"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

Competition and consumer protection law as well as policies are part of a range of levers that the Singapore government utilises to ensure efficient economic outcomes. This existing efficiency-as-endgoal architecture continues to ameliorate - but perhaps only partially - the more deleterious effects of anti-competitive behaviour in fast-moving digital markets. Although the kinds of market failures that occur in digital markets are not unfamiliar, they do present novel definitional, detection and monitoring problems. Concurrently, the nature of the digital economy also challenges some of the implicit assumptions that current laws and policies are based off - for instance, that consumers can access critical decision-making information amongst others.

Consequently, while the essay finds that an overhaul of the competition and consumer protection framework is unnecessary, it argues that government intervention through targeted amendments aimed at increasing transparency and clarity is not. Six concrete proposals are provided to tackle both global and Singapore-specific issues posed by the digital economy. For global issues, it argues that:

1. An expert advisory panel will be crucial in detecting and determining violations of competition law in this new market environment.
2. The CCCS should review existing thresholds and guidance to decide if a firm is in violation of existing Competition laws.
3. The exponential pace of growth of the digital economy suggests a need for the recalibration of enforcement tools of various government agencies.

Where Singapore-specific market failure issues are concerned, the government should:

4. Reconsider voluntary notifications for mergers given the “competition *for* market” dynamics of the digital economy.
5. Institute legislative changes that increase built-in incentives aimed at inducing voluntary civil compliance to pre-empt the increased volume of complaints under the CFPTA.
6. Act to plug the widening information gap that handicaps consumer’s ability to exercise due care in the new digital environment.

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Introduction

To sustain macroeconomic growth, Singapore gears its competition and consumer protection laws towards promoting microeconomic efficiency. In this reading, the law does not primarily concern itself with distributional equity between consumers and producers; instead, it functions as one of the many tools used to achieve efficient economic outcomes. The authority that is entrusted with this fiduciary duty is the Competition and Consumer Commission of Singapore (henceforth CCCS) which administers the Consumer Protection (Fair Trading) Act (henceforth CPFTA) as well as the Competition Act.[1]

The primary objective of the Competition Act is, according to then-Senior Minister of State for Trade and Industry Vivian Balkrishnan, to "ensure an *efficient functioning market in Singapore* [emphasis added] and, ultimately, a competitive economy with competitive firms" (Singapore Parliament, 2004). Unlike EU Competition Law, Singapore's Competition Act does not explicitly contain clauses that aim to ensure distributive justice in favour of consumers. Indeed, in ascertaining SISTIC's violation of Section 47, the CCCS had utilised the total welfare standard instead of the consumer welfare standard. In the infringement decision, it notes that although "harm on consumers is an important part of total welfare" it is only insofar as "profitable increase in price reduces output"; the manner in which consumer welfare is considered in the decision-making process highlights the importance of competition laws in rectifying market inefficiencies (CCCS, 2010).

[1] The CCCS has enforcement powers only for the Competition Act.

The CPFTA is likewise aimed at improving market competition with the view that this will lead to better outcomes for consumers. First, current onus is for the consumer to undertake due diligence for market transactions (Low, 2018). Second, when drafting the associated legislation, the government was acutely aware of the risks of overburdening businesses with additional administrative barriers (Singapore Parliament, 2008).

It has been argued that this privileging of efficiency has necessarily resulted in potentially narrow definitions of both anti-competitive behaviour and consumer protection (Loo and Ong, 2017; Low, 2018; Khoo and Sng, 2019). This essay does not conclude if such a philosophy is desirable. However, it contends that there still exists scope for further selective and balanced government intervention under this efficiency logic when considering how rapid technological changes have transformed the nature of familiar market failure problems.

Overall, while is no need for an overhaul of the current competition and consumer protection architecture, amendments to existing legal and policy tools as well as the active involvement of technical experts will be required to better tackle the novel definitional, detection and enforcement problems presented by an economy based on digital computing technologies. The essay will closely consider these questions while outlining its case:

1. How does the digital economy challenge existing laws and policies?
2. Given current economic and social objectives, can we devise balanced policy and legal amendments that meet these novel challenges?

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It will first examine market failures that affect economies across all jurisdictions before proceeding to issues that are specific to Singapore given its development strategy and legal set-up. In both cases, suggestions that address both the extent and nature of government intervention are provided.

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A. Tackling market failure problems that are global in nature

I. Expert advice, in the form of an advisory panel, will be crucial in detecting and determining violations of competition law in this new market environment.

Price collusion can now occur without the usual smoking gun of design and instruction. Simulations conducted by economists illustrate how algorithms are able to coordinate without explicit communication to achieve prices significantly higher than a competitive market would produce (Calvano et al., 2019; Klein, 2019). This gives rise to two problems. First, Section 34 requires the existence of “agreements, decisions and concerted practices” for an act to be deemed a violation. Consequently, it seems that the clause is unlikely to cover widespread, unintended algorithmic collusion. Second, even if it were possible to challenge the legality of such behaviour, detection is likely to be very challenging. Previous cases adjudicated by CCCS have relied overwhelmingly on tip-offs or declarations under its amnesty scheme.[2] Given the black-boxed nature of profit-making algorithms and the possibly unintentional nature of collusion, violations may go undetected especially with insufficient technical expertise.

Simultaneously, the multiple high-profile cases brought against big tech firms demonstrates the potential difficulty in prosecuting and enforcing provisions found in Section 47 of the Competition Act. The thrust of this clause, and more generally the Act itself, lies in the ability to define the market in which a firm is in and hence

[2] For more information, do refer to CCCS’s report on the 2018 capacitor manufacturer case (disclosure under amnesty) and 2014 fresh chicken distributor cartel case (anonymous tip-off).

establishing whether they are in a “dominant position”, who their “competitors” are or the market relationship that firms have with other parties.

In both cases, CCCS can benefit from the counsel of a **select advisory group of technical experts** particularly for a market that is nascent, experimental and ever-evolving. First, increasing the involvement of tech specialists can be useful in detecting violations where anti-competitive behaviour is concealed by opaque algorithms. Second, economists and venture capitalists can provide input on CCCS’s counterfactual analysis, market definitions and merger reviews particularly in cases where the anti-competitive threat is not immediately apparent. Lastly, information exchange with international agencies can ease high detection costs by identifying recurring typologies of firm violations.

II. The CCCS should review existing thresholds and guidance to decide if a firm is in violation of existing Competition laws to better account for unique characteristics of the digital economy.

Prosecution under the “effect” limb of section 34, rather than “object” limb, may become more commonplace given the nature of firm behaviour in the digital economy. Object-based prosecution generally requires, amongst others, that (i) a credible collective will exist to enact the anti-competitive behaviour and (ii) an unambiguously negative economic harm based on the “total welfare” standard (Khoo and Sng, 2019). The first requirement makes reliance on the object clause difficult. There will exist severe difficulty in ascertaining collusive intent by algorithms even with technical

advice. Second, it remains to be seen how exactly the total welfare standard will be operationalised in cases that involve markets with zero-price, multi-sidedness and very low marginal costs.

One suggestion could be to **consider anti-competitive behaviour by firms operating in tipping markets qualitatively differently**. In markets with strong network effects, firms are incentivised to undertake penetrative pricing in early stages of competition in order to capture a dominant market share (Dube et al, 2008). It may be possible to provide a counterfactual case that illustrates the diminishing of total welfare in specific instances similar to standards used in CCCS's SISTIC case. Here, the CCCS should update guidelines with definitions of what might be deemed to have an appreciable impact on competitiveness.

Separately, the CCCS should **explore whether existing market dominance thresholds apply well to the digital economy**. In its investigation into claims that exclusive contracts by certain food delivery services were in violation of section 47, the CCCS had chosen to not intervene as firms are still “competing aggressively and market shares [are] changing significantly” (CCCS, 2016). Nonetheless, it recognised that when dominance does occur such exclusive contracting “risks infringing competition law” (CCCS, 2016). It may be beneficial to review whether it is reasonable to apply existing thresholds to the start-up industry where potentially anti-competitive behaviour early on assists in enabling the tipping effect that results in significant barriers to entry being erected. A relaxed definition of market dominance in cases relating to specific sectors could be used before applying the legal test for abuse of dominance.

III. The exponential pace of growth of the digital economy suggests a need for the recalibration of enforcement tools of various government agencies.

Traditionally, the legal benchmark for anti-competitive behaviour, particularly the abuse of market power, has been high (HM Government, 2019; WEF, 2019). Evidently, governments are aware of the risks of unnecessarily stifling the competitive process through overly restrictive legislation. Because of these associated complexities the time taken to conclude such cases can be long – 2 years in the United Kingdom and 7 years in the European Union (HM Government, 2019). Given the rapid rate in which market share accumulates, a long timeframe can prove deleterious to competition and consumers alike.

The CCCS **should thus consider greater use of its interim measures when prosecuting potentially anti-competitive behaviour**. A large swathe of cases handled have tended to involve fines and were stretched out over long time horizons.[3] This may be ineffective as consistent and high fines will be needed to influence the behaviour of large digital firms while fines themselves may prove ineffective in alleviating the damage to competitiveness in fast-moving markets.

[3] The CCCS's use of interim measures in the Uber/Grab merger provides a good template for expedited investigation as well as the use of targeted remedial measures that mitigate anti-competitive effects in digital markets (Lee and Leow, 2018).

B. Tackling Singapore-specific market failures

I. Voluntary notifications for mergers needs review given the "competition *for* market" dynamics of the digital economy.

Merger of direct competitors in the same digital market presents the most clear-cut case for intervention. However, such cases are rare. Instead, threats to competition and consumer welfare come in the form of the acquisition of small-scale tech firms in both direct and related markets by well-established tech giants. Two possible issues arise from such acquisitions. First, they may foreclose competition from a potential competitor. Studies suggest that at least 6% of acquisitions by big tech firms end up quashing would-be competitors (Cunningham, Ederer, and Ma, 2018) whose entry would have generated far larger benefits in terms of engendering greater competition, innovation and lower prices. Second, acquisitions in related markets have served to consolidate market shares of firms, with potentially unintended consequences of stifling competition (WEF, 2019).

Mergers in Singapore currently operate based on *voluntary* self-reporting. CCCS requires merger notification if each of the party's turnover is above S$5 million and the combined worldwide transaction is over S$50 million. However, CCCS is likely to investigate a matter only if market share of the merged entity is above 40% or between 20 to 40% with the post-merger combined share of three largest firms above 70% (CCCS, 2012). In the case of the Grab/Uber merger, both parties had not notified CCCS of the merger despite the likely risk to competitiveness. Thus, it is worth asking if problematic mergers have been conducted without CCCS's involvement given that they receive comparatively less media attention and direct consumer impact.

The possibility of underenforcement is particularly serious in fast-moving digital markets. Given that these fast-paced markets tend towards a winner-takes-all outcome, delays in intervention can have deleterious effects on total economic welfare. The CCCS **should review if the existing voluntary merger notification system** adequately addresses the threat posed by (i) non-declaration and (ii) cases that do not require notification; where feasible, merger notifications should be made mandatory.

II. Legislative changes should increase built-in incentives aimed at inducing voluntary civil compliance to pre-empt the increased volume of complaints under the CFPTA.

Beyond the direct harms that reduced competition poses to consumers, the rapid shift of commercial activities to online platforms opens up new fronts for ill-intentioned firms to exploit buyers. This threat is particularly salient given the rate of growth of Singapore's digital economy as well as its push to position itself as a global e-commerce hub.[4]

To better address the risk of increased investigation and monitoring costs of CPFTA violations, the government can **consider legislative changes that increases built-in incentives aimed at inducing voluntary civil compliance**. Two problems raised suggests the need for this - first, it will be difficult to monitor compliance in an online

[4] The gross market value of the digital economy is projected to triple to USD$7 Billion by 2025, from USD$2 Billion in 2019 (Google, 2019).

setting and second, there may be an increase in caseloads as e-commerce gains further traction in Singapore. For instance, Loo and Ong (2017) note how recalcitrant traders can continue to evade reputational costs of having an injunction status despite the amendments to the act in 2016. One way to address this is to increase CCCS's institutional power, equipping it with the power to apply to court directly for pecuniary penalties proportionate to firm revenue rather than to wait upon the outcome of police investigations (Loo and Ong, 2017). In so doing, the increased threat of incurring monetary penalties are strong enough to incentivise compliance. Moreover, the risks of saddling businesses with wrongful or disproportionate punishments are mitigated by existing avenues of appeal.

III. Consumer's inability to exercise due care in the new digital environment requires the government to plug the widening information gap.

Technological progress has facilitated the rise of complex algorithm-driven digital financial products. Singapore's ambitious FinTech plans, light-touch financial regulation and high levels of disposable incomes present a very attractive market for these platforms. Some of these robo-advisories, aimed at attracting retail investors, can have low barriers to adoption. Moreover, a survey found that eight in ten consumers are willing to consider using robo-advisories for their banking, insurance and retirement planning (Accenture, 2017). These developments, coupled with MAS's easing of eligibility restrictions in 2018, greatly increases the importance of regulatory oversight. Concerns have been raised about problematic algorithms that exploit information asymmetries to constrain consumer choice or reproduce bias by selecting

poor proxies for credit ratings (Baker and Dallaert, 2018). Second, the growth of digital platforms may make it easier for firms to exploit consumer behavioural biases to maximise profits through deceptive marketing strategies and ill-intentioned choice architecture.

Thus the current emphasis on placing onus of due diligence on consumers is increasingly challenged by the opacity of business operations and the increased potential for exploitation by firms. While consumers should continue to "bear the primary responsibility for protecting their interests" through "exercise [of] due care", more should be done to empower the consumer to close the widening information gap (MAS, 2004)**.**

Regulators have a responsibility to ensure that firms provide consumers with ample information about their product; this is especially crucial given the policy assumption of reasonably well-informed consumers. To this end, the government should **enable consumers to make well-informed decisions by exploring the possibility for consumers to crowd-source information and embarking on consumer education campaigns**. In the former, a one-stop-shop consumer platform can be integrated into CASE or CCCS's existing web resources. This platform can reduce the information gap through open reporting and provide easily-accessible data on violators. Such a platform can also assist in compliance monitoring and assisting CCCS to detect trends in hard-to-observe violations such as algorithmic price-fixing.

Conclusion

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The digital economy presents a range of novel definitional, detection and enforcement problems for governments where market failure is concerned. However, the transition to a new normal characterised by fast-moving, highly networked markets can be managed with carefully calibrated amendments to existing legal and policy tools. The proposals have sought to align with the broader efficiency logic through encouraging greater transparency in the market by businesses, consumers and governments alike.

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