with exclusion which raises questions as to the appropriateness of the action. For example, in *British Leyland*, *1998 Football World Cup* and *BdKEP* certain price-based and other practices of a dominant undertaking were found 'unfair' and thus were perhaps 'exploitative' of the customer, but it was not necessarily obvious how these were harmful to *competition*.[56] Similarly, in cases such as *SABAM, GEMA, DSD and Tetra Pak II* where 'unfair trading conditions' were found to be abusive, it is unclear why such contractual clauses were deemed to be a competition law issue.[57] There are also cases which held to be abusive the consequences of the inefficiency of the dominant undertaking that would have exploited the trading partners of the said undertaking without necessarily also having distortive effects on competition. [58] Without this separate showing of harm to competition in the form of, for example, exclusion, some of these practices appear more like contractual or consumer protection problems than competition law

[53]See eg Case C-23/14 *Post Danmark A/S v Konkurrencerådet*EU:C:1979:36, [67].

[54]For the extensive literature on the discussion whether EU competition law protects competitors or competition, see eg P Jebsen and R Stevens, 'Assumptions, Goals and Dominant Undertakings: The Regulation of Competition Under Article 86 of the European Union' (1996) 64 Antitrust Law Journal 443, 459; J Kallaugher and B Sher, 'Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse under Article 82' (2004) 25 (5) ECLR 263, 277; D Geradin, 'Limiting the Scope of Article 82 EC: What Can the EU Learn from the U.S. Supreme Court's Judgment in *Trinko*in the Wake of *Microsoft*, *IMS*, and *Deutsche Telekom*? (2004) 41 Common Market Law Review 1519, 1532. For the case law, see eg Case T-286/09 *Intel Corp v European Commission* ECLI:EU:T:2014:547, [105] noting that harm to consumers is not necessary for conduct to be abusive.

[55]See P Akman *The Concept of Abuse in EU Competition Law: Law and Economics Approaches* (Hart Publishing, Oxford, 2012) in particular 307-310

[56] Case 226/84 *British Leyland plc v Commission* [1987] 1 CMLR 185; *1998 Football World Cup* (Case IV/36/888) Commission Decision 2001/12/EC [2000] OJ L5/55; *BdKEP – Restrictions on Mail Preparation* (Case COMP/38.745) Commission Decision 20 October 2004 (unreported).

[57]Akman (n 55) 321.

[58] Akman (n 55) 320. Such cases include Case C-179/90 *Merciconvenzionaliporto di Genova SpA v SiderurgicaGabrielliSpA*[1991] ECR I-5889; Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-1979; *British Telecommunications* (Case IV/29/877) Commission Decision 82/861/EEC [1982] OJ L360/36; *P&I Clubs, IGA and P&I Clubs, Pooling Agreement* (Case IV/D-1/30.373 and IV/D-1/37.143) Commission Decision 1999/329/EC [1999] OJ L125/12.

problems.[59] Such practices should consequently be tackled under contract law or consumer protection law and not competition law.

In India, the CCI has also had to grapple with this issue in its decisional practice. In *Shivang Agarwal & Ors. vs. Supertech Ltd. Noida*,[60] the CCI recognized that UTPs are

> adopted by many enterprises whether dominant or not. Every unfair trade practices or abuse done by an enterprise is not covered under Competition Act. Several aspects of the unfairness on part of service provider/goods provider are covered by the Consumer Protection Act. The two aspects covered by the Consumer Protection Act are unfair trade practice as well as charging of price in excess of the price agreed upon between the parties.

In *Mr. Gajinder Singh Kohli vs. Genius Propbuild Private Limited,*[61] the CCI considered whether delay in delivering possession of an apartment amounted to an abuse of dominant position. The opposite party challenged the CCI's jurisdiction to inquire into UTPs. The CCI however examined the matter on its merits observing that since the issue involved was of abuse of dominant position, the CCI would review the case to determine whether it breached the Act's abuse of dominance provisions. It noted that the CCI's enforcement practice is predicated on the existence of unilateral conduct of the kind defined under Section 4 of the Act.

With the existing invasive proliferation of e-commerce and digital media in the Indian market, the conduct of firms, as they adapt to business and competition, need not necessarily take a form based approach. As such, where practices do not fall within the rigid descriptions of unilateral conduct under Section 4, the CCI must consider an effects based approach to enforcement. Naturally, this may also call for amendments to the existing statute since UTPs remain explicitly excluded from the purview of the Competition Act unlike, for example, Article 102 TFEU which explicitly covers unfair prices and unfair trading conditions.[62]

Experiences of other regulators in dealing with UTPs that distort or restrict competition shed considerable light on the desirability of an effects based approach. For example, the Korean Fair Trade Commission's Guidelines for Review of Unfair Trade Practices[63] prescribe a 'fair trade hindering' threshold for UTPs. Under these guidelines, Fair Trade Hindering involves a significant or possible reduction of the number of competitive businesses (including potential competitive business) or degree of market competition caused by the related act. Relatedly, they prescribe 'unfairness' as an objective determination of unfair trade or competitive means. Unfairness of competitive means involves hindering or possible hindering of fair competition using improper competitive means apart from the cost and quality of

[59]Akman (n 55) 307.
[60]Case No. 28 of 2012.
[61]Case No. 15 of 2016.
[62]*Ibid*, Section 66.
[63]Guidelines for Review of Unfair Trade Practices, 12 August 2009.

services or goods. Unfair trade refers to a violation or a possible violation of the foundation of fair trade by causing a disadvantage or hindering free decision making based on the business relation.

A related question is the advisability of consumer fora to look into limited issues of anti-competitive conduct against consumers at a policy level. Some may argue that they do look at limited RTP and UTP issues relevant to consumers; but regulations must keep up with the times and the development of business practices. We must consider whether consumer fora armed with powers akin to the CCI have been better able to tackle real estate practices and lay down a code for good practices, like the CCI recommended in *DLF*. This may have bypassed contentious issues of market power and competition foreclosure of the ilk of *DLF* and the real estate cases that succeeded it. By contrast, the FTC's experiences with Section 5 of the U.S. Federal Trade Commission Act which prohibits 'unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce' sheds considerable light on the desirability of convergence in consumer and competition policy and practice. A 1938 amendment to the FTC Act[64] made it clear that a consumer, who may be injured by an unfair trade practice, is of equal concern before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor. The U.S. Supreme Court affirmed this broad mandate in *FTC v. Sperry & Hutchinson Co.*[65] in these words:

> Congress, ... defines the powers of the FTC to protect consumers as well as competitors, and authorizes it to determine whether challenged practices, though posing no threat to competition within the letter or spirit of the antitrust laws, are nevertheless either unfair methods of competition or unfair or deceptive acts or practices. The Wheeler-Lea Act of 1938 reaffirms this broad congressional mandate.

V. Conclusion

While the jurisdictions and mandate of consumer fora and the CCI under Indian law are vastly different, with a total of 3.7 million consumer cases pending in consumer forums until 2014,[66] it would be advisable that a certain level of market regulation in favour of the consumer is introduced into the existing system by either generating a best practices code or by enabling *suo-moto* regulation by the consumer fora. Some of these changes have already been conceptualised in the form of the Consumer Protection (Amendment) Bill, 2015 which proposes the establishment of a Central Consumer Protection Authority (CCPA) to promote, protect and enforce the rights of consumers. The CCPA will carry out the following functions, among others: (i) inquiring into violations of consumer rights, investigating and launching prosecution at the appropriate forum; (ii) passing orders for recall of goods, or withdrawal of services and reimbursement of the price paid, and pass directions for discontinuation

[64]Wheeler-Lea Amendment to the Federal Trade Commission Act.
[65]FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972).
[66]http://timesofindia.indiatimes.com/india/3-7-lakh-cases-pending-in-consumerforums/articleshow/45253646.cms

of unfair trade practices; (iii) issuing safety notices and order withdrawal of advertisements; and (iv) declaring contracts that are unfair to a consumer as void.[67] The starting point in setting policy should be the recognition that competition law and consumer protection law have separate functions, mechanisms and to a degree separate objectives even if one of the common goals might be the enhancement and protection of the interests of consumers. The two areas of law protect consumer interests in different ways. The objectives of competition law are much narrower than the wider consumer protection law goals.[68] Competition law should be enforced to prohibit practices that distort competition and thus are detrimental to consumer or total welfare (or any other ultimate goal) as determined by policy.[69] The scrutiny of practices that are merely exploitative of the customers of a dominant undertaking through unfair practices and the like without also being exclusionary through distortive effects on competition may require competition authorities to act as regulators for which they are unlikely to be the appropriate bodies.[70]

The Indian legislator, by removing UTPs from the scope of the Competition Act, has already demonstrated its preference for the demarcation of consumer protection law and competition law in the context of UTPs. This demonstrates a more modern approach to competition law than both that of the US and the EU neither of which has achieved such separation in the legislation. The proposal to set up an apex body (the CCPA) with powers akin to the CCI to look specifically at consumer issues is a welcome step to ensure that consumer interest is preserved both in terms of consumer protection from unfair and restrictive practices by the CCPA; and consumer welfare by ensuring effective competition through the CCI. Although in the US, through the case law and FTC policy, UTPs have been made subject to a demonstration of harm to competition before they will be acted against, the EU still lags behind in finding a workable separation concerning the competition law treatment of practices that may harm the interests of consumers without necessarily also distorting competition. In fact, the EU has also not found a solution to the issue of the treatment of practices that may harm competitors without necessarily also causing harm to consumers. All in all, it is clear that there is a lot the jurisdictions under examination can learn from one another on the interplay between consumer protection law and competition law.

[67] Consumer (Protection) Amendment Bill, 2015.
[68] R O'Donoghue and J Padilla *The Law and Economics of Article 102 TFEU* (2nd ed, Hart Publishing, 2013) 848.
[69] P Akman, 'The Role of Exploitation in Abuse under Article 82 EC' (2009) 11 Cambridge Yearbook of European Legal Studies 165, 184.
[70] Akman (n 69) 185.