



The Competition Authority
An tÚdarás Iomáíochta

**Submission of The Competition Authority
to the
Consumer Strategy Group**

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INTRODUCTION

1. What do consumers want when they purchase goods or services? They want maximum satisfaction from their purchases, with respect to their own particular preferences for price/quality and diversity. Consumer policy and competition policy work alongside one another to promote consumers' interests and the economy as a whole.
2. When markets function well, competitors strive to meet consumers' needs in the most efficient manner possible. Competition between rival suppliers thus exerts downward pressure on costs and prices, and promotes quality and innovation. Suppliers who satisfy consumers' needs prosper and those that serve them poorly do not. Competition *policy* promotes market conditions that are conducive to competition: ensuring that the natural discipline of competition is not interfered with, for example, by the operation of cartels. To work effectively, markets need customers to be reasonably well informed about the choices before them and to be able to trust that the information they are receiving is correct and that their contract will be honoured¹. Consumer policy seeks to empower consumers so that they may choose from competing suppliers in a way that is appropriate to their wants. Consumer power is enhanced by appropriate information, protection, and pro-consumer government policy generally.
3. Competition policy and consumer policy also benefit businesses and the economy. Businesses that strive to meet the needs of their domestic customers have higher productivity, and sophisticated consumers for product testing, and this enables them to compete better abroad. Strong consumer-focused policy in non-exporting markets (e.g. transport) also contributes to making Ireland a better place to do business, via a lower cost base and attracting internationally mobile skilled labour. An economy where consumers are empowered is characterised by job creation, efficiency, a flexible business environment (less red-tape), and international competitiveness.²

COMPETITION AND CONSUMER POLICY INSTRUMENTS

4. While there are strong complementarities between competition policy and consumer policy, the two policies – and their accompanying institutional frameworks – have evolved at different paces in recent years. Competition enforcement and advocacy has become much more focused in the past two years, following the enactment of the Competition Act, 2002. One important element of this is the continuing development of a tightly-focused Competition Authority with strong leadership, and comprising a good mix of skills in the economic, legal and public policy-making areas.
5. Consumer policy has not kept pace with the demands of a modern successful economy. While the focus of the Office of the Director of Consumer Affairs has been limited by statute to a specific range of public enforcement instruments, a

¹ See Vickers J. (2003) "Economics for consumer policy – British Academy Keynes Lecture", and Akerlof G. (1970) "The Market for Lemons": Quality, Uncertainty and the Market Mechanism" *Quarterly Journal of Economics*, 84: 488-500.

² For further discussion on the operational synergies between competition policy and consumer protection see: Muris T. J. (2002), "The interface of Competition and Consumer Protection" The Fordham Corporate Law Institute 29th Annual Conference on International Antitrust Law and Policy.

diverse set of other laws, rules and administrative practices affect consumers in a fundamental way throughout their lives – laws whose development the Office is powerless to influence³. This, in turn, has stifled the role of that Office.

6. While it might be tempting to see the solution to this problem being to merge The Competition Authority and the Office of Director of Consumer Affairs, this would be attempting too much too soon, in view of the divergences outlined above. A better strategy would be to revitalise both the consumer protection legislation “package”, and the role of the Director of Consumer Affairs, to begin with. Strengthening consumer policy in this way, coupled with the continuing development of expertise in The Competition Authority, would better enable the complementarities to be exploited in the quickest way possible, leaving the question of institutional changes to be addressed later, if necessary. Strengthening both policies concurrently would exploit the synergies without attempting to walk before we can run.

Consumer Protection

7. Consumer protection policy focuses on enabling consumers to make informed choices, without being pressured to make purchases. Notwithstanding the fact that this supplements market forces to protect vulnerable members of society, the appropriate standard for consumer protection is that a consumer “acting reasonably under the circumstances” would not be misled.
8. There are two possible legislative approaches to consumer protection:
 - a. *Ex-ante* regulatory legislation: contains pre-emptive provisions such as compulsory registration systems, outright bans on advertising, price regulation, etc.
 - b. *Ex-post* regulatory legislation: involves the provision of redress for consumers and punishment of suppliers indulging in outlawed practices, for example by having general requirements that advertising must be truthful and provisions whereby consumers can sue companies in relation to misleading information.
9. Consumers tend to find *ex-ante* measures more attractive than the option of redress. This is amplified where court action is unlikely to deter businesses from rogue practices, due to being expensive and time consuming for consumers. *Ex-ante* mechanisms, however, are often overly restrictive, resulting in less suppliers in the market and dampening rivalry between suppliers. Such measures thus contribute to higher prices, less choice, and less innovation, which is bad for consumers. *Ex-post* measures, on the other hand, are a more targeted regulatory instrument⁴. If supplemented with enforcement by a public body, they are a more efficient way of protecting consumers than *ex-ante* mechanisms. To be efficient, public enforcement of consumer protection requires adequate investigative powers and powers to fine and/or to initiate Court proceedings. In the UK, the consumer protection provisions of the Enterprise Act, 2002⁵ promote this approach.

³ e.g. laws relating to food safety and retailing, health, public services, and a host of other areas.

⁴ A good paper on the respective role of *ex-ante* regulation and *ex-post* regulation is Fletcher A. (2004) “*The liberal profession – Getting the regulatory balance right*”

⁵ Office of Fair Trading (2002), “*Enforcement of consumer protection legislation*”.

Consumer Advocacy

10. Consumer policy also involves promoting consumers' awareness of their rights and how to exercise them⁶. It is then up to the consumer to choose whether to exercise his/her rights (e.g. shop around). While this works well in those areas dealt with by specific consumer legislation (e.g. Sale of Goods Acts, Consumer Information Act, etc.), the difficulty is that consumers are considerably under-represented when it comes to wider public policy making in general, particularly in relation to legislation under other codes which will affect consumers.
11. Too often, legislation designed to protect a certain subgroup of society can be harmful to society as a whole. The previous limitation on taxi numbers in Ireland is a case in point. Even regulations that purport to protect consumers from unscrupulous vendors can, in non-intended fashion, actually work to the benefit of suppliers, and against the consumer (the regulation of some professions is a good example).
12. To ensure that legislation takes full account of the interests of consumers, two further elements of consumer policy are required. The first is an informed, unbiased, consumer advocacy body, to advise Government Departments on the positive and negative consequences for consumers of various policy proposals, and indeed any adverse effects of a whole range of *existing* legislation and policies. In circumstances where consumers are disparate and thus unable to form a coherent, consistent and articulated policy agenda, an appropriately-equipped and objective State agency is the right place to locate such a function – an agency that can, for example, acquire the legitimacy and the expertise to counteract the influence of lobbies. The Office of the Director of Consumer Affairs is the obvious choice to fulfil this role.
13. Second, information on consumer needs and wants is needed to inform policy positions. This necessitates public funding of research to develop evidence-based policy making across a wide spectrum of Government activity and responsibility, i.e. policy making that is based on a good understanding of both what really matters to consumers in terms of quality of products or services and how markets function to satisfy consumer needs. The Study of the taxi industry by the Office of Fair Trading⁷ provides an excellent example of why research is necessary to understand what consumers want⁸ and how such research can benefit policy makers. Giving this research function to the ODCA would also help it to perform the much needed advocacy function described above, as well as aiding private consumer advocacy.
14. On the grounds that a pre-empted problem is a problem solved in the most efficient way, active promotion of good regulation among policy makers should take place to avoid regulations that are ultimately harmful to consumers. Existing regulations should also be reviewed to ensure that those that are harmful to consumers are identified and removed/replaced.

⁶ Vickers J. (2003) "The new way ahead for consumer policy enforcement"–.

⁷ OFT (2003) "The Regulation of Licensed Taxi and PHV services in the UK"

<http://www.of.gov.uk/NR/rdonlyres/C309CE26-2D4E-46A6-8C1F-11B06BA8338B/0/OFT676.pdf>

⁸ See OXERA (2003), "Making Taxis compete" in *Competition Ideas*, December 2003 for a summary of the economic analysis underlying this analysis.

RECOMMENDATIONS

15. The Director of Consumer Affairs should be given:

a. a consumer advocacy function⁹, to include:

- identifying and publicising particular issues and policies that impact adversely (and disproportionately) on consumers,
- giving advice to public bodies on such matters where they meet certain strict criteria,
- where such advice includes advice that legislative or proposals should be amended, or that existing legislation should be reviewed or amended, in the interests of consumers, an obligation on the public body concerned to respond publicly, and in a reasoned manner, to the advice within a given timeframe.

b. a consumer research role, to review:

- consumers' actual needs,
- consumer legislation in Ireland and elsewhere,
- other legislation / regulations that affect consumers.

16. To use these powers effectively, the ODCA needs to be able to recruit specialised staff with expertise in economics, law-making (e.g. with a civil service background), law enforcement, communications and marketing.

17. In order that consumers can be better informed in advance about policy proposals which may affect them, considerably more use should be made of public consultation procedures in appropriate cases, as recommended both by the OECD and the Government's own White Paper on Better Regulation.¹⁰ Indeed, where this impact is likely to be significant, such consultation should be way of a mandatory "public notice and comment" process.

18. Finally, a review of the consumer protection legislation enforced by the Office of the Director of Consumer Affairs should be undertaken to ensure that the Director's policy brief reflects today's economic and social needs. Such a review should identify where ex-ante regulation may be replaced with ex-post regulation and whether the ODCA should be given more enforcement powers.

⁹ The Competition Authority has such a function under Section 30 of the Competition Act, 2002 in relation to competition.

¹⁰ OECD – *Regulatory Reform in Ireland*, 2001. Also, *Regulating Better* – White Paper, Department of the Taoiseach (2004).