Abstract

The traditional focus of competition law has been maintaining market competition and efficiency. But as the world undertakes more progressive measures to combat climate change, questions arise as to how clashes between environmental protection and market efficiency should be resolved, as well as how the Competition and Consumer Commission of Singapore (CCCS) can make use of its toolkits to contribute to Singapore's environmental campaigns. This essay starts by highlighting the fluidity of market definition in light of environmental changes and the corresponding policy reforms. It then moves on to argue that environmental factors can and should be incorporated into the CCCS's assessment of business conduct. Not only does the Competition Act permit the CCCS to do so, but it is also the duty of the Commission to encourage sustainable practices. The essay further examines three questions:

(1) In relation to restrictive agreements, how the CCCS can take environmental benefits into account in an objective and principled manner. Ideally, environmental benefits should constitute "net economic benefits". But given the practical difficulty of quantifying the benefits, it is also suggested that the CCCS can consider not taking formal proceedings against restrictions that are purely ancillary to an environmental agreement.

(2) How the CCCS should supervise concentrated markets and dominant firms which arise as a consequence of new environmental policies and technologies. Conversely, how the CCCS can promote sustainability in concentrated markets, such as through introducing the right to repair. Exact answer to these questions requires case-by-case analysis.

(3) In view of the growing concerns over greenwashing, what measures the CCCS should adopt to facilitate Singapore's ambition to become a green finance hub. Broad-based guidelines governing general business conduct, as well as stronger legal enforcement measures, are called for. Public education on greenwashing is also crucial.

(294 words)

Introduction

Moving towards a net zero emissions future, the government and private parties in Singapore are proposing and implementing various environmental initiatives. While traditional competition law centres on economic efficiencies, a more expansive role is needed. Not only can the CCCS facilitate green initiatives that do not unduly undermine competition, but it can also foster environmental projects by creating an open and honest environment. This essay examines CCCS's and businesses' major involvement in the SG Green Plan[1], including promoting sustainable fuels and electrical vehicles (EVs), managing waste, and developing Singapore as a green finance hub. In particular, it proposes that:

(1) CCCS's finding of the relevant market should be sensitive to new environmental policies, technologies, and people's changing perception.
(2) Environmental benefit should be relevant to assessing whether an agreement is anti-competitive, but it must be quantifiable or restricted to exceptional cases to prevent abuse.
(3) Businesses can make greater use of standardisation agreement to promote sustainable practices.
(4) Nevertheless, CCCS should be sharp to see through environmental benefit as a guise for dominant firms' anti-competitive conduct.
(5) Singapore should be slow to embrace the right to repair movement due to underlying uncertainties.

[1] Ministry of Sustainability and the Environment's Committee of Supply 2021, *Media Factsheet Public Sector Leads the Way with Bold Targets under Singapore Green Plan* (4 March 2021).

(6) Stronger measures, including broad-based guidelines, more effective enforcement measures and public education, should be taken against greenwashing.

1. Be discerning to external changes

Defining the relevant market begins the competition law inquiry. Given the profound influence of climate change, CCCS should pay closer scrutiny to fact-finding when applying the "hypothetical monopolist" test.

For producers, new government regulations can reshape the market. For instance, as part of Singapore Green Plan, new diesel car and taxi registrations will cease from 2025[2]. Diesel-vehicle manufacturers may thus switch to producing other vehicles, intensifying competition in these markets. Conversely, new technical know-hows can also lower the cost of producing sophisticated products like solar panels, thereby lowering the barriers to entry. For consumers, the government has been enhancing environmental education and charging lower Additional Registration Fee and road tax for mass-market EVs[3]. With gradual mindset shifts and EV-favouring policies, fossil fuel cars and EVs may longer be close substitutes.

Furthermore, quickly developing technologies can also create new substitutes. In the acquisition of Sanyo by Panasonic, for example, the Federal Trade Commission found that although the two's combined market share for NiMH battery exceeded 65%, the

[2] *Ibid.*
[3] *Ibid.*

relevant market should also include Li-ion HEV battery – an emerging alternative EV energy solution[4].

To accurately define the relevant market amidst a state of flux, *it is crucial for the CCCS to view relevant policies, technologies, and public perception as evolving and dynamic factors rather than static givens.*

2. Take environmental benefits into account

Clashes between environmental goals and traditional competition law principles can arise frequently. This is potentially when businesses collectively agree to refuse to deal with a "dirty" company, phase out energy inefficient products, and impose environmental surcharge. In Singapore's context, one instance is small supermarkets' *voluntary* implementation of plastic bag charges, which was observed by Minister Fu approvingly when mandating the plastic bag charges for big supermarkets[5].

However, such well-intentioned agreements may well infringe Section 34 of the Competition Act ("s34") under traditional analysis. *Agreeing* to charge a flat fee on all plastic bags can constitute price-fixing. In *VOTOB*, six chemical storage undertakings agreed to impose an environmental surcharge amounting to 4% of the average storage cost, and the European Commission did not hesitate to find an infringement against Article 101(1) of the TFEU[6]. Similarly, the high profit margin of plastic

[4] FTC Matter: 091 0050 Federal Trade Commission, "*Panasonic Corporation and Sanyo Electric Co., Ltd., in the Matter Of.*" (7 July 2021).
[5] Singapore Parliament, *Committee of Supply – Head L (Ministry of Sustainability and the Environment)*, Volume 95 (7 March 2022)
[6] European Commission, *XXII Report on Competition Policy* (1993), [177] – [186].

surcharges and lack of transparency of how the money is used can create concerns of "profiteering" by supermarkets[7].

Yet, the CCCS *can and should* go beyond market analysis, for the purpose of the Competition Act extends to "enhanc[ing] the *competitiveness*" and "*longer-term* economic efficiency" of Singapore's economy[8]. Given that climate change can potentially destruct Singapore's natural and human capital, environmental sustainability surely contributes to Singapore's competitiveness and long-term efficiency. Indeed, CCCS bears the duty to "promote overall…innovation and competitiveness of markets"[9], so environmental benefits that promote innovation or Singapore's long-term competitiveness *should* be given merit. Instead of constraining Singapore's pursuit of sustainability, *the CCCS should articulate clear rules and principles of how it evaluates environmental benefits*.

2(a) Net Economic Benefits

The CCCS can incorporate environmental benefits into its analysis through a more liberal reading of the "net economic benefits" exclusion. Although Section 9 is currently used for objective efficiency gains of the agreement, the wide wording encompasses any contribution to "improving *production or distribution*". Arguably, improvement should include more sustainable production/distribution method. Yet, as seen in CCCS's dealing with the proposed joint venture Poultry Slaughtering Hub, *environmental benefits can constitute net economic benefits only if they are*

[7] *Supra Note 5*
[8] Singapore Parliament, *Competition Bill*, Volume 78 (19 October 2004).
[9] Section 6(1)(a), *Competition Act* 2004.

substantiated and quantifiable[10]. Environmental benefit should not unconditionally prevail over, but be balanced against, anti-competitive effect.

Conceptually, environmental benefits are often self-evident – higher price or limited supply of environmentally unfriendly products forces consumers to internalise the environmental cost of consumption, thus reducing over-consumption.

Further, quantifying environmental benefits is challenging but not impossible. First, the value of environmental benefits can be measured by cost-saving for consumers, e.g., using more energy-saving appliances helps consumers save energy spending[11]. Second, market price for environmental services, if it exists, is also a good measurement. Direct survey of consumers' willingness to pay for the services is another indicator[12]. Third, even if direct observation is unavailable, consumers' revealed preference can still be informative. Recent research by the Land Transport Authority, for instance, measured the value of quietness by comparing housing prices before and after implementing sound barriers[13].

Yet, it is admitted that the practical difficulties of quantification should not be understated. Take supermarkets' plastic bag charge for illustration. Since Singapore incinerates plastic bags[14] instead of recycling them, the value of fewer plastic bags cannot be measured as recyclers' cost-savings. Even if less incineration of plastic

[10] CCCS 400/005/17, *Application for Decision by Mr. Tan Chin Long, Kee Song Holdings Pte. Ltd., Sinmah Holdings (S) Pte. Ltd., Tong Huat Poultry Processing Factory Pte. Ltd. and Tysan Food Pte. Ltd* (29 June 2018).
[11] European Commission. "*Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011/C 11/01*)." at [329] (2011).
[12] Suzanne Kingston, *Why Environmental Protection Goals Should Play a Role in EU Competition Policy: an Economic Argument*, Greening EU Competition Law and Policy at 163-194, Cambridge University Press (2011).
[13] Ong Li Wen, *Estimating the Value of Highway Noise Barriers Using a Difference-in-Difference Approach*, LTA Economics Unit – NUS Economics Research Seminar (2022).
[14] *Supra Note 5*

bags improves air quality, it is unrealistic to distinguish the contribution by fewer plastic bags from other air-cleaning initiatives. In any event, it is the businesses that bear the burden of proving net economic efficiencies. Ordinary businesses are unlikely to afford the time and resources for in-depth investigations to quantify the benefits.

2(b) Ancillary Restraint

To prevent the environmental benefit argument from effectively becoming a privilege for industry giants able to afford in-depth investigations, *CCCS should further consider not taking formal action when a restrictive clause is merely ancillary to an environmental agreement*. In *Wouters*[15], the EU Court of Justice validated a Dutch bar self-regulatory provision because the restriction did not go 'beyond what is necessary…to ensure the proper practice of the legal profession'. Given the similarity between TFEU Article 101(1) and s34, arguably, when a restriction is merely ancillary to achieving a social objective, e.g., environmental protection, it should not raise competition concerns in the first place. But to prevent social objectives from blurring the focus of competition analysis, they should be relevant only where (1) *absence of the restriction clause will frustrate the entire environmental agreement*; or (2) the restriction is *necessary* to create an environmental regulatory framework (e.g., restriction on materials for packaging)[16]. Additionally, as a small and open economy, Singapore need not impose formal hearings to ascertain whether such restriction is ancillary. The CCCS can adopt a consultative approach to engage with business groups and understand the true intention and context behind restrictive agreements

[15] *Wouters* [2002] ECR I-1577; Case C-519/04 P
[16] Suzanne Kingston, *Article 101(1) TFEU*, Greening EU Competition Law and Policy at 225-260, Cambridge University Press (2011).

beforehand. Conversely, businesses should also be forthcoming to promote mutual trust.

3. Make use of standardisation agreement to promote sustainable practices

Sustainability requires governmental efforts *and* business endeavours to adopt greener practices. For instance, given that a voluntary uniform plastic bag charge potentially infringes s34, *businesses can consider standardising their dealing* with plastic bags. The agreement can specify the size and material of the plastic bag supplied to consumers, as well efforts to manage used bags (e.g., collecting plastic bags along coastal lines). Objective standard that is transparent and open to participation by other retailers is unlikely to infringe s34[17]. Surcharging for additional costs incurred to follow the standard is possible, but the exact amount should be subject to competition among retailers to find the most cost-effective way to follow it.

4. **"Environmental protection" is not an absolute shield**

The involvement of innovative technologies and scale of environmental projects may create significant barriers to entry. Particularly, the European Commission identified waste management as a lucrative but very concentrated industry worthy of attention[18]. Singapore can face similar issues. In 2021, the NEA appointed one Producer Responsibility Scheme Operator for five years to collect and manage electronic waste

[17] *Supra Note 11* at [332].
[18] DG Competition, *Paper Concerning Issues of Waste Management in Recycling Systems* at [30] (22 Sept 2005).

nationwide[19], potentially giving rise to a monopoly in electronic waste management. The high fixed cost of EV charging infrastructures may also create a natural monopoly for charging services.

While dominance is not a vice simpliciter, European experiences demonstrate that these firms' conduct should still be scrutinised. For electronic appliance manufacturers using the waste management service, the Operator may oblige manufacturers to employ its service for all their products or none[20]. Alternatively, the Operator may assign exclusive zones to selected sub-contractors for waste collection, thus excluding others from providing the service[21]. While such exclusive arrangements may be necessary for the Operator to recover the heavy fixed cost of implementing waste management schemes, it should not be a permanent shield when the scheme's viability no longer relies on exclusivity.

5. Take a prudent approach to Right to Repair

The right to repair movement is gaining global momentum, pushing manufacturers to make information and materials required for product repairs more accessible. Intuitively, the right to repair appears to benefit the environment. Greater accessibility to these resources enables third party repairers to compete with manufacturers at a lower price, thereby disincentivising consumers from buying new products and generating less future waste. But the real impact of the right to repair may be more complex. Modelling suggests that if the cost of producing new devices is low, the right

[19] Ministry of Sustainability and Environment, Singapore, "*The Resource Sustainability Act*." (30 July 2020).
[20] European Commission, *XXVIII Report on Competition Policy* (Luxembourg, Office of Official Publications of the European Communities) at 165 (1999).
[21] *Supra Note 6* at [153].

to repair prompts manufacturers to charge less for new products. Albeit benefitting consumers, this move also generates more future waste. Conversely, high-production-cost manufacturers may charge a higher price, thus harming consumers but reducing future waste[22].

If CCCS or the legislature is to introduce the right to repair into the current CPFTA framework, a broad-brushed approach should be avoided. It would be wise to *study individual industries' cost structure case-by-case before deciding whether such right benefits consumers or the environment and how potential conflict between the two should be resolved*.

6. Take stronger measures against green washing

More environmentally aware consumers are willing to pay more for green products, but this also exposes them to greenwashing. Besides making false representations of environment-related features of a product, companies can also make selective disclosure to create the misperception that their products are environmentally friendly. Greenwashing becomes an even more glaring issue as Singapore envisions itself as a hub for green finance, setting up a carbon exchange to facilitate trading of carbon offset credits[23]. For investors will be willing to invest in environmental projects only if their impact is sufficiently certain and accurate. Effective tackling of greenwashing requires CCCS to actively collaborate with other governmental agencies and private parties in three major aspects.

[22] Jin Chen, Luyi Yang, and Cungen Zhu. *Right to repair: Pricing, welfare, and environmental implications.*", Management Science (2022).
[23] Singapore Parliament, *Towards a Low-carbon Society (Motion)*, Volume 95 (12 Jan 2022).

First, given the uncertainty surrounding the environmental impact of using a product, *a broad-based guideline for how businesses should make environmental claims in compliance with the prevailing law is useful.* While the Monetary Authority of Singapore has already published guidelines governing environmental risk disclosures by different financial institutions, broad guidelines that cover general corporations is necessary, given that greenwashing is not restricted within the financial industry. A common standard across industries also helps companies save cost of acquiring and verifying information from other industries.

Second, *more active self-regulation within each industry according to the general guidelines is called for to strengthen consumer protection.* Currently, the CPFTA applies only to claims below $30,000, thus abridging its protection for larger-sum financial products. Moreover, as consumers bear the onus of proving their claims, they will shoulder the unrealistic burden of verifying environmental impact of a product, including green bonds financing massive environmental projects. While France has prima facie prohibited businesses from making environmental claims without providing sufficient supporting information[24], such a restrictive approach may not suit business-friendly Singapore. An eclectic solution is to promote impartial and transparent self-regulatory agreement within each industry, so that the governing body of each industry can directly enforce against players' unfair practices. CCCS should also have the power to issue financial penalties to deter greenwashing.

Third, *more efforts are needed to educate consumers about greenwashing*. Better knowledge of ambiguous terms such as "carbon neutrality" renders consumers more vigilant against misleading product description. The UK approach can be considered,

[24] Gowling WLG, *Greenwashing: Exploring the Risks of Misleading Environmental Marketing in the UK, Canada, France and Singapore* (28 Apr 2022).

where authorities publish guides containing simple questions a consumer should consider before deciding whether to believe in environmental claims about a product[25].

(2490 words)

[25] Competition and Markets Authority, UK, *Misleading Environmental Claims* (11 Jan 2022).