

Harmonising Competition and Consumer Protection: Two Roles One Agency

Abstract

Competition law and consumer protection law share a common goal of enhancing consumer welfare and removing market distortions. The two work in a complementary manner - competition law addresses market distortions from the supply side while consumer protection law targets market distortions from the demand side. While the Competition and Consumer Commission of Singapore (“**CCCS**”) has taken on an additional consumer protection role from 1 April 2018 onwards, this regulatory agency is not in fact new to the table on this front – in its former iteration as the Competition Commission of Singapore, it had already been concerned with pursuing consumer protection goals, both from the supply and demand side.

Despite these commonalities, there is a potential for conflict between the policy objectives underlying competition and consumer protection law. This essay makes three main suggestions to address potential conflicts between competition and consumer protection objectives, and to further harmonise the competition and consumer protection roles of CCCS:

- (a) Adopt an expansive reading of the NEB Exception to take into account consumer protection concerns in competition law cases. This framework clarifies the specific and narrow situation where consumer protection objectives can have preference over competition concerns when they conflict, and allows CCCS to manage the dual pursuit of competition and consumer protection objectives in a principled manner.

- (b) Conduct joint investigations in appropriate cases where there are clear concerns under both the Competition Act and the Consumer Protection Fair Trading Act (“**CPFTA**”) for greater administrative efficiency.

- (c) Give CCCS powers under the CPFTA to issue infringement decisions and financial penalties. This bridges the existing disharmony in the enforcement powers under the Competition Act and CPFTA, and leads to more effective and efficient enforcement of both competition and consumer protection concerns by CCCS.

(300 words)

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The Competition and Consumer Commission of Singapore's ("**CCCS**") Mission is stated as "Making markets work well to create opportunities and choices for businesses and consumers in Singapore". The reference to "consumers" was contained within the Mission prior to CCCS' formation on 1 April 2018. Premonition? Perhaps!

Ensuring choices for consumers is very much tied in to consumer protection. Choices for consumers and protection for them is a by-product of ensuring a fair and vibrant economy without anti-competitive behavior. Arguably, hence, whilst CCCS has only now been clothed with the wider function of consumer protection given the new remit of promoting fair trading practices and preventing unfair trading under the Consumer Protection (Fair Trading) Act¹ ("**CPFTA**"), it is not entirely new – it has always been concerned with protecting consumers. The integration of competition and consumer protection within the same agency is not unprecedented, and exists in various countries, including the US, UK, and Australia.

The question remains whether there will be substantial changes in the manner in which enforcement will be managed, whether as regards competition policy or consumer protection. The consistent rhetoric from CCCS is that there will be no major changes in approach nor enforcement, with the two taking parallel paths. This is fair comment given that even established international agencies which manage both functions have largely

¹ Cap 52A, 2009 Rev Ed.

kept them separate. Yet, there is room for some degree of harmonisation. This paper provides a high-level discussion of some suggestions.

I Competition and Consumer Protection – New for CCCS?

It is widely acknowledged that competition policy and consumer protection share a common goal of enhancing consumer welfare and removing market distortions. The two are different sides of the same coin - competition policy addresses markets from a supply side and ensures that markets function effectively to deliver choices to consumers; consumer protection addresses markets from a demand side by ensuring that consumers are better informed and empowered to exercise choice in a competitive marketplace,² and also builds consumer trust in the workings of the market (e.g. by preventing fraud and unfair trading practices).³

This complementary role has manifested itself in work undertaken by the then-Competition Commission of Singapore (“**CCS**”) at different times, and most recently in its market studies. In its 2017 market inquiry report on formula milk, one of CCS’ key recommendation was a call to improve consumer awareness by reducing information asymmetry relating to the nutritional content of formula milk and by highlighting differently-priced formula milk products available on the market. The aim was to equip consumers with the ability to make more effective choices. This study demonstrated the function CCS performed in looking at demand-side factors, which in turn had a strong play from the consumer protection perspective.

² OECD Policy Roundtable, ‘The Interface between Competition and Consumer Polices’ (2008) <<http://www.oecd.org/regreform/sectors/40898016.pdf>> accessed 31 May 2018

³ William E. Kovacic, ‘Competition Policy, Consumer Protection and Economic Disadvantage’ (2007) 25 Washington University Journal of Law & Policy 101

In other words, whilst seemingly new, it is submitted that CCS is not in fact new to the table with its new clothes as CCCS when it comes to consumer protection. There are some added elements, such as unfair trading or misleading statements, but these are all founded in ensuring consumer protection – getting the demand side clarified and effective.

II Conflicts between the Objectives of Competition and Consumer Protection Laws?

Although consumer protection and competition laws complement each other in primarily furthering consumer welfare, the two do conflict.

The conflict is best illustrated where increased price transparency is advocated. In February 2009, CCS expressed the view that price guidelines would have anticompetitive effects - price convergence, restricting independent pricing decisions and signaling likely charges.⁴ The Singapore Medical Association (“**SMA**”) had in seeking guidance from CCS in relation to fee guidelines for medical services and procedures argued that the guidelines would reduce information asymmetry between consumers and medical practitioners and enable consumers to make informed choices,⁵ thus ensuring consumer protection. However, CCS took the view that the price guideline would contravene the Competition Act.⁶

The Financial Advisers Case⁷ provides another illustration of the conflicting objectives. Here, ten financial advisers were found to have infringed the Competition Act

⁴ CCS Decision 400/001/09 *Singapore Medical Association – Guidelines on Fees* (2009) at [89].

⁵ *Ibid*, at [60]

⁶ Cap 50B, 2006 Rev Ed.

⁷ CCS Decision 500/003/13 *Financial Advisers* (2016)

by collectively pressurising a competitor to withdraw its offer of a 50% commission rebate on life insurance products provided online. The parties submitted that the agreement did not restrict competition as it was intended to protect the consumer and prevent distortion to the consumer's decision-making process, and further arguing that the use of a substantial discount upfront to induce consumers to purchase life insurance was unethical. CCS held that even if the parties intended to pursue these objectives, such considerations were "irrelevant" in assessing whether the conduct had the object of restriction of competition in Singapore, seemingly strongly advocating that consumer protection could not justify anti-competitive conduct.

Conflict also arises in non-price scenarios where standards are set. In the US decision of *National Society of Professional Engineers v. US, the National Society of Professional Engineers* (the "**Society**"), the Society sought to defend a rule prohibiting members from submitting competitive bids for engineering services on the basis that overly vigorous competition would lead to cost cutting and produce inferior engineering work which endangered public safety.⁸ This justification was rejected on the basis that the rule violated Section 1 of the Sherman Act. The Supreme Court affirmed the decision, noting that the Society's action "prevents all customers from making price comparisons...and imposes the Society's views of the costs and benefits of competition on the entire marketplace."⁹ Whilst one can see why this finding accords with competition law principles, it is arguable that without some form of self-imposed restraint by the Society, rampant competition could indeed result in the contemplated consequences. In 2016, the Singapore government initiated a review of its procurement practices for

⁸ *National Soc'y of Prof. Engineers v. United States*, 435 U.S. 679 (1978)

⁹ *Ibid*, at 435.

construction projects,¹⁰ which was triggered by a large number of workplace fatalities in construction sites. The recent 2017 viaduct collapse which killed one worker and injured ten has lent renewed urgency to the review, with reports suggesting that construction projects were won on the basis of the lowest bid without regard to safety and quality.¹¹ Arguably, this reflects unregulated competition leading to a less-optimal outcome for consumers. The Government's step is thus to be welcomed.

Even as we identify conflicts, we note a shift in the CCCS approach. In the 2011 market inquiry into the retail petrol market, CCS seemingly took a softer stance than in the SMA decision by accepting that price transparency was beneficial in allowing consumers to make effective decisions, whilst recognising the risk that it could allow competitors to collude.¹² In 2017, CCS seems to have progressed further and recommended a price website to be established in the retail petrol market. This approach reflects a competition regulator bearing in mind consumer considerations.

III The Future

It is early days. Agencies across the world with the dual functions continue to evolve. So it will be with CCCS. At a very high level, some suggestions are put forth here.

i. Assessing Consumer Protection Through Net Economic Benefits ("NEB") Exception

One key challenge that arises when consumer protection concerns are pursued together with competition objectives is the risk of inexorably expanding the range of

¹⁰ Kenneth Cheng & Louisa Tang, "Viaduct Collapse: Firm's Record, Lowest Bid Wins Tender", Today (Singapore, 01 August 2017) <<https://www.todayonline.com/singapore/viaduct-collapse-or-kim-peow-won-contract-due-lowest-tender-price-and-good-track-record>> accessed 26 May 2018.

¹¹ *Ibid.*

¹² CCS, "An Inquiry into the Retail Petrol Market Study in Singapore" (19 May 2011) at 9.

concerns that need to be examined. Competition law is more narrowly focused on economic efficiency while consumer protection concerns could involve significantly broader inquiries of what practices are unjust, and myriad ways through which consumers could be protected, including price transparency, safety, and vulnerable consumers, which risks embarking “on consideration of social mores and political issues without any meaningful limiting principle”.¹³

The NEB Exception allows CCCS to manage the dual pursuit of competition and consumer protection objectives in a principled manner. The NEB Exception allows for agreements to be excluded from the Section 34 Prohibition if they contribute to improving production or distribution, or promote technical or economic progress. This review has tended to look at objective economic efficiencies¹⁴ which result in cost savings, greater consumer choices and benefits to the Singapore economy. However, there have been cases in the EU¹⁵ where the NEB Exception (which is worded similarly to Article 101(3), TFEU) was applied in a broader manner to consider environmental benefits,¹⁶ and raising professional and ethical standards in an industry.¹⁷ It is submitted that CCCS can and should adopt a broader application of the NEB Exception to also consider consumer

¹³ Maureen K. Ohlhausen, ‘One Agency, Two Missions, Many Benefits: The Case for Housing Competition and Consumer Protection in a Single Agency’ (2014) <<https://www.ftc.gov/public-statements/2014/10/one-agency-two-missions-many-benefits-case-housing-competition-consumer>> accessed 31 May 2018.

¹⁴ CCS 400/001/16 *Proposed Joint Venture between Deutsche Lufthansa AG and Singapore Airlines Limited* (2016) at [122]

¹⁵ See generally, Christopher Townley, *Article 81 EC and Public Policy* (1st edn, Hart Publishing 2009)

¹⁶ *CECED* (Case IV.F.1/36.718. CECED) Commission Decision 2000/475/EC [2000] OJ L187/47

¹⁷ T-193/02 *Laurent Piau v Commission* [2005] ECLI:EU:T:2005:22

protection concerns. This can be applied both in the context of anti-competitive agreements, and also in the context of abuse of dominance cases.¹⁸

Considering consumer protection objectives under the NEB Exception ensures that competition concerns are not undermined, as the framework only allows a specific and narrow situation where consumer protection objectives can have preference over competition concerns when they conflict. Given the NEB Exception's indispensability limb, consumer protection concerns may only trump competition concerns if the relevant restrictions are absolutely indispensable to achieving the consumer protection objectives, without the possibility of eliminating competition in respect of a substantial part of the goods or services in question. This provides a principled approach to considering consumer protection concerns.

ii. Conducting Joint Investigations

Separately and practically, the writers recommend that CCCS' two arms should work together to conduct joint investigations in appropriate cases. CCCS is empowered under the Competition Act and the CPFTA to launch investigations where there are reasonable grounds for suspecting that the Competition Act or the CPFTA have been violated.¹⁹ It would be administratively efficient for CCCS to conduct a joint investigation in cases where concerns arise under both the Competition Act and the CPFTA. It is contemplated that this would see a common case team, duly trained over time, managing the matter.

¹⁸ See C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] ECLI:EU:C:2012:172 where the ECJ recognised the possibility of broadly applying Article 101(3) TFEU limbs as a defence for abuse of dominance allegations.

¹⁹ Competition Act s 62; CPFTA s 12G

Joint investigations are currently the practice of the US Federal Trade Commission (“**FTC**”). For example, in 2010, the competition and consumer protection divisions of the FTC conducted a joint investigation into Intel Corporation’s conduct in the market for computer chips.²⁰ A common case team was formed with members from both divisions to undertake the market analysis in that case.

While conducting joint investigations, it is important to note that CCCS’ powers in respect of its competition role and its consumer protection role derive from two different legal sources (i.e. the Competition Act and the CPFTA) which are distinct and have evolved separately. Accordingly, although CCCS may conduct joint investigations, it must ensure that its final analysis with respect to whether the Competition Act or the CPFTA has been contravened should fit within the legal principles and requirements prescribed by the respective Acts to ensure legal certainty in both competition and consumer protection law. Yet this is but an interim concern and may resolve itself over time with a single legislation being introduced, or simply where sufficient harmonisation is achieved even as the two legislation remain independent.

iii. Enforcement Powers under the CPFTA

While conducting joint investigations will allow for concerted solutions to manage both anti-competitive conduct and unfair trading practices, the current disharmony in the enforcement powers under the Competition Act and the CPFTA undermines the effectiveness of such action. In particular while the CPFTA requires CCCS to apply to the

²⁰ Julie Brill, ‘The Future of FTC Jurisdiction over Antitrust and Consumer Protection: A Commentary’ (Federal Trade Commission, 30 September 2011) <<https://www.ftc.gov/public-statements/2011/09/future-ftc-jurisdiction-over-antitrust-and-consumer-protection-commentary>> accessed 30 May 2018

Court for reliefs against a supplier which has engaged in unfair practices,²¹ the Competition Act allows CCCS to issue infringement decisions and, importantly, impose financial penalties for anti-competitive infringements. This practically means that where both anti-competitive conduct and unfair trading practices surface during an investigation, CCCS will have to pursue two different enforcement strategies, which results in a waste of resources and undermines any purported efficiencies contemplated through the creation of the single agency. To contrast, the Australian Competition and Consumer Commission (“**ACCC**”) has the power to impose a financial penalty upon an undertaking for both anti-competitive conduct and unfair trading practices.²² Whilst maintaining two streams of reviewers, there is merit in following Australia’s approach and the writers recommend that legislative amendments should be made in the mid-term to harmonise CCCS’ enforcement powers under the CPFTA and the Competition Act to enable CCCS to issue infringement decisions and financial penalties where suppliers have engaged in unfair practices.

IV Conclusion

Housing the consumer protection and competition regulatory functions within the same agency in Singapore is a positive step towards achieving a fair, balanced and more cohesive management of supplier side and demand side issues. Yet, it is recognised that a single unified regulator may not result in any fundamental shifts in the policy underpinnings of Singapore’s competition laws. There are expectations that there could be a shift from the total welfare standard to a more consumer-centric welfare standard as

²¹ CPFTA s 9

²² ACCC, “2018 ACCC Compliance and Enforcement Policy and Priorities” (February 2018), <<https://www.accc.gov.au/publications/compliance-and-enforcement-policy>> accessed 30 May 2018

competition concerns are reviewed, given the presumption that CCCS has traditionally only looked to total welfare potentially at the expense of consumer welfare. Yet, one need not be achieved at the expense of the other – the two roles can effectively be enforced in a parallel manner even as they occasionally twin, but never one at the detriment to the other. Definitive harmonisation is not critical to CCCS being effective as it moves forward and manages both roles as reflected by illustrations from the FTC and the ACCC, amongst others.

All said, time will tell what benefits will result from the unified agency, which with its new-found powers, is able to see and hear from a wider perspective, and perhaps truly bring about a fairer, transparent and more competitive environment in Singapore regardless of which end of the spectrum one looks at the issue from.

(2477 words)