

Executive Summary

While competition advocacy is thriving internationally, the phenomenon of competition watchdogs being combined with their consumer protection counterpart raises the question of efficacy. While both have a common goal of improving consumer welfare, both policies have different tools and emphases. Competition policy focuses more on supply-side whereas consumer protection policy focuses more on demand-side determinants. Consumer cases are far more frequent than competition cases. Competition as a tool is also more broad-based whereas consumer protection is more industry-specific.

Despite the differences, this paper argues that a merger of both functions will lead to a more comprehensive analysis of a particular market/ sector. While there are cases whereby consumer law and anticompetitive law can both be applied, this is certainly not true for every single case. Nonetheless, this paper proffers that the synergies is not so much in the application of the laws per se, but the way the cases are being analysed. Analysing interactions between consumers and producers in tandem with market structures can lead to a well-rounded view of the market as well as better understanding of the nuances present in the market. In particular, there are efficiency gains in defining a market, quantifying consumer harm and proposing more tailored remedies. These efficiencies are likely to be even more pronounced in this Internet Age where issues are often more multi-faceted. Moreover, there is likely to be spillover effects when conducting market inquiries, as well as raising awareness of the enforcement agency and educate the public.

However, there are two caveats to note. First, it can be difficult to align both policies together at times and a fine balance should be strived. Second, greater

OP015

collaboration of expertise across both groups is essential for the benefits of such a merger to be reaped.

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Nexus between Competition and Consumer Protection Policies

Competition advocacy is thriving internationally. The past few decades witnessed more countries with antitrust laws, as well as the the birth and growth of the International Competition Network (ICN), an international organisation of governmental competition authorities. The ICN currently boasts 120 competition jurisdictions across 132 member states. Within OECD countries, competition is broadly accepted as the best available mechanism for maximising economic efficiency. Competition is widely believed to benefit both businesses and consumers alike. While businesses benefit from lower barriers to entry and more equal playing field, consumers gain in terms of more choices, lower prices and better services and products. Promoting and protecting competition are thus central tenets in antitrust laws. With an intention to promote healthy, well-functioning and competitive markets, antitrust laws commonly have clauses to forestall market failure, such as formation of cartels, collusive pricing and joint decisions to reduce supply. Mergers and acquisitions also need to be assessed on their impact on competition reduction.

Many competition watchdogs however, have their national competition agencies combined with their consumer protection counterpart. Consumer protection deals with unfair trade practices that result in consumers being deceived or misled, by setting minimum quality specifications and safety standards for goods and services and establishing mechanisms to redress their grievances. Examples of consumer protection laws includes prohibitions on misleading advertisements and inaccurate information. The Federal Trade Commission (FTC) in the United States, the UK Competition and Markets Authority (CMA) and Australian Competition and Consumer Commission (ACCC) function on such dual-function basis. More recently, Singapore's Competition Commission of Singapore announced the consolidation of the functions

of protecting fair trading and competition into one agency, expanding CCCS's portfolio to conduct investigations into unfair practices. If the structure of enforcement systems is a reflection of the inner mechanisms of the market (just like the markets they regulate), there then must be substantial efficiencies associated with a dual-responsibility agency. In this paper, I henceforth argue that there are significant synergies between competition and consumer policies. With a common goal of improving consumer welfare, the different emphases, scope and tools of both policies allow a more holistic analysis of the market and more tailored remedies. Nonetheless, achieving a fine balance between the two policies is important. Better coordination between the different groups is also essential for the benefits of such a merger to be reaped.

Certainly, both competition and consumer policies work towards a common outcome of enhancing consumer welfare. Both recognise the inherent unequal relationship between consumers and producers. Consumers have markedly less information or bargaining power than suppliers in real markets. However, as two separate policies, competition and consumer policies undertake different approaches in addressing consumer welfare. Consumer protection protects consumers directly by addressing demand-side determinants. For instance, consumer policy aims to improve market transparency and information flow between consumers and producers, weed out rogue traders and minimise transaction and search costs for consumers. Consumer protection cases are more frequent and employ more industry-specific tools. Conversely, competition policy protects consumers indirectly by ensuring that the supply-side is free and open. In keeping markets competitive, competition laws aims to spur businesses to strive hard in differentiating themselves in terms of efficiency

and new products and services, which in turn benefits consumers. Antitrust cases are also less frequent and adopts a more broad-based approach.

Despite the differences, this paper argues that these differences can be melded together to provide a more holistic analysis of a particular market/ sector. While there may be cases whereby consumer law and anticompetitive law can be applied simultaneously, this is certainly not true for every single case. This paper thus proffers that synergies is not so much in the application of the laws per se, but the way cases are analysed. Analysing interactions between consumers and producers in tandem with market structures can lead to a well-rounded view of the market as well as better understanding of the nuances present in the market. In particular, there are efficiency gains in defining a market, quantifying consumer harm and proposing more tailored remedies.

Understanding consumer perception is critical in defining a market – an integral component in any competition analysis. In a way, a market is defined largely based on consumer perception. The Small but Significant Non-transitory Increase in Prices (SSNIP) test, which investigates consumer's response to an increase in price, is a common tool used for defining the market. For example, if the price of Coke rises by 5%, and consumers switch to consume Pepsi, Coke and Pepsi are likely to be in the same market. Conversely, if consumers do not switch, Coke is likely to have a market on its own. Essentially, the SSNIP test delineates the relevant market by determining the profitability of a given price increase. Consumer's behaviour is thus key in setting the boundaries.

However, the percentage of price increase in the SSNIP test is arbitrary. The SSNIP test also implicitly assumes that non-price factors (e.g. brand loyalty, switching costs) will be fully reflected in prices, and that consumers' stated preference

will be necessarily be played out in real life. A more focused analysis of consumer behaviour can aid a better market delineation, and circumvent the cellophane paradox. Du Pont, a cellophane producer, was found to set prices at the monopoly level, such that consumers viewed other materials such as aluminium foil, wax paper as substitutes. Had cellophane be priced competitively, consumers would not have switched to other materials given a small but significant price increase. Moreover, information asymmetries have a significant effect on consumer behaviour as well. A 2012 consumer survey on warranty restrictions conducted by the ACCC found that 60% of car owners still believe that car warranty will be voided if they have their car repaired at independent workshops. Such sentiments persist despite a regulation in 2003 prohibiting car manufacturers and authorised workshops from restricting warranty servicing and repairs to the authorised workshops. Hence, a deeper understanding of consumer interactions can be beneficial for antitrust enforcement.

Next, there can be efficiency gains from analysing consumer harm. Consumer harm can be a result of unfair practices and/or market structures. For example, the ACCC has deemed dual pricing detrimental to consumer welfare. Dual pricing is the practice of comparing the normal sticker price of a product with a lower temporary sales price, thereby generating a sense of urgency and reward for finding a bargain. Such consumer harm can be magnified in market structures with large network effects, such as platform economies. Recently, the CMA has opened investigations on booking sites, as it is concerned whether the clarity, accuracy and presentation of information on these sites can mislead consumers and prevent them from finding the best deal. In particular, CMA will examine the determininants of hotel rankings, (e.g. commission rates), pressure selling (i.e. creating a false impression of room availability using claims on traffic volume, sales, limited promotion), discount claims

(i.e. comparing higher weekend room rate with the weekday rate to magnify discounts) and hidden charges (i.e. unexpected fees, such as taxes or booking fees) (CMA, 2017). While this case is still pending, having complementary expertise from both competition and consumer protection teams will no doubt be beneficial.

Here, it is important to note that the definition of consumer harm is dependent on context. The applicability of such synergies thus varies. While antitrust regulations are generally similar in principle, individual countries have their own nuances and interpretations. For example, Singapore does not have any restrictions on vertical restraints – competition restrictions in agreements between firms or individuals at different levels of the production and distribution process. In the EU however, the Vertical Block Exemption Regulation (VBER) only permits firms with less than 30% of market share to be able to have vertical restrictions, insofar that they generate efficiencies that also benefit consumers. For example, luxury brands qualify under the VBER, and are allowed to have selective distribution channels to sell their goods to protect their brand image (which is perceived to be valued by consumers).

Combining both functions under a single agency can also allow remedies to be better crafted with an eye toward realities of the market. Solutions may lie on either or both sides of market. Cseres (2008) has argued that opening up formerly monopolistic markets, such as electricity, gas and telecommunications, has not yet resulted in expected consumer benefits. Despite increased competition, there are barriers of accessing the alternatives, such as information asymmetries, complexity in making choices, high search and switching costs and imperfect decision-making processes (UNTD, 2014). Under a single agency, a larger portfolio of policy instruments can create more flexible and tailored solutions. As a relatively blunt but broad-based instrument, tools in competition policy complements its consumer protection

counterparts which focus on smaller-scale and more industry-specific scenarios. Remedies for anticompetitive practices can thus have a consumer protection slant, and remedies for consumer protection can have a competition angle to it. In this way, regulatory bodies are better equipped in addressing industry specificities in a more finely honed way by combining both functions within a single portfolio.

The aforementioned synergies in market definition, consumer harm and remedies are likely to be even more valuable in this information age, where issues are increasingly multifaceted. Broadening the scope and tools of enforcement agencies can then allow these issues to be addressed more comprehensively and holistically. A case in point is data, which can have both competition and consumer implications. Consumers often trade data in exchange of “free” services such as emails. Despite the seemingly “low-cost” of data, data has immense potential that opens another can of worms. Increased knowledge about customers’ characteristics and preferences can facilitate price differentiation. In extreme cases, firms can absorb all consumer surplus via individualised pricing. The proliferation of data, coupled with improved computer systems and advanced algorithms, can also facilitate tacit collusion, as firms post prices online that can be easily tracked by competitors. However, transparency of prices can be beneficial to consumers, making the problem a tricky one. The significance of data in technology firms may also necessitate it as an additional consideration in mergers and/or acquisitions. For instance, in the recent acquisition of Uber by Grab in Southeast Asia, the permissibility of the transfer of data of Uber’s customers to Grab should be better clarified (McSpadden, 2018).

Another issue is the rise of platform economies, such as e-commerce sites, hotel booking websites, and phone-based applications. While platform economies deliver consumer benefits by reducing searching and transaction costs, they bring a

host of problems as well. The Internet knows no boundaries. However, some firms restrict access to Internet content based upon the user's geographical location. This is otherwise known as geoblocking. While geoblocking can be viewed as detriment to consumers by denying consumers of more choice, understanding the cost-structures of firms is also important since there should be reasons (e.g. transport costs) discouraging firms more serving a larger market.

Indeed, these issues on Internet has garnered much attention within the competition authorities in the past few years. The EU has started enforcement of the General Data Protection Regulation this May, requiring companies to spell out the use of data and provide consumers clear choices for consent. Individuals would be able to force companies to return data to them if they wanted to leave a service. The EU has also started many inquiries into platform economies such as Google Shopping, Android OS and conducted market studies on the online hotel booking sector and e-commerce. In Singapore, CCCS's also recently announced its intention to conduct a study into the online booking sector on airlines and hotels, as well as embarked a occasional paper in collaboration with Personal Data Protection Commission (PDPC). Since these issues are likely to encompass both competition and consumer concerns, having different perspectives can certainly help to address these issues better.

Aside from case analysis and market studies, combining both functions under a single agency can have spillover effects as well. Combining both functions under the same agency can raise awareness of the work of the enforcement agencies in the consumer psyche. Other than regulations, education for businesses and consumers is essential for various parties to know their rights and avenues to seek redress. A single agency is then more efficient in educating the public about both policies simulateneously.

Despite the benefits to be reaped from a dual-function agency, there are several caveats that are worth highlighting. First, caution has to be exercised because remedies can sometimes conflict with either policy. There is also a fine equilibrium to tether between consumer protection policies and competition policies. CCCS's approach towards competition issues have geared towards total welfare. Combining both functions in one agency may run the risk that competition policy tend to create a bias towards consumer welfare, instead of seeking to maximise total welfare. Moreover, while regulations are necessary, excessive regulations can create a restrictive environment for businesses to function in. While EU is blessed with a massive market that few firms are willing to forgo, excessive regulations put smaller markets more at risk by discourages businesses from entering.

Secondly, the aforementioned benefits are on the premise the there is extensive collaborative work and sharing of expertise across both areas. Anecdotal hearsay evidence suggests that there appears to be little collaborative work across departments (Huffman, 2010). This may not come as surprising. While competition and consumer policies do have some overlaps, they are still quite different. Competition cases are more rare and broadbased whereas consumer cases are more frequent and specific. Both also operates under different laws. While the scenarios that were briefly touched on in this paper illustrate some synergies, these synergies do not necessarily exist in every single case. Nonetheless, I am still a firm believer in the potential gains behind such dual-function agencies due to the value of different perspectives and increasing relevance of multi-pronged approach to address issues in this Internet Age.

In sum, competition law and consumer protection act have different emphases, approaches and tools. However, their differences can be melded together for a more

OP015

comprehensive analysis of a particular market/ sector. These synergies are expected to amplify in this Internet Age, where issues are more multi-faceted. A merger of both functions also generates efficiencies gains in consumer education and increase prominence of the regulatory body in the public consciousness. Keeping in mind to strike a balance between both policies, I believe that dual-function agencies will pave the way ahead towards the goal of a vibrant economy with well-functioning and innovative markets.

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