

## **Nexus between Competition and Consumer Protection Policies**

**Abstract:** The wisdom of housing competition and consumer protection policies in a single agency finds its root in the recognitions that these policies have a common, overarching goal for enhancing consumer welfare and that when applied properly, they reinforce one another.

To help shed light on how an agency may take advantage of its combined role to make markets work well for both businesses and consumers, this article will first discuss the opportunities and benefits offered by housing two functions in a single agency. Experiences in other jurisdictions demonstrate that dual-function agencies are capable of approaching competition and consumer protection issues in a unified manner. For instance, where unfair commercial practices misleading or deceiving consumers are used as tools to hinder competition, convergence of enforcement efforts offers the most effective and appropriate solution. In conducting market studies and advocating the policies, a single agency again has the strength of carrying out both competition and consumer protection functions in a comprehensive and balanced manner.

It would however be unrealistic to assume that the means and ends of competition and consumer protection law are always aligned. Potential collusion risks could arise from a consumer protection regime; or conversely, pro-competitive market liberalisation efforts could put the consumers at risk. Ways to address these challenges are found in appropriate institutional design, setting overarching policy or legal principle to guide the resolution of conflicts; and obtaining access to and co-ordination of the relevant skills and expertise.

At the end, this article will discuss how the businesses and activities in the internet space may give rise to both competition law and consumer protection concerns and consider the benefit of addressing these issues with tools from the two policies.

## **1. Introduction**

As widely acknowledged, competition and consumer protection policies speak the same language; they have a common, overarching goal for enhancing consumer welfare.<sup>1</sup>

Around the world, there are multiple jurisdictions which house competition and consumer functions in a single agency. To name a few, there are the Federal Trade Commission ("**FTC**") in the US, Australian Competition and Consumer Commission ("**ACCC**"), Competition and Markets Authority ("**CMA**") in the UK, Irish Competition and Consumer Protection Commission and Korea Fair Trade Commission.

The wisdom of merging the two functions finds its root in the recognition that applied properly, competition policy and consumer policy reinforce one another.<sup>2</sup> It would however be unrealistic to assume that the means and ends of competition and consumer protection law are always aligned; potential tension could arise between these two bodies of law.

To help shed light on how an agency may take advantage of its combined role to make markets work well for both businesses and consumers, this article will first discuss the opportunities and benefits offered by housing two functions in a single agency, and

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<sup>1</sup> OECD Policy Roundtables (2008) on the Interface between Competition and Consumer Policies, available at <http://www.oecd.org/daf/competition/40898016.pdf>

<sup>2</sup> Ibid.

then identify the challenges brought by such integration and the proposed manner to address these challenges. Lastly, it will suggest an area in the market that can be better addressed using both competition and consumer policies.

## **2. Opportunities and benefits offered by housing two functions in a single agency**

Experiences in other jurisdictions demonstrate that dual-function agencies are capable of approaching competition and consumer protection issues in a unified manner. For instance, where unfair commercial practices misleading or deceiving consumers are used as tools to hinder competition, convergence of enforcement efforts offers the most effective and appropriate solution.

Reference could be made to FTC's settlement with Intel Corp. in the US. in 2010. Intel held monopoly power in the market for Central Processing Units ("**CPUs**"). When its monopoly was threatened by other CPU manufacturers, Intel allegedly adopted various methods to block or slow the adoption of its competitors' products, including punishing computer manufacturers for using its competitors' products, redesigning its compiler and library software to reduce the performance of competing CPUs and making deceptive statements about the performance of its CPUs relative to its competitors' products. FTC's redress used competition remedies (which prohibited Intel from taking retaliation actions) as well as consumer protection measures (which required Intel to make appropriate disclosures in respect of the performance of its product).<sup>3</sup>

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<sup>3</sup> Decision and Order, Intel Corporation, Docket No. 9341, available at <https://www.ftc.gov/sites/default/files/documents/cases/101102inteldo.pdf>

In addition to enforcing the laws, other key tools for promoting competition and consumer polices include conducting market studies and advocating the policies. Again, a single agency has the strength of carrying out these functions in a comprehensive and balanced manner.

ACCC in Australia regularly conducts market studies that inform consumers and encourage debates over competition and consumer matters. A report released by ACCC in December 2017 on Australia's new car retailing industry<sup>4</sup> noticed that car manufacturers had failed to provide to independent repairers technical information with the same breadth, depth and timeliness as those made available to their own dealers, and thus created barriers on the competition in the aftermarkets for the repair and servicing of new cars. Notably, in the same study ACCC observed that car manufacturers' complaints handling systems and policies were preventing consumers from obtaining the remedies to which they were entitled under the Australian consumer law, and consumers were not receiving accurate information about the fuel consumption or emissions performance of new cars.

Coincidentally, the Competition Commission of Singapore ("**CCS**") (the predecessor of Competition and Consumer Commission of Singapore) published its report of market inquiry into the supply of car parts in Singapore in December 2017. CCS also assessed the independent repairers' ability to compete with the car dealers' authorised workshops and identified competition concern arising out of the warranty restrictions imposed by car dealers requiring consumers to service or repair their cars exclusively at the authorised workshops. At the risk of speculating, if CCS had taken up the

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<sup>4</sup> ACCC (14 December 2017), a market study on New Car Retailing Industry, available at [https://www.accc.gov.au/system/files/New%20car%20retailing%20industry%20final%20report\\_0.pdf](https://www.accc.gov.au/system/files/New%20car%20retailing%20industry%20final%20report_0.pdf)

consumer protection mandate at the time of the inquiry, there might be opportunities for it to venture into other consumer issues that were pressing in the industry in the same way as ACCC conducted its market study.

Moreover, experiences of the CMA in the UK demonstrated that its dual competencies enable it to offer thorough recommendations to other executive branches of the government and contribute to legislative and policy changes.

In response to a reference made by the Gas and Electricity Markets Authority in 2014, the CMA conducted an investigation into the energy market and brought in various measures to increase competition and help consumers switch to better deals. The government took on board many of CMA's recommendations, among which include proposal of technical changes that would result in reduction of consumers' bill, reform of governance arrangements for gas and electricity industry and introduction of new legislation.<sup>5</sup>

These real-life examples are consistent with the observation of the OECD Competition Committee: "an integrated authority may benefit from a stronger, more unified voice and greater external viability among the public; consequently, it may be easier for the authority to gain attention from elected officials and the media and to raise awareness concerning its activities".<sup>6</sup>

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<sup>5</sup> See Department for Business, Energy & Industrial Strategy (February 2018), Government Response to the Competition & Markets Authority Energy Market Investigation, available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/683926/cma-energy-market-investigation-government-response.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/683926/cma-energy-market-investigation-government-response.pdf)

<sup>6</sup> Key points of the Roundtables on Changes in Institutional Design, Summary Record: Annex to the Summary Record of the 123<sup>rd</sup> Meeting of the Competition Committee held on 15-19 June 2015, OECE 16-18 June 2015, DAF/COMP/M(2015) 1/ANN0/FINAL, available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/M\(2015\)1/ANN9/FINAL&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/M(2015)1/ANN9/FINAL&docLanguage=En)

### 3. Challenges brought by integration

One however should not lose sight of the fact that there are various circumstances illustrating how these policies can create challenges for each other. In a paper prepared by Allan Fels and Henry Ergas for the discussion of institutional changes in the OECD Competition Committee, it is observed that opening a previously highly regulated market to competition may well raise new issues for consumer; an example given was that many OECD countries faced new consumer protection issues as a result of the liberalisation of financial markets, which, however beneficial it may have been, exposed consumers to new risks and difficulties.<sup>7</sup>

In the same way, consumer protection policies, however, well-intentioned they may be, can have adverse consequences for competition, with the ultimate outcomes being contrary to the goals that both consumer and competition policy should seek.<sup>8</sup> A classic example of such conflict is provided in *California Dental Association v FTC* 526 US 756 (1999). The US Supreme Court was asked to consider the California Dental Association's ("**CDA**") Code of Ethics which prohibits false or misleading advertising. Specifically, dentists were required to disclose all variables and relevant factors in relation to the discounts they offer; advertising claims as to the quality of dental services were categorized as likely to be false or misleading on the basis that they were not susceptible to measurement or verification. FTC was of the view that such code, as aggressively enforced by the CDA, was anticompetitive because it effectively prohibited truthful and non-deceptive advertising. The Ninth Circuit affirmed

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<sup>7</sup> Note by Allan Fels and Henry Ergas (18 December 2014), Institutional Design of Competition Authorities, DAF/COMP/WD(2014)85, available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD\(2014\)85&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2014)85&doclanguage=en)

<sup>8</sup> Ibid.

the FTC's opinion. The decision was overturned by the Supreme Court on the basis that the assessment should have been carried under a complete rule of reason, i.e. a more thorough enquiry into the consequences of those restraints.

Of particular interest to this article is FTC's decision to intervene in a matter which was on its faces aimed for consumer protection. A reasonable interpretation of the Supreme Court's rule would be that the FTC's analysis of the association's activities did not strike the appropriate balance between competition and consumer protection interests.<sup>9</sup>

As illustrated by the above US authority, wearing two hats at the same time could present the dilemma of balancing competition law concerns against consumer protection concerns. In the event of conflict, the agency is faced with the difficult question of whether the principle of one law should take precedence over the other.

#### **4. Addressing the challenges**

Instead of dealing with the tension between competition law and consumer protection on an ad hoc basis when the issue arises, it is preferable to have mechanisms in place to ensure that potential conflicts can be avoided, identified and managed effectively.

The first step to establishing such mechanism would be to provide an appropriate institutional design. It is by no means suggested that all dual-function agencies adopted the same structure or assumed the same extent of responsibilities in both competition and consumer protection policies. For example, when Office of Fair Trading ("**OFT**") and Competition Commission merged into the CMA in the UK, most

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<sup>9</sup> Julie Brill (2011), The Intersection of Consumer Protection and Competition in the New World of Privacy, Competition Policy International Volume 7, Number 1 Spring 2011

of OFT's consumer functions were transferred to other organisations while CMA retained the expertise to enforce unfair terms in consumer contract regulations and focused on high impact consumer enforcement cases. Nevertheless, CMA continued to put consumers' interest at the heart of everything it does. It is recognised that some aspects of consumer protection (such as product safety) may not have a close nexus with competition policy. There is every reason for an agency to focus on areas where greater synergy can be generated from the integration of competition and consumer protection policies, as opposed to diverting its resources across a wide range of mandates which may have the potential of confusing its priorities.

Secondly, a clear overarching policy or legal principle will be helpful to the resolution of conflicts. A unique feature of the Australian competition law is that parties wishing to engage in potentially anticompetitive conduct may seek advance authorisation on public benefit grounds. For example, Medicines Australia Inc (a national association of firms and companies involved in the manufacturing and marketing of prescription medicines in Australia) sought and obtained from the ACCC authorisation for its revised Code of Conduct which sets standards for, among other matters, the advertising of prescription medicines and other promotional activities.<sup>10</sup> The claimed public benefits in relation to such code include its effect on enhancing compliance with the prohibitions on misleading and deceptive advertising conduct and encouraging compliance with prohibition on direct-to-consumer advertisement. Contrasted with the *California Dental Association* case in the US, unfruitful enforcement action is avoided where a methodology exists to inform the agency of the correct weight to be attributed to competition policy and consumer protection policy respectively.

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<sup>10</sup> Application by Medicines Australia Inc [2007] ACompT 4



Lastly, it is important to recognise that competition law and consumer protection cases require different legal, economic analysis and expertise. As observed at the roundtable discussions of OECD on Changes in Institutional Design, most multifunction authorities have separate operating divisions across policy functions (e.g. consumer division, competition division, energy regulation division) but with a variety of mechanism to help co-ordinate these functions, such as: interaction at management/decision-making levels (e.g. senior management committees, common decision-makers), sharing a common pool of economic or legal expertise, assembling cross-functional teams to work together on specific cases or projects where the situation calls for it.<sup>11</sup> Apparently, the ability to co-ordinate the experts and operational team internally and ensuring access to the relevant skills and knowledge are the keys to addressing any challenges.

## **5. An area that can be better addressed using both competition and consumer policies**

While there are endless possibilities presented by the integration of competition and consumer policies, one area that stands out for immediate consideration is the businesses and activities in the internet space. New businesses models evolved in the form of online retailers, social media platforms, fintech operators etc. Technologies have been developed to collect consumers' data, conduct data analysis and to carry out behaviourally targeted marketing and advertising.

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<sup>11</sup> Key points of the Roundtables on Changes in Institutional Design, Summary Record: Annex to the Summary Record of the 123<sup>rd</sup> Meeting of the Competition Committee held on 15-19 June 2015, OECE 16-18 June 2015, DAF/COMP/M(2015) 1/ANN0/FINAL, available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/M\(2015\)1/ANN9/FINAL&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/M(2015)1/ANN9/FINAL&docLanguage=En)

These developments have caused difficulties in the traditional competition law analysis such as the definition of markets and the assessment of market powers, and hence complicated merger control and assessment of anti-competitive behaviour. More often than not, the practices of these businesses also give rise to consumer protection concerns, such as in areas of data privacy and advertising.

As early as 2010, OFT in the UK conducted a market study on Online Targeting of Advertising and Prices<sup>12</sup> and observed that in relation to the use of tracking system to collect information about consumers and their browsing behaviour, a combination of privacy regulation, Data Protection Act 1998 and associated codes of good practice, Consumer Protection from Unfair Trading Regulations 2008 could be applied to protect consumers. In respect of the application of competition law, OFT noticed that the tracking of consumers across different websites may involve information exchange between competing firms and also, competition law may be infringed by dominant firms if they price discriminate via price targeting.

In 2014, the acquisition of WhatsApp by Facebook was considered by the FTC. While the merger did not give rise to competition law concerns, FTC notified both firms that it expected them to honour WhatsApp' promises about the limited nature of the data it collected, maintained and shared with third parties, which exceeded the protections promised by Facebook to its users.<sup>13</sup>

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<sup>12</sup>[http://webarchive.nationalarchives.gov.uk/20140402182803/http://oft.gov.uk/shared\\_oft/business\\_leaflets/659703/OFT1231.pdf](http://webarchive.nationalarchives.gov.uk/20140402182803/http://oft.gov.uk/shared_oft/business_leaflets/659703/OFT1231.pdf)

<sup>13</sup> Letter from Jessica L. Rich, Director of the Federal Trade Commission Bureau of Consumer Protection, to Erin Egan, Chief Privacy Officer, Facebook, and to Anne Hoge, General Counsel, WhatsApp Inc. (April 10, 2014), available at [https://www.ftc.gov/system/files/documents/public\\_statements/297701/140410facebookwhatappltr.pdf](https://www.ftc.gov/system/files/documents/public_statements/297701/140410facebookwhatappltr.pdf)

It is evident from the above that the combined force of competition and consumer policies are necessary to address to the wide range of issues and complexities in the territory of internet-based businesses.

## **6. Conclusion**

Bringing together the two bodies of law in a single agency may not be a step completely free of controversy. Singapore is however not alone in making this critical move. Positive interactions between competition and consumers policies are evident in various other jurisdictions which opted for a dual-function agency.

Without doubt, a single agency will be in a position to communicate coherent messages to businesses and consumers about their respective obligations and rights. And importantly, such agency is better equipped to address new developments and innovations in the market, when it is empowered to employ the tools of competition law and consumer protection policy in a complementary and harmonised manner.