Abstract

This essay is divided into 3 parts. In Part I, I briefly discuss the objectives of competition law and argue that even though considerations of equality should be irrelevant to whether a practice is anticompetitive under the law, such considerations can nevertheless be relevant to policy design. Potential recommendations include allowing larger firms to independently sue for antitrust injury which will free up the CCCS's resources to pursue other claims. In Part II, I discuss network effects and how they are relevant to the risk of anticompetitive foreclosure in digital markets. I also recommend an update to the substantive guidelines on merger control to reflect the risk of "killer mergers". Finally, I propose that the requirement of pre-existing dominance for prohibition of abusive conduct under Section 47 be abolished in light of novel methods of monopolisation. In Part III, I argue that consumer protection under the CPFTA chronically under-deters unfair trade practices to the detriment of consumers and I advocate for significant reform centred upon granting the CCCS wider powers.

I. The Goal and Non-Goals of Competition Law

Competition law's essential function is to deter conduct detrimental to the competitive process and ultimately long-run welfare. Even without introducing competing objectives, this is a complex process. Undoubtedly, addressing public policy goals like externalities and inequality is important. Such goals, however, should be irrelevant to competition law's doctrines. Their consideration would reduce clarity and diminish the effectiveness of behaviour modification intended by the law.

While these considerations should be extraneous to the *substance* of competition law, they may be relevant to the design of the regulatory system. Reducing inequality is possible by eliminating the follow-on requirement for private actions. This would allow large corporates who are victims of antitrust violations to pursue remedies independently of prior intervention by the CCCS. This would free up the CCCS's resources to pursue claims which SMEs or consumers cannot afford to take up themselves. It is strange that although trademark and competition laws are both forms of trade regulation, competitors can independently sue for trademark infringement but not for antitrust violations.

Another change would be to address inequality caused by the falling share of labour income by reprioritising efforts towards vulnerable labour markets. In particular, numerous wage-fixing and no-poach cases in the United States and Europe have been brought against employers in the technology and healthcare industries.[1] Labour markets in these industries are likely more amenable to

[1] For collusion by healthcare employers see e.g. *Danielle Seaman v. Duke University and Duke University Health System*; *United States v. Utah Society for Healthcare Human Resources Administration*; *United States and the State of Arizona v. Arizona Hospital and Healthcare Association and AzHHA Service Corporation*; HD 200.056.031, Gerechtshof 's-Hertogenbosch (Netherlands), May

collusion because of the relative homogeneity of workers' technical skills and oligopolistic market structures. Apart from market studies, the CCCS should also consider issuing a guidance to HR professionals to highlight the seriousness of collusion in labour markets, as the DOJ and FTC have already done.[2]

II. The Digital Economy is Many Things

The digital economy is dynamic

Like in no other industry before it, technology start-ups scale rapidly due to low marginal costs. A recent allegation against antitrust enforcers is that they have failed to prevent tech giants from engaging in so-called "killer mergers" of maverick start-ups, some of whom could have otherwise become forceful competitors. Despite their negligible market shares, critics lament that many of such acquisitions have been greenlit to the detriment of competition and welfare.

Regardless of the prevalence of "killer mergers" in Singapore, no major legislative reform is required. The existing test of a substantial lessening of competition under Section 54 is sufficiently broad to address acquisitions of potential competitors. Such acquisitions are still subject to Section 54 as market shares are merely indicative of the likely loss of competition. Indeed, the proposal in the ACCC Digital Platforms Inquiry[3] is a modest one and does not overhaul merger control under the Australian Competition and Consumer Act. The ACCC only recommends an amendment to emphasise the significance of potential competitors and digital assets like data. In recognition of the competitive threat of

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4, 2010. For collusion by technology sector employers see e.g. *In Re: High-Tech Employee Antitrust Litigation*, U.S. District Court, Northern District of California.

[2] Department of Justice and Federal Trade Commission, *Antitrust Guidance for Human Resource Professionals* (October 2016).

[3] Australian Competition Commission, *Digital Platforms Inquiry Final Report* (June 2019) at 105.

small tech firms, a similar update to the Section 54 guidelines to address the digital economy may be useful.

The real challenge lies in the availability of resources. To properly evaluate the counterfactual, the CCCS will need the expertise to assess the capabilities of small tech firms and the expected value of consumer welfare lost, if any, due to an acquisition.[4] It must determine whether the dominant firm can succeed at replicating the acquired firm's innovations and thereby retain its dominance or if the small firm will maintain its technological edge for a sufficiently long period of time to become a competitive threat. Wrongly barring acquisitions of firms which were never going to succeed against the dominant firm would, without any benefit to static competition, unnecessarily harm dynamic efficiency by reducing the incentives of start-ups driven by payoffs from acquisitions.

The digital economy is behavioural

Much of the digital economy is driven by small-scale transactions with millions or billions of users. Firms like Google, Facebook and Amazon use an arsenal of techniques to encourage usage and extract maximum value from their users. While some innovations such as UX improvements are innovative and productive, many techniques provide no benefit to the user and are purely rent-seeking.

A major subset of these rent-seeking techniques nudges users towards increased usage by exploiting behavioural biases. Harry Brignull coined such methods as "dark patterns". Examples include the exploitation of our bounded willpower and attention by making it difficult for users to delete their accounts by

[4] See C. Scott Hemphill, *Uncertain Harms: The Case of Nascent Competitors*, Concurrentialiste (June 16, 2020).

requiring the user to contact customer service by email. Preying on our fears of social exclusion, a now-removed Facebook feature once prominently featured photos of friends it claimed would “miss you” if you attempted to deactivate your account. A method endemic in ecommerce is the exploitation of our carelessness through automatic subscriptions and pre-checked checkboxes.

Such practices are not simply privacy or consumer protection issues but have potential relevance to antitrust.[5] Users who unintentionally sign up to a long-term ecommerce subscriptions which promise discounted rates are likely to favour that platform to the detriment of competing platforms. In the case of non-paying users on platforms like Facebook or YouTube, capturing the person’s attention for longer periods maintains the firm’s hold on their core marketable commodity for sale to advertisers. Of course, not all innovations should be deemed anticompetitive. Only conduct which intentionally worsens the customer experience but nevertheless increases usage is likely to be anticompetitive and might satisfy the “no-economic sense” test.

Are our competition laws sufficient to address such practices? I argue that they are not. Section 47 is the natural choice to regulate unilateral conduct, but it only prohibits abuses *of* dominance. Dark patterns’ effectiveness does not require that the firm in question is dominant in any relevant or related market. Of course, a dominant tech firm’s access to usage data and a larger userbase will significantly improve the effectiveness of such behavioural exploitation through, for example, enabling effective A/B testing. However, dominance is not strictly required for implementation of dark patterns.

[5] For a thorough survey, see Gregory Day and Abbey Stemler, *Are Dark Patterns Anticompetitive?* (2019). Alabama Law Review, Forthcoming.

It is an open question whether a causal connection between dominance and abuse is even required under Section 47. Notwithstanding the interpretations of Article 102 (the parallel provision in the TFEU) in *Continental Can*[6] and *AstraZeneca,*[7] Section 47's plain text implies such a connection. To the detriment of the German Bundeskartellamt's case against Facebook, the Düsseldorf court has rightly interpreted Article 102 to conclude that a causal connection is necessary.[8] Novel methods of monopolisation unlinked to dominance, including the employment of dark patterns, thus may fall outside the scope of Section 47. On a comparative note, monopolisations which *lead* to the acquisition of dominance are prohibited under the Sherman Act. Likewise, Section 47 should be amended to eliminate the requirement of pre-existing dominance.

Naturally, abuses of pre-existing dominance pose greater competitive risks. However, that does not justify the blanket exclusion of all other methods of monopolisation. Abolishing the dominance requirement will also be useful outside the digital economy. Methods of monopolisation unlinked to dominance include the intentional spread of disinformation, sabotage and sham lawsuits intended to raise rivals' costs.

The digital economy is networked

Contemporary debates surrounding the digital economy often revolve around network effects. Yet, the mere existence of network effects should not imply an anticompetitive risk. As the Competition Appeal Board's decision in *SISTIC*

[6] Case 6/72, *Europemballage Corp and Continental Can Co Inc v Commission* [1973] ECR 215.
[7] Case C-457/10 P, *AstraZeneca v Commission*, 6 December 2012. The so-called abuses of dominance in question were misrepresentations that the firm had made to several European patent and regulatory offices.
[8] Case VI-Kart 1/19 (V) OLG Düsseldorf, *Facebook v Bundeskartellamt*, August 26, 2019.

demonstrates, the strength of network effects is context-specific and a matter of degree. Mere leveraging of a network or self-preferencing cannot always be presumed to be anticompetitive as vertical integration has well-studied procompetitive dimensions.

The main problem with network effects is that they operate as a barrier to entry. Accordingly, strongly networked firms can extract concessions intended to foreclose rivals upstream or downstream without fear of displacement. This manner of foreclosure forms the basis of the EC's case against Google in *Google AdSense* and *Google Android*. The problems with network effects, therefore, are largely rehashes of traditional problems of foreclosure. Antitrust law has long had the tools to supervise such methods of monopolisation, primarily through its experiences with exclusive dealing, tying and volume discounts. The search for a consensus on the correct test for foreclosure is ongoing, but that is a problem not unique to networks in digital markets and therefore no extraordinary reform is required.

III. The Curious Case of Consumer Law in Singapore

Turning to consumer law, the Consumer Protection (Fair Trading) Act (CPFTA) is the chief consumer protection legislation in Singapore and grants consumers rights beyond ordinary contract law. However, in shifting the burden of legal action to consumers, the CPFTA under-deters unfair trade practices and leaves consumers vulnerable to repeated injury.

When a consumer is injured by an unfair practice as defined under the CPFTA, only the consumer can sue for recovery. The CCCS can only apply for court declarations, injunctive relief, public notification obligations or obtain voluntary compliance agreements. Unable to impose punitive financial penalties or obtain redress for customers, businesses have little incentive to accede to voluntary compliance orders as doing so exposes them to greater liability than they would have by ignoring the CCCS. The only real risk is if a consumer actually invokes her rights under the CPFTA, but even then the firm will only be forced to unwind the transaction and is not subject to punitive penalties.

Since efficient deterrence of any harmful practice requires that the expected cost must be at least as great as the expected value obtained, rational firms will carry out unfair practices until they are ultimately restrained by the court. This will be the case as long as the percentage of injured consumers who pursue their remedies is under 100%. Intuitively, few consumers will invoke their CPFTA rights due to the layperson's unfamiliarity with the legal system.

The existing approach reflects a legitimate fear of chilling businesses and substantial faith in reputational mechanisms. However, if we already trust the CCCS to identify correctly bad actors sufficiently to grant it the ability to seek injunctive relief,

then we should also trust the CCCS to mete out financial penalties proportionately. The judicious use of warning letters against first-time offenders can also mitigate this fear. The CCCS can also reach settlements with businesses to avoid the heavy administrative costs of court proceedings. Yet, without the ability to seek or impose penalties, financial or criminal, the bargaining position of the CCCS is very weak.

The weakness of the current approach is exemplified by the case of SG Vehicles. Briefly, the firm was placed on the CASE company alert list in 2015 and again in 2017 for misrepresenting terms of sales agreements and for seeking additional payments. SG Vehicles declined a voluntary compliance agreement. Only in April 2019 was a court order obtained enjoining the firm from unfair practices under the CPFTA. The amount of consumer injury caused by SG Vehicles over several years of operation before issuance of the order is likely to be significant. Essentially, the signal sent by the CPFTA is that firms can keep their profits even if they get caught.

By international standards, the norm is for enforcers to be able to impose financial penalties. In a survey of 31 governments carried out by the OECD,[9] 60% can apply civil penalties (such as forfeiture and redress payments) and 57% can issue criminal fines. Breaches of Australian consumer law can be penalised by fines up to $10,000,000, three times the value of the benefit received, or 10% of the firm's annual turnover. Personal individual liability is also possible. In New Zealand and the United States, authorities can impose fixed-term and permanent bans on companies from engaging in particular lines of business.

The statutorily prescribed limits of $30,000 for claims under the CPFTA also curiously deprives the most serious victims of remedies under the CPFTA. The

[9] OECD, *Consumer protection enforcement in a global digital marketplace*, OECD Digital Economy Papers, No. 266 (2018).

existence of this bright-line exclusion is unwarranted. It is not true that individuals with claims above the amount should be presumed to deserve only ordinary contractual remedies. The elderly can possess large sums of expendable wealth and are known to be vulnerable to pressure-selling of dubious health and financial products. Those with mental disorders can be persuaded to spend large sums they cannot afford – in 2019, a well-educated professional in her twenties was alleged to have borrowed and spent hundreds of thousands of dollars at a bust enlargement salon advertising "natural" methods.

Why do consumers not frequently invoke the CPFTA? Unfamiliarity, a lack of access to justice and a false belief that they are always bound by the terms of their contracts are some reasons. One might suggest improving public education and access to justice. Yet, the returns of investment in public education campaigns are likely to be marginal. Professor Ben-Shahar describes how most business-to-consumer relations are realistically "one-way contracts" where enforcement is only realistically available to the business, not the consumer. Consequently, policymakers should rely less on empowering consumers and instead design policies assuming consumers will rarely ever invoke their rights.[10]

Reputational mechanisms are also inadequate. By way of illustration, the Company Alert list operated by CASE lists just 39 businesses on its "Company Alert List", including companies flagged as far back as 2010. This means roughly just 4 businesses are flagged per year. This number is likely to represent a small fraction of the true numbers of errant businesses. One explanation could be that CASE is not able to flag companies without a sufficient number of complaints. The lack of

[10] Omri Ben-Shahar, *One-Way Contracts: Consumer Protection without Law*, 6 European Review of Contract Law 221 (2010).

complaints is the result of a public good problem: Consumers are underincentivised to promote the common good by lodging a report if doing so does not increase their own prospect of recovery. Rational consumers will simply move on with their lives.

In conclusion, consumer protection in Singapore falls far behind international norms. Too much faith is placed on contractual and reputational mechanisms that simply do not work. Major reform is recommended.