The Way Forward: Harnessing Competition and Consumer Regulations to Tackle Challenges of the Digital Age

An indispensable part of safeguarding Singapore's economy lies in ensuring that our competition and consumer protection policies function as they should in enhancing market efficiency. However, the rise of the digital economy with its attendant challenges has upset the sense of equilibrium. This paper examines why there is a fundamental need for governmental intervention in competition and consumer protection in today's free market, before analysing the sufficiency of current policies in tackling market failures precipitated and exacerbated by the digital age. First, it argues that there is scope for increased intervention in competition policies to preserve the competitive process. Specifically, the method of determining market definition should be broadened to measure the effects of data flows on market power to give effect to the value of data in business models of the digital economy. In addition, there is cause to contend that the blanket exclusion of vertical agreements from the ambit of the Competition Act should be reconsidered. Second, this paper considers that apart from certain necessary clarifications on the ambit of the Consumer Protection (Fair Trading) Act in light of the increase in consumer-to-consumer transaction platforms, current levels of consumer protection policy efforts ranging from domestic and cross-border enforcement efforts to empowering consumers with digital skills are adequate to address market failures. Finally, it acknowledges that not all challenges can be adequately addressed with competition and consumer protection policies. Instead, these policy areas

must be harnessed in conjunction with other existing regulatory tools, including the Personal Data Protection Act and the Unfair Contract Terms Act.

I. Introduction

Competition and consumer protection regulations are cornerstones of Singapore's economic policy. Singapore takes an instrumentalist perspective by treating both as a means of enhancing market efficiency (OECD, 2008). The Competition Act ("CA") preserves market contestability by mitigating market failures caused by anticompetitive conduct. Meanwhile, the Consumer Protection (Fair Trading) Act ("CP(FT)A") addresses the market failure of information asymmetry between consumers and traders by granting consumers an avenue to seek civil redress against traders who engage in unfair practices in the marketplace.

In recent years, the rise of the digital economy – defined as an economy in which businesses invest heavily in digital capabilities to increase productivity (WEF, 2019) – has posed new challenges to the competition and consumer protection regimes. Many digital platforms rely significantly on the collection, processing, use and storage of data, raising issues of market power. These platforms also capitalise on vertical agreements and vertical integration to concentrate market power in the hands of few market players. As new business models including multisided platforms facilitating consumer-to-consumer transactions become increasingly common, the ambit of current legislation may not adequately cover these situations to protect consumers. The surge in online transactions has also simultaneously exacerbated instances of unfair practices against consumers.

This essay argues that there is scope for increased governmental intervention to curb anticompetitive practices. For consumer protection, aside from necessary clarifications on the ambit of the CP(FT)A, current levels of consumer protection policy efforts are adequate to address market failures.

II. Competition Policy in Singapore

Economists treat competition as a good to be protected on the assumption that scarce resources are most efficiently allocated in a perfectly competitive market. When firms face stiff competition, they are more compelled to improve their products and services, which aligns with Singapore's push for an innovation-driven economy. However, this market mechanism is undermined when private undertakings engage in self-interested conduct that distort the competitive process. This leads to inefficient allocation of resources and ultimately stifles innovation. Governmental intervention is thus justified to limit the economic freedom of undertakings in specific instances to preserve the competitive process, namely: (a) anti-competitive agreements ("section 34 prohibition"); (b) abuses of dominant positions ("section 47 prohibition"); and (c) mergers that substantially lessen competition.

The following discusses a selection of challenges catalysed by the digital age, specifically (i) the influence of data collection on market power; and (ii) the significance of increases in vertical agreements and vertical integration on competition policy. It suggests that current levels of intervention are likely insufficient to tackle the new business models of the digital economy, as traditional competition law principles must similarly evolve to suit new realities.

First, data collection is a critical component of business models of multisided digital platforms, particularly in zero-price markets which provide products or services in exchange for personal data (UNCTAD, 2019). Yet, monopolisation of data may provide opportunities for already-large firms to further entrench market power. For example, Facebook's ability to capitalise on user behavioural data from its large userbase confers it with significant competitive advantage over smaller rivals to better attract new users. While market dominance *per se* is not anticompetitive, it may be abused if data is misused to artificially erect barriers to entry for new market entrants, pre-emptively stifling competition. Newman (2015) argues that this issue is insufficiently captured in the neo-classicist approach to competition law rooted in price-focused guidelines. In Singapore, market definition (necessary to determine infringements of the section 34 and 47 prohibitions) is determined by the Hypothetical Monopolist Test. This test relies on price mechanisms and is unlikely to accurately measure the size of the relevant zero-price market (UNCTAD, 2019). Instead, regulators may underestimate a firm's market power. As the interface between data and competition becomes more apparent, it becomes crucial to broaden the method of determining market definition to measure the effects of data flows. A possible alternative to the current quantitative test is the SSDNQ test, which measures the effect of small-but-significant non-transitionary decrease in quality (OECD, 2016). Similarly, merger control in Singapore is typically focused on the price effects of the transaction based on market share, against which there are suggestions that risks of data monopolisation and consumer privacy violations should be factored into merger review (OECD, 2016).

Second, vertical agreements between firms operating on different levels of the supply chain are becoming increasingly common in the digital marketplace (OECD, 2018). This includes (i) exclusivity agreements which prevent participants (e.g. sellers in a marketplace) from switching to a rival platform or multi-homing; and (ii) parity clauses where platform service providers seek parity between conditions of sale (e.g. price) on their platforms and the supplier's own sales channel or other indirect sales channels. Undoubtedly, vertical agreements can produce pro-efficiency results, such as reducing free-riding problems. The CA's blanket exclusion of vertical agreements was thus justified on economic efficiency grounds during the bill's public consultation, on the basis that the majority of vertical agreements have pro-competitive effects that outweigh anti-competitive effects (MTI, 2004). However, it is unclear whether this "one-size-fits-all" rationalisation remains appropriate in the new digital economy. For example, parity clauses have raised competition concerns insofar as they may stifle innovation by reducing the incentive for platforms to compete on product quality or on commission charged to suppliers. This ultimately raises prices for end-consumers (OECD, 2018). Recently, there have been several high-profile enforcement actions against parity clauses, including those against Booking.com and Amazon. Several jurisdictions, including Turkey, found these clauses to be anticompetitive, while other cases were resolved after the undertaking in question voluntarily removed the offending clauses (OECD, 2018). While vertical agreements involving dominant players can be investigated under the section 47 prohibition (MTI, 2004), some situations may not involve dominant players. This creates a lacuna in the law, which may potentially erode the competitive process. Instead of a blanket exclusion of vertical agreements, a better approach may be to establish a rebuttable presumption that vertical agreements are non-anticompetitive, with CCCS bearing the burden of

proof to prove otherwise. This would not unduly increase business regulatory costs, while granting sufficient regulatory recourse against vertical agreements proven to have anticompetitive effects.

Finally, many digital platforms have expanded operations vertically upstream and downstream in the value chain, such that they also become competitors to the users of their own platforms. This may increase the potential for abuse of dominance through margin squeezing (UNCTAD, 2019). Margin squeezing is anticompetitive because it forecloses competition in the downstream market by disadvantaging rivals that are at least as efficient as the dominant firm (OECD, 2018). For example, Amazon plays dual roles of marketplace (where sellers transact with consumers) and online retailer (where it competes against other independent retailers). The European Commission (EC) is currently investigating Amazon for allegedly abusing data collected from marketplace sellers to gain advantages as a retailer, such as marketing an Amazon-version of successful product offerings at a lower price than the original merchant (EC, 2019). In Singapore, any infringements of this variety will likely be investigated under the section 47 prohibition. However, increased regulatory oversight over these possible forms of conduct is necessary as multisided digital platforms in Singapore (e.g. Shopee, Lazada) continue to ride on the e-commerce wave.

III. Consumer Protection Policy in Singapore

The law's general approach to consumer protection is caveat emptor. It expects consumers to take reasonable steps to guard their own interests, which encourages consumer vigilance in the marketplace (Lim, 2003). This further reflects concerns that overly prescriptive policies will lead to higher business costs, which may ultimately be

passed on to consumers (Teo, 2013). However, contrary to the assumption of free market economics that consumers respond rationally to their choices, there are inherent information asymmetries between consumers and traders because of differentials in bargaining powers. These imperfect information flows therefore legitimise governmental intervention in transactions between private actors. The CP(FT)A is thus a concession to the general rule by providing for consumer rights (a) against unfair practices; and (b) in respect of non-conforming goods. This recognises that consumers may still fall prey to traders' unfair practices despite greater consumer responsibility.

Yet, current consumer protection policies may be considerably weakened in the digital economy by (i) the rise of new business models; and (ii) the significant uptick in online, including cross-border, transactions. Nonetheless, beyond certain necessary clarifications on the state of the law, it is arguably unnecessary to increase governmental intervention because sufficient safeguards are in place to protect consumers.

First, the digital economy has begotten the emergence of new business models (OECD, 2014). A prominent example is the rise in consumer-to-consumer markets (e.g. Grab and Carousell) where transactions are carried out between consumers on third-party intermediary platforms. However, it is unclear whether the CP(FT)A governs this form of consumer transactions. Currently, the CP(FT)A prohibits unfair practices from "suppliers", the definition of which only extends to persons acting in the "course of business". If a seller (e.g. in a Carousell transaction) is considered a consumer and cannot be said to be selling items in the course of business, it appears

that any unfair practice propagated by this seller would not fall within the CP(FT)A. Thus, the consumer has limited recourse if a dispute arises. On the contrary, the definition of a “transferor” who has sold non-conforming goods does not include the requirement of selling goods in the course of business. If this interpretation is accurate, a buyer of goods in a consumer-to-consumer transaction cannot seek redress for any unfair practices but is entitled to additional rights in respect of non-confirming goods. Given this inconsistency, it will be germane to further clarify the current laws as applicable to new forms of e-commerce.

Besides, information asymmetry is exacerbated in zero-price markets, where users are rarely aware of the types of data (e.g. behavioral data, location tracking data) that businesses collect from them, much less how these data may be used and by whom (OECD, 2016). Businesses capitalize on the fact that most users do not read privacy policies, because they are typically dry, extensive and incomprehensible from a layperson’s perspective. In addition, online services are often marketed as “free”, which is misleading because any costs borne by the consumer is non-pecuniary in nature, such as data collection and exposure to advertisements. At first glance, users of zero-price digital services can be construed as “consumers” under the CP(FT)A, as they receive services from a supplier. However, it is suggested that this area is better regulated by data protection laws.

Third, as more online transactions are being concluded, there is a concomitant increase in unfair practices (OECD, 2019). This can partly be attributed to a lack of transparency (e.g. where consumers are not physically present to inspect the goods) which exacerbates information asymmetry. For instance, a 2019 CCCS market study

found that online travel channels capitalize on the nature of the platform to adopt certain practices that may be highly prejudicial to consumers, including opt-out boxes and pressure selling. To abate consumer fear, there must be sufficient dispute resolution and enforcement mechanisms on both domestic and cross-border levels. On the domestic front, aggrieved consumers have multiple options. They may seek assistance from CASE or undergo mediation with the trader. Consumers may also file a claim in the Small Claims Tribunal or enlist help from the police. Further, as cross-border consumer transactions become more popular, consumer protection regulations must have sufficient extraterritorial reach to crack down on foreign digital platforms if disputes arise. The CP(FT)A as it currently stands has limited extraterritorial effect and the extent to which CCCS is empowered to take action against errant traders outside of Singapore's territories is unclear, particularly given "potential interstate diplomatic minefields" (Ong, 2011). Nonetheless, CCCS has evinced a clear commitment to enhance cross-border cooperation with foreign authorities to ensure that consumers' interests are well-protected. Based on publicly-available information, CCCS has signed a Memorandum of Understanding with Competition Bureau Canada to coordinate enforcement activities. Separately, ASEAN has agreed to establish an online dispute resolution portal to facilitate the resolution of cross-border e-commerce claims by 2025. Besides, some digital platforms (e.g. Shopee, Lazada) offer their own dispute resolution mechanisms. Given the following, current policy efforts to protect consumers on the domestic and cross-border dispute resolution fronts are likely sufficient.

Ultimately, the most sustainable approach to tackle digital challenges is to empower consumers, as opposed to increasing governmental intervention which can prove

costly for regulatory bodies and businesses. The Infocomm Media Development Authority has thus placed the necessary focus on cultivating consumer sophistication by imparting digital skills to navigate today's technology-infused world and educating the citizenry on possible market pitfalls.

IV. Conclusion

This paper argues that current competition policies may be insufficient to address the market failure of anticompetitive behaviour, due to shifts in business models and the heavy reliance on data collection, which traditional competition metrics may be inadequate to capture. The latter issue in particular has brought the interplay between competition, consumer protection and data protection into sharp focus. However, not all data concerns, particularly consumer data privacy, are suitably policed under the CA or the CP(FT)A. For instance, while data matters that distort the competitive process such as the misuse of data to increase market power can be overseen by the CA, other matters including third-parties' use of consumers' personal data may be more appropriately governed under the Personal Data Protection Act. Similarly, not all matters relating to consumer protection should be regulated under the CP(FT)A and may be better suited to other laws including the Unfair Contract Terms Act. Nonetheless, beyond certain legislative clarifications, existing consumer protection policies strike an appropriate balance between ameliorating the market failure of information asymmetry, empowering consumers and minimising business compliance costs. As the digital economy continues to evolve, Singapore must make use of its arsenal of regulatory tools to address new sources of market failures and promote economic efficiency.

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