Free Market and Buyers Beware? Where are we today and what is the optimal level of government intervention to protect competition and consumers in Singapore?

ABSTRACT

The balance between having a free market and government intervention has always been difficult to strike and this challenge has only been heightened by the rise of the digital economy precipitating new markets and market conditions.

To help shed light on the current state of Singapore's competition and consumer protection regime, this paper evaluates the regime's ability to address market failures surrounding anti-competitive mergers and information asymmetry. Firstly, current laws and policies surrounding anti-competitive mergers have been successful in fairly considering the efficiency gains against losses through the total welfare standard that Singapore adopts. However, the framework used to determine financial penalties are not appropriate for anti-competitive mergers in the digital economy as start-ups tend to prioritise growth over revenue. Secondly, steps have been taken to improve price transparency so as to reduce information asymmetry, though there is still a lack of regulations to adequately protect consumers from abuses of information asymmetry in the peer-to-peer lending industry. Such abuses may proliferate in the digital economy if left unchecked as the growth of fintech broadens access to complex financial and digital products.

To address these shortcomings, this paper recommends that (1) the transaction value of mergers be considered in the damage assessment of anti-competitive mergers; (2) transparency be promoted by enhancing regulations mandating

disclosure by producers; and (3) regulatory oversight be increased via cross-sectoral collaboration between government agencies.

Overall, while current laws and policies are insufficient to tackle the challenges brought on by the digital economy, the principles that guide the CCCS—adopting a total welfare standard, promoting transparency, and cross-sectoral collaboration—will intrinsically address market failures if the Commission's policies are adapted to better reflect these principles. Therefore, it is in a nuanced approach to markets, guided by these principles, that the optimal level of government intervention can be found.

1. INTRODUCTION

The role that competition law and consumer protection plays in levelling the playing field, promoting economic efficiency, and addressing market failure is undeniably important. Yet, excessive government intervention is costly and distorts markets, stifling innovation and the achievement of financial synergies. Regulatory agencies like the Competition and Consumer Protection Commission of Singapore ("**CCCS**") endeavour to strike the right balance between the two. However, new risks created by the rise of the digital economy require competition law and consumer protection to adapt to remain effective in addressing market failures.[1]

To help shed light on the current state of Singapore's competition and consumer protection regime, this paper will analyse the extent and nature to which the government should intervene in markets through an evaluation of the present regime's ability to address market failures; namely, anti-competitive mergers and information asymmetry.

[1] "The digital economy broadly encompasses the production and consumption of digital products and services, digital platforms and business activities that are enabled by digital technologies" (Ministry of Trade and Industry, 2017, para. 1).

These were chosen as they encompass other forms of market failure and hence provide a broad and rigorous test against which the sufficiency of current competition and consumer protection policies can be assessed. Anti-competitive mergers can lead to monopolies and anti-competitive conduct, while information asymmetry can be abused through unfair trade practices and lead to anti-competitive conduct.

2. ANTI-COMPETITIVE MERGERS

Current competition law and consumer protection policies aim to address mergers that restrict the competitive process and induce market failure. One way this can occur is through vertical mergers eliminating one of the merging firms as a potential entrant into the other firm's market. An example would be the Live Nation/Ticketmaster merger, where Live Nation was a potential entrant into ticketing and Ticketmaster was a potential entrant into promotion and venues (Salop & Culley, 2014). Additionally, market failure can occur when the merged entity abuses its newfound market power to significantly mark up its prices above the prevailing level to command a greater profit, lower the quality of its goods and services, and/or restrict production variety, reducing consumer choice. All these actions result in goods and services being distributed inefficiently in favour of the merged entity, thus inducing market failure. Over a 10-year period, firms which were involved in mergers were found to have a 15-50% price mark-up compared to firms without merger involvement (Blonigen & Pierce, 2016). Thus, firms that undertake mergers are more likely to abuse their market power for self-interest vis-a-vis a market where firms are rivalrous.

2.1 Merger Notification System

To counteract the market failure caused by anti-competitive mergers, CCCS has a merger notification system, calling upon merger parties to notify CCCS if they have serious concerns that their merger will result in a substantial lessening of competition. Moreover, the parties can put forth commitments to mitigate any adverse effects caused by the merger. For example, SEEK Asia committed to cap its post-merger prices at prevailing prices, only allowing for inflation, after its acquisition of JobStreet (Competition Commission of Singapore [CCS], 2014). CCCS will evaluate the submission made by the parties before deciding whether the Competition Act was infringed. Should the Competition Act be infringed, CCCS has the discretion to financially penalise the parties involved.

2.2 Inadequate Financial Penalties

The framework surrounding how the financial penalty is calculated is insufficient in addressing market failure in the digital economy. The current framework centres upon formulating a base penalty by multiplying the severity of the infringement (expressed as a percentage) with the relevant turnover of the undertaking (CCCS, 2016). This is especially problematic in the digital economy for two reasons which will be illuminated using the example of Grab's acquisition of Uber's Southeast Asian business.

Firstly, turnover is an unsuitable metric for the digital economy where start-ups are common because start-ups tend to pursue growth maximisation aggressively. This manifests in firms cutting prices at the expense of profit to capture market share. Coupled with high venture capital funding, which is usually tied to growth prospects, these start-ups have more incentive to price below operating costs—Uber lost US$4.5

billion the year preceding the acquisition (Aiello, 2018). Thus, revenue is unlikely to fully reflect the true scale of Grab and Uber's activities in the market.

Secondly, the framework does not consider the large amount of economic surplus that firms can extract because of its disruptive nature, commonplace in the digital economy. It is estimated that US$1.60 of consumer surplus is generated for every dollar spent by consumers in the ride-hailing market (Cohen et al., 2016). This means that there is ample opportunity and likelihood for the merged entity to utilise its market power to extract this surplus by raising prices.

Thus, the way that financial penalties are calculated for anti-competitive mergers in the digital economy needs to be improved. For instance, the transaction value of a merger should also be taken into account in computing the financial penalty for it to be significantly deterrent to the firm. Moreover, CCCS should leverage the large amounts of data collected by firms to more precisely understand a firm's product market and the potential value extractable.

2.3 Network Effects

The digital economy, with the proliferation of multi-sided markets where network effects are present, [2] has brought about an additional consideration towards market failure caused by mergers.

For example, the merger of an ATM network could generate efficiencies by increasing the number of machines available to network customers and making off-premise ATMs more feasible in places like airports and supermarkets (Evans, 378). Hence, when regulating mergers in the digital economy, the government needs to

[2] A product exhibits network effects if its value to one consumer depends on how many other consumers there are (Shapiro & Varian, 1999).

weigh the efficiency gains from network effects against the negative effects of market failure post-merger.

In this regard, the government is well-positioned to do so as Singapore adopts the total welfare standard instead of the bias towards consumer welfare that many countries adopt (Toh, 2018). This is best exemplified through the Competition Act's Fourth Schedule permitting mergers which have economic efficiencies that outweigh the adverse effects caused by the substantial lessening of competition. Furthermore, the parties undergoing a merger are required to submit any arguments and evidence relating to efficiency gains when filing a merger notification with CCCS. CCCS will always consider efficiency gains per its guidelines on assessing mergers and acquisitions, stipulating that it will consider the presence of any economic efficiencies that result from a merger. An example of this is evident in its assessment of Western Digital's acquisition of SanDisk, where it noted that the acquisition may lead to continued innovations and additional resources being devoted to research and development (CCS, 2016). Thus, competition law and policy relating to mergers promotes efficiency by allowing firms to merge should there be net economic benefits through increased efficiency or innovation.

3. INFORMATION ASYMMETRY

Information asymmetry exists when one party holds a significant informational advantage over the other, impeding informed decision-making in transactions (Low, 2010). This prevents buyers from accurately valuing goods and services, leading to overconsumption than when there is perfect information, resulting in market failure. The rise of the digital economy has made it easier to abuse information asymmetries because of the increased difficulty in verifying the quality of goods and ease of omitting or misrepresenting material information over the internet, creating consumer protection concerns. Additionally, information asymmetry can hinder competition by stifling consumers' ability to compare products between competitors or inducing them to purchase inferior products due to misrepresentations of information. Thus, government intervention is increasingly required to promote competition and protect consumers from the abuse of information asymmetries.

3.1 Price Transparency

CCCS has actively worked to prevent abuse of information asymmetry by promoting price transparency, guided by the principle of transparency that undergirds the Consumer Protection (Fair Trading) Act ("**CPFTA**") (Lim, 2003). CCCS (2019a) conducted a market study on the online travel booking sector in Singapore and found several practices that raised consumer protection concerns, including drip pricing.[3] In response, the CCCS Draft Guidelines on Price Transparency were developed and released for public consultation. These guidelines help to address information asymmetry by clarifying how suppliers should advertise prices and what actions may constitute breaches of the CPFTA (CCCS, 2019b). While this is a step in the right direction, they must be enforced upon formalisation to protect consumers. For instance, investigations by the UK Office of Fair Trading into airlines who abused drip pricing resulted in 12 airlines agreeing to include debit card fees in headline prices and increase price transparency (Tamefuji, 2016).

[3] Advertising a lower headline price, but 'dripping' additional fees along the payment process.

3.2 Peer-to-Peer Lending

Furthermore, information asymmetry increases the risk of consumers incurring losses or undertaking highly risky transactions—evident in the industry of peer-to-peer lending (“**P2P lending**”) to businesses. P2P lending platforms (“**platforms**”) match companies seeking debt financing with individuals willing to provide unsecured loans. Companies seeking such financing are often small-and-medium enterprises that cannot obtain loans from banks as they lack collateral or have immature credit histories, thus turning to P2P lending for its ease of access to credit. This democratises risky unsecured debt financing to retail investors, attracted by claims of high investment returns, some of whom do not fully understand the nature and risks of the investment.

In an already high-risk environment, information asymmetry can cause investors to incur more risk than desired or suffer financial losses due to misrepresentations of default rates and fees. For example, the advertised default rate on Funding Societies Singapore’s (“**FSS**”) mobile application is 1.70% (on 14 June 2020).

However, their non-performing loan rate, declared under Monetary Authority of Singapore ("**MAS**") requirements, stands at 2.27% (as of 31 December 2019) (FSS, n.d.).

Rates of Return & Non-Performing Loan Rates

Year of disbursement	Rates of Return		Non-Performing Loan Rates	
	Lowest & highest rates (per annum)	Weighted average (per annum)	Past 30 days but fewer than 90 days	Past 90 days
2017	7.66% - 27.90%	16.21%	1.89%	0.08%
2018	6.58% - 24.61%	11.73%	1.99%	0.00%
2019	3.35% - 23.87%	9.82%	2.27%	1.89%*

Historical rates of return may not reflect the future rate of return will be.
Please note that the calculation of the weighted average Rate of Return includes pro-rated principal repayment of ongoing bullet loans (of which the one-time principal repayment is not expected within the year)
*As of March 2020, 0.16% of the loans that are 90 days past due are under restructuring

This discrepancy between advertised and actual default rates is echoed by users, with 24 reviews of FSS on Seedly (n.d.) including complaints of high default rates and doubts on the accuracy of advertised default rates.

Fees may also be misrepresented. For example, the US Federal Trade Commission ("**FTC**") (2018) charged LendingClub, an American P2P lending company, for falsely advertising "no hidden fees" on their loans when it had deducted "thousands of dollars in hidden up-front fees from the loans" (para. 1). Thousands of borrowers complained that they were unaware of the fee and many would have preferred "a loan from a competitor or no loan at all." (*FTC v LendingClub*, 2018, p. 18).

These examples illustrate how information asymmetry can cause consumers to incur losses or bear risks they cannot manage and distort competition, resulting in inefficient markets and hence, market failure. Thus, government intervention is essential to protect consumers from such exploitation.

3.3 Policy Review and Recommendations

According to MAS (2018), P2P lending is regulated under the Securities and Futures Act and Financial Advisers Act, and platforms offering securities must obtain a capital markets services licence. However, platforms are not legally required to provide potential investors with information needed to make informed decisions and companies seeking loans may not need to be audited (MAS, 2016). Thus, the information presented on investment opportunities may be both insufficient and inaccurate, stifling informed decision-making and increasing the risk of fraud, such as when Capital Springboard was cheated of over S$25 million due to fake invoices (Alkhatib, 2018).

Noting these insufficiencies, policy improvements that promote informed decision-making and regulatory oversight could better protect consumers while also increasing the sophistication of retail investors, helping them make wiser decisions in future.

Informed decision-making can be promoted by legally requiring platforms to disclose a wider range of reliable data such as returns, losses, default rates, fees, and company financials. This is congruent with the UK Financial Conduct Authority's (2019) regulatory enhancements to better investors' understanding of risks and promote competition by enabling comparisons between platforms.

Furthermore, regulatory oversight can be improved through cooperation between CCCS and MAS to better understand the market and eliminate unfair practices. This is consistent with CCCS's principle of collaboration to prevent double jeopardy and minimise regulatory burden (CCS, 2005). As this industry raises competition and consumer protection concerns, CCCS should consider conducting a joint market study with MAS, following up on the latter's public consultation of 2015, to determine the extent to which regulatory enhancements are required. Moreover, as CCCS can investigate platforms engaging in unfair practices under section 12G of the CPFTA, clear synergies exist for collaboration on industry supervision and enforcement against errant platforms.

Ultimately, while P2P lending was highlighted, the principles behind these recommendations apply to tackling information asymmetry in general. Promoting transparency to ensure consumers can make informed decisions, paired with greater regulatory oversight that enables the examination, augmentation, and enforcement of regulations in a proportionate manner, will cultivate a competitive and innovative economy while protecting consumers. As the rise of the digital economy broadens access to complex financial and digital products through the growth of fintech, it is imperative for Singapore to strike this balance to further our Smart Nation initiative without compromising the well-functioning of markets.

4. CONCLUSION

Current competition law and consumer protection policies are largely insufficient because they are not well suited to the new markets and market conditions that the digital economy precipitates. The revenue-centred approach towards penalising anti-competitive mergers is unsuitable for technology start-ups, which often prioritise growth over revenue. Furthermore, technology spurs digital product innovation, forming new markets. These products may be overly sophisticated for the layman to fully understand, which prevents its market from working well.

However, CCCS's guiding principles intrinsically address market failures if policies adapt to better reflect them. These include the adoption of the total welfare standard for competition matters, promoting transparency for consumer protection, and collaboration with the relevant regulator for cross-sectoral cases.

Undergirded by these principles, this paper has put forth recommendations that seek to strengthen the current competition and consumer protection regime for the digital economy.

Firstly, on the competition front, CCCS should consider the specific context of the markets examined to approach market valuation and damage assessment appropriately. This can be done in alignment with the total welfare standard by leveraging data collected by companies to more effectively measure welfare effects and analyse efficiencies that new products bring.

Secondly, on the consumer protection front, regulation needs to be enhanced to ensure that the principle of transparency is upheld. Mandating disclosure by producers achieves this, leading to a more informed consumer and levels the playing field for all producers in the market.

Thirdly, on both fronts, CCCS must continue to cooperate with other government agencies. Products and markets in the digital economy are likely to increase in complexity and fall within the mandate of multiple government agencies. Conducting joint studies is one way to ensure cross-functional regulatory oversight over new markets.

Looking ahead, as technology continues to evolve, CCCS must remain guided by their principles when reviewing and augmenting competition law and consumer protection policies to suit changing market dynamics. It is in this nuanced and principled approach to markets that the optimal level of government intervention can be found.

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