GRAB 'GRABS' UBER IN SOUTHEAST ASIA: AN ANALYSIS OF THE COMPETITION CONCERNS

Introduction

Ride-hailing applications ("**apps**") like Uber, Lyft, Ola and Grab are symbolic of the new digital economy and the peer-to-peer sharing business model. However, many of the legal and economic concerns pertaining to these businesses are the same as those that apply to other large corporations in a variety of other industries.

On 26th March 2018, Grab announced that it had acquired Uber's Southeast Asian[1] ride-sharing and food-delivery businesses (the "**Acquisition**"). Uber would take a 27.5% stake in Grab and Uber's chief executive officer would join Grab's board of directors.[2] According to Uber, this was part of its overall strategy to "*compete with real focus and weight in the core markets where we* [Uber] *operate, while giving us valuable and growing equity stakes in a number of big and important markets where we don't*."[3]

The news of the Acquisition was received with some elation (mostly on Grab's part) and no small amount of trepidation on the part of drivers working for Uber,[4] customers[5] and Singapore government regulators.[6] This was understandable, in light of the fact that similar acquisitions in other countries have had significant anti-competitive effects. For instance, Chinese ride-hailing company Didi Chuxing ("**Didi**"), upon acquiring Uber's business in China, managed to garner a 90% share of the ride-hailing market in China. As a result, fares for Didi's ride-hailing services rose by 20% in Beijing, and there were reports of fare hikes in other major Chinese cities. It was therefore unsurprising that government regulators in Singapore and other Southeast Asian countries moved to scrutinise the Acquisition.[7]

Soon after, the Competition & Consumer Commission of Singapore ("**CCCS**") began investigating[8] whether the Acquisition was a prohibited anticompetitive merger that infringed s. 54 of the Competition Act (Cap. 50B)

[1] Encompassing Cambodia, Indonesia, Malaysia, Myanmar, the Philippines, Thailand, Vietnam and Singapore.

[2] "Grab Merges with Uber in Southeast Asia", Grab.com Press Centre, 26th March 2018, online: <https://www.grab.com/sg/press/business/grab-merges-with-uber-in-southeast-asia/>

[3] Dara Khosrowshahi, CEO, "A New Future for Uber and Grab in Southeast Asia", *Uber Newsroom,* 25th March 2018, online:<https://www.uber.com/newsroom/uber-grab/>, accessed on 30th June 2018.

[4] Channel News Asia, "Grab-Uber merger: Drivers worried about incentives, car rental contracts", 27th March 2018, online: <https://www.channelnewsasia.com/news/singapore/grab-uber-merger-drivers-incentives-lion-city-rental-10078104>.

[5] Asiaone, "As Uber bows out to Grab, drivers and riders bemoan loss of choice", 27th March 2018, online: <http://www.asiaone.com/business/uber-bows-out-grab-drivers-and-riders-bemoan-loss-choice>.

[6] The Straight Times, "Regulations to Ensure Grab-Uber deal will not erode competition", 27th March 2018 online: <https://www.straitstimes.com/singapore/transport/regulators-to-ensure-grab-uber-deal-will-not-erode-competition>

[7]Reuters, "Philippines, Malaysia put Uber-Grab deal under anti-competition scrutiny", 2nd April 2018, online: <https://www.reuters.com/article/us-uber-grab/philippines-malaysia-put-uber-grab-deal-under-anti-competition-scrutiny-idUSKCN1H90GF>, accessed on 29th June 2018.

[8] The CCCS is statutorily empowered to investigate pursuant to s. 62(1)(d) of the Act (Cap. 50B) (the "**Act**").

(the "**Act**"). The investigation sought to determine whether the Acquisition had resulted, or may have been expected to result, in a substantial lessening of competition within any market in Singapore for goods or services.

On 13th April 2018, the CCCS issued its Interim Measures Directions (the "**IMD**") to prevent any action by any party that might prejudice the giving of the necessary directions to end the infringement or to require the party(ies) to take the necessary action to remedy, mitigate or eliminate any adverse effects of such infringement, and to prevent the recurrence of such infringement.[9] In other words, the purpose of the IMD was to 'freeze' the Acquisition, insofar as it may potentially affect competition in the relevant market in Singapore, until the CCCS decided on a final course of action. The IMD required the Parties to preserve pre-Acquisition pricing and commission levels, remove exclusivity obligations on drivers, prohibit Grab from using Uber's operational data to enhance Grab's market position, and to ensure that drivers and riders remained free to choose their preferred platform.[10]

On 5th July 2018, the CCCS released a proposed infringement decision ("**PID**") that provisionally found that the Acquisition had led to a substantial lessening of competition in the relevant market (which was then defined as the market for chauffeured point-to-point transport platform services). To mitigate this, the CCCS proposed, among other things, remedies such as the removal of exclusivity arrangements and the maintenance of Grab's pre-Acquisition pricing algorithm and driver commission rates.[11]

On 24th September 2018, the CCCS announced that it had issued an Infringement Decision ("**ID**")[12] in which it held that the Acquisition had indeed led to a substantial lessening of competition in the provision of ride-hailing platform services in Singapore.[13] In coming to this conclusion, it found, *inter alia*, that:-

(a) effective Grab fares had increased after the Acquisition;[14] and

(b) Post-Acquisition, Grab will hold approximately 80-90% of the market share of the relevant market, and that made it difficult for potential competitors to scale and expand their operations.[15]

The CCCS imposed a total fine of about S$13 million on Grab and Uber[16] (the payment of Uber's portion of the

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[9] CCCS, "Notice of Interim Measures Directions: Acquisition of Uber's Southeast Asian business by Grab and Uber's acquisition of a 27.5% stake in Grab", 13th April 2018, online: <https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/uber-grab-merger> ("**IMD**").

[10] CCCS, "Uber/Grab merger: CCCS Issues Interim Measures Directions", CCCS Media Release, 13th April 2018, online: <https://www.cccs.gov.sg/media-and-publications/media-releases/uber-grab-imd-13-april-18>.

[11] CCCS, "Grab/Uber merger: CCCS Provisionally Finds that the Merger Has Substantially Lessened Competition, Proposes Directions to Restore Market Contestability and to Impose Financial Penalties", CCCS Media Release, 5th July 2018, online: <https://www.cccs.gov.sg/media-and-consultation/newsroom/media-releases/grab-uber-merger-pid>.

[12] CCCS, "Notice of Infringement Decision: Sale of Uber's Southeast Asian business to Grab in consideration of a 27.5% stake in Grab", 24th September 2018, online: <https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/uber-grab-merger?type=public_register> ("**ID**").

[13] ID, paragraph 1 of the Executive Summary.

[14] ID, paragraph 2 of the Executive Summary.

[15] ID at paragraph 183.

[16] ID at paragraphs 430 and 438.

fine has been suspended in light of its appeal against the ID, which is expected to be heard sometime in the later part of 2019. Grab has not appealed and has already paid its portion of the fine).[17] Additionally, the CCCS directed that Grab shall remove all, and shall not impose any, exclusivity obligations, lock-in periods and/or termination fees on all Grab drivers.[18] Furthermore, Grab was directed to cease its exclusivity arrangements with any taxi fleet in Singapore.[19] Grab was also directed to maintain its pre-Acquisition pricing, pricing policies and product options, and in particular, to maintain its pre-Acquisition algorithm pricing matrix.[20]

About a month thereafter, the Philippine Competition Commission fined Grab and Uber a total of 16 million pesos (S$408,000), stating that their reason for penalising Grab and Uber was that the two ride-hailing companies had consummated their merger too soon and that the quality of the service had fallen.[21]

Some of the main 'take-aways' and salient points pertaining to competition law that emerge from the Grab-Uber 'saga' are elaborated on below.

Competition law seeks to enhance market competition, and not to stifle business.

It may seem as though competition law and the CCCS is a fetter on business and an unnecessary burden that seeks to interfere with the legitimately-earned fruits of Grab and/or Uber's business success. However, this is assuredly not the case, or at least, not the intention. The objective of competition law is not to stifle business, but rather, to promote the efficient functioning of Singapore's markets and to enhance the competitiveness of the economy. It seeks to prohibit activities that unduly prevent, restrict or distort competition.[22]

Competition law in Singapore addresses three broad categories of prohibited activities:

a) Agreements, decisions and practices that have as their object or effect the prevention, restriction or distortion of competition in Singapore e.g. agreements to fix prices at unduly high levels or to reduce supply ("**Anticompetitive Agreements**");[23]

b) Activities that amount to an abuse of dominant position ("**Abuse of Dominant Position**"), e.g. predatory behaviour towards competitors a.k.a undercutting;[24] and

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[17] The Straits Times, "Uber's $6.58m fine suspended amid appeal", 2nd April 2019, online: <https://www.straitstimes.com/singapore/transport/ubers-658m-fine-suspended-amid-appeal>.

[18] ID at paragraph 372(a).

[19] ID at paragraph 372(c).

[20] ID at paragraph 372(f).

[21] The Straits Times, "Philippine watchdog fines Grab, Uber for rushed merger, drop in service quality", 17th October 2018, online: <https://www.straitstimes.com/asia/se-asia/philippine-watchdog-fines-grab-uber-for-rushed-merger-drop-in-service-quality>.

[22] Competition & Consumer Commission website, accessed on 14th June 2019, online: <https://www.cccs.gov.sg/about-cccs/what-we-do/cccs-and-the-competition-act>.

[23] The Act , s. 34.

[24] The Act , s. 47.

c) Mergers[25] (a term that, for the purposes of the Act, encompasses the Acquisition) that result (or may be expected to result) in a substantial lessening of competition in any market for goods and services in Singapore ("**Anticompetitive Mergers**").[26]

The prohibition against Anticompetitive Mergers has its genesis in US antitrust law.[27] These laws were first enacted at the beginning of the 20th century, at a time when corporations of unprecedented size and market power (the most famous of which was Standard Oil Co. Inc.) were emerging in the US as a result of the American economic boom brought about by the vast natural resources that were made accessible and exploitable by the construction and proliferation of railroads. An overwhelming public reaction and the resulting political will to curb the untrammeled power of these large corporations brought about the crystallisation of the main principles of antitrust, or competition, law, one of which is the prohibition of Anticompetitive Mergers.

The importance of determining the relevant market

There are three salient questions that arise in assessing any potential merger that may infringe s. 54 of the Act: (1) whether a transaction in question is a "merger" within the meaning of s. 54; (2) what would amount to, and what evidence would prove, a "substantial lessening of competition"; and (3) what would be the relevant market to assess the transaction. The first issue (whether it amounts to a "merger") rarely causes controversy. The heart of the matter usually resides in the other two issues, namely, what would constitute the relevant market, and whether the proposed transaction would cause a "substantial lessening of competition" in that market. Both these issues were contested by Grab and Uber in their representations to the CCCS prior to the publication of the IMD.

On the issue of the relevant market, the CCCS decided that the effects of the Acquisition would have to be determined in the context of (1) the market for two-sided platforms matching drivers and riders for the provision of booked chauffeured point-to-point transport services in Singapore, and (2) the market for the provision of rental of chauffeured private hire cars to chauffeured point-to-point transport drivers in Singapore.[28] The CCCS included taxi booking services in the relevant markets but excluded street-hailed taxi services public transportation (buses, trains) and private car usage, because these were not sufficiently close substitutes.

The key points here are that, firstly, defining the relevant market is crucial to determining whether s. 54 was infringed. The wider the definition, the less the likelihood of infringement. Secondly, it is the presence (or lack thereof) of substitutes that determine the relevant market.

Determining whether there has been a substantial lessening of competition.

[25] This includes mergers that take place outside Singapore, or when any merger party is outside Singapore, as long as such a merger causes, or is expected to cause, a substantial lessening of competition of any market in Singapore (s. 33(1) of the Act).

[26] The Act, s. 54.

[27] Clayton Act, 15 U.S.C § 18, s. 7. It should be noted that despite being referred to as "antitrust" law, the law governing competition is not linked to the law of trusts; the term originates from the practice of large corporations in the US at the turn of the 20th century using trusts as instruments of agglomeration; these large conglomerates were informally referred to "trusts".

[28] ID at paragraph 178.

In determining whether there would be a substantial lessening of competition due to the Acquisition, the CCCS' considered numerous factors. The salient factors were:-

a) **Post-Acquisition Market Share:** CCCS noted that Grab, post-Acquisition, would have a market share of between 80-90% of the relevant market(s), which would be more than 5 times that of the next largest player in the market(s), ComfortDelGro.[29] This substantially exceeds the thresholds in CCCS' *Guidelines on the Substantive Assessment of Mergers 2016*.[30] This meant that the competitive constraints that ComfortDelGro would be able to impose on the merged entity would be limited.[31]

b) **Barriers to entry:** The CCCS found that the barriers to entry and expansion in the market for booking services were high due to the strong indirect network effects, given the two-sided nature of the market. A more established business would attract more drivers, which would in turn increase its service quality (riders would have shorter waiting times), which would in turn attract more riders, thereby creating a 'virtuous cycle'. Any new entrant would therefore need to incur significant costs in order to build up a competing network operating at a sufficient scale, to be able to compete effectively.

c) **Non-coordinated effects (i.e. Grab is able to increase prices and/or reduce service standards with impunity):** The CCCS held that the Acquisition was likely to have led to non-coordinated effects because the Acquisition would eliminate competition between Grab and Uber, each other's closest competitor, in the relevant market(s). Furthermore, the strong network effects create significant barriers to entry to potential new entrants. Furthermore, the CCCS noted the many complaints that it had received from riders and drivers.

A wide variety of factors were taken into consideration to determine whether there had been a substantial lessening of competition, and these are by no means the only ones. Ultimately, this is a fact-dependent inquiry.

Steps that a party to a merger or anticipated merger can take

A party to a merger or anticipated merger that has serious concerns about whether there was or might be a substantial lessening of competition should notify the CCCS. They may either submit a formal application to CCCS or contact CCCS to set up a pre-notification discussion prior to submitting a formal application. Any party to an anticipated merger also has the option of applying to the CCCS to seek its advice (on a confidential basis) on whether the said transaction is likely to infringe s. 54 of the Act.[32] However, it bears noting that the CCCS is not bound by the advice it provides.

Merger parties are also strongly encouraged by the CCCS to conduct self-assessments to ascertain whether the merger or anticipated merger infringes s. 54 of the Act. This can be done by reference to the CCCS Guidelines on the Substantive Assessment of Mergers 2016.

Exceptions and exclusions

[29] ID at paragraph 183.

[30] Paragraph 5.15 of the *CCCS Guidelines on the Substantive Assessment of Mergers 2016* states that competition concerns are unlikely to arise in a merger situation unless the merged entity will have a market share of 40% or more, or the merged entity will have a market share of between 20% to 40% and the post-merger CR3 is 70% or more.

[31] ID at paragraph 186.

[32] The Act, s. 55A(1).

Apart from mergers that have been approved by government authorities or that involve certain fundamental infrastructure industries, the main exception to the s. 54 prohibition are mergers in which economic efficiencies that arise as a result of the merger outweigh the adverse effects caused by the substantial lessening of competition (a "**Net Economic Efficiency**").[33]

In the context of the Acquisition, Uber and Grab submitted that there would be efficiencies generated due the fact that there would a larger number of drivers and riders with the merged entity, post-Acquisition, leading to shorter waiting times for riders, and drivers being able to spend a larger proportion of their driving time on trips, as well as from service improvements that improve the experience and safety of riders and drivers. Both these efficiencies were underpinned by higher network density.[34]

However, the CCCS was unable to conclude on whether the claimed efficiencies would outweigh the detriments of such substantial lessening of competition. The CCCS held that the efficiencies that Grab and Uber claimed had not been demonstrated or quantified. The CCCS also noted that, in any case, any purported efficiencies had not led to lower prices.

Conclusion

The CCCS' decision shows its willingness to impose sanctions and financial penalties on businesses that carried out anti-competitive practices. It was highlighted, in paragraphs 379 of the ID, that the CCCS placed considerable importance on the fact that Grab and Uber had proceeded with the Acquisition despite the CCCS having previously warned them about the potential anti-competitive effects of the Acquisition and given them the opportunity to bring CCCS onboard before proceeding. What we glean from this is the importance of sound legal and regulatory actions vis-à-vis regulators before proceeding with any significant business transaction.

In March 2018, Parliament passed the Competition (Amendment) Act 2018, which came into effect on 16th May 2018 and which expanded the powers of the CCCS by allowing it to accept binding commitments in relation to Anticompetitive Agreements and Abuses of Dominant Position, provide confidential and non-binding advice on Anticompetitive Mergers and conduct general interviews during inspections and searches. This shows a clear intention to strengthen the competition law framework in Singapore, which will no doubt make competition law an increasingly important consideration for businesses moving forward.

[33] The Act, s. 55 read with the 4th Schedule, paragraph 3. It should be noted that efficiencies would also be considered at the stage of ascertaining whether or not there was a substantial lessening of competition in the first place (see paragraph 327 of the ID).

[34] ID at paragraphs 322 – 326.

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