

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Competition Issues in Labour Markets – Note by Singapore****5 June 2019**

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More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm>

Please contact Mr. Antonio Capobianco if you have any questions about this document  
[E-mail: [Antonio.Capobianco@oecd.org](mailto:Antonio.Capobianco@oecd.org)]

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## 1. Competition Law in Singapore

1. Competition law in Singapore is administered and enforced by the Competition and Consumer Commission of Singapore<sup>1</sup> (“CCCS”), a statutory body established under the Competition Act (Cap. 50B) (“Competition Act”) and which operates under the purview of Singapore’s Ministry of Trade and Industry.
2. Section 6(1) of the Competition Act sets out CCCS’s functions and duties. Under section 6(1)(b) of the Competition Act, one of the key functions of the CCCS is to eliminate or control practices having an adverse effect on competition in Singapore. The three key prohibitions in the Competition Act are as follows:
  1. **The section 34 prohibition** – section 34 of the Competition Act prohibits agreements, decision and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore.
  2. **The section 47 prohibition** – section 47 of the Competition Act prohibits any conduct which amounts to the abuse of a dominant position in any market in Singapore.
  3. **The section 54 prohibition** – section 54 of the Competition Act prohibits mergers and acquisitions that substantially lessen competition with any market in Singapore.
3. The Competition Act is largely based on the competition provisions of the Treaty of the Functioning of the European Union (“TFEU”) and the United Kingdom Competition Act 1998.
4. The Competition Act applies to “undertakings”. This covers any natural or legal person who is capable of engaging in economic activity, regardless of its legal status and the way in which it is financed. It includes individuals operating as sole proprietorships, companies, firms, businesses, partnerships, co-operatives, societies, business chambers, trade associations and non-profit-making organisations.<sup>2</sup>
5. Singapore’s Competition Act applies to practices carried out by both sellers and buyers in a market, where such practices have an adverse effect on competition in Singapore. For example, the section 34 prohibition may be infringed by buyers with market power who fix the price that they are prepared to pay and hence limit competition within the market,<sup>3</sup> or a merger between competing buyers that creates or enhances monopsony power, and hence substantially lessens competition in a market in Singapore, may infringe section 54 of the Competition Act.<sup>4</sup>

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1 Previously, CCCS was known as the Competition Commission of Singapore (“CCS”) and assumed its current name on 1 April 2018 after it became the administering agency of the Consumer Protection (Fair Trading) Act (Cap. 52A) (“CPFTA”), which aims to protect consumers against unfair trade practices in Singapore. For consistency, the name “CCCS” will be used throughout this contribution, even in relation to work undertaken by the CCS prior to 1 April 2018.

2 CCCS Guidelines on the Major Provisions 2016, at [1.1].

3 CCCS Guidelines on the Section 34 Prohibition 2016, at [3.15].

4 CCCS Guidelines on the Substantive Assessment of Mergers 2016, at [4.11] and [5.31].

## 2. Competition law in the context of labour markets

6. Considering first the interaction between competition laws and the supply side of labour markets, typically, labour unions are exempted from antitrust liability such that they may coordinate actions of workers for the purposes of protecting their salaries or avoiding salary competition.<sup>5</sup> EU competition law draws a distinction between an employee and a self-employed person in relation to collective bargaining agreements, with case law supporting that collective bargaining agreements that involve employees are typically excluded from the application of Article 101(1) of the TFEU.<sup>6</sup> On the other hand, self-employed service providers who may perform the same activities as employees are, in principle, “undertakings” within the meaning of Article 101(1) TFEU, and collective agreements involving them cannot be excluded from the Article 101(1) regime.

7. Under Singapore law, similarly, employees in a single firm associating for the purposes of collective bargaining will not fall foul of the law because they are not considered undertakings.<sup>7</sup> Singapore’s Industrial Relations Act<sup>8</sup> further provides for recognised trade unions to initiate collective bargaining on behalf of employees. The collective bargaining process is prescribed under the Industrial Relations Act and can be initiated by either the employer or the trade union.<sup>9</sup> However, independent contractors who associate and try to protect their salary levels would fall foul of competition law since they are considered undertakings who are competitors that supply services. The definition of employee under the Industrial Relations Act may also not be broad enough to cover self-employed persons or independent contractors as it only applies to a person who has entered into or works under a contract *of* service with an employer as opposed to a contract *for* service.<sup>10</sup>

8. As regards competition law and the demand side of labour markets, competition enforcement against employers (where such action has been taken) has generally been in

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5 Section 6 of the US Clayton Act provides that labour unions are not illegal combinations or conspiracies in restraint of trade, under the antitrust laws. In the EU, case law supports that collective bargaining agreements that involve employees are typically excluded from the application of Article 101(1) of the TFEU.

6 *Albany International BV v Stichting Bedrijfspensioenfonds textielindustrie* Case C-67/96 [1999] ECR I-5751

7 By definition, an undertaking means any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services. For an example of undertakings, please refer to the CCCS Guidelines on the Section 34 Prohibition 2016 at <https://www.ccs.gov.sg/legislation/competition-act>.

8 Industrial Relations Act (Cap. 136).

9 <https://www.mom.gov.sg/employment-practices/trade-unions/industrial-relations>.

10 Section 2 of the Industrial Relations Act (Cap.136) – “employee” means a person who has entered into or works under a contract of service with an employer and includes an officer or servant of the Government included in a category, class or description of such officers or servants declared by notification in the Gazette by the President of Singapore to be employees for the purposes of this Act, but does not include any person or class of persons whom the Minister may from time to time by notification in the Gazette declare not to be employees for the purposes of this Act.

relation to hard-core cartel conduct, such as wage-fixing and no-poaching agreements,<sup>11</sup> although in recent years, some leading competition authorities have published guidance or reports on the application of competition law to demand side conduct in labour markets. For example, the US Department of Justice Antitrust Division and Federal Trade Commission have highlighted that, in addition to naked wage-fixing and no-poaching agreements among employers, the sharing of information with competitors about terms and conditions of employment can also run afoul of antitrust laws.<sup>12</sup> The Japan Fair Trade Commission has also published a Report of the Study Group on Human Resource and Competition Policy, setting out the views of the study group on theoretical applications of Japan's Antimonopoly Act to competition for human resources, including in respect of conduct that may amount to anti-competitive agreements, and anti-competitive unilateral conduct.<sup>13</sup>

9. In Singapore, CCCS has not to-date carried out enforcement action relating directly to the demand side of labour markets, although in 2011, CCCS took action in relation to a cartel case relating to the fixing of monthly salaries by employment agencies.

### 3. Case Study 1 – Fixing of monthly salaries of new Indonesian Foreign Domestic Workers in Singapore<sup>14</sup>

10. In this case, CCCS found that 16 employment agencies (“EAs”) had infringed the section 34 prohibition of the Competition Act by entering into an agreement to raise and fix the monthly salaries of new Indonesian Foreign Domestic Workers (“FDWs”) at S\$450.

11. In Singapore, EAs are licensed by Singapore’s Ministry of Manpower (“MOM”) to carry out procurement and placement of FDWs in Singapore. In order to place new Indonesian FDWs in Singapore, the Singapore EAs will source for potential new Indonesian FDWs from Indonesian suppliers, and negotiate with their Indonesian suppliers the monthly salary of the FDWs for placement in Singapore. The Singapore EAs will then furnish the information of these potential FDWs and the terms of employment (including monthly salary of the FDW), to prospective employers in Singapore. If a prospective

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11 For example, *United States v. eBay, Inc.*; *United States and the State of Arizona v. Arizona Hospital and Healthcare Association and AzHHA Service Corporation*; LJM: BM3366 (Court of Hertogenbosch) HD 200,056,331 Date of judgment: 05.04.2010, Date of publication: 04.05.2010, Mariette J. Plomp, ‘Netherlands: anti-competitive agreements – hospitals’ (2010) E.C.L.R. N174-175; the Turkish Competition Board’s *Private Schools Association Case No. 11-12/226-76*, 03 March 2011.

12 US Department of Justice Antitrust Division and Federal Trade Commission, *Antitrust Guidance for Human Resource Professionals* (October 2016), pages 3 and 4.

13 Japan Fair Trade Commission, Competition Policy Research Center, *Report of the Study Group on Human Resource and Competition Policy* (15 February 2018).

14 CCS 500/001/11: Notice of Infringement Decision: Fixing of monthly salaries of new Indonesian Foreign Domestic Workers in Singapore (30 September 2011), [https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/price-fixing-of-monthly-salaries-of-new-indonesian-foreign-domestic-workers-by-employment-agencies?type=public\\_register](https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/price-fixing-of-monthly-salaries-of-new-indonesian-foreign-domestic-workers-by-employment-agencies?type=public_register).

employer is keen to hire a particular new Indonesian FDW, the Singapore EA then makes the necessary arrangements for that FDW to enter Singapore and commence work.<sup>15</sup>

12. For the provision of this placement service, the EA charges the FDW a placement fee for finding her an employer in Singapore. CCCS found that the placement fee is usually expressed in terms of a number of months of the FDW's salary, and is divided between the Singapore EA and the Indonesia supplier in accordance with the commercial agreement between them. The MOM requires that the amount of placement fee retained by a Singapore EA be capped at 2 months of the FDW's salary, while that retained by the Indonesia supplier is largely determined by the suppliers themselves.<sup>16</sup>

13. CCCS's investigations found that, in an attempt to achieve what they regarded as necessary to attract new Indonesian FDWs to Singapore, the 16 EAs discussed and collectively raised the monthly salary of the FDWs to S\$450. It should be noted that while the agreement was in relation to the monthly salary of FDWs, the effect was also to increase the placement fee retained by the Singapore EAs, given that the placement fee was usually expressed in terms of a number of months of the FDW's salary (i.e., the salary of the FDW is a component of the placement fee that is charged by the EA). The agreement therefore reduced competition among the EAs by reducing the options available to employers and hence benefitted the EAs themselves. While CCCS found that the agreement to fix the salary of FDWs was an infringement of the Competition Act, CCCS did not take a position on what should be the appropriate salary for the new Indonesian FDWs, and was of the view that EAs should independently determine the salaries of the FDWs.<sup>17</sup> It should also be noted that CCCS's infringement finding was against the EAs only, and not the FDWs themselves.

#### 4. Blurring the lines between employee and self-employed?

14. Whilst EU competition law distinguishes between employees and self-employed persons such that self-employed personnel, as "undertakings", associating for the purposes of a collective bargaining agreement will fall within the purview of competition law, the European Court of Justice ("ECJ") has, in *FNV Kunsten Informatie en Media v Staat der Nederlanden* (Case C-413/13), examined this issue and laid down some principles in determining whether a worker is "self-employed" and thus should be treated as

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15 CCS 500/001/11: Notice of Infringement Decision: Fixing of monthly salaries of new Indonesian Foreign Domestic Workers in Singapore (30 September 2011), [https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/price-fixing-of-monthly-salaries-of-new-indonesian-foreign-domestic-workers-by-employment-agencies?type=public\\_register](https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/price-fixing-of-monthly-salaries-of-new-indonesian-foreign-domestic-workers-by-employment-agencies?type=public_register), at [18] to [21].

16 CCS 500/001/11: Notice of Infringement Decision: Fixing of monthly salaries of new Indonesian Foreign Domestic Workers in Singapore (30 September 2011), [https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/price-fixing-of-monthly-salaries-of-new-indonesian-foreign-domestic-workers-by-employment-agencies?type=public\\_register](https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/price-fixing-of-monthly-salaries-of-new-indonesian-foreign-domestic-workers-by-employment-agencies?type=public_register), at [26] to [29].

17 CCS 500/001/11: Notice of Infringement Decision: Fixing of monthly salaries of new Indonesian Foreign Domestic Workers in Singapore (30 September 2011), [https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/price-fixing-of-monthly-salaries-of-new-indonesian-foreign-domestic-workers-by-employment-agencies?type=public\\_register](https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/price-fixing-of-monthly-salaries-of-new-indonesian-foreign-domestic-workers-by-employment-agencies?type=public_register), at [33], and [71] to [75].

“undertakings”. This case involved associations representing both employees and self-employed persons, entering into a collective agreement with an employers’ association. The terms of the collective agreement included terms (such as minimum fees) for the employees (hired under contracts of employment), as well as self-employed musicians who were called upon to substitute members of an orchestra.

15. The ECJ held that the self-employed musicians were, in principle, “undertakings” within the meaning of EU law as they offer their services for remuneration on a given market and perform their activities as independent economic operators in relation to their principal (i.e. the employer). However, the ECJ noted the formalistic classification of a “self-employed” person under national law does not prevent that person being classified as an employee (and therefore not an “undertaking”) for the purposes of EU law. The ECJ suggested that there may be circumstances where a self-employed person is “false self-employed” by carrying out work comparable to the employed thereby disguising an employment relationship. This may arise depending on factors such as the degree of control the self-employed worker has over his work; whether or not he shares the commercial risks of his employer; and whether or not he forms an integral part of the employer’s undertaking creating a single economic unit of employer plus self-employed.

16. As such, whether or not a person is “false self-employed” is not always easy to determine as the factual situation will necessarily differ from case to case. Indeed, with the growth of the digital economy and the proliferation of non-traditional business models such as digital platforms, the boundaries between the definitions of employees and self-employed independent contractors or service providers who are considered undertakings, are becoming increasingly blurred. This distinction between employees and self-employed persons was examined by CCCS in its recent investigation into a merger in the ride-hailing sector in Southeast Asia.

## **5. Case Study 2 – Sale of Uber’s Southeast Asian business to Grab in consideration of a 27.5% stake in Grab<sup>18</sup>**

17. In March 2018, CCCS commenced an investigation into the sale of Uber’s Southeast Asian business to Grab Inc. (“Grab”), a competing ride-hailing platform in Southeast Asia, in consideration of Uber holding a 27.5% stake in Grab. At the conclusion of CCCS’s investigation, CCCS found that the completed transaction had infringed section 54 of the Competition Act.

18. In analysing the overlap between Grab and Uber and identifying the focal product(s) for the merger assessment, CCCS examined the terms and conditions under the parties’ contracts with drivers to ascertain whether the parties operated in the underlying transportation service at the service delivery level, in addition to the platform level, i.e. the provision of a platform that facilitates matching between riders and drivers. In this regard,

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18 CCCS 500/001/18: Notice of Infringement Decision: Sale of Uber’s Southeast Asian business to Grab in consideration of a 27.5% stake in Grab (24 September 2018), [https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/uber-grab-merger?type=public\\_register](https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/uber-grab-merger?type=public_register).

CCCS found that Grab’s and Uber’s respective terms and conditions provide, *inter alia*, that:<sup>19</sup>

- On Uber’s app, drivers (or an independent company in the business of providing transportation services (“Transportation Company”)) acknowledge and agree that their provision of transportation services to users “*creates a legal and direct business relationship*” between the Transportation Company and the user, to which Uber is not a party, and Uber does not, and shall not be deemed to direct or control the Transportation Company or drivers generally, including in connection with the operation of the Transportation Company’s business, the provision of transportation services and the acts or omissions of drivers;
- Similarly, on Grab’s platform, for drivers, the software and application are intended to be used for facilitating drivers (as transportation providers) to offer their transportation services to passengers and customers, and Grab is not responsible or liable for acts and/or omissions of any services provided to passengers, and for any illegal action committed by drivers. Drivers shall also, at all times, not claim or cause any person to misunderstand that he or she is the agent, employee or staff of Grab, and the services provided is not in any way to be deemed as services of Grab;
- Both Uber’s and Grab’s terms of use also highlight that the respective company does not provide transportation services and is not a transportation carrier or provider, with Uber’s terms of use further stating that a user acknowledges that “*all such transportation or logistics services are provided by independent third party contractors who are not employed by Uber or any of its affiliates*”; and
- Uber facilitates the “*payment of the applicable Charges on behalf of the Third Party Provider as such Third Party Provider’s limited payment collection agent*”, and that “*payment of the Charges in such manner shall be considered the same as payment made directly by [a rider] to the Third Party Provider*”. Similarly in respect of fares, Grab’s terms provide that a driver acknowledges that “*the total amount of fare paid to [him/her] by the passenger or customer includes the software usage fee, which [he/she is] collecting on behalf of the Company*”, such “software usage fee” being up to 20% of the fare stipulated for the Service for each time the passenger or customer completes a ride.

19. Given the above rights, obligations and liabilities between riders, drivers and the platform, as set out in the parties’ respective terms of use, CCCS found that said terms of use clearly illustrate that the parties merely provide a matching/booking service for riders and drivers, with the underlying transportation service being provided by drivers to riders.<sup>20</sup> In other words, the drivers on the respective platforms are not employees of the parties.

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19 CCCS 500/001/18: Notice of Infringement Decision: Sale of Uber’s Southeast Asian business to Grab in consideration of a 27.5% stake in Grab (24 September 2018), [https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/uber-grab-merger?type=public\\_register](https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/uber-grab-merger?type=public_register), at [125] to [128].

20 CCCS 500/001/18: Notice of Infringement Decision: Sale of Uber’s Southeast Asian business to Grab in consideration of a 27.5% stake in Grab (24 September 2018), [https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/uber-grab-merger?type=public\\_register](https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/uber-grab-merger?type=public_register), at [129].

20. This finding, in turn, flowed through to other related findings in CCCS's infringement decision against Grab and Uber. For example, since drivers are not employees of the parties, CCCS identified that the exclusivity obligations imposed by Grab that restricted a driver's ability to multi-home on other ride-hailing platforms would constitute a barrier to entry and/or expansion. These exclusivities were removed as part of the package of remedies under the infringement decision and directions issued by CCCS.<sup>21</sup> The drivers not being employees of the parties also had a bearing on whether trip fares formed part of the parties' relevant turnover, for the purpose of calculating the financial penalties levied on Grab and Uber for the infringement of the Competition Act. The relevant turnover was ultimately defined as the turnover of the parties attributable to the provision of the ride-hailing platform services (i.e. commission) in Singapore<sup>22</sup>, as opposed to trip fares which would correspond to the provision of the underlying transportation services.

## 6. Conclusion

21. As non-traditional business models such as digital platforms continue to grow and evolve with the growth of the digital economy, and in particular where platforms increasingly utilise the "gig" economy, competition authorities are increasingly expected to encounter cases where issues of the distinction between employees and self-employed independent contractors or service providers will need to be considered. In this regard, a close examination of the facts at hand will be required, in particular the degree of control and the commercial risks borne, in determining whether a person is genuinely "self-employed", and accordingly should be treated as an "undertaking" which is subject to competition law scrutiny.

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21 CCCS 500/001/18: Notice of Infringement Decision: Sale of Uber's Southeast Asian business to Grab in consideration of a 27.5% stake in Grab (24 September 2018), [https://www.ccs.gov.sg/public-register-and-consultation/public-consultation-items/uber-grab-merger?type=public\\_register](https://www.ccs.gov.sg/public-register-and-consultation/public-consultation-items/uber-grab-merger?type=public_register), at [222] to [224], and [372].

22 CCCS 500/001/18: Notice of Infringement Decision: Sale of Uber's Southeast Asian business to Grab in consideration of a 27.5% stake in Grab (24 September 2018), [https://www.ccs.gov.sg/public-register-and-consultation/public-consultation-items/uber-grab-merger?type=public\\_register](https://www.ccs.gov.sg/public-register-and-consultation/public-consultation-items/uber-grab-merger?type=public_register), at [404].