

Solving Environmental Problems with existing Competition Law

After reading the recent newspaper reports of the issues facing your Environmental Audit Committee, I contacted your offices, and have been asked to write this paper for you.

It is possible for your committee to meet many of its fundamental objectives using existing and long standing legislation on Competition Law, and I would be grateful if you would take a few minutes to read this paper, and subsequently meet with me so that I can provide a more detailed briefing.

The methodology offered here is a way to out flank the methods by which large corporations fuel the “throwaway society” that you correctly identify, and consequently use market forces to bring them into line. Please excuse me for starting by stating the obvious, but I would like to identify and focus in on exactly how this works, and on what aspect of the issues.

Your requirement is to reduce waste, and to ensure that whatever waste is produced should ideally be 100% recycled. The methodology described here focuses on reducing waste and is not relevant to the recycle issue. I am part of the community that believes the words “Re-use” and “Repair” are the ones we should focus on before we come to “Recycle”. The methodology below is entirely focussed on “Repair”.

Large corporations in many consumer areas make their money from selling more product, and apply three strategies to achieve this that I will call “Forced Obsolescence”, “Consumer Manipulation” and “Repair Prevention”.

“Forced Obsolescence” is self-explanatory. It is achieved either by using inferior components in manufacture to deliberately cause the product to have a shorter working life, or (in the case of some electronic products) continual ‘upgrade’ of operating software with either deliberate performance downgrade consequences hard coded in, or to cause an increase in the demands on older hardware to give the same effect.

“Consumer Manipulation” is all about using Marketing techniques to imbue products and brands with a cachet and importance that they actually do not have, and then manipulating consumers into believing that they are somehow seriously deficient in society if they do not have the latest version of whatever it is that is being sold.

I do not wish to address either of the above issues here. My focus is on the third issue, “Repair Prevention”, because if repair of products becomes easily and cheaply available to consumers, then market forces will quickly expose where forced obsolescence exists, and if repair is a viable option for consumers, they will not be so easy to manipulate.

Unscrupulous large corporations create “Repair Prevention” by controlling the supply of spare parts. They either refuse to openly supply them altogether, or they only supply certain ‘approved’ repair services that they closely control to ensure long turn around times and

extortionate pricing, all designed to make a replacement product the more attractive option for the user.

One industry where this does not happen is the Motor Trade. Parts supply is entirely open. Any attempt by manufacturers to restrict supply of parts is dealt with severely, and is met with a barrage of consumer complaints that force the manufacturers to back down. As a consequence, vehicles of all types can be kept running for decades, and consumers at all sectors in the market have easy access to all levels of repair services. What I want to show you that I believe is of importance to your committee's objectives, is that the legislation that has caused this behaviour in the automotive market is not specific to that industry, nor even to the subject of repairing, but is in fact simple Competition Law.

I use the word "simple" quite deliberately. The basics of Competition Law are easy to explain, and the laws themselves fill less than a page. I would be happy to give more detail at a later time, but for now will give just a brief introduction.

There are two basic parts to the law. One deals with cartel behaviour and makes it unlawful for undertakings to group together and manipulate markets. The second (and the one of importance in this document) deals with the offence of "Abuse of Market Dominance". The wording of Section 18 of the UK Competition Act 1988 is as follows:-

...any conduct on the part of one or more undertakings which amounts to an abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.

Conduct may, in particular, constitute such an abuse if it consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The types of Abuse are clearly listed above, and the legal definition of Dominance is 30% market share and above.

For the offence of "Abuse of Market Dominance" to be found, the starting point is the definition of the market concerned. Here again, the existing law helps your requirements greatly. It is long established case law that Primary sales of a product are one market, Repair Services are a distinct second market, and Parts for Repair are a distinct third market. Because of this, manufacturers cannot claim that parts sales constitute less than 30% of their total market and therefore they are not dominant. In fact, there is a further part to the law that helps you even more.

Within parts supply, the law applies a "Substitutability Test". What this means is that if it were possible to repair an Apple phone with Samsung spare parts, then parts for these products form one market. If it is not possible (and in the Apple example it clearly is not) then each brand of parts is a market by itself. Furthermore, as the only place one can buy these parts is from the brand itself, they are clearly 100% market dominant.

All that is left is to show "Abuse", and again this is simple because refusing to openly supply spare parts clearly falls foul of definition (b) above. Indeed, case law on this point says a refusal to supply by a 100% (or super-dominant as it is known) entity is "presumptively abusive".

In the press report I saw, you complained to Apple (without response) about the cost of repairing their products and the consequent impact on electronic waste. The description I have given you shows that the law already exists that should oblige manufacturers like Apple to openly supply spares. The issue is that the Law is not being applied. Make the spares openly available and a raft of small businesses offering local repair services rapidly springs up. Competition between repairers keeps prices low for consumers, and with repair as the superior option (especially in economically challenging times) the culture shift from replace to repair happens naturally and quickly. With the concept of repair at the front of consumer thinking, forced obsolescence is exposed, and the valueless nature of product image is also exposed so consumer manipulation drops also. The ultimate winner is the environment, as it consequently benefits from less waste.

I am not a lawyer, I am a Business Consultant. My expertise in this issue comes from having spent the last 5 years full time working for a client who is a small business in a legal fight with a major Swiss corporation over the refusal to supply spare parts for watch repair. As a consequence I have a great deal of knowledge on the practical application of the law in this type of circumstance. The lack of application of these laws is down to a number of factors that need a more detailed explanation than there is time to set out here, and that is why I would like to meet or video call with you at your earliest convenience. However, I can assure you that your objectives can be reached without the need for new legislation, and that the moment manufacturers who promote the throwaway culture find themselves facing significant penalties for breaching the law, they might be a little more inclined to appear in front of Parliamentary committees when asked, and a little less inclined to think they can ignore them.

In drafting this paper, it was suggested to me that I may be seeking to accuse Apple of breaking the law, which is a serious claim to make. This suggestion made me think about why this would be a concern, and I believe this is only due to lack of knowledge in society at large. If a manufacturer of any consumer product were to produce a mandatory price list that all retailers were obliged to follow, almost every member of the public would know that resale price maintenance is illegal, and expect that manufacturer to be prosecuted. The fact is that the public at large have virtually no knowledge of Competition Law, so when breaches of Competition Law occur, they just go unchallenged. I do not think of what I have written as being an accusation that the law is being broken, rather I think that my knowledge allows me to recognise when it very likely is, and point this out to others.

Please do contact me. I would appreciate the opportunity to discuss the importance of product repair in the environmental issue, and I would be pleased to assist further in the work of your committee. I have provided your Clerk with my contact details.

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