

CCCS-ESS Essay Competition

Environmental Sustainability: The Role of Competition and consumer protection laws and policies

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ABSTRACT

Public awareness of environmental problems has grown over the past few years, galvanising worldwide efforts to switch to more sustainable practices. On top of inspiring individual action, this has also prompted governments to introduce laws and guidelines to ensure environmental protection. However, there exists cost barriers that may disincentivise businesses from engaging in the ‘greenification’ of their production processes and operations. As such, businesses occasionally engage in anticompetitive behaviours in order to mitigate the aforementioned harms.

While the primary goal of current competition and consumer protection laws remains the guaranteeing of fair market competition, given Singapore’s goal to transform into a green economy, there is room to consider the ways in which competition and consumer protection laws can evolve to better support businesses who wish to embrace sustainable practices.

In our paper, we evaluate two broad categories of anticompetitive behaviour: behaviour that is environmentally harmful and behaviour that is environmentally beneficial. In the former case, we examine how existing law — in protecting fair competition — coincides with sustainability interests. Specifically, we focus on three types of behaviour: greenwashing, abuse of dominance and collusive agreements. We discuss possible improvements which can better deal with such instances.

In the latter case, when competition and sustainability interests conflict, we first evaluate the normative question of whether competition law should make exceptions in order to better support sustainability goals. We further suggest a possible framework for how environmental interests can be factored into judgements on anticompetitive cases. Finally, we touch on alternative measures that CCCS can adopt in order to balance competition and sustainability interests.

1 INTRODUCTION

1.1 The Effects of Sustainability on Businesses

As the urgency of environmental issues such as climate change and global warming become increasingly apparent in the public consciousness, individuals, businesses, and governments have accordingly begun adopting measures and strategies which support sustainability efforts. While government regulation and individual action are effective in many ways, private businesses undeniably play an indispensable role in our environmental fight.

However, for businesses in particular, being sustainable comes with its concomitant costs. They incur an immediate cost in having to invest capital in R&D and change their production processes to be 'greener', they pay an opportunity cost in the present for an indeterminate benefit in the far future, and they also face a first mover's disadvantage in risking being undersold by competitors who choose cheaper, environmentally destructive practices instead. Sustainable endeavours often put businesses at a competitive disadvantage in the short run. Businesses therefore engage in a range of anticompetitive practices (elaborated on below) to mitigate these repercussions.

While firms often genuinely adhere to the environmental ideals they prioritise despite their anticompetitive behaviour, in situations where information is opaque and accountability hard to uphold, businesses may also choose to simply pay lip service without truly following through with their sustainable endeavours.

1.2 The Principles of Competition

Regardless of environmental outcomes, immediate consumers of the product are harmed by anticompetitive behaviours. To recoup the cost of investments in green technology, businesses sometimes collude to sell at a fixed cartel price and quantity, which forces consumers to pay more. Product choice is also reduced as environmentally destructive alternatives are discontinued; and product quantity is further diminished as pollutive resources are not being utilised for production.

Competition prevents these harms. In a free market, businesses competing with each other to provide the same product drives prices down, increases total output, and encourages innovation. Evidently, the above detrimental effects of sustainable production on consumers directly compromise the principles of competition, and authorities like the Consumer Protection Commission of Singapore (“**CCCS**”) must intervene. This paper aims to outline the different frameworks authorities should adopt depending on whether competitive and environmental interests align or conflict.

2 THE ROLE OF COMPETITION AUTHORITIES

2.1 When Competitive and Environmental Interests Align

In many cases, businesses seek the beneficial outcomes of environmental sustainability without having to fork out the costs associated with R&D and upgrading production processes, and thus run afoul of competitive regulation in this pursuit. Here, the course of action is clear — authorities must take punitive measures to halt anticompetitive behaviour.

2.1.1 *Greenwashing*

Greenwashing is the act of companies deceiving consumers regarding their environmental practices in order to appear more sustainable — and therefore palatable — to an environmentally-conscious consumer base (Delmas & Burbano, 2021). Sustainability claims are often complex: there is no specific, consolidated metric that conclusively points toward sustainable behaviour, allowing businesses to issue misleading, incomplete information that masks environmentally-destructive practices (Schaper & Wong, 2022). The sustainability of a product is increasingly an aspect of market competition (Volpin, 2020) — misrepresentation of the environmental value of products means legitimate green businesses are forced to compete on unfair grounds. Our suggested approach is two-fold.

First, transparency can be improved through the mandated disclosure of the environmental performance metrics of businesses and characteristics of products for industries that commonly greenwash or have a large environmental impact (e.g. electronics, vehicles, fashion). CCCS can offer a set of disclosure requirements on business' production methods, sources of materials, investments, and relevant

aspects which businesses typically omit or distort — against which any environmental claims can be corroborated. This is similar to MAS' new requirements for financial institutions (Business Times, 2021).

Second, the CCCS can propose revisions to legislation and offer explicit guidance on environmental claims. Under the Consumer Protection (Fair Trading) Act, consumers are generically protected against businesses “representing goods or services of a particular standard, quality, method of manufacture if they are not”, but no guidance is offered specifically regarding the forms of greenwashing, penalties, or means of redress. Thus, CCCS should first establish that greenwashing constitutes an unfair business practice, and then clarify the application of existing consumer protection laws to it. This can be modelled after the UK's Green Technical Advisory Group which fulfils a similar purpose.

2.1.2 Abuse of Dominance

There are situations where the abuse of a dominant position may also result in environmental damage. The dominant Italian polyethylene market consortium Polieco, for instance, tried to undermine its competitor Ecopolyethylene by tying special benefits to registration with Polieco. The Italian Competition Authority judged that such behaviour was exclusionary and risked a reduction in the number of goods recycled and poorer environmental compliance services (Balestra, 2021). Else, dominant producers could also exclude rival businesses that have greener practices through anticompetitive means such as exclusive dealing and predatory pricing (Dolmans & Mostyn, 2021).

CCCS should treat such infringing cases as with any other abuse of dominance case. However, the existing Financial Penalty Framework is limited as it

considers purely immediate, economic parameters within the market, whereas the environmental impacts typically manifest out-of-market. A revised system for holistically evaluating the impacts of environmental externalities is needed.

CCCS may wish to draw on its existing penalty framework (as described in the Guidelines on the Appropriate Amount of Penalty in Competition Cases 2016; CCCS, 2016) and adapt it to environmental damages: let an initial percentage penalty of applicable turnover be established based on the severity of environmental damage. The level of severity should be predetermined based on a general scientific understanding of its impact, similar to how anticompetitive behaviours are currently categorised (e.g. plastic waste generation would classify as intermediate, while chemical pollution would be a serious infringement). This percentage can then be moderated based on factors CCCS deems relevant (e.g. intentionality, duration of infringement, deterrent value).

2.1.3 Collusive Agreements

Competition laws already penalise businesses which collude to adopt less environmentally-friendly practices, like limiting the development or implementation of green technology and eliminating competition through killer acquisitions. For example, the European Union's antitrust commission decided that Daimler, BMW, and Volkswagen infringed antitrust rules in agreeing on selective catalytic reduction technology (EC, 2021). CCCS should treat collusive cases as with any other breach of competition law, with the recommendations mentioned in 2.1.2.

2.2 When Competitive and Environmental Interests Conflict

Competition regulations, however, do not always cohere with environmental interests. A more pertinent problem emerges when actions that adversely affect competition are simultaneously beneficial to the environment — it is here that CCCS has to balance the immediate consumer welfare with the ecological benefits derived from anticompetitive actions.

To mitigate the increased costs of sustainability, businesses which seek to be environmental sometimes adopt certain measures to guarantee that their green endeavours will not be undercut by market forces. Primarily, they:

1. Collude with competitors to set environmental requirements on their products and services that are more stringent than legally stipulated, such as when five automakers (including Ford and Honda; constituting 30% of the US auto market), collectively agreed to increase their fuel economy amidst relaxed federal rules (Davenport, 2020);
2. Abuse their dominant market position to force consumers into opting for environmentally friendly options, such as when washing machine producers coordinated to take their least energy-efficient models off the European market in 1999 (European Commission (“**EC**”), 1999); and
3. Merge and acquire competitors to co-opt environmentally friendly production methods, such as when Spanish energy company Repsol acquired Viesgo’s renewable energy business as part of its transition towards green electricity generation (Repsol, 2018).

Such agreements and practices certainly prevent the tragedy of the commons from occurring and foster long term environmental health. Yet, they are collusive and violate free market ideals.

2.2.1 The Pertinence of Environmental Effects

In aiming to “[safeguard]” consumer interests (CCCS, 2021), the CCCS must recognise that consumers have stakes in various dimensions of their lives apart from their participation in the specific market. The costs of environmental degradation to individuals such as the health detriments (Donohoe, 2003), and the potential economic benefits in the long-term through mitigating future damages (Drouet et al., 2022) are undoubtedly significant. These outcomes are external and cannot be evaluated if the CCCS considers only immediate market effects.

Further, extending the purview of the CCCS to future consumers, compromising on sustainability in the present depletes resources and reduces the dynamic efficiency of firms in the future — consumer welfare in the long term is thus undercut by price increases and impediments to production.

Finally, allowing sustainable production can also generate consumer welfare for ‘would-be’ consumers — environmentally conscious individuals who do not currently buy the product but would be willing and able to do so if it were more sustainable; their range of product choices would increase.

In these cases, competition authorities are confronted with two key questions:

1. How do we evaluate environmental effects?

Environmental benefits are often not obvious in the short-term, non-pecuniary, and subjective. How should the non-use value of the

environment — such as the ability of future generations to enjoy it — factor in?

2. *Whose interests are relevant?*

The environmental benefits of sustainability are felt by everyone, whereas the anticompetitive costs are borne solely by the direct consumer of said product. To what degree should the welfare of the direct consumer be traded off for out-of-market benefits? Should CCCS, for instance, consider environmental benefits to individuals outside of Singapore? How many generations into the future should environmental considerations extend?

2.2.2 *Evaluating Environmental Effects*

CCCS must weigh the effects of environmental benefits against the harms of anticompetitive behaviour. Here, we propose a three-stage test.

First, anticompetitive behaviour must be definitively established. This draws on existing CCCS guidelines on market competition.

Second, it must be proven that the anticompetitive behaviour does in fact lead to the environmental benefits claimed by businesses. Here, the onus is on part of the business to provide evidence for their claimed benefit(s) and how it translates into meaningful environmental impact — either through quantitative data like environmental studies and metrics, or qualitative descriptions of the impact where empirical data cannot be gathered. It is also, in part, on CCCS to adjust the standard of what is admissible as proof, beyond immediate price effects. Given the necessary information, CCCS has to determine whether:

1. The environmental benefit is material; and
2. The environmental benefit has a high chance of being realised.

Third, having established that there is a benefit, CCCS must then evaluate whether said benefit is significant enough to warrant leniency. It must consider whether:

1. The anticompetitive act was absolutely necessary for the realisation of the benefit, and could not have been achieved in a more competitive manner which hurts direct consumers less;
2. The benefit is significant: it solves a pertinent problem that affects or will affect a large number of people, or preserves a resource many would consider valuable (elaborated on in section 2.2.2);
3. The harm does not inflict exceedingly deleterious effects on direct use consumers (e.g. significantly raise the price of staple foods);
4. The benefit is likely to remain in the long run. Conversely, the harm will not exceed the benefit in the foreseeable future (e.g. collusion leading to a lack of strategic motivation to continue sustainable innovation);
5. If necessary, quantitative measures of the benefit can also be taken into account.

If these conditions can be met, the anticompetitive behaviour in question will have been sufficiently proven to bring about enough environmental benefit to outweigh the harm, and CCCS should consider granting leniency to the businesses that undertook these actions.

2.2.3 Weighing Interests

The following metric helps evaluate the significance of environmental benefits in the third step. As established, CCCS' duty is, in large part, to the consumer. In evaluating the effects of anticompetitive behaviour, it should use consumer welfare as a baseline metric, and environmental effects are then measured by their relative proximity to the consumer. The less direct and less immediate the benefits, the greater the corresponding scale of benefits (e.g. quantity of emissions cut, number of people affected) must be to outweigh the anticompetitive effects. In this way, CCCS can weigh the relative significance of different interest groups.

<i>Recipient and nature of benefit</i>	<i>Example</i>	<i>Scale of environmental benefit required</i>
Direct consumer, immediate benefit within the market	Immediate cost savings from more efficient green products	No benefit needed, as both consumer and wider environment are benefitted
Direct consumer, immediate benefit out of market	Consumers harmed by increase in waste disposal costs of a factory, but societal benefit from reduced pollution in local water bodies (of which the consumer enjoys)	Some degree of environmental benefit required, as consumers are hurt but also stand to benefit from the betterment of the environment, which they are a part of
Non-consumer, immediate benefit out of market	Consumers harmed by increased price of paper products, but natural forests are preserved for others to enjoy	Larger degree of environmental benefit required
Future consumers, future benefit	Current increase in price of timber, to ensure that forests are preserved for future generations to log	<i>Ditto</i>

Where anticompetitive behaviours give rise to a range of different environmental benefits, they should be evaluated comprehensively and holistically.

2.3 Additional Measures

CCCS can also adopt other measures to ensure businesses compete fairly in their pursuit of sustainability.

While collaboration between businesses can be allowed, CCCS can restrict the specific forms in which such collaboration can take place. Businesses can, for instance, be allowed to form joint ventures to invest in researching green technologies to be shared between competitors, but be penalised for coordinating how they utilise these technologies in production or their prices. This ensures that only the steps in the development cycle of a product which prove to be critical to ensuring its sustainability are undertaken. The EC, for example, ruled on the Consumer Detergents Cartel case (Laurinen, 2011), where the implementation of environmental initiatives reducing the weight and packaging of detergents did not contravene regulations per se. Rather, it was the ensuing price discussions that proved problematic, as it was considered extraneous to sustainability concerns.

3 CONCLUSION

Singapore's existing competition regulations need to be revised to address the sustainability concerns of the 21st century. While current competition law can be extended to cover some forms of environmentally degrading behaviour, it can afford to be more comprehensive and targeted in its approach towards environmental effects.

Although there is room for CCCS to better support sustainability, at the end of the day, the main priority of CCCS remains the prevention of unfair competition and the protection of consumers. Competition law is not the primary or only way to encourage businesses to adopt more environmentally friendly practices — instead, authorities should consider other avenues of promoting green practices, preferably in ways that do not affect competition negatively. As the nature of environmental concerns continues to evolve, CCCS should also consider how it can develop its approaches to achieve a better balance between different interests.

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