



REVIEW ARTICLE

THE CONCEPTUALISATION OF CONSUMER HARM

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ABSTRACT

Whilst consumer welfare has been well documented in the economics and marketing literature, the same cannot be said about the conceptualisation of consumer harm. This paper will thus help to enhance the existing body of knowledge in Competition Law and Consumer Protection fields by providing a conceptual framework that will incorporate aspects of consumer harm from both the Competition Law and the Consumer Protection perspectives. Whilst this aspect has already been subject to debates, the existing body of literature on competition law and consumer protection has tended to ignore a very important concept of consumer harm from the marketing perspective which tends to show that consumer protection should also incorporate consumer confusion. This paper will hence aim at filling this gap in the literature and provide an innovative framework that will integrate protection from harm from different perspectives including competition harm, consumer harm as defined in the consumer protection field, and consumer confusion.

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INTRODUCTION

It is argued that consumer discontent and concerns for consumer protection emerged as a result of increasing consumer expectations in terms of better lifestyle and the perception of negligence of business organizations as well as poor government policies for better consumer protection (Jones and Gardner, 1976). The perception that governments were pro-business and detrimental to consumer interests has also highlighted the importance of the paternalistic role of governments in terms of better regulatory and institutional frameworks for Consumer Protection (Andreasen and Best, 1977; Harvey 1982). In developed countries like the US, concerns for better consumer protection have risen since the start of the 20th century due to numerous complaints from buyers and consumers arising from unfair competition and questionable business dealings (Bevans, 2011). More recently, global concerns like growing unemployment, fraud and dishonesty in commercial dealings, oppressive bargains and the emergence of new consumer related issues, have also driven the interest for the protection of consumers during the past few decades (Harvey, 1982; Bevans, 2011). Although proponents of market-oriented economies posit that free

market offers wider consumer choice with higher levels of market efficiency, many policy makers of developed and developing countries are adopting a philosophy of greater reliance on government interventions for better protection of consumers (Al-Ghamdi *et al*, 2007). On the other hand, whilst Consumer Protection is often considered as complementary to Antitrust with its integration in competition legislations in some countries like Germany, in others such as France, separate body of legislations specific to Consumer Protection has been developed (Cseres, 2004). Such differences in models across countries have therefore made it difficult to consider both fields as a single one (Cseres, 2004). This separate consideration of Consumer Protection and Competition Law as different fields hence raises the concern that even in the context of antitrust, Competition Laws alone may not be sufficient to cater for the protection of consumers. While the concept of consumer welfare has been very well documented in literature, 'consumer harm' has not always enjoyed the same consideration by academics and researchers. As stated by Huffman (2010, p3), "the concept of consumer harm is remarkably undertheorized". Hence the question that is key to this paper remains: against what should consumers be protected or put simply, what is the harm from which consumers need to be protected and to what extent do competition laws cater for these harms? The literature

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highlights two main forms of harm from which consumers need to be protected: competition harm and consumer harm.

Competition harm as consumer harm

Since Consumer Protection Laws and Competition Laws form two separate and distinct fields, the concept of “harm” differs in both fields (Haracoglou, 2007; Huffman, 2010). Whilst in the Consumer Protection field, it can simply mean the breakdown of an individual consumer transaction, its definition is different in the Competition Law field (Huffman, 2010). The definition of harm in the Competition Law field has the tendency to ignore transactions at individual level and make a more macro level analysis by suggesting that the mass of consumers will produce the desired results and will hence offset any failures in individual transactions (Huffman, 2010). This assumption corroborates with the consumer welfare model which defines the aim of Competition Law as to avoid competition harm by preventing rise in price caused by dominant firms in the market (Cseres, 2005) while at the same time prevent anti-competitive behaviours in the market (Dabbah, 2003).

In fact, as Haracoglou (2007) stated, harm under Competition Law simply refers to harm to competition which will ultimately harm consumers. Likewise, competition harm will also decrease options available to consumers to make their choice and ultimately harm them (Averitt and Lande, 1997). Thus, the reduction of competition harm *via* Competition Laws will ensure that the market operates under competition situation and not distorted by anticompetitive practices while at the same time protect the welfare of consumers by increasing their choice of the different options available to them (Averitt and Lande, 1997; Haracoglu, 2007). That is why Cseres (2006) argues that the goal of Competition Laws is to ensure the market operates efficiently for onward benefits to consumers. In this context, whilst they have been referred differently under different competition laws across the world, potentially anticompetitive practices leading to competition harm can be grouped as follows (Clarke *et al*, 2005):

- Cartels, vertical agreements, horizontal agreements;
- Mergers and acquisitions;
- Steps taken by a firm or group of firms to monopolise or dominate an industry; and
- Abusive pricing practices.

Consumer harm in the Consumer Protection field

Whilst the goal of Competition Law is the preservation of competition, Consumer Protection is a body of law designed “to protect a consumer’s interests at the level of individual transaction” (Huffman, 2010, p.2). However, while both set of fields carry the main objective of protecting consumers from harm, Consumer Protection limits itself to individual transactions especially at the origination phase (Huffman, 2010). As compared to the Competition Law field, harm in the Consumer Protection Law field can be defined as the breakdown in an individual consumer transaction (Huffman, 2010). Nevertheless, Antitrust researchers such as Averitt and Lande (1997) stated that though Competition Law and Consumer

Protection are different in their operations, they are however complementary. They stated that whilst the role of Competition Law should be to protect options available for consumers, Consumer Protection on its part should prevent harm at individual level that is, preventing restriction from consumers to make rational choice of the options. They further added that Consumer Protection Laws should prevent deception which harms the consumer by limiting his abilities to negotiate the terms of his transaction and to choose from different options available to him. Hence, deception is considered as harm to consumers in the Consumer Protection field as it operates at the origination stage of any consumer transaction and give rise to situations where it prevents consumers to enter into a transaction that truly reflects justice and fairness as their power to negotiate transactions is limited (Huffman, 2010). Deceptive practice occurs when “it misleads reasonable consumers and is likely to affect their purchase decision” (Leary 2004, p1147), more especially when it gives the impression that a product is worth more than it actually is. Further to that, Ekman (2001) suggests that deception involves misleading others without giving notification of the intent to do so. From a sociological point of view, Mollering (2008) suggests that deception involves unequal relationship between two actors as there is deliberate distortion of facts relevant to this relationship. In fact, deception is considered as one of the major issues considered in the Consumer Protection field as though it is common in the marketplace, it is no more considered as acceptable (Braucher, 2006).

Moreover, according to Huffman (2010), consumer harm from the Consumer Protection field should also include aspects that inhibit consumer choice for good consumer transactions such as, behavioral exploitation, that is, “such behaviour as structuring default choices to induce consumers to make decisions favoring the merchant, not the consumer”. Basing himself on behavioural economics which he referred to as a marriage of social psychology, management theory, and economics, Huffman stated that firms, being aware of the irrationality of consumers, may arrange transactions to their advantage. Huffman and Heidtke (2012) termed this situation as “sophisticated repeat-player merchant sellers” dealing with “relatively naïve end-user purchasers”. They added that behavioural exploitation which he also termed as exploitable biases or decision making heuristics, “are mental short cuts that facilitate rapid decision-making, but frequently cause consumers to deviate from their utility maximizing decision paths” (Huffman and Heidtke, 2012, p.81) and hence impacts on consumer rationality. Huffman (2010) added that such biases include over-optimism, the tendency to judge choices as to their relative, rather than absolute, merit; the tendency to believe exciting or fearsome (salient) phenomena, which are easy to call to mind, are more common than actually they are; and the tendency to anchor decisions to arbitrary values. He summed up his definition of behavioural exploitation as a situation which default choices are structured for the benefits of the seller. Furthermore, market manipulation in the wholesale market is also considered as another type of consumer harm (Huffman, 2010). This refers to false reporting of prices in the wholesale market which Huffman considers as very much possible in market structures such as the monopoly and also in oligopoly where there may be colluding prices. Besides,

Haracoglu (2007) posited that Consumer Protection can, in some cases, not only be related to price factors which are more direct but also to non-price factors areas such as unfair and deceptive advertising and fraud, product safety, food and drug regulation, quality and consumer education.

Harmonisation of Competition Law and Consumer Protection to deal with consumer harm: The Consumer Choice Paradigm

Although former theories of antitrust have showed a relationship between Competition Law and protection from competition harm, none have however been able to explain any sort of relevancy in the context of harm from the Consumer Protection perspective. This has remained a major flaw in the theoretical literature as Consumer Protection is considered as being an important ingredient of competition if it is to serve its purpose (Swann, 1979). Indeed, Consumer Protection works to ensure that “consumers can make well-informed decisions about their choices and that sellers will fulfill their promises about the products they offer” (Muris 2002, p4). In fact, consumer choice is increasingly becoming a crucial factor in competition policy (Giulietti *et. al*, 2005).

Hence, Averitt and Lande’s “consumer choice” paradigm came to fill in this gap in the literature by seeing the harmonisation of Competition Law and Consumer Protection (Osti, 2009; Huffman, 2010). Their paradigm has been derived from the general consumer choice theory which suggests that though both fields are different they are nonetheless similar in the performance of their tasks (Averitt and Lande, 2007; Huffman 2010). In a critical assessment of the price and efficiency paradigms of antitrust law, Averitt and Lande (2007) argued that whilst these paradigms cater perfectly for price competition, it does however present shortcomings when faced with non-price competition for instance in cases such as variety, innovation and quality. The price and efficiency paradigm has limitations also in cases where some markets presents few price competition like in oligopoly market structure or in situations where there are horizontal agreements to limit advertising (Averitt and Lande, 2007).

Hence, the consumer choice paradigm posits that in addition to price, there are other alternatives to compete in the market. Antitrust analysis should in addition to price and efficiency aspects, focus more on non-price competition since in many market situations such competition can take place in terms of innovation, scheduling, service, convenience, or product variety (Avritt and Lande, 1997). Hence, Avritt and Lande suggested that four principles emerge:

- Consumers benefit from a reasonable range of choice;
- There are nonetheless diminishing returns to variety;
- We should take account of long-term variety in innovation as well as short-term variety in immediate consumption; and
- Because of uncertainties about the general relationship between concentration and beneficial variety, it will be fruitful for antitrust policy to identify particular industries in which lower concentration and greater variety are especially important to consumers.

Another major characteristic of the consumer choice paradigm is that although competition law and consumer protection laws are from different fields and perform different tasks, they are nevertheless complementary. They argued that since consumer choice is important, competition law has to ensure that enough options are available to make his choice whilst at the same time Consumer Protection Laws should operate to ensure that there are no violations in the consumer’s ability to select among the options. They said that by being able to choosing some options over the other rationally, it improves consumer sovereignty. In short, they categorised the roles of the two sets of laws as follows:

- Competition Laws should deal with market failures external to the consumer that is, those which reduce the number of options to the extent that it affects the consumer’s ability to choose rationally; and
- Consumer Protection should deal with market failures internal to the consumer that is, those which inhibits the consumer ability to choose rationally even when appropriate choice level is present. They categorized such situations as follows:
 - Those consumers who are subject to coercion and cannot act free will;
 - Members of vulnerable groups;
 - Wrong information;
 - Incomplete information; and
 - Information that is hard to process.

In sum, they added that the consumer choice paradigm will protect all types of choices important to consumers and also postulated that by protecting competition, Competition Law will ultimately increase consumer options for their benefits. This will finally lead, according to them, to two ingredients necessary for choice which is options and ability to choose among them that is, better consumer sovereignty (Averitt and Lande, 2007; Huffman, 2010; Osti, 2009). Hence, whilst some theoretical literature such as price and efficiency paradigms, have highlighted the relationship between Competition Law and Consumer Protection by focusing on how competition harm can initially lead to inefficiency and ultimately harm consumers, others like the consumer choice paradigm have improved the understanding of this relationship by adding the aspect of non-price competition for better Consumer Protection.

Consumer confusion as consumer harm

Whilst the Law and Economics literature has shed light on the relationship between Competition Law and Consumer Protection by analysing harm either from the Competition Law or Consumer Protection Law perspective, none has however analyzed a relatively new concept that is often related to in the marketing literature: the concept of consumer confusion. As Fletcher and Ward stated “Confusion is central to consumer protection because confused consumers may suffer physical harm when they unknowingly buy a product other than the one they intend to buy (1987, cited in Mitchell and Papavassiliou 1999, pp. 321). Moreover, Mitchell and Papavassiliou, (1999, p327) highlighted that consumer confusion is considered as harmful to consumers as it provokes negative outcomes:

- Unknowingly altering the consumer's brand choice;
- Knowingly altering a brand choice caused by a lack of understanding;
- Making the same choice, but with undue amounts of uncertainty, frustration and dissonance;
- Making the same choice, but which results in poor or non-maximal product utilisation caused by inadequate understanding;
- Making the same choice, but disabling the consumer from informing others about the product or causing them to misinform others, which may create problems;
- Making the same or a different choice depending on the outcome of a delay designed to clarify the choice by using confusion reduction strategies; and
- Creating decision paralysis

In fact, whilst Averitt and Lande's paradigm posited that increase in consumer choice is essential in protecting consumers from harm, Drummond (2004) argued that more choice leads to greater complexity in the decision making of the consumer leaving them either frustrated or stressed or even thoroughly reflects on whether they have done the right purchase. In addition to this, Walsh and Mitchell (2005) highlighted that situations of confusion have negative impacts on consumers in terms of decreased brand loyalty, decreased satisfaction, negative word-of-mouth, delayed or postponed decision making and inefficiency in terms of competition. Confusion can hence also give rise to adverse effect on the consumer in terms of "mistaken purchases, product misuse, product misunderstanding or misattribution of various products attributes which result in a non-maximization of utility" (Walsh and Mitchell, 2010 p.840).

Several definitions of consumer confusion have been highlighted in the literature. For instance, it is defined as "a mental state characterised by a lack of clear and orderly thought and behaviour (Leek and Kun 2006 cited in Shukla, Banerjee and Adidam, 2010, pp.292). Likewise, Turnball, Leek, and Ying (2000, p. 145) defined consumer confusion as "consumer failure to develop a correct interpretation of various facets of product/service, during the information processing procedure. As a result, this creates misunderstanding or misinterpretation of the market. Also, it is also posited that confusion stem mainly from an overload of information which leads to difficulties in the decision making of the choice of products (Mitchell and Papavassiliou 1999; Mitchell, Walsh and Yamin 2005; Edward and Sahadev, 2012) and further stress to the consumer (Karani, Fraccastoro and Shelton, 2013). In this same context, consumers faced with product complexity and similarity, with inadequate relevant or ambiguous information or too much non-relevant information, often leads to wrong choice in their decision making (Mitchell, Walsh and Yamin, 2005). Moreover, many consumers are also often confused by brand similarity as brand imitation is often used as a marketing strategy for producers of less known products to make consumers confused so that they purchase a brand that look a lot like the 'original' brand (D'Astous and Gargouri 1999; Chrysochoidis 2000). However, while brand confusion, has often been related in the Trademark Law and Consumer Protection issues, confusion from overchoice is relatively a new concept (Mitchell and Papavassiliou, 1999).

Hence, though many economic theories applaud the merits of perfect competition, characterized by homogeneous products, in achieving efficiency for the benefits of consumers, Mitchell and Papavassiliou (1999) advanced that consumers are also confused due to similarity of products, information overload and ambiguous information. Mitchell and Papavassiliou (1999) further stated that the three elements of confusion can be further decomposed into the following categories of confusion:

Product Confusion

The marketing importance of brands has been recognized since several years as marketers began to understand the social and psychological importance of products importance of products (Arnould *et al.*, 2005). Arnould *et al.* (2005) stated that a consumer's attitude of brands may have considerable impact on his purchasing behavior. Product confusion stems mainly from brand similarity. Levitt (1966 cited in Mitchell and Papavassiliou, 1999) highlighted that "most of what we see as new in the marketplace is not new at all, but is rather 'innovative imitation". Therefore, when firms engage themselves in physical imitation of reputed brand named products, it will *de-facto* confuse consumers (Mitchell and Papavassiliou, 1999). Hence, "lookalikes" brands which often copy original ones in terms of packaging and design will confuse consumers by making them wrongly believe of similar product quality (Balabanis and Craven, 1997; Mitchell and Papavassiliou, 1999). Aspects of packaging and design include the shape, size, colour or lettering, or the logo which are used to imitate leading brands (Balabanis and Craven, 1997). Look-alikes brand also confuse consumers in terms of inference-making process of the consumer (Balabanis and Craven, 1997). The inference-making process is "the filings in missing information about a product attribute in order to evaluate a product or choose among alternative brands" (Balabanis and Craven, 1997, pp.300). For this reason, "look-alikes" makes consumers wrongly believe both "look-alikes" and original brand are similar in the quality and attributes (Balabanis and Craven, 1997). In this same context, Walsh and Mitchell (2010) further added that consumers who are prone to similarity confusion often experience dissatisfaction in their purchasing experience. Coupled with this, Mitchell and Papavassiliou (1999) stipulated that claims often made by copycat brands in terms of wordings or signs often mislead consumers in terms of validity and believability especially in cases of environmentally friendly products. On the other hand, lack of product positioning of leading brands due to wrong product claim in terms of contents, information including the country of origin, and quality of the product not well justified will lead to situations whereby consumers will be unable to distinguish between quality of different brands (Mitchell and Papavassiliou, 1999).

Product complexity

The number of types, brands, specifications, features, properties, and performance characteristics of some particular products often leads to product complexity and can lead to difficulties in decision making of consumers (Mitchell and Papavassiliou, 1999). Combined to this, the incompatible standards of evaluation of products make decision making

difficult among many consumers. In fact, this 'decision difficulty' referred to as 'confusion' by Walsh and Mitchell (2005), is often prevalent among certain groups of consumers such as female, older, and less educated consumers. Walsh and Mitchell (2010) relates product complexity as ambiguity confusion whereby consumers process lots of information when assessing lots of products, conflicting information of the same product from different sources or product characteristics that are different from the actual product characteristics.

Product Packaging

"Packaging is considered to form part of the product and the brand" (Ampuero and Vila, 2006 p101). That is why as stated by Prendergast and Pitt (1996 cited in Silayoi and Speece, 2004), product packaging is one of the most important factor that influence purchasing decisions especially at the point of sale. The packaging information including labels are more being utilised by consumers to take their decisions and that's why it has become one of the most important marketing communication tools to attract consumers by conveying messages (Silayoi and Speece, 2004). Throughout packaging, brands can show out their originality and distinctiveness which in the end can influence the quality judgments of consumers (Silayoi and Speece, 2004). The 'product picture' as highlighted by Underwood *et. al* (2001 cited in Silayoi and Speece, 2004) provides the mental image to the consumers of how a product should look at and hence influence his/her decision of purchase. Silayoi and Speece (2004) distinguished between two categories of packaging elements that influence consumer purchase decision making: First, there are visual elements which affect the affective side of decision making and informational elements which influence the cognitive side of decision making of consumers. The visual elements include firstly graphics and colour which can further be decomposed in terms of layout, colour combinations, typography, and product photography.

Silayoi and Speece (2004) further stated that each culture has its own preference for particular colours and a product comprising such specific characteristics of colour will be favoured by consumers from particular cultures. Moreover, the second visual element includes the package size, shape, and elongation of the product. These elements can provide the visual signal, whether right or wrong, of the quantity or volume of a product and this can influence decision making of consumers. As regards the informational elements, these include product information and packaging technology. Font and dense writing styles on the package can send the wrong signal to the consumer and inhibit the readability of the information on the packaging of the product (Mitchell and Papavassiliou, 1999; Silayoi and Speece, 2004). On the other hand, packaging technology are often used to make products have a longer shelf life, being environmentally friendly, nutritionally responsive and meeting food safety requirements and this makes it a special element for decision making of consumers (Silayoi and Speece, 2004). As stated by Clement, Andersen and Jensen (2012), consumers often feel misled with what they have been presented at the time of purchase and what they truly experience with a particular product. A large amount of information available on a product package coupled with lack of time for the consumer to make a rational purchase

may lead to wrong decision making (Clement, Andersen and Jensen, 2012). Confusion may hence also emanate from packaging which can lead to confusing, misleading, and overload information.

Product Proliferation

The number of product that have proliferated down the years which Fielding (1994) called "product clutter", has gone on increasing and this led marketers to question whether choice is an important factor for consumers (Mitchell and Papavassiliou, 1999). As Pine *et al.* (1995, Mitchell and Papavassiliou, 1999 p.342) quoted, "Customers do not want more choice, they want exactly what they want, where, when and how they want it." These proliferations leading to rise in choice, are more profit driven rather than consumer driven and thus may not always be at the advantage of the consumer. Hence, consumers will be rather confused by the amount of products exposed in the market due to overchoice and less able to differentiate between different brands (Mitchell and Papavassiliou, 1999).

Moreover, as Chrysochoidis (2000) argues, consumers are finding it more difficult to differentiate between products as they tend to overlook the unique characteristics connected with a particular product. This, as he argues often leads to market failure since this means the elimination of the product due to small market share. Despite the fact that economic theory holds that more choices are better for the consumer (Maxwell, 2005), such lack of consideration by consumers for product differentiation in a market with a wide variety of product defeats the purpose of having a wide array of choices for the consumer. As stated by Maxwell (2005, p.448), greater choice initially has a positive effect on consumers' likelihood of purchase and their judgments of the fairness of the price. But too much choice has a negative effect, thereby creating an inverted "U" response curve". This negative effect can be illustrated in terms of making the wrong choice or in order to better protect themselves, not being involved in any purchasing activity and hence creating further dissatisfaction.

Price confusion

Despite the fact that one of the main aim of Competition Law is to reduce competition harm which will *inter-alia* reduce price of products, it is important to note that price itself can be a source of confusion. From the consumer perspective, as noted by Zeithaml (1988, p10), "price is what is given up or sacrificed to obtain a product". Research has shown that consumers have the tendency to consider price information as a mean to evaluate the quality of a product when other information is absent (Obermiller, 1988). That is why price confusion is considered as another factor of consumer confusion. Indeed, misleading or partially disclosed price of product such as the exclusion of Value Added Tax from price lists, and outlets' heavily price discounts can give rise to false impression to consumers regarding the real and original value of the product and also confuse them in terms of amount of information they have to process in a short period of time (Mitchell and Papavassiliou, 1999).

Similarly, hidden pricing can be detrimental to consumers who are unable to calculate the true value of the product exposed

for sale (Ayres and Nalebuff, 2003 cited in Romani 2006). In addition to this, Lee and Han (2001) analysis of the attitudinal effect of partitioned pricing, that is, price charged in two or more parts, found in their studies that it leads to detrimental effect on consumers as it promotes higher levels of error in price recall. Moreover, Devlin *et. al* (2007) highlighted how the use of time limit in price promotional activity can mislead consumers. They argued that if such information is genuine then it might be useful to consumers in their decision making process. But if not, as they underlined, time limit restrictions such as sale reductions marked “for one week only” or for a “one day spectacular”, might be confusing and misleading since this lead consumers to engage themselves in purchases under false pretences.

Promotional confusion

A promotion is defined in the marketing literature as “the part of the marketing process that communicates the benefits of a product (Hill and O’Sullivan, 1996, p.246). As a matter of fact however, promotions, such as advertisements and sales promotions, can also confuse consumers. Indeed, an increasing influx of advertisements from different brands or products might not only lead to overload information but also confuse the consumer in terms of complex or conflicting messages (Mitchell and Papavassiliou, 1999). In addition to this, Mitchell and Papavassiliou (1999) added that sales promotions might induce the consumer to engage in a transaction he would not have entered in initially e.g. when the slogan “Special offer promotion: see inside for details”. The consumer may hence be misled and confused by promotions which can incite purchase.

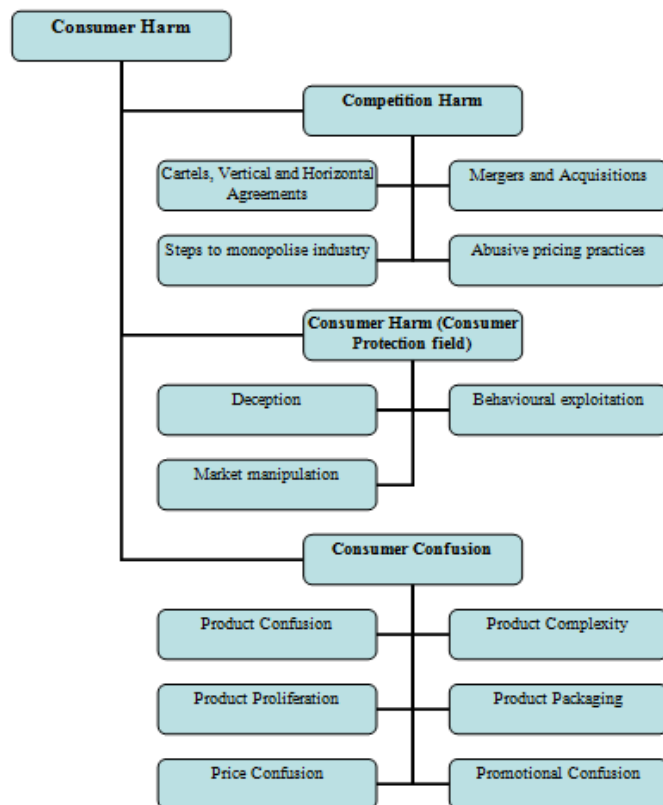


Figure 1. Conceptual Framework of Consumer Harm

According to McKechnie *et al* (2012), comparative price advertising also known as reference price advertising, has also been identified as a way in which consumers may be deceived. This involves “comparing a sale price with some (higher) reference price and, in principle, enables the retailer to demonstrate, and the customer to identify, that the specific purchase offers superior value as a consequence of the reduced price” (McKechnie *et al*, 2012, p.1501). Additionally, the way products are displayed on shelves may also confuse the consumer. Indeed, when too many brands are placed together, this might create information overload and reduce their capacity to distinguish between different brands (Mitchell and Papavassiliou, 1999). The conceptual framework is therefore illustrated in Figure 1.

Conclusion

During the last few decades or so, the world has witnessed fast and profound transformations due to changes happening not only in its economic, social and physical environments but also in its business environment. With the advent of the information age, we are now living in a knowledge based society with more educated and informed consumers. The concept of concept of consumer harm has thus become a matter of concern to all of us. Whilst this concept can be tackled from different perspectives, on the basis of the literature, a conceptual framework is proposed. The concept has been analysed from both the consumer protection and the Competition Law fields whilst at the same time included the aspect of consumer confusion from the marketing literature.

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