COMPETITION LAW AND CONSUMER LAW: IDENTIFYING THE CONTOURS IN LIGHT OF THE CASE OF *BELAIRE OWNERS ASSOCIATION v. DLF*

*Jenisha Parikh & Kashmira Majumdar**

Recent events suggest that the near-automatic consequence of being a dominant firm in a profitable market is abuse of that position by resorting to the imposition of unfair terms and conditions in standard contracts. Ostensibly, this may seem to be a consumer law problem due to the 'unfairness' of the conditions involved but such practices also have an impact on competition in the market, which justifies antitrust scrutiny too. The forum to which the matter is taken influences the relief This paper analyses the interface between competition law and consumer law in the theoretical framework and through the non-uniform understanding of 'consumer welfare' that informs both. This framework outlines the nature of such cases and reinforces the idea that a consumer law problem can be problematic for competition in the market too. Through the case study of Belaire Owners Association v. DLF, *this paper seeks to identify the most appropriate regulatory tool between the two laws that would sufficiently regulate such market failures. It concludes that though both competition law scrutiny and consumer law intervention are justified, the question is with respect to their sufficiency. In this context, an analysis of the source of such market failure helps in identifying the correct remedy, which this paper argues, is consumer law.*

I. INTRODUCTION

In India, the Competition Act, 2002 (`Competition Act') regulates and maintains competition in the market through its provisions proscribing anti-competitive agreements' and abuse of dominance.[2] We also have the Consumer Protection Act, 1986 (`CPA') which seeks to protect the interests of the consumers against unfair trade practices, deficiency of services, information asymmetry etc.' Under the Competition Act, the Competition Commission of India (`CCI') is the adjudicatory body for issues relating to competition'

• 3rd and 2nd year students respectively of the W.B. National University of Juridical Sciences, Kolkata. We thank Prof. Shiju MV, Lecturer, Department of Policy Studies, Teri University for his valuable comments and suggestions.

[1] Competition Act, 2002, §§3(3) and 3(4).

[2] Competition Act, 2002, **§4.**

[3] Consumer Protection Act, 1986, §§2(f), 2(g) and 2(r).

[4] Competition Act, 2002, §7(1).

whereas under the CPA, the District Forum, the State Forum and the National Consumer Forum are empowered to deal with issues affecting consumers.' This dichotomy and separation of the adjudicatory bodies dealing with the issues of competition and consumer interests is in stark contrast to the mechanism established in the US and the UK where the Federal Trade Commission and the Office of Fair Trading respectively, are entrusted with the enforcement of competition law as well as consumer law.' This unification of powers of enforcement in a single body is not simply a matter of administrative convenience. It is in recognition of the fact that consumer law and competition law are both concerned with the objective of 'consumer welfare',' a term that can be interpreted in a number of ways. It is further acknowledged that consumer welfare cannot be achieved in isolation by the application of either of the two. Moreover in achieving the stated objective, it is important to understand how both the policies interact with each other.[8] Such regulatory models assume that the synergies between the two areas of law can be best utilised if jurisdiction is vested in a single adjudicatory body.[9] Though a single body is given the baton to adjudicate the claims under both legislations, it is important to understand that the policy goals of competition law differ significantly from the objectives that consumer law seeks to attain. While the former is concerned with the sustenance of competition in the market, the focus of the latter is primarily on the efficiency of the transaction between the individual seller and the consumer.

The focus of this paper is to understand and delineate the policy goals and objectives of competition law and consumer law in light of their common goal of attaining 'consumer welfare'. The importance of this exercise lies in understanding the role that the CCI has assumed of late. The CCI has taken upon itself the onus to adjudicate upon claims even when the effect on competition is indirect, *i.e.* where direct injury to the consumer flows from the adverse effects of the impugned act itself. The problem with this lies in the fact that given the absence of anti-competitive effects of the impugned action, the appropriate remedy would otherwise lie with consumer courts. Though the form of such practices would suggest a consumer law remedy, their distortive effects on competition may result in competition law scrutiny.

[5] Consumer Protection Act, 1986, §§ 4, 7 and 9.

[6] Thomas Leary, *Competition law and Consumer Protection Law: Two Wings of the Same House*, 72 ANTI TRUST LAW JOURNAL 1147 (2005); Simon Priddis, *Competition and Consumer law in UK*, 21 ANTITRUST 89 (2006-2007); Spencer Weber Waller, *In Search of Economic Justice: Considering Competition and Consumer Protection Law*, 36 LOYOLA UNIVERSITY CHICAGO LAW JOURNAL (2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=726512 (Last visited on February 25, 2012).

[7] *Id.*

[8] Timothy Muris, *The Interface of Competition law and Consumer Protection*, October 31, 2002, available at http://www.ftc.gov/speeches/muris/021031fordham.pdf (Last visited on February 25, 2012).

[9] Leary, *supra* note 6, 1147.

In this context, Part-II seeks to analyse the recent spate of complaints filed with the CCI wherin informants have alleged abuse of dominance against the opposite party in the matter of unfairness of standard contract. In order to understand the nature of the market failure involved in such cases and the appropriate remedy, Part-III demarcates the role of competition law and consumer law in correcting market failures. Part-IV tries to understand the notion of 'consumer welfare' under competition law, which also sheds light on the understanding of 'unfairness'. Finally, Part-V tests the theoretical premises in *Belaire Owners Association v. DLF* [10](`DLF case') in order to determine the appropriate tools that would correct the market failures involved in such cases.

This paper aims to iron out the creases and provide a sound legal and economic basis for the application of competition law and consumer law. Though abstractions and principles are pertinent, an attempt has been made to assert them as an irreducible primary as this facilitates the process of practically applying the principles to a given case.

II. UNDERSTANDING THE PROBLEM: REVIEWING THE COMPLAINTS FILED WITH THE CCI

In recent times, the number of complaints that have been filed with the CCI reflect a curious conundrum. The common thread running through all these cases is that though the injury involved would *prima facie* suggest a consumer law remedy, redressal has been sought from the CCI. This point is made clear by citing a few examples in this context.

In *Pravahan Mohanty v. HDFC Bank Ltd*,[11] the informant alleged that the terms and conditions imposed by the bank (which was alleged to be in a dominant position in the relevant market) in the 'card member agreement' were onerous, unilateral and biased against the customer.[12] It was specifically alleged that the text of the agreement was printed in small size and that the customer was not informed in advance about the nature of the terms and conditions of the agreement!' This, according to the informant, amounted to an abuse of dominant position by the bank under §4(2)(a) of the Competition Act. In this case, the complaint was dismissed on the grounds that the bank did not occupy a dominant position in the market due to which the allegations under §4(2)(a)

[10] Case No. 19/2010.
[11] Case No.17/2010, May 23, 2011.
[12] *Id.*, 1[2.7 (The nature of such terms and conditions included terms that would enable the third party to unilaterally change the terms of the contract, charge interest rates after the termination of the contract , charging unstipulated financial charges which were not explained in the agreement etc).
[13] MIN 2.4. and 2.7.

could not be established.' This case is one amongst the numerous complaints that the CCI has received with respect to the allegations of abuse of dominance by the opposite party in the imposition of the terms and conditions!' Most of these cases were dismissed on the grounds that the opposite party did not occupy a dominant position in the market. In the DLF case, the complainants filed a similar complaint whereby it was alleged that DLF had abused its dominant position by imposing unfair terms and conditions in the flat purchase agreement. In this case, the CCI upheld the claims against DLF on grounds of abuse of dominance under §4(2)(a). Though this case is analysed in greater detail below,[16] what needs to be noted in all these cases is that even if the injury is related to the unfairness in the nature of the practice itself, the complaint has been drafted to contain the allegations of abuse of dominance. Recently, in a similar instance involving a Gurgaon residential project,[17] the CCI also issued a cease and desist order against DLF, having scrutinised the complaint of the Magnolia Flat Owners' Association. The Director-General Investigations found DLF to be abusing its dominant position in the market as it imposed unfair conditions on the flat-owners. The CCI concluded that DLF's Buyer's Agreement was in contravention of §4(2)(a)(i) of the Competition Act and further ordered a modification of its terms.[18] The CCI explicitly stated that the reasoning of the DLF case would even apply to this case, as the facts in both the cases are similar.[19]

Prima facie, the complainant could also approach the consumer forum on the grounds of unfair trade practice." The allegations of imposition of such conditions by a dominant player has, however, triggered the CCI's scrutiny in all these cases.

[1a] /d.1 9.4.

[15] EMGEE Greens Co-operative Housing Society v. Mudhit Gupta, Case No. 63/2011, December 14, 2011; in Re Brig B.S. Perhar v. Hill View infrastructure Pvt Ltd. with in Re Pritam Perhar v. Hill View infrastructure Pvt. Ltd., Case No. 22/2011 & 23/2011, November 30, 2011; Neelam Sood v. Raheja Developers, Case No.62/2011, December 21, 2011.

[16] This case is presently under appeal before the Competition Appellate Tribunal (COMPAT) as Appeal No. 20 of 2011, available at http://compat.nic.in/upload/PDFs/juneordersApp2012/27_06_12.pdf (Last visited on June 25, 2012). Any decision rendered on the merits of the case should, however, be read independently of the issues discussed in this paper. The scope of the paper only includes the identification of the correct policy tools that should be implemented in cases of imposition of unfair conditions by the alleged dominant firms as such cases can trigger competition law scrutiny as well as a consumer law remedy.

[17] Case No. 67/2010.

[18] *M.,* 117.8.

[19] ***Id.,*** 17.3.

[20] Consumer Protection Act, 1986, §2(1)(r).

III. INTERSECTION BETWEEN COMPETITION LAW AND CONSUMER LAW

A. CONSUMER WELFARE AS THE SHARED GOAL OF ANTITRUST AND CONSUMER LAW

The primary goal of competition law is to promote and maintain competition in the market.' It does so by distinguishing legitimate business transactions from those practices that shall have an adverse impact on the functioning of competitive markets. Competition law ensures the competitiveness of the market by prohibiting certain anti-competitive agreements (horizontal and vertical) and the abuse of market power held by a particular firm. Primarily, it is concerned with the efficient allocation of resources which is ensured through the existence of competition in the market.[22]

On the other hand, the goal of consumer law is primarily to protect the end consumer from the market failure that may arise due to unequal bargaining power between the consumer and the seller. It is assumed that the consumer stands at a disadvantageous position in the market with respect to the seller due to which the consumer needs to be protected from the potential malpractices of the seller.[23] It seeks to correct the consumer's position in the market with respect to the supplier, so that cost effective and efficient transactions are ensured.'

In practice and on examination of the goals of the competition policy in different jurisdictions, one may see that 'consumer welfare' is an important goal of competition law,[25] while examining the anti-competitive effects

[21] William Kolasky, *What is Competition? A Comparison of US and EU Perspective*, 49 Antitrust Bill 29/ 2004 (Explains the meaning of the term `competition').

[22] Kati. J. Cseres, *Competition and Consumer Policies: Starting Point for Better Convergence* (Amsterdam Centre for Law & Economics Working Paper Group, Paper No. 2009-06) (Though it is essentially stated that competition law is concerned with the efficient allocation of resources, at times, this may entail that the other stakeholders may be at a loss. For example, the total efficiency standard of competition law disregards the transfer of wealth from the consumers to the firms. Similarly, it has been stated that competition law seeks to protect competition and not competitors).

[23] Kati J. Cseres, *Controversies of the Consumer Welfare Standard*, 3(2) COMP. L. REV. (2006), 121, 130 (In Consumer law, consumer welfare stands for correcting market failures in order to improve the consumer's position in market transactions. Consumer welfare is concerned with efficient transactions and cost-savings but it is also directed at social aspects of the market such as the safety and health of consumers).

[24] *Id. See also,* Thomas L. Eovaldi, *Private Consumer Substantive and Procedural Remedies under State Law*, 3 J. REPRINTS ANTITRUST L. & EcoN. 381 (1971-1972).

[25] Treaty for the Functioning of the European Union (`TFEU'), Art. 101(3) (It provides that Art. 101 proscribing anti-competitive agreements would not be deemed illegal if they contribute to the production, distribution and technical or economic progress while allowing the consumers a fair share of the resulting benefits); EIRIK OSTERUD, IDENTIFYING EXCLUSIONARY ABUSES BY DOMINANT UNDERTAKINGS UNDER EU COMPETITION LAW , INTERNATIONAL COMPETITION LAW SERIES

of an impugned action in a market.[26] Although the understanding of this term is *per* se complex and unclear in competition law,[27] its goal of consumer welfare marks its first point of interface with the goals of consumer law. The significance of the intersection of these two laws lies in the framing of their policy goals, which in turn affects the course of inquiry into complaints filed before them. Thus, even though both play a role in protecting the consumer's interest, there is a difference in the way each of the policy tools seeks to do so.

In this context, it is pertinent to understand the idea of 'consumer sovereignty'. This idea claims to provide a basis for the unification of consumer law and competition law." The focal point of the theory of consumer sovereignty" is the exercise of choice by the consumer. It expects the markets to function from the locus of consumer demand, in contrast to the seller's choice or state intervention." Simply put, the theory expects an efficient market to respond to consumer choice and expectations. Since the theory of consumer sovereignty depends upon the choice made by the consumer, it expects competition law and consumer law to enable the consumers make the best choice possible.[31]

In a market, all firms compete to gain a profitable share which in turn depends upon their ability to satisfy the consumer demand. In a competitive market, the firms shall compete with each other to provide the best possible goods and services to the consumer.[32] Thus, the role of a competition policy is to ensure the sustenance of free and fair competition in the market as no matter how well informed or rational the consumer might be, he or she cannot prevent

Vol. 45 24 (Cited Case 6/72 Continental Can v. Commission and Glaxosmith v. Commission to state that the objective of Art. 102 and the aim of preserving competition is to protect the interests of the consumers); Guidelines on Vertical Restrains (2000/C 291/1), 17, available at http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=FR&numdoc=32000Y1013(01)&model=guichett (Last visited on April 4, 2012) (which states that protection of competition is important in order to enhance consumer welfare). *See* Robert Lande, *Wealth Transfer as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged in* COMPETITION LAW 45 (2nd series of The International Library of Essays in Law and Legal Theory).

[26] This is reflected in the scheme of the Competition Act, 2002. §19(3)(d) states that accrual of benefits to the consumers shall be one of the factors that shall be considered while determining whether an agreement has an appreciable adverse effect on the competition under §3. Similarly, §19(4)(f) states that the extent of the dependence of consumers on the enterprise shall be an important factor in determining whether an enterprise enjoys a dominant position or not.

[27] Cseres, *supra* note 23, 122 ("The term consumer welfare has several interpretations and it has often been misinterpreted or even misunderstood in Competition law analysis. It is sometimes used to refer to economic efficiency or a certain consumer interest without defining its real content").

[28] Neil Averrit & Robert Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Laws*, 65 ANTITRUST L. J. 713 (1997), 716.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] Muris, *supra* note 8.

the formation of a cartel or a vertical agreement that would limit their options and sources of supply in the market."

It has also been stated that in a competitive market, the sellers would not risk their goodwill." If the consumer is suspicious of the quality of goods offered by the seller, it is natural that the consumer would switch to another supplier in the market." Thus, it has been stated that a competitive market ensures the sustenance of honest and scrupulous suppliers who would not make false claims about their product or its related services."

Though competitive markets facilitate honest transactions between the buyer and the seller, it is not sufficient. In many cases, it may happen that it would be difficult for the buyer to identify the falsity of the claims or the product." Moreover, in certain cases, infrequent purchases from a particular seller would not deter the seller from engaging in unscrupulous activities." There may also be cases where the sellers themselves may be concerned only with a one-time sale transaction with the customer, which would not prevent them from indulging in such unfair activities." It is in these cases that consumer law seeks to intervene 4^0 As opposed to competition law, consumer law is responsible for enhancing the consumer's ability to make an effective choice among the various options available in the market." It seeks to control those market practices that unfairly distort the decisions and choices of the consumer with respect to his/her purchase transactions.'

Thus, by preventing certain horizontal mergers, exclusive vertical agreements, price and output fixing agreements, competition law ensures

[33] Averrit & Lande, *supra* note 28, 729.

[34] Muris, *supra* note 8 ("The consumers' ability to shift expenditures imposes a rigorous discipline on each seller to satisfy consumer preferences. Competition does more than simply increase the choices available to consumers, however. It often motivates sellers to provide truthful, useful information about their products and drives them to fulfil promises concerning price, quality, and other terms of sale").

[35] *Id.*

[36] *Id.*

[37] *Id., Kati J.* Cseres, *The Impact of Consumer Protection on Competition and Competition law: The Case of Deregulated Markets* (Amsterdam Centre for Law and Economics, Working Paper No. 2006-05) (Even in competitive markets, however, serious consumer problems may arise. These are principally related to information failures that may lead to situations where consumers are not able to take the advantages made possible by effective competition).

[38] Murris, *supra* note 8.

[39] *Id.*

[40] Waller, *supra* note 6, 633 (Consumer protection law covers a broader and more diffuse bundle of areas. Unfair and deceptive advertising is prohibited, as are acts of outright fraud. Consumer credit, debt collection, and warranty transactions are regulated in various ways, but primarily through mandatory disclosures of terms and charges. Increasingly, identity theft and the use of the Internet for fraudulent and deceptive purposes have been the focus of consumer protection law as well); Cseres *supra* note 37.

[41] Averrit & Lande, *supra* note 28, 716.

[42] *Id.*

the availability of competitive options for the consumers. On the other hand, consumer law seeks to help the consumer make an informed choice among the available options in the competitive market by clamping down on misleading statements and fraudulent trade practices. It has been rightly stated that while competition law is suitable to deal with failures external to the consumer (`competition law failure'), *i.e.,* outside the consumer's head, consumer law is equipped to deal with failures internal to the consumer, or inside the head (`consumer law failure).[43] This theory recognises the fact that existence of multiple options does not automatically translate into an efficient selection of those options by the consumer. Though this line of argument facilitates an easy demarcation between the two laws, in practice their boundaries often get blurred.

The next section discusses how and why these boundaries merge. The importance of the following section lies in the fact that the right policy tools need to be implemented in cases where consumer interests and the overall growth of the markets are involved. It has been said that though there is a common understanding of what actions need to be prohibited, what remains unclear is the sort of laws and policies that are most appropriate to check such actions in society." The next section discusses the cases where it is difficult to distinguish between consumer law failures and competition law failures, which may lead to the cross application of the remedies under the two fields of law. Such cross application may result in a situation where the costs of false positives and false negatives would be high, along with the fact that the market failure in question would not be addressed and checked in the most effective manner.

B. INTERPLAY BETWEEN COMPETITION LAW FAILURE AND CONSUMER LAW FAILURE

It may happen that some conduct/practice on the part of the seller may seem to justify competition law scrutiny, primarily on the grounds that the practice distorts competition in the market. For example, information asymmetry and high switching cost *(i.e.* the 'cost' involved in changing the seller/` switching' to another seller from whom the purchases are made) may induce firms to enter into a price fixing agreement. Since the firm knows that consumers lack knowledge and that switching is almost impossible, the firms could exploit this internal failure by fixing prices, reducing output etc. In such a case, would competition law scrutiny be effective as opposed to a consumer law remedy? Does the price fixing factor in itself justify competition law scrutiny? In order to answer these questions effectively, one needs to first understand the interplay between the market failures that these policy tools seek to rectify.

[43] ***Id.;*** N. Averritt, *The Meaning of Unfair Acts and Practices in § 5, FTC,* 21 B.C.L. REV. 227 (1980), available at http://lawdigitalcommons.bc.edu/bc1r/vol21/iss2/1/ **(**Last visited on February **4,** 2012).

" Kati J. Cseres, *Enforcement of Collective Consumer Interest: A Competition law Perspective in* COLLECTIVE ENFORCEMENT OF CONSUMER LAW 125 (2007).

As stated above, the market failure that competition law seeks to regulate implies impairment in the number of options available to the consumers whereas a consumer law failure affects the consumer's ability to choose effectively. Consider an example of a consumer law failure- for instance, the deceptive and false statements made by a seller in the market. Firstly, by claiming that the product is of a certain quality when in reality it is not, the consumer stands at a disadvantage as he/she does not get the desired product. In certain cases, the substandard nature of the product may even harm the consumer. What would happen, however, if the customer never discovers the dishonest behaviour of the seller? Naturally, the consumer would continue to buy the products from the same seller. Moreover, other consumers may also be misled by such claims. So if dishonesty wins and the customers make repeated purchases from the same seller, then it indirectly disincentivises the other sellers from competing on price and non-price factors. No matter how good their product is, they cannot attract the consumers till the time the dishonesty continues to prevail and work in the favour of such sellers. This in turn would affect competition in the market."

This interface between unfair practices and its consequent effects on competition can also be well understood by the 'market for lemons' theory advocated by George Akerlof." This theory recognises the impact of information asymmetry on the workings of the market. Through this theory, Akerlof likens defective cars (new and used) to lemons. He further says that the buyers of the car do not know the lemons, though they know that some lemons *exist* in the market. On the other hand, the seller has information with respect to the lemons in the market. Since the buyers are not aware about the lemons, they would be wary of paying a higher price for any car in the market, even if it is not a lemon. As a result, the seller has no incentive to invest resources in developing good quality cars, as he would not be paid the corresponding amount. Thus, it is difficult for mutually beneficial transactions to take place due to which over time the good quality cars would leave the markets, thereby only leaving the lemons behind.[47]

What we see here is that misleading and false information, deceptive practices, provision of incomplete information and other unfair trade practices would result in the reduction of competition as a lack of informed choice

[45] Muris, *supra* note 8; Averrit & Lande, *supra* note 28, 734; Stephen Rhodes, *Reducing Consumer Ignorance: An Approach and its Effects*, 20 ANTITRUST BILL 309 (1975); Angus MacCulloch, *The Consumer and Competition law in* HANDBOOK OF RESEARCH ON INTERNATIONAL CONSUMER LAW 77 (2010).

[46] Hon. JJ Spigelman, A.C., *Are Lawyers Lemons? Competition Principles and Professional Regulation, 77* AUSTRALIAN LAW JOURNAL 44 (2003), available at http://papers.ssm.com/sol3/papers.cfm?abstract_id=1800450 (Last visited on April 4,2012); M.M. Sardana, *Information Asymmetry: Law and Competition, available* at http://isid.org.in/pdf/DN1108.pdf (Last visited February 25, 2012).

[47] *Id.*

on the part of the consumer would encourage lower quality services without incentivising the weak to improve and the strong to sustain." This is clearly reflected in the policy goals of the consumer protection regime in the EU, which extends the goal of consumer protection to a healthy economy.[49]

From the above discussion, there is no difficulty in understanding that competition law is the most appropriate regulatory tool when the markets fail to work in case of exclusionary and discriminatory conduct which limit the supply of the particular commodity in the market. It is also settled that in case of individual market transactions between the buyer and the seller, consumer law remedies are apposite to protect the buyer from fraudulent representations and other dubious practices as a competitive market fails in its role to do so. The problem, however, arises in case of market failures as outlined above, where the failure in the form of an unfair or unethical practice affecting the individual market transaction with the end user still has anti-competitive effects in the functioning of the market. Though competition law scrutiny would be justified, the focus of this paper is to determine the most appropriate policy tool between the two, so that the cost of regulatory intervention does not exceed the benefits it seeks to confer.[50]

IV. UNDERSTANDING THE GOALS OF COMPETITION LAW AND CONSUMER LAW: THE CONSUMER WELFARE STANDARD UNDER COMPETITION LAW

As stated above, both consumer law and competition law are concerned with the promotion of 'consumer welfare'. Depending upon the goals of the competition policy in different jurisdictions, it can be said that generally the role of consumer welfare in competition law is to determine the anti-competitive effects of an impugned action on the markets.[51] It is also used to delineate and set the contours of the competition regime for a particular jurisdiction.[52] Moreover, it has been stated that competition law protects consumer interest

[48] Rhodes, *supra* note 45, 310; Averrit & Lande *supra* note 28, 734 (Market failures internal to consumers may eventually lead to market failures external to consumers, and vice-versa); Cseres, *supra* note 37.

[48] Geraint Howells, *The Potential and Limits of Consumer Empowerment by Information*, 32 J. L. & SOC'Y 349 (2005).

[50] Cseres, *supra* note 37, 4. ("Intervention might be necessary in these situations. However, intervention has to be justified in terms of specific identified market failure. In particular, it has to be established whether the problem is due to anti-competitive behaviour or to consumer empowerment issues such as imperfect information, lack of confidence in a particular market, an inability to make informed decisions about complex issues, high search, and switching costs or an inability to obtain redress. Expected costs and benefits of intervention to consumers, business, and government have to be identified and estimated").

[51] Competition Act 2002, §§19(3) and 19(4).

[82] Cseres, *supra* note 23, 121.

in an 'indirect way'." In contrast, the consumer welfare standard in consumer law is of immense significance to determine the consumer harm in a particular transaction between the customer himself and the supplier. The difference in the understanding of this term is further supported by the scope of the term `consumer' under both these laws. Under consumer law, a consumer is usually the end user or the final user of the goods and services who does not avail it for commercial purpose" whereas under competition law, it includes any person who purchases the goods and services, irrespective of whether it is purchased to be reused, resold or for personal consumption."

The difference in the scope of the term 'consumer' has two important implications. Firstly, the broader scope of the term under competition law reflects its general goal of protecting competition in the market, thereby focusing on the overall interests of society." Also (as it shall be explained below), the notion of consumer welfare in competition law itself is complex in its understanding. Bork equated consumer welfare to the total welfare in the market, irrespective of the short term disadvantages that the consumer may have to face" in terms of loss of consumer wealth. Others, however, identify this term to mean protecting the consumer surplus even though it may be at the cost of the firms losing their efficiencies."

Impersonal logic dictates that in any market, at any given point of time in any country, no one in an economy can be made better off, except at the cost of someone else." Accepting this, the best that can be done is to ensure the efficient allocation of resources. The perfectly competitive market model is

[53] Cseres *supra* note 22, 132.

[54] Consumer Protection Act, §2(c)(vi)(d): Consumer means "any person who buys any goods... but does not include a person who obtains such goods for resale or any commercial purpose". MacCulloch, *supra* note 45, 77, 78.

[55] Competition Act, 2002 , §2 (f): "consumer" means any person who-

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, whether such purchase of *goods is for resale or for any commercial purpose or for personal use.*

[56] MacCulloch, *supra* note 45, 78.

[57] ***Id.*** (Quoting Bork, "Consumer Welfare is the Greatest when the society's economic resources are allocated so that consumers are able to satisfy their wants as fully as technological constraints permit." Consumer Welfare, in this sense, is merely another term for the wealth of the nation. Anti Trust has a built in preference for material prosperity, but it has nothing to say about the ways prosperity is distributed or used).

[58] John Kirkwood & Robert H. Lande, *The Chicago School's Foundation is Flawed: Antitrust Protects Consumers, Not Efficiency* 89 (University of Baltimore Legal Studies Research Paper No. 2009-17, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1358402. (Last visited on February 5, 2012).

[59] The Pareto criterion would be the economic ideal, a situation where it is not possible to further increase the economic well-being of any person without reducing someone else's. The goal of effective allocation of resources is to attain this; Qi Zhou, *The evolution of efficiency*

the ideal because it achieves this goal.° Despite the unrealistic qualities of this model, it is treated as the standard- any deviation from it is treated as an error of imperfection, which must be corrected. Competition is one tool of economic policy that is used to correct this error. In other words, its purpose is to create allocative efficiency.[61] This objective may encounter a trade-off between efficiency and a negative effect on consumer welfare. Such a trade-off could be resolved in one of three ways. Competition policy can decide in favour of efficiency, focusing on total welfare at the cost of the consumer.[62] This is unlikely to be desirable because it is ostensibly against public policy to not protect consumer interest. If the trade-off were decided by protecting short-term consumer interests, it would harm long-term interests of the firms;[63] they are disincentivised from investing in the future through innovation or technology that takes time to yield gains. The third way to reconcile both sides of the trade-off between efficiency and consumer interest is to prioritise overall welfare of the economy over short-term consumer interest, while ensuring that the individual consumer's share in total welfare is protected.[64]

An instance of such trade-offs is the case of merger agreements, where the issue involved is whether assessments of merger agreements should consider the short-term effects on prices (and therefore, the consumers) or also the long-term effects on innovation.[65] It is argued, in this regard, that the EU's policy of taking the short-term approach is significantly harming long-term interests of the market.[66]

Thus, at the crux of the matter is the choice between using the total welfare or the consumer welfare standard. The total welfare standard seeks to maximise total surplus, which is in the interests of both firms and consumers in the market.[67] For instance, in the context of a merger, there is a trade-off between productive efficiency (and thereby greater gains to the firms involved) and allocative inefficiency (because of the increased market power of

principle: from utilitarianism to wealth maximization, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=870748 (Last visited on January 30, 2012).

" Wolfgang Kerber, *Should Competition Law Promote Efficiency? Some Reflections of an Economist on the Normative Foundations of Competition Law in* ECONOMIC THEORY AND COMPETITION LAW 96 (2009).

[61] Competition policy differentiates between productive and allocative efficiency. Productive efficiency is when the output is produced at minimal cost, with the lowest amount of inputs. Production is inefficient if economies of scale are not optimally exploited, if goals other than profit maximisation are pursued etc. The result of productive inefficiency is poor allocation in the economy.
Cseres, *supra* note 22, 5.

[63] *Id.*

[64] *Id.*

[65] Kerber, *supra* note 60, 100.

[66] Christian Ahlborn, Vincenzo Denicolo, Damien Geradin & A. Jorge Padilla, *Implications of the Proposed Framework and Antitrust Rules for Dynamically Competitive Industries* 28 (DG Comp's Discussion Paper on Art. 82, 2006).

[67] *See* Zhou, *supra* note 59.

the merging firms). Total welfare would be maximised if the former outweighs the latter. In this paradigm, what was previously consumer surplus is now being converted into market profits for the firm.[68] This shift in redistribution is irrelevant to the total welfare standard because total welfare is the undiscerning sum of producer and consumer surpluses. The stake of the consumer is not a weighted one. If the consumer welfare standard is applied to the same merger, it would analyse the state of consumer surplus before and after the merger, allowing the merger only if consumer surplus increases.[69] The only basis of this analysis, however, is the market price, which oversimplifies the decision.[70] For instance, the increased market control resulting from a merger might raise market price, but the decision of the firms might lead to increased productive efficiencies. The consumer welfare standard would not allow such a merger, on the ground that there is a transfer of wealth from the consumers to the producers, even though the economy would benefit as a whole.

It is the economist's argument that clearance of mergers should not be prevented if they increase efficiency.[71] If the cost of total welfare is distributional inequalities between the consumers and the firms, then the law should promote efficiency, while social policy should rectify the distributional effects. The total welfare standard is justified by the Kaldor-Hicks welfare criterion[72] because any economic decision that raises producer surplus above consumer surplus implies that the firms can theoretically compensate the consumers, even though such compensation is not necessarily paid. This is why this paradigm is criticised, because here, consumers are required to accept a decrease in wealth without compensation, merely because their losses are offset by greater gains to the firm. In contrast, the Pareto criterion requires that no one is worse off than the other. Secondly, the total welfare standard is also not accepted because it entails comparing the losses of one party to the gains of the other and making a judgment based on the latter.[73] Law-making ethics would argue against society being allowed to make decisions in this manner.[74]

What would occur if consumer welfare were the normative standard instead? There are many justifications for such a decision. It is argued that this is an easier standard to apply because all the effect of all economic

[68] Kerber, *supra* note 60, 11.
[69] *Id.*, 101.
[70] *Id.*
[71] This is also the view of the Chicago school that the primary goal of anti-trust is to maximize efficiency.
[72] Zhou, *supra* note 59 (The principle of wealth maximization; it is criticized, however, for allowing uncompensated redistributions, which are unlikely to be seen in practice).
[73] Roger Zach, *Competition law Should Promote Economic and Social Welfare by Ensuring the Freedom to Compete- A Lawyer's View in* ECONOMIC THEORY AND COMPETITION LAW 124 (2009).
[74] *Id.*

decisions is being assessed solely on price Even if consumer welfare is not applied uniformly to an economy, it becomes relevant in certain markets.[76]

The goals of competition law are changing with new developments in the economy, and there is a proposed shift from ensuring the freedom to compete to promoting socio-economic welfare. Some academics believe that the two goals are not mutually exclusive, and further, that it is competition that causes consumer interests to be normalised in the long run.[77] Some do not see consumer welfare as the appropriate standard because of the inherent vagueness of the goal of 'socio-economic welfare'.[78] It would make it difficult to frame laws with certainty if there was no universally accepted or uniform definition of the goal itself. It necessarily assumes that competition authorities that follow this standard can foresee the future market outcomes. The competition authority has to see whether a particular economic decision by a firm would raise or diminish *future* consumer welfare, something that is impossible to determine accurately.[79]

The aim of this section is twofold: firstly, to show the understanding of the consumer welfare standard in competition law and secondly, to reflect upon the inadequacies of competition law to deal with non-economic aspects of the market transaction. As seen above, competition law is simply concerned with the provision of competitive choices in terms of price, quantity and innovation,[80] either through the total welfare standard (where the productive

" *Id.*

[76] *Id.*

[77] Anne Perrot, *Appropriation of the Legal System by Economic Concepts: Should Conflicting Goals be Considered? in* ECONOMIC THEORY AND COMPETITION LAW 130 (2009) (In this context, it is commonly assumed that environmental and competition laws are always going to be in conflict. For instance, the proliferation of firms as a result of increased competition would only exacerbate the problem of pollution. If some of those firms were allowed to merge, creating a virtual monopoly, a single industrial entity could better internalize its pollution and control its impact. Therefore, if competition policy were to allow such a merger, it would benefit the environment more than allowing multiple competing firms).

[78] Zach, *supra* note 73, 124.

[79] A. E. RODRIGUEZ AND ASHOK MENON, THE LIMITS OF COMPETITION POLICY 43 (2010). (The biggest problem a competition authority faces is that it cannot always see what would have happened if the matter had been decided in an alternative way, or if the enforcement mechanism had operated at a different level. This restricts effective evaluation, because not all possible outcomes can be assessed with equal accuracy, so the actual decision taken is not necessarily the right one. It can, however, be said that mistaken prohibition of a practice as anti-competitive has a worse impact than mistakenly acquitting what is actually an anti-competitive practice. In the second instance, the system eventually corrects itself: a practice that was incorrectly allowed reveals itself to have an anti-competitive effect over time, and will then be regulated by the authorities. If an acceptable practice is wrongfully but pre-emptively declared as 'anti-competitive', however, there is no window for error-correction. Entrepreneurs and firms will wary of implementing this practice, even though had it been allowed, it would have had a positive effect on competition and innovation).

[80] The Competition Policy in EU has adopted the consumer welfare as the ultimate goal of competition law. Art. 101(1) TFEU suggests that the loss of short term harm to the consumer can

efficiency would ultimately benefit the consumers) or through the consumer welfare standard, (which upholds the immediate loss of consumer surplus over the productive efficiency claims)." The analysis assumes that the consumers have adequate information about the price and the products in the market." The end result of these remedies is to focus on providing the consumers with competitive options on the supply side of the market. Thus, even a pro-consumer standard of competition law scrutiny is concerned only with the economics of a particular market transaction that may seek to reduce the consumer surplus in the market, which is represented in terms of price, quantity, and innovation of the products. It does not consider the normative goals of ensuring an honest relationship between a buyer and a seller, especially if it does not affect the efficient allocation of the resources in the market.

Secondly, a central aspect of the debate with respect to the consumer welfare standard ultimately reflects upon the goals of the competition law. Advocates of a consumer welfare standard, as opposed to the total welfare standard, promote the inclusion of non-economic aspects amongst the goals of competition law. They are concerned with the 'wrong' involved in the redistribution of surplus and the acquisition of rents from the consumer to the producers. On the other hand, the proponents of the total welfare standard focus the competition law goals simply on the efficiencies of the market, instead of considering the inclusion of the distributional aspects of the transaction. This debate highlights the inherent inadequacies of competition law in regulating the non-economic aspects involving considerations of equity. In the light of its myriad objectives and considerations, it has also been stated that competition law is not suitable to deal with non-economic objectives of consumer welfare like the health and safety aspects of a market transaction.[83] Thus, the prudence of the consumer law regime lies in the fact that it has the baton to regulate the economic and the non-economic aspects of the market transaction. It ensures the efficiencies of a particular transaction between the seller and the consumer in terms of cost savings while at the same time, it is also concerned with the health and the safety aspects of the transaction." Moreover, it is important to note that consumer law provides for an *ex-ante* form of regulation whereby it confers a right upon the consumers to be protected from the market malpractices such as fraud and deception. It is suspicious of such practices as being a wrong in itself, irrespective of the extent of its effects on the consumer.

be ignored if the long-term efficiency gains of the transaction ultimately enable the consumers to attain a 'fair share' of the resulting benefit.

81 *Id.*

82 Rhodes, *supra* note 45, 309.

83 Cseres, *supra* note 23, 136 ("It can be argued that Competition law is first of all to benefit consumers in terms of price and output and it is less capable to take account of broader consumer interests, like health, safety, or information problems. Although competition enforcement might incidentally address consumers' non-economic interests, it is neither fit nor effective in doing so").

84 *Id.*

V. *DLF v. BELAIRE OWNERS:* CONSUMER COURT OR CCI?

The provision of a theoretical framework defining the intersections and the divergence of competition law and consumer law was of utmost importance to understand the nuances of the DLF case with respect to the application of the appropriate policy. As it shall be mentioned below, the dangers of cross application of competition law and consumer law lie in the costs involved with false positives and false negatives, besides the digression of each of them from their normative goals and the failures which they are best equipped to deal with. Before going into the depth of the case, it shall be pertinent to highlight the history of competition law and consumer law in India.

A. HISTORY

Before the enactment of the CPA, the Monopolies and Restrictive Trade Practices Act, 1969 (`MRTP Act') was the law that dealt with monopolistic and restrictive trade practice. It was the Indian competition law, which primarily dealt with the effects of such practices on the competition in the market. It was, however, felt that even though a mechanism existed to protect consumers from anti-competitive practices, this did not necessarily translate into effective protection of consumers from other market distortions that primarily included deceptive and unfair trade practices. This resulted in the insertion of §36A in the MRTP Act," which sought to protect consumers from fraudulent and deceptive practices. Even though one might see this as an attempt to integrate consumer law and competition law in a single agency, it is interesting to note that prior to the amendment of §36A,[86] it stated that such unfair practices should cause harm to consumers, whether by 'eliminating or restricting competition or otherwise'. In this context, the impact of unfair trade practices on the competition in the market has been pointed out. An example would be when a consumer switches to a dishonest seller on being manipulated by him, which may in turn affect the competition in the market. Since adverse effects on competition would ultimately harm consumers, the section was framed in that manner.[87] The wordings of the unamended section reflect upon the indirect effects of an unfair trade practice on competition.

[85] MRTP (Amendment) Act, 1984 (The amendment was primarily a result of the recommendations of the Sachar Committee which opined that the Act contained no provision to protect consumers from false and misleading advertisements/sales promotion techniques and other similar practices which would mislead consumers into buying a product that does not satisfy the laurels its seller claims to. The Commission also recognized the problem of inequality of bargaining power amongst consumers and sellers).

[86] MRTP (Amendment) Act, 1991, §36A: "In this Part....adopts any unfair method or unfair or deceptive practice including any of the following practices" replaced the phrase "adopts one or more of the following practices and thereby causes loss or injury to the consumers of such goods or services, whether by eliminating or restricting competition or otherwise."

[87] S. M. DUGAR, GUIDE TO COMPETITION LAW, Vol. 1 377 (2010).

The inadequacies of the MRTP Act in protecting the final consumer, however, resulted in the enactment of the CPA. The need for the enactment of the CPA was to address the problem of vulnerability of the consumers in spite of the existence of a couple of legislations (including the MRTP Act) during that time, which also sought to protect consumer interest.[88] The MRTP now stands repealed by the Competition Act.

Post its repeal and with the enforcement of the Competition Act, the pending cases with the MRTP involving unfair trade practices was transferred to the Consumer Forum whereas cases with respect to restrictive trade practices stood transferred to the CCI.[89] Currently, the jurisdiction over unfair trade practices lies only with the Consumer Forum.

The early developments that took place in the realm of competition and consumer law, can be paralleled to the development of the same in the US. §5 of the Federal Trade Commission Act was initially enacted to prohibit `unfair methods of competition'.[90] This phrase was thought to be adequate to deal with the problem of 'unethical conduct' in the US markets.[91] The shortcomings of the section, however, became evident when US courts held that a complaint under §5 shall be dismissed if there is no adverse effect on competitors in the market.[92] It was then felt that the final consumers would be left without a remedy if the effect of competitors could not be shown. In order to rectify this anomaly, the US Congress amended §5 to prohibit 'unfair or deceptive acts or practices'.[93]

B. DLF CASE: ANALYSING THE APPROPRIATE REMEDY

In this case, the complainants were a group of apartment allottees who had entered into a standard form contract with DLF, and alleged that DLF had imposed unfair and one sided conditions in their standard contract,[94] which amounted to an abuse of dominance. Moreover, the complainants alleged that

[88] J. N. Barowalia, THE CONSUMER PROTECTION ACT 14 (2010).

[89] Pradeep Mehta, *Competition Law in India: Evolution, Experiences and Challenges*, *available* at http://www.concurrences.com/article_revue_web.php3?id_article=12615&lang—en (Last visited on February 25,2012); Competition Act, 2002, §36(4).

[90] Federal Trade Commission Act, §5.

[91] Neil Averitt, *The Meaning of 'Unfair Methods of Competition' in § 5 of the Federal Trade Commission Act*, 21 B. C. L. REV. 227 (1980).

[92] FTC v. Raladam, 283 U.S. 643 (1931).

[83] Wheeler-Lea Amendment of 1938, ch. 49, §3, 52 Stat. Ill (codified at 15 U.S.C. § 45(a)(1) (1976)). §5 of the FTC Act now reads in relevant part: "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." 15 U.S.C. §45(a)(1) (1976).

[84] Case No. 19/2010, 1 2.1. Also, along with the imposition of such unfair terms, it had been alleged that DLF had obtained certain licences and clearances in spite of violating certain provisions of the applicable law. Moreover, the facts of the case suggest that there had been a

they had paid a substantial amount of money before signing the standard contract and thus, they had no option but to adhere to the terms of the contract.[95] After establishing that DLF occupied a dominant position in the market, the CCI held that imposition of such terms amounted to an abuse of dominance under §4(1)(a) of the Competition Act.[96]

To start with, it is pertinent to note the findings of the Director General.[97] The findings of the Director General (`DG Report') stated that the complex terms of the apartment buyers agreement along with a behavioural bias in favour of DLF resulted in the problem of information asymmetry, which eventually led to high search cost and high switching costs as the apartment allottees had already paid a substantial amount of money. The findings of the DG stated that high switching costs along with information asymmetry meant that the consumers could not choose another firm, which in turn would disincentivise such firms to compete on price and quality factors, thus affecting the operation of static and dynamic competition in the market. Thus, the DG Report stated that consumer bias, asymmetry of information and one sided agreements have 'affected the consumers' and the 'competition in the market'.[98] It stated that the terms of the standard agreement were one sided as they gave sole discretion to DLF with respect to change of zoning plans, usage plans, carpet area etc., where the buyer was given no scope to voice his concerns.[99]

The CCI finally held that the clauses in the agreement could not be considered to be 'fair' as it was in 'brutal disregard to the consumer's right'm as DLF could cancel allotments, forfeit money, and could obfuscate the terms of the agreement. Thus, it seems that the CCI considered the terms to be `unfair' as it affected the consumer's rights and personal interest, which would

change in the layout of the construction plan along with a considerable amount of delay in the completion of the project.

112.2.2.

[96] M.,112.104.

[97] Under §26(1) of the Competition Act, 2002, the CCI may ask the DG to conduct an inquiry into the matter if in its opinion, a prima facie case exists.

[98] 116.18. *See* DG Report in the complaint filed by Magnolia Flat Owners Association, 115.23 (It held that it *cannot* be said that the exploitation of consumer biases, asymmetry of information and one sided terms and conditions *affects the consumer only and not the competition,* as the static and dynamic competition is also being affected in the market. Misleading statements can harm the consumer *as well* as the market place).

[99] ¶ 2.101.

[656] 112.102 ("Under normal market scenario, a seller would be wary of including such one-sided and biased clauses in its agreements with consumers. The impunity with which these clauses have been imposed, the brutal disregard to consumer right that has been displayed in its action of cancelling allotments and forfeiting deposits and the deliberate strategy of obfuscating the terms and keeping buyers in the dark about the eventual shape, size, and location etc. of the apartment cannot be termed as fair. The course the progress of the project has taken again indicates that DLF Ltd. beguiled and entrapped buyers through false solicitations and promises").

be affected if DLF could act in an arbitrary manner and change the building plan, discharge itself of liability etc.

With respect to the effects of the practice on competition in the market, however, the CCI held that a dominant player is the one who is in a position to impose such unfair conditions in the agreement. The CCI proceeded on the assumption that in a competitive market, even if such terms were included, the competitive forces would ultimately force the seller to be more consumer friendly as the consumer would always have the option of switching to another supplier.[101] Moreover, though the CCI did not explicitly refer to the DG's logic of distortion of competition in the markets, one can read its reasoning on those lines. Primarily, the CCI held that imposition of such terms on consumers by a dominant firm would mean that the other small players in the market would also follow suit, as competing with such a dominant firm would be difficult. This reasoning can be read on the lines of the DG's submission mentioned above. High switching costs and information asymmetry would mean that the consumers would not be able to reward the firm offering him the best options. This in turn would disincentivise the other firms in the market from competing on price and non-price factors, which would then emulate and impose similar terms and conditions as those imposed by the dominant firm. Thus, such emulation would imply a distortion in the competition in the market for the firms to compete to offer the best possible options and the related terms and conditions.

Two pertinent points emerge here: firstly, the CCI's notion of 'unfair term' corresponds to the notions of the 'unethical', as it directly affects the consumers' interests in terms of their rights and expectations. What needs to be noted here is that the terms and conditions in the flat purchase agreement were not unfair because they affected competition in the market; they were unfair as they were biased, unilateral, arbitrary and against the interests of the consumers. Secondly, such market failures that directly affect the buyers' right, in turn distort competition in the market. These two points will now be analysed in the context of the nature of market failure to understand whether antitrust inquiry in such cases is effective, desirable, sufficient and, above all, justified.

[101] *See* OSTERUD, *supra* note 25, 24 (Reference has been made to European Economic Community Comm'n, Memorandum Sur le Probleme de la Concentration dans le Marche Commun Dec 1, 1965 which states that an abuse occurs when a dominant firm utilizes the possibilities which flow from its position of dominance in order to obtain benefits which it could not obtain if it were exposed to effective competition); *See also* Pravan Mohanty v. HDFC Bank Ltd, Case No.17/2010 (In a similar case, the CCI held that the consumer had ample choices in the market which seemed to suggest that the imposition of unfair terms and conditions by the Opposite Party did not affect the competition in the market).

1. A form based approach: understanding the meaning of `unfairness'

The term 'unfair' is certainly vague and broad as it may encompass any act or practice that does not appeal to our notions of equity. §4(2)(a)(i) uses the term 'unfair' in the context of imposition of unfair terms and conditions by the dominant firm. On the other hand, the meaning of 'unfair' is used in a different context under the CPA. §2(r) defines the term 'unfair trade practices', which includes a number of practices that are generally fraudulent, misleading, or deceptive. Although one may intutitively understand the difference between the notion of 'unfairness' under the two laws, it is important to analyse and delineate its meaning under both the laws.

A competitive market ensures the best deals for consumers in terms of price, choice, quantity and quality of the product. In such a market, the seller who offers the best in terms of price and innovation sustains, while the rest who cannot compete would have to exit from the market. In this manner, competition law ensures 'fairness' in the market.[102] Every player is given the opportunity to compete on price and non-price terms. An act would be considered to be 'unfair' if it illegitimately affects this opportunity to compete, except through efficiency or merit.[103] Thus, the notion of 'unfairness' is linked to the sustenance of competition in the market, which deplores exclusionary conduct by means other than those on merits.[104] As mentioned above, the total welfare versus the consumer welfare debate highlights the inadequacies and complexities of competition law to deal with claims of equity and other non-economic goals. At most, the equity concerns that competition law deals with are related to the distributional aspects of surplus in the market. Through the lens of equity, a competition law regime may favour the protection of competitors or may adopt a consumer welfare approach in the sense described previously, even if that may result in the loss of efficiencies for the impugned firm.[105]

Here, we see that the unfairness factor under competition law is understood and linked to the myriad ways in which competition is distorted in the market, as such distortions affect the other players in terms of choice (for

[102] Bert Keirsbilck, THE NEW EUROPEAN LAW OF UNFAIR COMMERCIAL PRACTICES AND COMPETITION LAW 524 (2011).

[103] David Gerber, *Law and the Abuse of Economic Power in Europe* in COMPETITION LAW 500 (2nd series of The International Library of Essays in Law and Legal Theory) (While understanding the notion of fairness in the context of abuse of dominance in EU, it states that the notion of unfair or unreasonable behavior is based on the concept of competition on merit).

[104] *See* Guidelines on Vertical Restrains 2000/C291/1 (It states that the protection of competition is the primary objective of EU Competition Policy as this enhances consumer welfare and creates efficient allocation of resources).

[105] MacCulloch, *supra* note 45, 81; Robert Pitofsky, *The Political Context of Antitrust in* COMPETITION LAW 155 (2nd series of The International Library of Essays in Law and Legal Theory).

the final consumers) or in terms of an opportunity to compete (with respect to the other competitors) or both. On the other hand, a firm may not have made any business decision that would restrict the output or result in higher prices in the economy. It may, however, try to increase its profits by misleading the consumer into falsely believing that his product possesses those characteristics, which the consumer desires. In such cases, the seller knows that his claims are false and untrue and thus 'unfair'. Here we see that the element of unfairness does not lie in the illegitimacy of a business decision distorting the market efficiencies. It manifests itself in the dubious and unethical claims of the seller. It is the dishonest representation in the transaction that makes the action 'unfair'.

The notion of unfairness under competition law and consumer law gives us an understanding of the 'forms' of practices that both proscribe.[106] In this context, it is submitted that while interpreting §4 of the Competition Act, the standard of unfairness should be such as described above. Also, *the notion of consumer welfare under competition law should be kept in mind* when the competition watchdog seeks to protect the 'consumer'.

In the present case, the CCI has rendered the terms to be unfair on the basis that the terms were arbitrary and favoured DLF, while giving hardly any say to the consumers who had no option but to agree to the terms and conditions. Such a schematic arrangement between the position of the buyers and sellers was considered to be unfair. Taking a strictly 'form' based approach in the light of the notion of 'unfairness' of the practice, such a transaction must fall within the contours of consumer law. The unfairness of the terms is reflected in the advantage taken by the firm of the information failure on the demand side of the market, along with the prevalence of high switching costs. Though the *CCI could define the unfairness of the terms for their competition distorting effects,* the facts highlighted above show that they have condemned the practices in itself, which is certainly beyond its mandate. Moreover, if one imports the idea of 'consumer welfare' under competition law to this case, it is clear that the CCI did not identify consumer protection in terms of safeguarding the best options and choices in the market. It sought to protect the consumer from the 'unfairness' of the terms and conditions, which is again beyond its scope and authority. Thus, when the complainants (as in the DLF case) are concerned with the proscription of the practice in itself, *a form based approach* does not permit a competition law remedy.

[106] Federal Trade Commission Act, §5: "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." Thus, the clause 'unfair methods of competition' proscribes practices having anti-competitive effects whereas 'unfair or deceptive acts' proscribes fraudulent and misleading trade practices against final consumers, irrespective of its effects on the competition in the market. This buttresses the submission made above with respect to the notion of 'unfairness' under competition law and consumer law.

One may, however, argue that the form of a practice is not important insofar as the effects of a particular practice correspond to the goals which the particular regulatory policy seeks to attain. Such a reading would justify competition law scrutiny if the impugned act has distorted competition in the market, thereby rendering the form based approach inapplicable. The case for antitrust intervention on the basis of an effects based approach is further buttressed by the manner in which §5 of the Federal Trade Commission Act has been interpreted in the US.[107] §5 has been given a broad mandate to proscribe any practice that would significantly affect competition in the market even though it does not stand in violation of the letter of American antitrust laws 1[08] This shows the importance of antitrust scrutiny in cases which have anti-competitive effects on the functioning of the market, irrespective of their form or nature.

The next sub-section analyses the effects based justification for competition law intervention. Before proceeding further, it must be clarified that the mandate of competition law does not allow it to condemn unfair, deceptive or fraudulent practices by themseles. It may, however, prohibit such practices from the prism of its anti-competitive effects on the market. This limitation of competition law plays a role in determining the sufficiency of competition law scrutiny in the case of DLF and other similar cases under consideration.

2. Effects Based Approach

As shown in Part-III, a consumer injury resulting from a false and misleading representation of the seller can also distort competition. In the DLF case, the CCI held that the unfair conditions imposed by DLF would also distort competition in the market as the other firms would not have an incentive to compete on price and non-price terms, including the competition on providing favourable terms and conditions to consumers. Moreover, the fact that DLF already occupied a dominant position in the market meant that the CCI would have been more apprehensive about the anti-competitive effects of the conduct on the market. What needs to be understood is that any abuse of dominance must have a linkage to competition in the market. On the basis of the discussion above with respect to the notion of consumer standard in competition law, it is clear that the prohibition on the abuse of dominance is in recognition of the fact that it would impair competition in the market and also harm consumers with respect to the availability of choices.[109] Generally, abuse of dominance is

[107] Federal Trade Commission Act, §5: Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

108 Neil Averitt, *The Meaning of 'Unfair Methods of Competition' in § 5 of the Federal Trade Commission Act*, 21 B. C. L. REV. 227 (1980).

109 Osterud, *supra* note 25, 27. (In the context of Article 102, TFEU that prohibits abuse of dominance, it has been stated that the objective of Article 102 is to protect competition in the

categorised as exclusionary (foreclosure of market, denial of market access) and exploitative (excessive or discriminatory pricing).[110] In this case, no mention has been made of a possible foreclosure of the market. Therefore, the impugned practices of DLF would fall under the category of being exploitative, which justifies antitrust intervention.

What needs to be noted in this case, however, is the fact that the consumer injury is twofold. Firstly, such practices violate certain crucial rights of the consumer. Secondly, the consumer suffers from the distortions of competition in the market. In this context, it is submitted that even though a competition law remedy may be justified on the basis of the anti-competitive effects on the market, it does not address the violation of the consumer right in the first place.

In the DLF case, the consumers were unable to make an informed choice due to information failures and high switching costs. The result was that they were bound by a number of arbitrary terms and conditions, which placed their interests in jeopardy. Two problems that can be identified here are the manner in which the consumers entered into the contract, which was largely a fallout of information asymmetry and secondly, the terms of the contract itself. A competition law remedy, however, only seeks to address the consumer harm that would result from a non-competitive market, thereby failing to recognise the violation of their rights in the first place. The fallout of such failure means that the market failures on the demand side may still prevail, which may lead to a reoccurrence of such cases. Such reoccurrence is also problematic for the competition in the market. The failure of competition law to proscribe the practice in itself is, however, understandable as competition law is not suited to regulate or safeguard the rights of the consumers in the first place.' Thus, though it proscribes the impugned action, such proscription is viewed from the lens of its effect on the competition in the market, rather than proscribing the practice in itself.

interests of the consumers which would increase their choices in terms of price, quality and quantity. This is reflected from Guidance on the Commission's enforcement priorities in applying Art. 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings).

110 Competition Commission of India, *The Competition Act 2002: Provisions Relating to Abuse of Dominance*, March 2011, available at http://www.cci.gov.in/images/media/Advocacy/A0D2011.pdf (Last visited February 25,2012). *See* MCX Stock Exchange Ltd. v National Stock Exchange of India Ltd., 13/2009 (the CCI did not find any justification for the impugned conduct and pricing strategies adopted by NSE).

111 Ramsay, CONSUMER LAW AND POLICY *157*, 161, 162. (Discussing V. Goldberg's view that competition amongst producers will not protect contract term takers due to the 'cost' of information involved. Moreover, movement towards contractual equilibrium due to aggressive bargain seeking of a few customers will be slow due to the 'fewness' of the customers who would find it worth it to pay the costs and the ease with which the firms can engage into 'contract term discrimination', that is provide favorable terms only for those that are vigilant about while keeping 'high information barrier' for other customers.) Thus we see that the root cause of such market failures is due to information asymmetry, which every seller would seek to exploit irrespective of the status of competition in the market.

In this case, competition law's mandate of proscribing unfair terms and conditions is based on the assumption that such proscription would automatically enable the markets to correct themselves and compete to provide better terms and conditions that would be translated in terms of efficient choices for consumers. Let us, however, assume that a dominant firm does not impose such terms and conditions. Accordingly, should one assume that if such terms were imposed by a non-dominant firm, there would be no market distortions? Moreover, what essentially induces the firms to impose such conditions? Though according to the CCI such practices by the dominant firm would make others emulate it, we answer this question using the issue raised in this particular case. In this context, the desirability of proscribing the practice in itself will be justified.

VI. PROSCRIBING THE PRACTICE IN ITSELF: UNDERSTANDING THE EFFICACY OF A CONSUMER LAW REMEDY

The CPA enshrines certain consumer rights, such as the right to be informed about the quality, quantity and standards of the goods, a right to protection against unfair trade practices, a right to be heard in the appropriate forum and a right to redress consumer grievances.[112] It is understood that the consumer occupies a weaker and more vulnerable position in the market and thus he/she may be unfairly victimised due to the malpractices of the seller. The adverse effects of such practices are myriad. It includes high transaction costs for the buyer, the selection of a less optimum choice along with possible adverse impacts on their health and safety.'" It is in recognition of the possibility of such undesirable effects that the consumer is safeguarded with certain rights that are of paramount importance!' A violation of these rights needs to be recognised as a problem in itself.

[112] Consumer Protection Act, 1986, §6: Objects of the Central Council.—The objects of the Central Council shall be to promote and protect the rights of the consumers such as,—
(a) the right to be protected against the marketing of goods and services which are hazardous to life and property;
(b) the right to be informed about the quality, quantity, potency, purity, standard and price of goods or services, as the case may be so as to protect the consumer against unfair trade practices;
(c) the right to be assured, wherever possible, access to a variety of goods and services at competitive prices;
(d) the right to be heard and to be assured that consumer's interests will receive due consideration at appropriate forums;
(e) the right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers; and
(f) the right to consumer education.

[113] Thomas Wilhelmsson and Chris Willett, *Unfair Terms and Standard Form contracts in* HANDBOOK OF RESEARCH ON INTERNATIONAL CONSUMER LAW 158 (2010).

[114] *See* Steve Keane, *Can a Consumer's Right to Know Survive the WTO?: The Case of Food Labelling,* TRANSNAT'L. L. & CONTENT. PROBS. 291 (2006-2007).

The problem of information asymmetry can arise due to various reasons. Primarily, it arises when information is withheld or if the seller misrepresents or if it is difficult for the buyer to access and understand the information.'" Acquiring information involves costs for both, the buyers (to search, obtain, and process) and the sellers (who are expected to reveal information).[1]'' Behavioural economics has provided us with several interesting insights into the way consumers react and respond in the market. In order to understand the way consumers behave, one needs to look beyond the notion of a 'rational consumer'. As mentioned above, a potential cause of the problem in the DLF case was information failure and the lack of understanding of the contract. The problem of information failure primarily means that the consumer would make bad deals by misallocating his/her resources[117] Information asymmetry primarily impairs the ability of the consumer to choose from the available options and to make a decision of his/her own choice!"

The problem of information asymmetry also arises in standard form contracts. Under such contracts, the consumer is expected to simply sign the dotted line without any scope for negotiating with the seller for a change in terms and conditions [19] The problems associated with such contracts are twofold: firstly, the buyers usually sign these agreements without reading them or even if they read the agreement, they may find it difficult to understand. Such difficulty is compounded by the complexity of the terms and conditions in small print. Even though the consumer theoretically has the option to read the terms and conditions, the consumer usually fails to do so primarily due to the cost involved in terms of the time and effort required to read it and to think and understand the implications of such terms.'" Moreover, at the time of signing the contract, the transaction costs involving the above mentioned scrutiny exceeds the dangers that an average consumer would expect!' Behavioural

[115] ROUNDTABLE ON ECONOMICS FOR CONSUMER POLICY, SUMMARY REPORT 9, available at http://www.oecd.org/dataoecd/5/38/39015963.pdf (Last visited on February 25, 2012).

[116] *Id.;* RAMSAY *supra* note 111.

[117] *Id.*

[118] In order to understand the other problems associated with information asymmetry, *See* Rhoades, *supra* note 45 (States that the vast array of goods and services, the cost involved in producing information, and the market power derived by forms due to the exploitation of consumer ignorance, creates the problem of information asymmetry With respect to the impact of such information failure on competition, he states that it limits price and quality competition among established firms, it sets a high entrance fee for the newcomers and it facilitates collusion by limiting the number of established firms).

[119] LAW COMMISSION OF INDIA, 199th REPORT ON UNFAIR (PROCEDURAL AND SUBSTANTIVE) TERMS IN CONTRACT (`LCR') 54 (2006).

120 Tjakie Naude, *Unfair Contract Terms Legislation: The Implications of Why We Need It For Its Formulation and Application, 17* STELLENBOSCH L. REV. 361 (2006); Geraint Howells, *The Potential and Limits of Consumer Empowerment by Information,* 32 J.L. & SOC'Y 349 2005 356 (The author shows the limits that are inherent in information disclosure as the consumer may still not prefer to read it due to paucity of time, lack of alternatives, high switching costs and due to other reasons highlighted by behavioural economics).

[121] *Id.*

economics shows that even a rational customer who understands the perils involved in a non-negotiated contract may fail to read the terms and conditions as he may not like to behave like an 'eccentric consumer' who shall 'negotiate and bargain' over terms and conditions that would be 'accepted' by other buyers!' What needs to be noted is that even if a consumer has an option of reading, evaluating and comparing the given terms with those of the competitors, the transaction costs involved in doing so would induce the consumer to sign the dotted line without understanding the implications and repercussions of the same!" The dangers of such an arrangement lie in the potential for inclusion of arbitrary and one-sided terms that would benefit the seller, but not the buyer!' It has been said that even in a competitive market, sellers would have little incentive to include fair terms as the probability of the consumer overlooking it and simply signing it is high!" Regulatory intervention is based on the theory of inequality of bargaining power. This is a reflection of the exploitation thesis, which assumes that business organisations impose a 'take it or leave it' condition on buyers, thereby giving them no say in negotiating the terms of the contract.[126]

It is in recognition of such inherent vulnerability of the consumer and the need to protect their rights and interests, that a number of jurisdictions have formulated regulations prohibiting the imposition of certain unfair terms in the standard contracts!" Such intervention may strike down the terms and conditions on 'procedural' and 'substantive' grounds. In case of the former, if the 'manner' in which the contract was entered into seems unfair, such conditions would be struck down on grounds of procedural unfairness!" Procedural unfairness in the context of standard form contracts recognises the inequal-

[122] *Id.* (Mentioning other aspects that would prevent a consumer from reading and evaluating the terms like prior arrangement and signing the contract at the last moment, the costs involved in comparing between the given terms and the terms offered by competitors).

[123] *Id.*

[124] Ramsay, *supra* note 111, 157.

[125] *Id.*, 16 (Given that consumers have behavioural biases, businesses that which to be successful in the market must exploit these biases).

[126] *Id.*

[127] Jeannie Paterson, *The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts*, 33(3) MELBOURNE UNIVERSITY LAW REV. 934 (2009), available at http://ssrn.com/abstract=1669008 (Last accessed on February 4,2012) (In the United Kingdom, the Unfair Terms in Consumer Contracts Regulations 1999 (UK) implemented the European Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts to regulate the use of unfair terms in consumer contracts. In Australia, The Competition and the Consumer Act 2010- Schedule 2 provides for the regulation of unfair terms and conditions.).

[128] LCR 138 (Refers to the provisions in other jurisdictions that deal with procedural unfairness. (UK) Unfair Terms Consumer Contracts Regulation, 1999, (UTCCR) Regulation 6 refers to the need to consider the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it was dependent; (UK) Unfair Contract Terms Act, 1977 (UCTA), §11(1) stated that the term must be 'fair and reasonable' having regard to the circumstances which were or ought reasonably to have been, known to or in contemplation of the parties when the contract was made).

ity in bargaining power between the seller and the consumer primarily due to reasons of information asymmetry, which is important to protect the interests of the consumers.'" Moreover, in case of the latter, the terms would be struck down simply because they are unfair in themselves irrespective of whether the consumer had a chance to read it, evaluate it or switch to another supplier.'" Such terms include the unilateral right of one party to terminate the contract, modify it or unilaterally vary it in such a manner that the interests of the other party would be affected.'"

Thus, the provisions regulating unfair terms in standard contracts seek to protect the rights of consumers against the probability of inclusion of unfair and arbitrary terms in a contract as it recognises the nature and manner in which such contracts are entered into in the first place. Though in India we do not have a separate comprehensive legislation dealing with unfair terms and conditions in standard contracts which surely is the need of the hour, such terms can be regulated under the mandate of unfair trade practices of the CPA 1986.[132]

129 Paterson, *supra* note 127, 940.

139 LCR, 152 (Unfair Terms of Consumer Contracts Regulations, 1999, Schedule 2 provides for certain terms that are considered to be 'substantially unfair'. It includes terms that deal with exclusion or limiting liability of a seller or supplier in the event of death of a consumer or personal injury to him on account of acts or omissions of the seller or supplier,
(b) inappropriately excluding or limiting legal rights of consumer in the event of breach,
(c) imposing conditions which depend on the sole will of seller or supplier,
(d) retention of consumer's money without delivering goods,
(e) requiring consumer to pay disproportionately upon the latter's breach,
(f) authorize seller or supplier to breach the contract unilaterally without a corresponding right given to consumer).

131 Competition and the Consumer Act 2010, §24, Schedule 2 therein provides for the meaning of the term 'unfair' whereas § 25 provides with examples of unfair terms which includes imposition of conditions whereby one of the parties can unilaterally change the terms, terminate or modify the contract. §24 states: A term of a consumer contract is *unfair* if:
(a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
(b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
(c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

132 In the case of Awaz, Punita Society, Jagrut Nagrik and Pradeep Kumar Thakur v. Reserve Bank of India and Ors. AND DCM Financial Services Ltd. vs. Mukesh Rajput and Chhabiram Singh Dhakad, 2008 BusLR 764 (NCDRC), while citing the Supreme Court' judgment in the case of Central Bank of India v. Ravindra, the NCDRC observed that the SC has proscribed what one would understand as 'procedural unfairness' as in that case, the banks had "pressed into service long-running documents wherein the borrowers fill in the blanks, at times without caring to read what has been provided therein". This, according to the Supreme Court, amounted to an unfair trade practice. Also, the Consumer Protection (Amendment) Bill, 2011 provides for the inclusion of 'unfair contracts,' which however, is myopic and limited in its scope.

The need for such regulation in cases such as the DLF case, gains importance in light of the fact that a market failure on the demand side is primarily responsible for the consumer injury and the subsequent adverse effects on the competition in the market (if one extrapolates the discussion in Part-III to the present context). Such demand side failures will induce even non-dominant firms to impose unfair terms and conditions, which in the long term would create market distortions. Demand side failures impair the ability of consumers to choose the best option available. Since sellers are aware of this inability, they do not have any incentive to compete on providing for the most favourable terms and conditions (if one recalls the market for lemons theory). This would eventually affect the competition in the market.

In the present case, a consumer law remedy would also prohibit DLF from imposing such terms, akin to a competition law remedy. A consumer law remedy, however, does so by recognising the inherent wrong involved in those practices, through an understanding of the manner in which such contracts are executed. Moreover, it protects the rights of the consumers against such practices in any given situation as it addresses the root cause of the problems, *i.e.* the unequal bargaining power and the problem of information failure on part of the consumers when they enter into a contract with the seller. Since competition law does not deal with the problems on the buyer's side, such market failures would continue to exist, which surely is problematic. The existence of a market failure on the buyer's side would imply that sellers/firms, even if non-dominant, can frame complex terms of standard contracts along with the inclusion of terms profitable to them but against the rights and interests of the consumers. If consumer exploitation is the norm, there shall be no incentive for any firm to compete for providing best options in the form of favourable terms and conditions. The CCI's assumption that a competitive market would correct the failures in itself does not hold good as the other half of the problem is the difficulty of the buyer in choosing the seller who would offer the best terms and conditions to him.[133] Even if a dominant firm does not impose unfair terms and conditions, the non-dominant seller may still offer unfavourable terms as the probability of the consumers finding a better alternative in the market is low. Thus, the problem would repeat itself and the cycle of violation of consumer's right and competition distortion in the market would continue.

VII. CONCLUSION

This paper primarily deals with those market failures, which directly affect a consumer's interest in the first place but still have anti-competitive effects in the market. The form based approach shows the inherent incapacity of a competition law remedy to rectify such failures as the notion

133 In case the CCI's assumption were to prevail on the basis of empirical evidence, in such cases, a competition law remedy would be sufficient as the main cause of the market failure would not include distortions on the demand side.

of unfairness under competition law implies proscription of those practices which affect the competition in the market and are thus unfair. Competition law fails to prohibit an unethical or fraudulent practice on grounds of unfairness. Moreover, an effects-based approach though justifies antitrust interference, fails to justify its sufficiency and effectiveness especially in the cost-benefit framework. It fails to address the potential reasons that lead to the distortion of a competitive market or enable any firm to act in an undesirable manner.

In the theoretical framework, the interplay between market failure on the demand and supply sides is demonstrated through the theory of lemons. This framework not only helps us to understand the nature of the market failure that was in question in cases such as the DLF case, but also provides a good indicator that even though the impugned practice results in anti-competitive effects, the root cause of such effects should be analysed before triggering scrutiny under the appropriate laws.

Claimants and lawyers must understand the costs involved when an inappropriate remedy results in false positives and/or false negatives. Regulatory intervention is desirable only when its benefits outweigh its costs. In the Indian scenario, such a trade-off assumes even more importance as our dual regulatory model for consumer and competition law does not have the benefits of employing flexible policy tools that a single agency would ideally have.