

NEXUS BETWEEN COMPETITION AND CONSUMER PROTECTION POLICIES

Abstract

Given the complementary nature of competition and consumer protection policies, it is not surprising that numerous jurisdictions, including Singapore, have integrated the functions of both under a single agency.

In this regard, competition and consumer protection policies share the common goal of seeking to enhance consumer welfare. Where applied, both policies may each make the other more effective. Integrating both functions under a single agency also increases administrative efficiency, and makes available a wider range of remedies. This enables a dual function agency to administer superior cures that involve an optimal mix of regulatory strategies.

Notwithstanding the high degree of complementariness that exists between competition and consumer protection policies, challenges arise from integrating both functions. Consumer protection initiatives, such as the imposition of standards and release of pricing information, can negatively affect competition. Similarly, an increase in competition also raises consumer protection concerns, particularly since the motivation of market players may alter and consumers may face difficulties handling the complexities of competition. Apart from such clashes, there is the risk of one function dominating the other. Each function may perceive itself to be relatively more important, and differences in cultures and perspectives between both functions may prove problematic. To this end, this paper will propose recommendations to address these challenges.

To fully capitalise on the benefits associated with integrating both functions, this paper further submits that market inquiries are especially useful and should be utilised prudently by dual function agencies. At the same time, insofar as behavioural economics affects both competition and consumer protection, competition agencies should tap into behavioural economics and the insights it offers by examining its implications, implementing policies and taking enforcement action that are influenced by behavioural insights. This will enable interventions and remedies to be tailored in a more effective manner.

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ESSAY SUBMISSION

I. Introduction

Although competition and consumer protection policies share the common goal of seeking to enhance consumer welfare, the former addresses this by focusing on the amount of competition in markets, while the latter seeks to protect and empower consumers. Given their complementary nature, numerous jurisdictions have integrated both functions under a single agency.

This paper begins by examining the extent to which both policies reinforce each other. While both policies are largely complementary, challenges arise from integrating both. In analysing the benefits and challenges arising from integration, this paper will make relevant observations and recommendations. Recognising that the Competition and Consumer Commission of Singapore (“CCCS”) has recently taken on the consumer protection function, proposed recommendations will, where applicable, be tailored to the CCCS.

I. Benefits of assimilating the two functions

A. Consumer protection policies strengthen competition policies

First, consumer protection policies make markets more competitive. These policies, which improve transparency and information flow between consumers and suppliers, correct information asymmetries. This enhances consumer choice as consumers are

able to make well-informed decisions and choose products that are more appropriate for their needs. Competition is stimulated as suppliers compete on the merits by differentiating and pricing their products to satisfy consumers' demands.

Secondly, consumer protection policies can foreclose suboptimal forms of competition. While competition policies generally assume that consumers behave rationally, behavioural economics suggests that this may not always be so. Instead, consumers may hold behavioural biases that make it more difficult for them to access information, assess offers and to act on information.¹ For instance, consumers usually consider relative rather than absolute search costs. These biases cause consumers to incur losses in terms of cost, or purchase products they may not in fact prefer.² Further, firms may exploit consumer biases by utilising a spectrum of tactics to undermine consumers' decision-making process, including obfuscating prices. Ultimately, behavioural biases distort markets, affecting competition. Insofar as consumer protection policies help to reduce these biases through regulating the behaviour of consumers and firms, this has beneficial effects for competition.

B. Competition policies strengthen consumer protection

The risk of being displaced in competitive markets induces firms to ensure that their products are of good quality, since this enables them to obtain repeat business and lower their marketing costs.³ This incentive contributes to consumer protection by

¹ Matthew Bennett *et. al.*, "What Does Behavioural Economics Mean for Competition Policy", in 6(1) *Competition Policy International* 117 (2010).

² ESRC Centre for Competition Policy, *Behaviour Economics in Competition & Consumer Policy* 32 (2013).

³ *Supra* note 2, at 18.

reducing the likelihood of firms engaging in unfair practices, thereby alleviating the burden associated with enforcing product and service standards.⁴

Further, competition policy may lower switching costs or prevent it from increasing. Specifically, competition incentivises rival firms to help consumers reduce their switching costs, by informing them of the benefits of switching and absorbing relevant one-off costs. Dominant firms that attempt to create or increase switching costs through schemes such as loyalty rebates may also be caught by the abuse of dominance prohibition.⁵ Cumulatively, this reduces the necessity for consumer policy interventions seeking to lower switching costs.⁶

C. Administrative efficiency and more effective remedies

Dual function agencies can benefit from harmonising both functions through increased administrative efficiency.⁷ Economies of scope in monitoring, developing, and sharing of expertise across the two disciplines can be attained,⁸ and savings generated from the shared use of human resources.

Such agencies would also be better poised to identify market failures more accurately and administer superior cures that involve an optimal mix of regulatory strategies.⁹

⁴ *Id.*

⁵ Office of Fair Trading, “Switching costs – Part one: Economic models and policy implications”, Economic Discussion Paper 5 (2003), at [1.13].

⁶ *Supra* note 2, at 18.

⁷ Maureen Ohlhausen, “One Agency, Two Missions, Many Benefits: The Case for Housing Competition and Consumer Protection in a Single Agency”, in P. Lowe *et al* eds., *European Competition Law Annual 2014: Institutional Change and Competition Authorities* 22 (2014).

⁸ *Id.*

⁹ William Kovacic *et al*, “Competition Agencies with Complex Policy Portfolios: Divide or Conquer?”, *GW Law Faculty Publications & Other Works Paper* 631 38 (2013).

This is not least because a wider range of remedies are available, and may be utilised to address problems more effectively.¹⁰

II. Challenges arising from integrating both functions

Although both policies largely complement each other, challenges arise from integrating both functions.

A. Consumer protection initiatives can negatively impact competition

(1) Imposition of standards and rules

While compulsory or minimum standards such as codes of conduct are generally imposed to protect consumers, they may limit competition by establishing barriers to entry, advantaging certain firms over others, or lowering the incentive to compete.¹¹ Such excessive standards will also invariably restrict consumer choice.

Accordingly, it is submitted that, following the approaches taken by the UK and Australia, CCCS can provide guidance in ensuring that codes are well-designed and properly implemented. Such guidance can come in the form of detailed guidelines setting out how codes may be drafted. Alternatively, CCCS may consider introducing an approval scheme, similar *in principle* to the UK Chartered Trading Standards Institute's Consumer Codes Approval Scheme. Under this suggested scheme, codes

¹⁰ *Id.*, at 21.

¹¹ Commonwealth of Australia, Competition Policy Draft Report (2014), at 76.

that meet the stipulated criteria may gain formal approval by CCCS, and code members will be entitled to use and display the CCCS approved logo. This ensures that codes endorsed will not run afoul of competition laws.

(2) *Pricing information*

On one hand, pricing information benefits consumers by lowering their search and negotiation costs, reducing information asymmetry between consumers and suppliers, and potentially preventing overcharging. On the other hand, such information, even if voluntary, harms competition by limiting independent pricing decisions and sending price signals to market players.¹² This has the effect of establishing a focal point for prices in the market to converge, regardless of differences in costs, thereby effectively fostering collusion.

Given this tension, dual function agencies should adopt a principled approach to the treatment of pricing information. This means recognising the benefits of pricing information, while ensuring that firms, trade associations and professional bodies are provided with clear guidelines on what forms of pricing information are anti-competitive.

Specifically, this paper proposes the following guidelines.¹³ First, minimum prices should not be stipulated. This comports with the objective of protecting consumers, and prevents efficient suppliers which are able to charge lower prices from charging higher fees. Second, pricing information must be introduced for consumers' benefit,

¹² CCCS Guidelines on the Section 34 Prohibitions at [3.5].

¹³ Singapore Medical Association – Guidelines on Fees, CCS/400/001/09 (2009).

and not for influencing prices. Thus, pricing information should exclude irrelevant information that may undermine competition, such as costs, and what prices *should* be. Instead, pricing information should contain historical and aggregated data. Third, to prevent conflict of interest, market players and relevant trade associations should not be *solely* preparing the information. Instead, information should be prepared with the assistance of independent parties, such as organisations representing consumer interests. Fourth, market players must not be compelled to comply with pricing information. Fifth, even if pricing information complies with the foregoing, whether it should be permitted ultimately depends on the facts. This falls on various factors, including the nature of the product and its effect on competition. For instance, there may be a greater impetus for pricing information to be provided in markets involving professional services, which are characterised by larger information asymmetries.

B. Increased exposure to competition may raise consumer protection concerns

The motivation of market players may alter in ways that engender consumer protection concerns.¹⁴ Inefficient incumbents which were formerly dominant may, upon realising the possibility of being displaced, be less willing to improve on their products and reputation, but more inclined to exploit consumers who are locked in.

Equally, consumers may experience difficulties handling the complexities of competition. One problem lies with the increased likelihood for consumers to make

¹⁴ Allan Fels *et al*, "Institutional Design of Competition Authorities", OECD Roundtable on Changes in Institutional Design of Competition Authorities, DAF/COMP/WD(2014)85 (2014), at [13].

poorer decisions when provided with more options.¹⁵ This arises because consumers may lack sufficient knowledge on the impact of an increase in competition, and potentially overestimate the difficulties involved in switching suppliers.¹⁶ Some consumers may refuse to switch suppliers because of the perception that search costs are high, or consider switching costs to be high.¹⁷ In this connection, the liberalisation of markets involving public utilities in several other jurisdictions has raised concerns about the challenges consumers face in understanding and selecting between complex pricing plans.

Accordingly, there is greater room for consumer protection policies for newly liberalised markets. Specifically, policies concerning transparency and consumer education to increase the provision of market information may be beneficial. Notably, given that Singapore's retail electricity market will be fully open to competition in the second half of 2018, the aforementioned consumer protection policies will be pivotal.

C. Risk of one function dominating another

First, each function may perceive itself to be relatively more important. Competition enforcement work, for instance, is usually larger, more expensive and complicated, while consumer protection issues are more likely to resonate with the general public.

¹⁵ Armstrong, "Competition Policy International: Interactions Between Competition and Consumer Policy", 4(1) *Competition Policy International* 97 130 (2008).

¹⁶ Waterson, "The Role of Consumers in Competition and Competition Policy", 21(2) *Int'l J. Indus. Org.* 129 (2003), at Table 7.

¹⁷ *Id.*

Differences in cultures and perspectives between both functions may prove problematic. Specialists trained and practising in their field may favour a policy that derives from their speciality, since they lack expertise in the other area. There is a risk that this may, for instance, result in policies that overemphasise consumer protection at the expense of competition concerns,¹⁸ as in the example of setting price guidelines.

One approach to allay these concerns involves adopting a formal integrated structure such that integrated operating units combining both competition and consumer protection disciplines are created.¹⁹ This approach, which was adopted by the UK's Office of Fair Trading, creates different units responsible for different markets, such as Goods, Infrastructure and Consumer units. Such an organisational structure is beneficial as it enables whole markets to be scrutinised more carefully with its conceptual and organisational fusion. It also has the corollary effect of creating awareness that neither function should dominate the other. However, one main limitation is that this may result in several separate units being created, which may not be in the interests of efficiency.

Alternatively, an independent division can be established to assist with policy integration. This division can work with the competition and consumer protection divisions to resolve tensions that arise, and ensure that neither function overpowers the other. In the US, the Bureau of Economics, which assumes such a role, has been applauded to be a "major source of [the FTC]'s policy integration".²⁰ Locally, the Business and Economics Division in the CCCS appears to take on a similar role by

¹⁸ *Id.*

¹⁹ *Id.*, at 44.

²⁰ Kovacic *et al*, *supra* note 12, at 40.

collaborating closely with the Legal, Enforcement and Consumer Protection Divisions to ensure, *inter alia*, “fair” and “thorough” execution of responsibilities.²¹ Unlike the earlier approach where integrated units are established, separate divisions enable both consumer protection and competition perspectives to be presented to decision makers, with both functions being accorded with equal regard.

Nonetheless, to prevent silos from being created by the operation of separate divisions, two recommendations are proposed. Preliminarily, while the CCCS’s Legal and Enforcement Divisions handle both consumer protection and competition issues, consumer protection often goes beyond enforcement and includes a host of other instruments, including standards and codes of conduct. This may suggest why a separate Consumer Protection Division exists.

First, where appropriate, cross-division teams may be established in cases where integration enhances the analysis. This encourages the cross-fertilisation of ideas to innovate effective remedies based on a broad perspective. This approach has been adopted by the US FTC.²² Second, divisions should be given the opportunity to provide inputs on guidelines and guides introduced by other divisions. This minimises tension between the two functions.²³ Anti-competitive effects from consumer protection guidance, for instance, will be avoided or kept at a minimum.

²¹ CCCS, “CCCS Divisions”, <https://www.cccs.gov.sg/about-cccs/organisation-structure/cccs-divisions> (accessed 27 May 2018).

²² Julie Brill, “The Future of FTC Jurisdiction over Antitrust and Consumer Protection: A Commentary”, https://www.ftc.gov/sites/default/files/documents/public_statements/future-ftc-jurisdiction-over-antitrust-and-consumer-protection-commentary/121127futureftcjurisdiction.pdf (accessed 27 May 2018) at p 3.

²³ Ohlhausen, *supra* note 7, at 30.

III. Capitalising on the strengths of an integrated approach

A. Recognising the value of market inquiries

Given that market inquiries are capable of accommodating a wide perspective, this enables features of competition and consumer protection to be combined, and is touted as a “natural vehicle to highlight the synergies” from the jurisdiction that a dual mission agency possesses over both areas.²⁴ Apart from constituting a lead-in for competition advocacy, market inquiries are useful in examining cases where the market may not be functioning effectively for consumers, and no clear case of infringement of competition laws arise. For instance, market inquiries can produce insights on the existence of consumer behavioural biases, or the existence of unfair trading practices for which competition policies would be irrelevant. Further, remedies and recommendations can be proposed on a forward-looking basis.

For these reasons, it is submitted that market inquiries are especially useful and should be utilised prudently by dual mission agencies. Locally, the CCCS has collaborated with consultants to assist in its market inquiries. While consultants are useful where specific expertise may be lacking, it should be noted that relying on staff

²⁴ OECD, “Market Studies”, DAF/COMP(2008)34 (2008).

to conduct market inquiries enables the benefits and knowledge to be retained by the CCCS.²⁵

B. Tapping into behavioural economics

While some agencies have been receptive towards behavioural economics and the insights that it offers, others have been more “cautious” and less willing to embrace it.²⁶

As aforementioned, behavioural biases can affect competition. In the realm of pricing advertisements, for instance, firms have relied on “drip pricing” that may lead to behavioural biases such as anchoring, in order to prevent consumers from choosing the optimal option.²⁷ Significantly, behavioural economics may also demonstrate that too much regulation may not be useful. This arose in the case in the UK OFT’s finding that simple information on food nutrition results in more favourable outcomes than detailed information.²⁸

Insofar as behavioural economics affects both competition and consumer protection, it is submitted that dual mission agencies, including the CCCS, should tap into this burgeoning field by examining its implications, implementing policies and taking enforcement action that are influenced by behavioural insights. This will enable interventions and remedies to be tailored in a more effective manner.

²⁵ *Id.*

²⁶ Christopher Decker, “Concepts of the Consumer in Competition, Regulatory, and Consumer Protection Policies”, 13(1) J. Com. L. & Econ. 151 167 (2017).

²⁷ OECD, “Use of behavioural insights in consumer policy”, DSTI/CP(2016)3/FINAL at 25.

²⁸ Bennett, *supra* note 1, at 130.

IV. Conclusion

While competition and consumer policies are largely complementary, challenges arise in integrating both. Insofar as dual mission agencies stand at the interface of competition and consumer protection, it is crucial to be mindful of the opportunities and challenges presented. To this end, it is hoped that the proposed recommendations will be of assistance to dual mission agencies.

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