Nexus between Competition and Consumer Protection Policies

Abstract: This paper proposes a framework for harmonising competition and consumer protection policies that go beyond a balancing test between the Competition Act[1] and the Consumer Protection (Fair Trading) Act.[2]

Part I posits that Parliamentary intention behind the enactment of the Competition Act[3] can be interpreted to allow for an incremental drift towards a consumer protection outcomes. Part II analyses the nature of alignments and misalignments in outcomes driven by competition v consumer protection laws, and highlights the sub-optimal public welfare outcomes that can arise under some circumstances.

Part III details the proposed framework to harmonise competition and consumer protection polices to optimize public welfare. Part IV concludes that, if a binary balancing test outcome is inevitable as a last resort, the bias should drift incrementally towards consumer protection over time. Future challenges facing the CCS in its harmonization efforts include (1) the nature of its relationship with the Consumer Association of Singapore, and (2) the potential for conflicts of interests between its oversight of competition and consumer protection laws vis-à-vis the exclusion of vertical agreements to s 34 of the Competition Act.[4]

[1] Competition Act (Cap 50B, 2006 Rev Ed)
[2] Consumer Protection (Fair Trading) (Cap 52A, 2009 Rev Ed).
[3] *Supra* n 1.
[4] *Supra* n 1.

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Part I posits that Parliamentary intention behind the enactment of the Competition Act[7] can be interpreted to allow for an incremental drift towards consumer protection outcomes. Part II analyses the nature of alignments and misalignments in outcomes driven by competition v consumer protection laws, and highlights the sub-optimal public welfare outcomes that can arise under some circumstances. Part III details the proposed framework to harmonise competition and consumer protection polices to optimize public welfare. Part IV concludes that, if a binary balancing test outcome is inevitable as a last resort, the bias should drift incrementally towards consumer protection over time. Future challenges to harmonization is briefly covered.

I. Competition and consumer protection laws in Singapore

1. Huffman had conceived competition law as the "regulation of the marketplace to ensure private conduct does not suppress free trade and competition," and that "[I]t has as its goal the preservation of competition."[8]

[5] Competition Act (Cap 50B, 2006 Rev Ed)
[6] Consumer Protection (Fair Trading) (Cap 52A, 2009 Rev Ed).
[7] *Supra* n 1.
[8] Huffman, M., *Competition Law and Consumer Protection*, presentation at the Fourth Antitrust Marathon, hosted by the Irish Competition Authority, Dublin, Ireland (Oct. 27, 2009).

2. In contrast, Huffman defined consumer protection as “a body of law designed to protect a consumer’s interest at the level of the individual transaction.”[9]

3. Competition law is generally about the process of competition and the conduct of competitors. It is a “big picture,” macro market/economy approach where the optimization is holistic. While competition law may ultimately optimize consumer interests, this is not the immediate purpose of competition law. Critically, the optimization of consumer interests may not be direct and may entail “harm” to a certain class of consumers if outweighed by greater “benefit” to other classes of market participants (including but not limited to other classes of consumers).

4. For example, the “net economic benefit” exclusion to s 34 of the Competition Act of Singapore[10] (“CAS”) can permit (otherwise anti-competitive) agreements that lead to harm to a class of consumers provided the benefits to other classes of market participants outweigh the harm. Likewise for the exclusion of vertical agreements,[11] where vertical agreements are (blanket) permitted despite the possibility of harming the interests of particular classes of market participants.

5. In contrast, consumer protection starts with the consumer. It is a “small picture” micro approach focused on the individual transaction, and on whether that individual consumer’s interests have been harmed.

[9] *Ibid*.
[10] *Supra* n 1, at s 9, Third Schedule.
[11] *Supra* n 1, at s 8, Third Schedule.

6. When Parliament passed the CAS in 2004, the (then) Senior Minister of State for Trade and Industry highlighted that "the objective of the Bill is to promote the efficient functioning of our markets and hence the competitiveness of our economy."[12] This confirms the "big picture," macro market/economy approach for the CAS. However, the Minister had also stated that the CAS "adopts international best practices, and yet takes into account *our specific economic characteristics and requirements*."[13] The phase "*specific economic characteristics and requirements*" suggests that the objective is dynamic i.e. it is responsive to changes in Singapore's *specific economic characteristics and requirements*.

7. This opens the door for a broader reading of the purpose of the CAS that can allow for a closer harmonization with consumer protection law. That Parliament has transferred oversight of consumer protection from SPRING Singapore to the Competition Commission of Singapore ("CCS") reinforces this conclusion. However, this does not mean that Huffman's conclusions for the United States (that "competition serves to optimize consumers' interests" and that "the two fields share the same ultimate goal"[14]) apply to Singapore without caveats.

II. Alignments and Misalignments between competition and consumer protection laws

8. The Singapore economy has changed since the enactment of the CAS in 2004, and the underlying economic strategy is no longer (only) about attracting multinational

[12] *Singapore Parliamentary Debates, Official Report* (19 October 2004) vol. 78 at cols 863-864 (Dr Vivian Balakrishnan, Senior Minister of State and Industry).
[13] *Id*, at col. 864.
[14] *Supra* n 4.

corporations (“MNCs”) into Singapore and/or growing Government Linked Companies (“GLCs”) within Singapore.

9. As incremental sources of land and labour within Singapore plateau, the “external wing” becomes increasingly important. It is not a coincidence that the transfer of consumer protection oversight to the CCS arose from the merger of SPRING Singapore with IE Singapore. With an increasingly “external wing” focus, the merged entity (Enterprise Singapore) will be ill-positioned to oversee consumer protection *within Singapore*.

10. In contrast, the CCS’ oversight extends only domestically i.e. “agreements…which have as their object or effect…*within Singapore*,”[15] “abuse of a dominant position in any market *in Singapore*…,”[16] “mergers that have resulted…in a substantial lessening of competition within any market *in Singapore*…,”[17] and “shall not apply unless…supplier or consumer is resident *in Singapore*; or…the offer or acceptance…is made in or is sent *from Singapore*.”[18]

11. This “external wing” v “domestic” distinction further expands the space for the CCS to harmonise competition and consumer protection laws. With growth becoming increasingly externally driven, the domestic economy will stabilize, with “more of the same” growth rather than “new” growth. It is in this economic and social context that the ultimate objectives of competition and consumer protection laws can begin to

[15] *Supra* n 1, at s 34.
[16] *Supra* n 1, at s 47.
[17] *Supra* n 1, at s 54.
[18] *Supra* n 2, at s 3.

converge towards Huffman's "the two fields share the same ultimate goal."[19] Put another way, the "competitiveness of our economy"[20] will increasingly lie with the "external wing" and the objectives of the CAS will incrementally drift towards consumer protection.

12. As such, optimizing for the whole (competition law) *within Singapore* will be increasingly aligned with protecting the individual (consumer protection) *within Singapore*. The caveat is that this harmonization will have to be incremental. There is no sudden step change from one mode to another because the dominance of the "external wing" will only arise incrementally.

13. Competition and consumer protection laws overlap in that they are both concerned with "distortions in the marketplace."[21] The difference is that competition law tends to focus on the supply side of the economics equation (i.e. agreements, abuse of dominance or mergers by/between the competing suppliers) while consumer protection law tends to focus on the demand side of the economics equation (i.e. unfair practices "for a supplier, in relation to a consumer transaction…")[22]

14. However, there can be situations where competition law concerns also impact the demand side, and where consumer protection concerns also impact the supply side.

[19] *Supra* n 4.
[20] *Supra* n 8.
[21] Brill, J., "The Intersection of Consumer Protection and Competition in the New World of Privacy" Competition Policy International, Spring 2011, Vol. 7, No. 1.
[22] Supra n 2, at s 4.

15. For example, an abuse of dominance (competition law) by a software supplier that blocks the use of alternative web browsers can also be framed as an unfair practice (consumer protection). If a vendor in a certain “IT mall” spreads deceptive “facts” (i.e. falsehoods) about another competitor, that could amount to unfair practice (consumer protection) targeting a competitor rather than a consumer.

16. In the former example, the framing of the issue can lead to action either via competition or consumer protection law i.e. the CCS has an option. A complaint could arise from either a competitor or a consumer. The CCS, with oversight of both competition and consumer protection has flexibility to decide on the framing of the issue, and hence the preferred approach. In this sense, the enforcement of competition and consumer protection law can be harmonised.

17. In the latter example, competition law is unlikely to be applicable in the first instance despite the target being a competitor (unless the offending vendor happens to be “dominant” and can be caught under s 47 of the CAS). Quick action via the Consumer Protection (Fair Trading) Act[23] can potentially stop this conduct before the deceptive “facts” take root. It is not in the interest of the other competitors in the “IT mall” to actively refute the deceptive “facts,” leading to a high probability of an eventual “concerted practice”[24] to facilitate the spreading of the deceptive “facts.” In this way, consumer protection law can be a first line defence to prevent an eventual competition law violation. By harmonising with competition law, consumer protection law can be an ex-ante tool in the CCS’ toolkit. This level of coordination is unlikely to be achieved

[23] *Supra* n 2.
[24] *Supra* n 1, at s 34.

when oversight for competition law and consumer protection law is parcelled out to separate regulators.

18. While the above illustrates alignments between competition and consumer protection laws, there are also instances when there are misalignments.

19. An example would be the anti-competitive nature of the Singapore Medical Association's ("SMA") proposed fees guidelines.[25] The SMA had proposed recommending a range of fees for medical services and procedures, justified by the objective of "safeguarding the interests of patients through greater transparency of medical fees to reduce the information asymmetry between patients and medical practitioners."[26] The CCS correctly concluded that such fee guidelines will be anti-competitive under s 34 CAS i.e. from a competition law perspective, the proposed fees guidelines should be prohibited.

20. However, the information asymmetry still exists and can result in a market failure where consumers (patients) are harmed due to information deficiencies leading to a lack of bargaining power. This market failure does not go away just because the fee guidelines violates s 34 CAS. The lack of fee guidelines opens the door for deceptive and/or unfair practices. Prohibiting the fees guidelines does not solve the problem, and competition law, in itself, is inadequate for public welfare.

21. With CCS having oversight of both competition and consumer protection, a different, more holistic, conclusion (e.g. getting a 3rd party such as the Ministry of

[25] CCS/400/001/09.
[26] *Ibid*.

Health to set up the fees guidelines) might have emerged. But it requires the CCS to (1) analyse the issue from both a competition and a consumer protection perspective, (2) recognise situations where a dissonance between the two arises, and (3) take ownership to facilitate a solution where the requirements of competition and consumer protection laws are met. The operative word is “facilitate,” by virtue of the CCS’ position at the nexus of the issue.

22. Such a holistic outcome would have been highly unlikely where the oversight of competition law and consumer protection were kept separate because the CCS would have had to coordinate such efforts with another regulator (Spring Singapore) and where there could have been conflicts of priorities and interests.

III. A proposed framework that goes beyond a balancing test

23. Building upon the above, the following framework that goes beyond merely “balancing” is therefore proposed:

23.1 Step 1: Identify the “target(s)” of the conduct (is it a competitor or consumer or both?) and frame the issue from BOTH a competition and a consumer protection perspective. If executed rigorously and reflectively, this analysis will reveal the issue’s nexus between competition and consumer protection laws.

23.2 Step 2: If the conduct can ONLY be framed as a competition OR consumer protection issue, then pursue that route accordingly.

23.3 Step 3: If the conduct can be framed as BOTH a competition AND consumer protection issue, determine if the OUTCOMES of applying competition law and consumer protection law respectively are aligned or contradictory.

23.4 Step 4: If the OUTCOMES are aligned, assess which perspective is dominant and pursue the issue from this framing.

23.5 Step 5: If the OUTCOMES are contradictory, determine the ASPIRED OUTCOME that maximizes public welfare in the absence of both competition and consumer protection laws. This step can reveal the nature and extent of inadvertent/collateral negative externalities created/contributed by competition and/or consumer protection laws.

23.6 Step 6: Facilitate solutions that can achieve the ASPIRED OUTCOME through careful and nuanced adjustment to the conduct that navigates past the restrictions imposed by competition and consumer protection laws. In some cases, the power to effect this may lie within the CCS (e.g. mandating certain directions or commitments). In other cases, the CCS may need to facilitate assistance by other parties.

IV. Conclusion

24. Step 6 is important because this is where the CCS can add-value in a holistic sense. A balancing test will merely result in a binary “one or the other” outcome that sacrifices the macro market/economy for the micro consumer or vice versa. This can sometimes be uncertain and/or arbitrary (e.g. if under populist pressure).

25. Step 7, as a last resort, will be a binary outcome based on a balancing test between competition and consumer protection laws. As described in paragraphs 8-12, the bias for this balancing test will drift incrementally towards consumer protection over time. At some point in the future, a broader definition of consumer protection may emerge which will fully close the gap between competition and consumer protection.

26. The proposed framework will expand the CCS' role and influence, and will allow the CCS to develop new capabilities and competences in pursuit of greater public welfare. It will justify the additional oversight that has been given to the CCS.

27. In CCS' 2017 "Market Inquiry on Retail Petrol Prices in Singapore,"[27] the CCS indicated that it was "exploring development opportunities" with respect to the development of a "price comparison web portal…to make available more information regarding petrol prices." While the analysis of the retail petrol market and its nexus with the CAS can be deeper,[28] the 2017 report has gone beyond the CCS' 2011 report[29] and already reflects some aspects of the proposed framework above.

28. Going forward, the CCS will have to address two additional challenges arising from its new oversight of consumer protection: (1) The nature of its relationship with the Consumer Association of Singapore, and (2) the potential for conflicts of interests

[27] Competition Commission of Singapore, Market Inquiry on Retail Petrol Prices in Singapore (19 December 2017).
[28] Koh, B. T., *"Collusion", "Signalling" or "Conscious Parallelism": A Critique of the Competition Commission of Singapore's Market Inquiry on Retail Petrol Prices in Singapore* (2018) (draft JD research paper, Singapore Management University). The substantive content of the draft JD research paper is outside the scope of this paper.
[29] Competition Commission of Singapore, An Inquiry Into the Retail Petrol Market Study in Singapore (19 May 2011).

between its oversight of competition law and consumer protection law vis-à-vis the exclusion of vertical agreements to s 34 of the CAS.[30]

[30] Koh, B. T., *Reforming the Competition Act: Balancing the commercial, policy and legal issues and implications of Singapore's competition laws on vertical restraints* (2018) (draft JD research paper, Singapore Management University). The substantive content of the draft JD research paper is outside the scope of this paper.