

competition-on-the-merits is a more accurate name. Suppliers compete by convincing buyers that their product gives the best value. Producers concentrate on increasing quality, increasing their distribution network, increasing efficiency, and enhancing their brand image. In short, when competing on the merits, producers concentrate not on the image of their products alone but on the underlying value of the products. Producers working to increase the underlying value of their product necessarily seek to enhance the product image as well. They will advertise to point out the increased value. But the essential point is that underlying value has actually been increased. These types of competitive activities are desired by society and so the proper place of government regulation is to encourage such activities. These types of activities are what is referred to as competition-on-the-merits.

Another type of competitive activity exists. Some producers concentrate on fooling the consumer in order to increase sales. Chocolate bars produced by a particular Munich producer may be equivalent to those produced by a particular London producer. They may be selling at approximately the same price. The Munich producer may well decrease chocolate content of its bars slightly in order to decrease the price and so increase its European market share. Or the Munich producer may decrease the size of its bars from 20 grammes to 17 grammes to the same effect. With non-meritorious competition, suppliers also compete by convincing buyers that their product gives the best value. However, no underlying increase in value has occurred. The consumer only notices that the chocolate product appears to be selling at a discount because it looks to be of the standard size. No increased product value benefits society as a whole.

This type of competition is usually associated with a saturated market. A saturated market is where the population is consuming just about all that it can consume of a particular product. Growth in sales are possible only by an increase in population or by cutting into a competitor's sales. In a growing market, non-meritorious competition is less of a problem. Since demand is actually growing, corporate managers concentrate on increasing production and distribution efficiency. They simply have less incentive to increase sales through non-meritorious means. Marketing theory supports this conclusion that market strategies change as the market becomes saturated:

The firm's strategy also may change as the product progresses through the various states of its life cycle. During the early stages, an undifferentiated marketing strategy [promoting one's product without trying to distinguish others'] might be useful as the firm attempts to develop initial demand for the product.

In the later stages, however, competitive pressures may result in modified products and marketing strategies aimed at smaller segments of the total market.<sup>16</sup>

Competitive pressures may also result in non-meritorious competition. Arguably, the European foodstuff market is currently in this saturation stage. The EC Commission certainly thinks so.<sup>17</sup>

### *Two strategies for attaining the second goal: disclosure and progressive*

Standards aimed at this non-meritorious competition employ two strategies. First, some standards require disclosure. The idea is that given the information, the consumer will know what to do with it. Certain EC standards bearing on chocolate products are of this type. The Labelling Directive specifically recognises this goal by stating, 'the prime consideration for any rules on the labelling of foodstuffs should be the need to inform and protect the consumer.'<sup>18</sup> Article 3 of the Labelling Directive lists seven indications a label must contain. The Foodstuff Pricing Directive states in the preamble that 'the indication of the selling price and the unit price of foodstuffs will make it easier for consumers to compare prices at the place of sale . . . increas[ing] market transparency and ensur[ing] greater protection for consumers.'<sup>19</sup> This system, so far, does not seem different from what is seen in a US grocery store every day.

The second strategy aimed at promoting competition-on-the-merits goes beyond merely requiring the seller to inform the consumer. This strategy will be referred to as the progressive strategy. These standards prohibit the seller from selling certain products, products deemed not needed by the consumer because the consumer is probably being misled. Significant EC standards concerning chocolate products illustrate this competition-on-the-merits strategy. The vertical standards set out in great detail the minimum cocoa content of various chocolate products. The Chocolate Directive goes even further than merely regulating the right to use the name chocolate and states in part:

The main name 'chocolate' and 'milk chocolate' may be supplemented by declarations or *adjectives*

16 Louis E. Boone and David L. Kurtz, *Contemporary Marketing*, Dryden Press, Chicago, 1989, (6th edn), at 98.

17 In a 1985 communication, the EC Commission said, 'Because of stagnating demand and the need to bring surpluses under control the future of rural production can no longer be seen in quantitative terms (*emphasis removed*).' Commission Communication on the Future of Rural Society, COM (88) 501 final, at 40.

18 Labelling Directive, see Note 8 above, at 1.

19 Foodstuff Pricing Directive, see Note 9 above, at 1.