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Environmental Sustainability: The role of competition and consumer protection laws and policies

Selene Tanne

Research Assistant
APCEL, Faculty of Law, National University of Singapore

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Abstract

Humanity is facing existential environmental crises, including climate change and biodiversity loss. This must be mitigated through environmental sustainability, which entails decarbonisation and reduced resource consumption. Despite the urgency, progress remains sorely inadequate. Sustainable technologies exist but not at the large scale of production and consumption required. Thus, this essay argues that competition and consumer protection regimes (i.e., laws and policies) can and should be instrumentalised by Singapore to push the economy-wide sustainability transition. While both are crucial, our competition regime is an important driver in the background, while our consumer protection regime takes a more front-facing role in driving our economy-wide sustainability transition.

Part I demonstrates how fair competition as we know it is environmentally damaging and seems at odds with environmental sustainability. Part II reconciles the two by showing how our competition regime maintains fair competition in a balanced and effective manner, excusing collaborations and mergers if they can achieve net economic benefits and benefits to consumers and wider society. Further, it draws on best practices from the Netherlands, a jurisdiction that is a pioneer in sustainability-conducive competition regulation, to show that we are on the right track and for ideas on how fair competition can be used to spur sustainability activities. Part III argues that, in contrast, our consumer protection regime is insufficient to protect consumers against greenwashing and regulate green claims. As a solution, it suggests setting up an expert group to (1) create and promulgate standards for green claims that are harmonised with international standards and national goals; and (2) exercises monitoring, verification, and enforcement powers.

(261 words)

Introduction

Under the UN Paris Agreement and the Sustainable Development Goals, the international community, including Singapore, has committed to environmental sustainability ("sustainability"), especially to cap global warming at 1.5˚C or 2˚C at most to avert irreversible environmental destruction. Economies must reduce resource consumption and decarbonise to achieve this, but progress remains sorely inadequate. Sustainable technologies exist but not at the large scale of production and consumption required (IPCC, 2022).

Competition and consumer protection regimes (i.e., laws and policies) can be instrumentalised by Singapore to push the economy-wide sustainability transition. Part I explores how fair competition as we know it seems at odds with sustainability. Part II reconciles the two by showing how, for our economic transition, we need our competition regime to continue maintaining fair competition in a balanced and effective manner through the lens of sustainability. Contrastingly, Part III explains how our consumer protection regime is insufficient to protect consumers against greenwashing and regulate green claims, giving suggestions to remedy this.

I. Fair competition as we know it is unsustainable

Fair market competition incentivises businesses to constantly innovate, produce outputs of favourable quality, and price their offerings attractively; thereby benefiting consumers (CCCS, 2021). This conceptualisation of consumer welfare, popularised by classical economics, is at the heart of fair competition and many competition regimes. However, the problem with this business-as-usual view is its narrow focus on direct, short-term, and

quantifiable economic benefits; while preferring to disregard other factors, including externalities borne by third parties (Holmes, 2020).

Therefore, there is tension between fair competition and circumscribing it in exchange for benefits *perceived* as non-economic, longer-term in nature, and difficult to price. Sustainability is one such benefit challenged in this way, despite (1) being the solution to the existential threat of climate change and irreversible environmental destruction (IPCC, 2022) that humankind urgently needs; and (2) that it *is* an economic benefit (OECD, 2011). Furthermore, the gap between fair competition and sustainability becomes even more obvious when we consider how competition spurs maximal resource consumption for minimal prices – thus far, it has *always* had direct negative implications for the environment (Veljanovski, 2022).

It has been said that competition regimes deter corporations from collaborating on sustainable G&S or standards, thereby preventing them from reaping economic benefits to benefit consumers and, generally, benefits to wider society. In a study conducted by Linklaters [1], 57% of businesses polled claimed that they had shelved collaborative sustainability projects because they were uncertain about whether these projects would be deemed anticompetitive; the legal risks of breaching competition law were too high (Linklaters, 2020). Numerous industry practitioners and experts in different countries have also stepped forward to share similar personal experiences (BIICL, 2021).

This specific problem has not yet been reported in Singapore, possibly owing to a lacuna in research and/or that sustainability activity in European markets is ahead. However, given

[1] One of the UK's global law firms.

that sustainability has repeatedly been confirmed as a national[2] and even regional priority[3], the acceleration of sustainable business activities is not just necessary, but also inevitable. To this end, Singapore's competition regime must support, not bar, her sustainability and economic progress.

II. Singapore must protect fair competition through the lens of environmental sustainability

If fair competition as such is unsustainable, must Singapore overhaul her existing competition regime to achieve sustainability? Not necessarily. Doing so could instead harm both consumers and sustainability. Competition itself is not the problem, but our use of it is.

The argument for dismantling competition regimes has gained traction particularly in UK and the EU, two jurisdictions that have significant influence (*Pang's Motor Trading v CCS*) on Singapore's competition and consumer protection regimes. Though it seems like a beneficial course of action enabling producers to internalise more negative environmental externalities (Veljanovski, 2022), it is fallible. To date, the European Commission has not blocked any of cooperative agreements for sustainability production (Veljanovski, 2022). Furthermore, many of the corporations professing reluctance and advocating for a looser competition regime in the name of sustainability (e.g., Unilever), have in fact formed cartels knowingly despite the risk of penalisation (Veljanovski, 2022).

Worse still, some "green cartels" pursuing sustainability have abused the market. For example, a European car cartel (BMW, Daimler, and VW Group) colluded to limit the

[2] For example, see the Singapore Green Plan 2030.
[3] For example, see ASEAN Taxonomy for Sustainable Finance (2021).

development of emissions cleaning technology to the bare legislated minimum and agreed not to compete for best possible performance (Veljanovski, 2022). Not only do such abuses distort the market and inflate prices, but they also hinder the development of sustainability technologies and prolong environmentally damaging practices. This is especially immoral, considering their ability to do otherwise.

These dangers do not mean that Singapore's competition regime should not accommodate sustainability. Market abuse is relatively rare in Singapore – only seven in the last twelve years, and most concerned elevator spare parts (CCCS Public Register). The number of collaborations conducted in good faith, with the genuine purpose and potential to maximise sustainability performance, are increasing (Jansen et al., 2021). While we should not dismantle competitive pressures that keep businesses accountable to consumers and society, we should leverage on them to spur sustainability innovations and widespread adoption. Thus, the solution is for Singapore to carve space for sustainability within its competition regime and clearly demarcate its thresholds.

Singapore's existing competition regime takes flexible and balanced approach towards potentially anticompetitive behaviours. Anticompetitive collaborations (Competition Act s34), mergers (Competition Act s54), and abuse of dominance (Competition Act s47) are prohibited by default. Where a net economic benefit could result, collaborations are allowed (Competition Act Third Schedule). The Competition and Consumer Commission of Singapore (CCCS) has willingly granted such exclusions and emphasised that collaborations can be economically beneficial and pro-competitive (CCCS, 2021). It has also issued industry-specific guidance for airline alliances, clearly explaining conduct and considerations that would be economically beneficial and/or pro-competitive (CCCS, 2018). Further, Singapore's competition regime takes total social welfare into account, as opposed

to just the consumer welfare standard (CCCS, 2010). It looks beyond the prices paid by direct consumers and considers the third-party externalities borne by wider society. This attitude enables us to preserve our competition regime while pursuing an economy-wide sustainability transition.

For example, in response to the COVID-19 pandemic, CCCS issued new, temporary guidelines to allow collaboration between competitors to fulfil the demand of essential goods and services (G&S) here. As part of that, CCCS adopted a general presumption that all collaborative activities for essential G&S would result in net economic benefits and not infringe the act, provided they do not involve “hardcore” anticompetitive practices (i.e., price fixing, bid-rigging, market sharing or output limitation). Even then, “hardcore” agreements were not automatically disallowed; they may have been permitted if they were indispensable to attaining the net economic objective (CCCS, 2020). The COVID guidelines were significant because they lowered the barriers to collaboration and removed the burden of proof on businesses to justify collaborative agreements. Not only had this redirected time and resources to economically productive activities to benefit that market, but it had also provided legal certainty to market players and encouraged them to collaborate “for the correct reasons”. The COVID guidelines, therefore, created the conditions necessary to meet the needs of businesses, consumers, and wider society to be met; and helped to avert essential G&S shortages that plagued other countries during the pandemic.

A similar, albeit permanent, pronouncement can be issued regarding collaborations and mergers that focus on sustainability, to achieve similar benefits. In fact, this is the approach pioneered by the Netherlands, which has one of the most sustainability-conducive competition regimes in the EU, and is considered a best practice (Jansen et al., 2021). Accordingly, these sustainability exclusions should be objectively weighed in terms of how

much environmental damage is circumvented, and can outweigh economic restrictions by default, unless such restrictions are excessive and unnecessary (Jansen et al., 2021). However, because this creates a space with lesser competitive pressures, CCCS must remain vigilant and reserve its right to use its powers where anticompetitive harms arise. Therefore, it is crucial for Singapore to preserve its comprehensive competition regime so that sustainability exceptions can operate within that effective system. While the competition regime is not the main regulatory intervention to push sustainability, it nevertheless is an important driver in the background.

III. Contrastingly, Singapore's consumer protection regime provides consumers with inadequate protection from greenwashing and should be revitalised in this aspect.

Greenwashing is the act of making false or misleading claims about the environmental merits of a product, service, or technology (Channel News Asia, 2021). A burgeoning global problem, businesses are exploiting increasing consumer preferences for sustainability by using "green claims" as a marketing tactic, rather than as a genuine expression of their product development. Not only are these practices unethical, but they also distort the market and exacerbate allocative inefficiencies and negative externalities as consumers' payments continue funding unsustainable practices.

Singapore's consumer protection regime is *laissez faire*, protecting consumers to the extent that the knowledge they receive from producers is true, while ensuring that the regime is not so strict as to be a barrier to entry to Singapore's market (Low 2018). The legislative frameworks within this regime – the Sale of Goods Act, the Unfair Contract Terms Act, and

the Consumer Protection (Fair Trading) Act 2003 – are not the problem. They capture specific unfair practices by firms while still maintaining enough generality to apply across various markets, including sustainability.

Instead, the problem lies with how enforcement is designed: responsibility for restitution is squarely upon consumers' shoulders. Legislative provisions and remedies are available but only if the affected consumer seeks them out herself (Low, 2018). This approach is generally adequate, but regarding sustainability, it fails to protect consumers and the market from greenwashing distortions. The laws offer only *ex post* courses of action that penalises, rather than prevents, damage. Granted, penalisations add to precedent and may deter greenwashing by other companies in this way. However, as mentioned, these mechanisms kick in too late, after harm is done and when restitution is sought. In this way, the existing consumer protection regime allows greenwash to circulate in the market until a consumer is harmed and decides to act. Even then, that is a costly and time-consuming process for consumers. Thus, it is crucial to have a consumer protection regime that robustly regulates sustainability claims and actively defends them from greenwash.

CCCS and the Consumers Association of Singapore do already assess and flag untrue claims made by businesses. This role can be expanded specifically to target greenwashing. Because sustainability is technically complex, a joint group of experts can be set up to develop clear guidelines for making and substantiating sustainability claims, drawing upon existing and developing standards, such as the ASEAN and EU green taxonomies, and international climate-related disclosure frameworks (e.g., as mandated by the Singapore Exchange). They are in a unique position to harmonise sustainability standards in Singapore with that in the international community, which also increases Singapore's contributions as

a global sustainability innovator and leader[4]. Each sustainability product is different, so these guidelines would serve not as an exhaustive list but a baseline that sellers must comply with as a minimum.

The expert group should also undertake active policing, which is how competition watchdogs in other jurisdictions are handling the problem (Horton, 2022). This is especially important considering that most consumers are unsophisticated laypeople, rather than sophisticated investors who have the means to undertake details technical assessments to verify sustainability claims of potential investments. As part of this, the expert group can be given the mandate to access confidential information to verify sellers' claims. It will function as the official intermediary to strike the balance between business confidentiality and information accuracy: sellers need not disclose confidential information to the market but if the expert group finds that their claims are untrue using public and confidential information, those errant sellers should be required to remove those claims from their product. If this mechanism is in place, consumers can also shop with more confidence because they would know that the claims they see are already verified and reliable, creating a more fair and efficient market. Moreover, promulgating green claims standards in this way raises public sustainability awareness, influencing consumer choices and spurring the sustainability transition even more.

As such, our consumer protection regime must be revitalised to play an active role in regulating green claims and improving both consumer expectations and holding businesses to account. It must take a front-facing role in driving our economy-wide sustainability transition.

[4] Singapore's intentions are clear in, for example, recently joining the global partnership to develop and scale-up low emissions technology. See https://www.channelnewsasia.com/singapore/singapore-joins-first-movers-coalition-low-carbon-emissions-world-economic-forum-iswaran-2708616 (Channel News Asia, 26 May 2022)

Conclusion

Singapore's competition and consumer protection regimes focus on protecting consumers, and this is especially necessary in the economy-wide sustainability transition. Our competition regime and CCCS regulate fair competition effectively and in a balanced manner and should continue to do so while prioritising national goals and international commitments for sustainability. However, our consumer protection regime is not proactive enough to robustly regulate green claims and protect consumers and the market from greenwash. More needs to be done for sustainability and this entails creating an expert panel to develop harmonised guidelines, monitor claims and take enforcement action.

(2499 words, including footnotes, references, and bibliography)

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