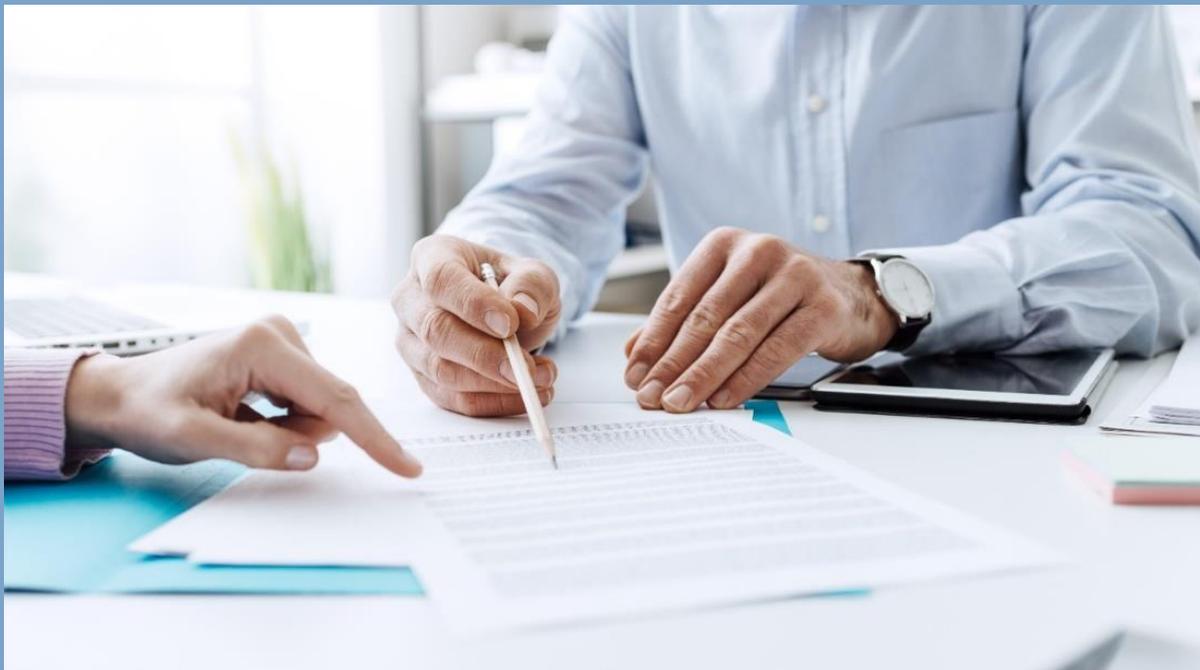


Price Transparency – Consumer Protection v Antitrust Infringement



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Introduction

On 7 September 2020, the Competition and Consumer Commission of Singapore ('**CCCS**') issued its guidelines on price transparency ('**Guidelines**')¹. The Guidelines set out how the CCCS will interpret and give effect to the Consumer Protection (Fair Trading) Act ('**CPFTA**') in relation to the display and/or advertisement of prices and other pricing practices in Singapore². Additionally, the Guidelines indicate some factors that the CCCS may consider while assessing whether the displayed price(s) are potentially misleading as well as providing some indicative actions that suppliers should take to ensure that prices (and their accompanying terms) are accurate and are clearly communicated.

While the Guidelines are intended to build a credible marketplace (by ensuring that consumers make informed decisions and suppliers adopt fair trading practices), the notion of price transparency has, for some time, been considered to be on the fringe of a skirmish between the principles of consumer welfare and the rules of competition laws.

In principle, greater price transparency seems useful, because markets typically function better when consumers have the information they need to make choices among available options. But price transparency is not pervasively good. When it goes too far, it can actually harm competition and consumers. Some types of information are not particularly useful to consumers, but are of great interest to competitors.

In this article, we intend to discuss the issue of price transparency and how it is considered by regulatory authorities from a consumer / competition law perspective.

What is Price Transparency?



Price transparency allows consumers to make informed purchasing decisions. The way suppliers display and advertise their prices can have a significant impact on consumers' behavior and their decision to purchase.

The Guidelines set out four key pricing practices that may mislead consumers and thus, be considered price-opaque. These include (amongst others):

¹ file:///C:/Users/pg005/Downloads/CCCS%20Guidelines%20on%20Price%20Transparency_HR%20(1).pdf - accessed on 07.09.2020

² On 1 April 2018, the CCCS assumed the role of the administrator and enforcer of the Consumer Protection (Fair Trading) Act from SPRING Singapore. This additional role runs concurrent with its role as the competition watchdog pursuant to the Competition Act of Singapore.

- (a) *Drip Pricing* – advertising a product / service at a lower price than the final price that a consumer would have to pay.
- (b) *Price Comparison* – suppliers making price comparisons with their competitors to indicate that they are offering the lowest price for a product/service.
- (c) *Discounts* – a representation that the current price (being offered) is lower than a product / service's regular price.
- (d) *"Free" products* – practice to entice consumers to try a product, either by way of bundling products, or increasing the price of the basic product to cover the cost of the 'free' product.

The aforementioned practices are considered unfair under the rules of consumer protection laws which have been formulated to safeguard the rights and interests of consumers. Markedly, the consumer protection regime does not consider the impact that some 'unfair practices' may have on other laws, including competition laws.

In fact, the United States Supreme Court has observed that the dissemination of information (including price transparency) in the marketplace "is normally an aide to commerce³" and "can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive⁴."

Thus, in a nutshell, it may be stated that price transparency is usually considered good and consistent with the rules of the consumer protection statutes in various countries. However, when the pricing information disclosures allow competitors to figure out what their rivals are charging so as to dampen each competitor's incentive to offer a low price, or increase the likelihood that the competitors can coordinate on higher prices, that is when price transparency enters the realms of competition laws and pique the interest of competition regulators.

The Conflict between Consumer Protection and Antitrust Rules

The advent of internet has led to a more dynamic pricing strategy as consumers are now able to enjoy increased price transparency and the consequent ease of price-comparison, and at the same time, it has also enabled suppliers to monitor their competitors' prices on a real-time basis and adjust their price levels accordingly. With the advancements in technology, competitors may also respond quicker than customers to price discounts and adjust prices downward to prevent any loss of customers⁵.

Additionally, the price at which the suppliers sell their product(s) on the 'online' market platform is, in many instances, lower than the cost price for the brick-and-mortar retailers. Accordingly, the latter either have to match the online prices (at a significant loss), or be at risk of being foreclosed by such virtual marketplace.

To address these concerns, competition authorities may focus on two points:

- (a) the 'value' of the price transparency in promoting efficiency in the market, including the benefits to consumers; and
- (b) the likelihood of such price transparency facilitating tacit collusion.

We discuss each of the aforementioned, in detail as under.

(a) Promoting Efficiency

We have stated earlier in the article that consumer behavior is influenced by various pricing practices. One such practice is the provision of discounts / rebates.

³ Sugar Institute, Inc. v United States, 297 U.S. 553,598 (1936)

⁴ United States v United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978)

⁵ Maurice E. Stucke, *Evaluating the Risks of Increased Price Transparency*, Antitrust magazine, Spring 2005, a publication of the ABA Section of Antitrust Law, at page 81

While it is acknowledged that price transparency (including discounts, rebates etc.) may be part of a legitimate price competition and may lead to lower prices for consumers, there is also a concern that they may be used by a dominant company as part of a strategy to exclude competitors and exploit consumers⁶.

Thus, an assessment of price transparency for antitrust purposes may involve an evaluation of the market power of the enterprise (offering the rebate / discount), the nature of the discount being offered, the intent behind the same and the effect of such price transparency on competition in the relevant market⁷.

Similarly, discounts offered by online platforms in the early years are typically seen as a means to establish network effect for user on-boarding. However, these discounts may harm competition when used as an exclusionary device by entities with market power⁸.

In fact, most of the competition issues emanating from the concept of price transparency seem as to arise from dominance and so, suppliers with a dominant position in the relevant market may need to be extra cautious while making their prices transparent.

To address any competition law concerns re price transparency, suppliers may take the following precautions (non-exhaustive):

- (i) ensure that price comparison remains as such and does not result in / arise from collusion / cartelization (discussed in more detail at part (b)- tacit collusion - below);
- (ii) ensure that the discounts / rebates are implemented only for a short period of time, or have a fixed 'end date' and/or cannot be considered 'predatory' in nature; and
- (iii) the provision of 'free' items should preferably be on a short-term promotion basis so as not to be viewed as an unfair tying / bundling.

(b) Facilitating Tacit Collusion

Price transparency may lead to tacit collusion amongst competitors. If competing agencies know of each other's prices, they can easily price their own products / services at the same price to the consumer's disadvantage and to the detriment of the overall competition process.

However, Courts generally recognize that in concentrated markets, information exchanges and increased price transparency can have anti-competitive effects, while in an oligopoly, each firm may set its price based partly on strategic considerations regarding its competitors' behavior⁹.

Additionally, the rapid dissemination of pricing information in the market may foster "supra-competitive pricing"¹⁰ (i.e. if competitors react more quickly than a sufficient number of buyers, the discounter stands to gain little, if at all. Any incremental sales will be to the extent that the market demand increases at the lower price point. If the discounter lowers its price, its competitors will follow and all of them will make less as a result).

When competitors have knowledge of what their rivals are charging, it both decreases the incentive to offer a lower price and increases the likelihood of coordinated behavior leading to higher prices.

If, however, the competitors unilaterally determine their own prices and have not taken any additional steps among themselves to foster the supra-competitive pricing, then even if the competition regulator finds a violation, there is little it can do as neither courts, nor antitrust enforcers can eliminate such non-coordinated action¹¹.

⁶ file:///C:/Users/pg005/Downloads/32370%20Comparative%20guide_EU_d4%20(1).pdf - accessed on 08.09.2020

⁷ *Market Study on E-Commerce in India: Key findings and observations*, Competition Commission of India, 08.01.2020; para 101, pg 33

⁸ *Ibid*, at para 99, page 33

⁹ *Supra*, at 5 above.

¹⁰ *Ibid*.

¹¹ *Ibid*.

The competition regulators can step in if it can be shown that the price transparency involves a “plus” factor (such as exchanging competitively sensitive information or an agreement to fix prices at that level).

Under a “plus” factor, regulators may generally consider:

- (i) the exchange of information among competitors pursuant to an agreement, rather than unilateral activity;
- (ii) private communications among competitors of non-public pricing information, rather than public dissemination of general pricing information;
- (iii) the exchange of detailed information regarding current or future prices or output, rather than older, aggregated price and supply data; and
- (iv) the exchange of information among oligopolists rather than in unconcentrated industries¹².

Thus, in assessing the antitrust risk level arising from price transparency, the focus should primarily be on consumer benefit and the value it brings in promoting overall market efficiency, and the same should be weighed against the likelihood of sharing such information leading to tacit collusion.

In Conclusion

Given that the Guidelines will only take effect in November, product and service suppliers have some time to review their current business practices and ensure that they comply with the requirements of the Guidelines and the CPFTA.

In addition to the CPFTA, suppliers need to also ensure that they do not, inadvertently, infringe any provision of the competition law regimes in their bid to comply with the price transparency guidelines.

In my humble opinion, the regulatory agencies – consumer v competition – need to make a clear demarcation between ‘price transparency’ and ‘pricing transparency’. While the former is pretty straightforward - the price that you see should be what you pay – the latter is slightly tricky, in as much as not knowing the price ahead of time, but knowing exactly how the price has been arrived at. In Singapore at least, distinguishing one from the other would be paramount, considering that the enforcement agency is the same, but the penalties for an infringement under one regulatory regime (consumer) vis-à-vis the other (competition) are significantly different.

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¹² *Ibid*, at page 82.

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