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Disentangling Consummated Mergers – Experiences and Challenges – Note by Singapore

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More documents related to this discussion can be found at
https://www.oecd.org/daf/competition/disentangling-consummated-mergers-experiences-and-challenges.htm

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Singapore

1. Introduction

1. As a matter of first principles in many competition law frameworks, should merger parties consummate anti-competitive mergers without taking due care to assess the anti-competitive effects of the merger or seek the competition authorities' clearance, the merger parties can be required to dissolve the consummated merger. This is true not only for mandatory merger notification regimes, but also for voluntary regimes such as Singapore's.

2. Practical issues and difficulties can arise, however, making it difficult to unscramble some consummated mergers and remedy the harm to competition. These issues may be especially pronounced as regards mergers between digital platforms, given the intangible assets involved, as well as the role of network effects and tipping in such markets.

3. This paper sets out the experience of the Competition Commission of Singapore ("CCCS") in relation to the topic of "Disentangling Consummated Mergers". The paper also studies the mechanisms available in the Singapore competition law framework to complement its voluntary merger notification regime, illustrated through a case study of CCCS's enforcement action against a completed merger between the two main ride-hailing platforms in Singapore in 2018.

2. Competition Law in Singapore

4. Section 54 ("section 54 prohibition") of the Singapore Competition Act 2004 (the "Act") prohibits mergers that have resulted, or may be expected to result, in a substantial lessening of competition ("SLC") in Singapore.

5. Singapore has a voluntary merger notification regime. There is no obligation, or mandatory requirement, for merger parties to notify their merger situations to CCCS before or after implementation of the merger. The merger parties should carry out a self-assessment to determine the expected competitive effects of their transaction. However, merger parties have the option of notifying their merger situation to CCCS, and to apply for a decision as to whether the merger situation infringes, or will infringe, the section 54 prohibition.[1] To assist merger parties with planning and consideration of anticipated mergers, in particular at the stage when the merger parties are concerned to preserve the confidentiality of the transaction, CCCS also provides such parties with an additional avenue to seek CCCS's confidential advice on whether a merger is likely to raise competition concerns in Singapore and whether a notification is advisable, with the necessary qualification that such advice is provided without having taken into account third-party views. Confidential advice is only available if CCCS is satisfied that certain conditions are met.[2]

[1] Paragraphs 2.3 and 3.2 of the *CCCS Guidelines on Merger Procedures*.

[2] Section 65A of the Act and paragraphs 3.18 to 3.23 of the *CCCS Guidelines on Merger Procedures 2012*.

6. CCCS has legal powers to conduct an investigation into an un-notified merger if there are reasonable grounds for suspecting that the merger infringes the section 54 prohibition.[3] In the event CCCS finds that a merger situation has resulted or is expected to result in a SLC in any market(s) in Singapore, CCCS has powers to decide on the action to remedy, mitigate or prevent the SLC or any adverse effects resulting from the SLC, including requiring a completed merger to be dissolved or unwound. CCCS may also impose financial penalties if it finds that the infringement has been committed intentionally or negligently.[4]

7. Prior to CCCS completing its assessment of an application or an own-initiative investigation, CCCS may impose interim measures to prevent any action that may prejudice CCCS's ability to investigate the merger situation or its ability to impose appropriate remedies. Interim measures may also be imposed as a matter of urgency for the purpose of preventing serious, irreparable damage to a particular person or category of persons or of protecting the public interest.[5]

3. The role of notification regimes to detect problematic mergers before completion

8. Notification regimes could assist in detecting problematic mergers before completion. In particular, regimes that mandate that transactions crossing the relevant notification thresholds (e.g. by revenue or market share) be notified allow competition agencies to detect problematic mergers before completion. This can be further augmented by strict enforcement and penalties against the pre-notification of notifiable mergers (i.e. gun-jumping). However, where incalcitrant parties choose to irreversibly complete a transaction without prior notification and/or clearance despite the risk of gun-jumping and the consequent penalties, such completed mergers may still be difficult to unwind.

9. Under many mandatory regimes, mergers that do not cross notification thresholds would not be notified to the competition agency. This is particularly relevant in the context of digital platform mergers, as some of these platforms may adopt accounting policies that book only the platform fees as their turnovers, which are often a small percentage of the underlying value transacted through these platforms.[6] As a result, mergers of these digital platforms are less likely to cross the turnover-based thresholds, despite their significantly greater economic influence from a competition point of view.

10. While Singapore operates a voluntary merger notification regime and does not mandate that merger parties notify their merger situations to CCCS before or after

[3] Section 62(1)(d) of the Act provides that CCCS may conduct an investigation if there are reasonable grounds for suspecting that the section 54 prohibition has been infringed by any merger.

[4] Section 69(3) of the Act and paragraphs 4.3 to 4.11 of the *CCCS Guidelines on Enforcement of Competition Cases 2016*.

[5] Section 67(2) of the Act.

[6] In the Grab-Uber merger (defined at paragraph 13 below), the relevant revenues submitted by the parties were limited to the platform fees collected by the parties. In addition, Uber's revenues were further deflated based on their submission that it follows the generally accepted accounting principles accounting method where amounts remitted to drivers are considered as a reduction in revenue or "*contra revenue*". While CCCS was able to include this "contra revenue" in calculating the financial penalties imposed on Uber (and the approach was upheld on appeal), this is illustrative of how platform players could potentially understate their revenue figures and the economic impact of their activities to seek to avoid notification obligations.

implementation of the merger, it allows merger parties the avenue to do so to ensure that they do not proceed to complete anti-competitive mergers which may be costly to unscramble. The confidential advice process also provides merger parties with further clarity on whether a notification is advisable while preserving the confidentiality of any anticipated transaction.

4. The importance of enforcement action to deter, and if necessary, remedy, consummated anti-competitive mergers

11. The onus is therefore on the merger parties to carry out a self-assessment to determine the competitive effects of their transaction and utilise the notification and confidential advice mechanisms available to them to ensure compliance, or face the risk of enforcement action by CCCS should they proceed to complete a non-compliant merger with the consequent remedies and financial penalties that CCCS is empowered to impose.

12. Given that Singapore is a small and open economy, there are many global mergers with significant competition impact in the relevant Singapore market. Singapore's merger framework, including a voluntary notification regime, is a calibrated balance that seeks to reduce business costs for unproblematic mergers on one hand, whilst allowing CCCS to utilise its resources to take necessary enforcement action against problematic mergers. From the merging parties' perspective, completing a global merger with anticompetitive effects in Singapore without first notifying CCCS may result in specific remedies to address Singapore's competition concerns, which may be costly for the parties to implement. For this reason, many merging parties have chosen to voluntarily notify CCCS of their transactions before completion and consummation.

5. A case study – the Grab-Uber merger

5.1. Background

13. A case in point is the investigation by CCCS into the sale of Uber's Southeast Asian business to Grab for a 27.5% stake in Grab in return (the "Grab-Uber merger")[7]. The un-notified and consummated merger was found to have resulted in a SLC in the provision of ride-hailing platform services in Singapore and therefore infringed the section 54 prohibition of the Act. Prior to the merger, Grab and Uber were each other's closest competitor in the provision of ride-hailing platform services in Singapore.

14. The un-notified Grab-Uber merger was completed on 26 March 2018. On 28 March 2018, CCCS commenced an investigation into the merger. Immediately after the un-notified Grab-Uber merger was completed on 26 March 2018, Uber began to transfer its assets (including confidential information and data) to Grab. On the same day, Uber started to migrate its drivers and riders to Grab's ride-hailing platform as the Uber mobile app in Singapore was due to cease within two weeks from the announcement made on 26 March 2018. In addition, Uber and Lion City Rentals (Uber's subsidiary operating a car rental

7 Notice of Infringement Decision issued by the Competition and Consumer Commission of Singapore on infringement of the section 54 prohibition in relation to the sale of Uber's Southeast Asian business to Grab in consideration of a 27.5% stake in Grab, CCCS 500/001/18, 24 September 2018.

business for private hire vehicles in Singapore) ("LCR") ceased operations at their respective offices upon the announcement of the merger.

5.2. Quick interim measures to prevent irreversible harm to the ride-hailing market

15. In view of the speed at which Uber had transferred its assets, data and operations to Grab and exited the Singapore market, CCCS had to respond quickly and a set of interim measures was issued on 13 April 2018 to prevent Grab and Uber from taking any action that might prejudice CCCS's ability to consider the merger further and/or impose appropriate remedies. The key interim measures required the following: removal of exclusivity obligations on drivers, prevention of Uber's operational data from being used by Grab to enhance its market position, preserving pre-merger pricing and commission levels, and ensuring that drivers and riders were free to choose their preferred platform.

16. Despite the interim direction to ensure that the Uber app will continue to be available in Singapore until 7 May 2018 with basic customer support given to handle contractual and payment issues for riders and drivers, the migration of drivers and riders that Uber had triggered immediately after announcing and completing the Grab-Uber merger could not be reversed, posing difficulties in CCCS's ability to direct Uber to maintain pre-merger operations on the Uber app.

5.3. Grab-Uber merger illustrative of issues faced attempting to unwind mergers between digital platforms

17. In digital markets, companies are often platforms that are multi-sided and are characterised by intangible assets and strong indirect network effects, where the most successful platform is rewarded when the market tips in its favour, making it difficult for other competitors to compete against it. Mergers between such platforms, once implemented, and the consequent network effects and tipping of the market, may cause irremediable harm to competition, and the intangible assets are difficult to disentangle. The intangible network of the acquiree, once dismantled, may prove difficult to rebuild.

18. In CCCS's final directions, CCCS was able to remedy the part of the transaction involving tangible assets (vehicles) by directing that LCR (or all or part of its assets) shall not be sold to Grab without CCCS's approval and any such purchase from the time of the Transaction to the date of any final decision by CCCS were to be reversed unless otherwise approved expressly by CCCS. CCCS also required Uber to sell LCR's vehicles to any potential competitor who made a reasonable offer based on fair market value to prevent Grab from absorbing and hoarding LCR vehicles to inhibit the access to a vehicle fleet by a new competitor. However, for the intangible part, it was not possible to direct the reversal of the driver and customer network that had migrated to Grab, or to direct Uber's pre-transaction network to be divested to another competitor once the network had been dismantled by the immediate implementation of the Grab-Uber merger.

19. Given the irreversibility of the consummated Grab-Uber merger, CCCS had to design directions to address the competitive harm and facilitate entry and expansion by other players. CCCS found that the consummated merger would have given Grab the ability and incentive to tie vehicle rental companies and drivers who rent from these rental companies in exclusive arrangements and reinforce Grab's position in the ride-hailing platform market by increasing the barriers to entry. Therefore, in addition to the remedies pertaining to the sale of LCR's assets, the directions centred on the removal of exclusivities imposed on drivers and fleet partners. Given that the provision of ride-hailing platform services in Singapore is characterised by strong network effects, CCCS assessed that it

would be difficult for potential competitors to attain a sufficient network of drivers and riders to provide a satisfactory product and experience to both drivers and riders to compete effectively against Grab.

20. CCCS directed Grab to maintain its pre-merger pricing, pricing policies and product options (including driver commission rates and structures) in relation to all its products in the ride-hailing platform services market. Specifically, Grab had to maintain its pre-merger algorithm pricing matrix (for those variables that Grab was able to control) for Grab's ride-hailing services which existed on its ride-hailing platform in Singapore prior to the merger. The algorithm pricing matrix included the surge factor and base fares which Grab was not allowed to increase beyond the surge factor cap and base fares as at the levels just before the merger, except for certain pre-defined events for which the surge factor cap shall be adjusted. This protects the riders' interests against excessive price surges, and the drivers' interests against increases in commissions that they pay to Grab, while not affecting Grab's flexibility to apply dynamic pricing under normal demand and supply conditions or restricting the amount of rider promotions and driver incentives that Grab wishes to offer.

21. While CCCS's directions did not fully restore pre-merger competitive conditions, they ensured continued contestability in the ride-hailing market. Following the entry and expansion of new players including GoJek and smaller players like Ryde and Tada, and the promulgation of sectoral regulation by Singapore's Land Transport Authority that, inter alia, prohibited ride-hailing players from imposing exclusive obligations on their drivers, CCCS eventually lifted the directions imposed on Grab on 20 November 2020.

22. Uber appealed CCCS's infringement decision against the Grab-Uber merger. Uber contended, inter alia, that Singapore's voluntary merger notification regime allowed the parties to implement the Grab-Uber merger without notification and offer commitments after electing to complete the Transaction in an irreversible manner. According to Uber, CCCS was obliged to accept the commitments made in this manner, in lieu of making a finding of infringement and imposing financial penalties. The appeal was dismissed with costs by the Singapore Competition Appeal Board ("CAB"). In doing so, the CAB affirmed that CCCS's investigation into an infringing merger that had been irreversibly completed, the rejection of commitments made after such irreversible completion of the transaction and after the commencement of the CCCS's investigation, and the imposition of directions including financial penalties to deter parties from entering into anti-competitive transactions irreversibly was in line with due process and Singapore's merger control framework. The CAB found that this would not undermine the voluntary notification regime, but rather, underscores the fact that merger parties run the risk of an unfavourable decision from CCCS where they choose not to notify pre-merger.[8]

6. Conclusion

23. Competition agencies can, and should, be empowered to disentangle consummated anti-competitive mergers.

24. Given the practical issues and difficulties that can arise, especially with regard to reversing completed mergers between digital platforms and players, it is important for competition law frameworks to both effectively detect and deter potentially anti-competitive mergers, as well to effectively remedy any such completed mergers. While

[8] Paragraphs 31 to 40 and 201 of the Decision by the Singapore Competition Appeal Board in Uber et al v. CCCS [2020] SGCAB 2.

some jurisdictions seek to achieve these through mandatory merger notification regimes that may be further reinforced through strict gun-jumping penalties, CCCS's framework seeks to achieve this through a multi-pronged approach of (i) a voluntary notification regime; (ii) prompt and strict enforcement action against errant merger parties; (iii) the power to impose financial penalties as a punishment and deterrent; and (iv) wide powers to impose remedies to restore competitive outcomes, or at least contestability, even if the merger cannot be completely reversed.