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Please contact Ms. Lynn Robertson [E-mail: Lynn.Robertson@oecd.org], if you have any questions regarding this document.

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Merger Control in Dynamic Markets

Merger Control: Remedies in Dynamic Markets

- Contribution from Singapore –

1. Introduction

1. Prior to the entry of ride-hailing platforms¹ in Singapore in 2013, point-to-point transport services were primarily delivered by taxis. Taxi drivers would cruise around to pick passengers by the kerbside or taxi stands (“street-hail”), or directly from designated locations for passengers who have booked the ride in advanced (“ride-hail”) through a phone call or text message. However, the latter only accounted for a small proportion of rides.²

2. Since 2013, the ride-hailing industry has gained much ground since the likes of platforms such as Grab and Uber entered Singapore. Prior to the merger of Grab and Uber, Grab and Uber were the two closest and largest competitors on the ride-hailing platform market. Both platforms offered competing products³, and were aggressive in providing incentive schemes for drivers and promotions for riders to use their platforms. Today, more than two-thirds of all point-to-point trips are provided by ride-hailing services.⁴ In allowing for better matching of supply and demand of drivers and riders, ride-hailing platforms have adopted dynamic fare pricing such that fares are higher during peak hours and lower during off-peak hours. In contrast, street-hail operators are required to charge metered fares for rides that begin from the kerbside.⁵

¹ A ride-hailing platform is a two-sided platform that matches drivers and riders for the provision of booked chauffeured point-to-point transportation (“CPPT”) services in Singapore. It enables riders to book CPPT services with drivers of taxis or private hire cars.

² Ministry of Transport, (2019). Paragraph 4, Opening Speech by Senior Minister of State for Transport Dr Janil Puthucheary on Second Reading of Point-to-Point Passenger Transport Industry Bill 2019.

³ For example, Uber launched UberFlash which provided similar services to Grab’s JustGrab by matching riders with the nearest taxis or chauffeured private hire cars. Uber also launched a new service, UberCommute, which provided car-pooling services similar to Grab’s GrabHitch.

⁴ Ride-hailing services includes booked private vehicle or taxi rides (including call bookings) but exclude street-hailed taxi rides; Ministry of Transport, (2019). Paragraph 5, Speech by Senior Minister of State Ng Chee Meng at the Committee of Supply Debate 2016, on Car Ownership and Taxi and Chauffeured Services.

⁵ These taxi companies are able to set its own flag-down fares but other taxi fare components (i.e. unit fares, surcharges, booking fees and additional passenger fees) are standardised by the Public Transport Council.

2. Competition Law in Singapore

3. The section 54 prohibition of the Competition Act (Chapter 50B) (“the Act”) enforced by the Competition and Consumer Commission of Singapore (“CCCS”) prohibits mergers that have resulted, or may be expected to result, in a substantial lessening of competition (“SLC”) in Singapore.

4. 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 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.⁶ 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 provides such parties with the ability to seek CCCS’s confidential advice on whether a merger is likely to raise competition concerns in Singapore and therefore whether a notification is advisable, with the necessary qualification that such advice is provided without having taken into account third-party views.⁷ Confidential advice is only available if CCCS is satisfied that certain conditions are met.⁸ CCCS has legal powers to conduct an investigation into an un-notified merger if there are reasonable grounds for suspecting that the merger infringes section 54 of the Act.⁹ In the event that 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.¹⁰ CCCS may also consider issuing interim measures prior to the final decision of the investigation.¹¹

5. In considering the appropriate remedies, CCCS will decide on the remedial action that will restore the competition that has been, or is expected to be, substantially lessened as a result of the merger. CCCS may therefore decide to impose more than one type of remedy.¹²

⁶ Paragraph 3.2 of the *CCCS Guidelines on Merger Procedure 2012*.

⁷ Paragraph 3.18 of the *CCCS Guidelines on Merger Procedure 2012*.

⁸ *Ibid.*

⁹ Paragraph 3.3 of the *CCCS Guidelines on Merger Procedure 2012*.

¹⁰ Paragraph 8.1 of the *CCCS Guidelines on the Substantive Assessment of Mergers 2016*.

¹¹ 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; Paragraph 2.13 of the *CCCS Guidelines on Merger Procedure 2012*.

¹² Paragraph 8.17 of the *CCCS Guidelines on the Substantive Assessment of Mergers 2016*.

3. Grab-Uber Merger Investigation and Remedies

6. 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”). The un-notified and completed 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.

7. The un-notified Grab-Uber merger was completed on 26 March 2018. On 27 March 2018, CCCS commenced an investigation into the merger. Prior to the merger, Grab and Uber were each other’s closest competitor in the provision of ride-hailing platform services in Singapore. As part of the merger, Grab acquired Uber’s assets, properties, claims and rights except for certain excluded assets and liabilities. 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 application in Singapore was due to cease within two weeks from the announcement made on 26 March 2018. In addition, Uber and Lion City Rentals¹³ (“LCR”) ceased operations at their respective offices upon the announcement of the merger.

8. CCCS found that the completed merger would have given Grab the ability and incentive to tie chauffeured private hire car (“CPHC”) rental companies and drivers who rent from these CPHC rental companies in exclusive arrangements and reinforce Grab’s position in the ride-hailing platform market by increasing the barriers to entry.

9. In view of the speed at which Uber had transferred its assets and data to Grab and exited the Singapore market, CCCS had to respond quickly and a set of interim measures¹⁴ 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 to impose appropriate remedies.¹⁵ This was the first time that CCCS had found it necessary to impose interim measures on any business in Singapore. Subsequently, on 24 September 2018, CCCS issued an infringement decision against Grab and Uber. CCCS imposed financial penalties on Grab and Uber to deter future cases of completed and irreversible mergers that harm competition, as well as issued directions to Grab and Uber to open up the market and level the playing field for new players.

¹³ Lion City Rentals is a private company incorporated in Singapore, which is an operating subsidiary of Uber that operates a car rental business for private hire vehicles in Singapore.

¹⁴ 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.

¹⁵ 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; Paragraph 2.13 of the *CCCS Guidelines on Merger Procedure 2012*.

10. In designing the directions imposed on Grab, CCCS ensured that the remedies were calibrated in addressing the competitive harm. The directions imposed to restore competition included the following: 1) maintaining the pre-merger pricing; 2) removal of exclusivities in the provision of ride-hailing platform services in Singapore, characterised by strong network effects; and 3) divestment of assets.

3.1. Remedy 1. Maintaining Pre-Merger Pricing

11. CCCS found that Grab had increased its effective fares¹⁶ (by between 10% and 15%) and the commission rates for drivers¹⁷ post-merger (for example, by way of a decrease in the amount and frequency of rider promotions and driver incentives).

12. As part of the infringement decision, 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.

3.2. Remedy 2. Removal of exclusivities in the provision of ride-hailing platform services in Singapore

13. Strong network effects make it difficult for new entrants to compete against the incumbent. Strong indirect network effects could be a potential barrier to entry, making it difficult for new entrants to compete against the incumbent.¹⁸ Exclusivities imposed by a dominant entity in markets characterised by strong indirect network effects could cripple the ability of potential entrants to gather sufficient scale to compete.

14. In the Grab-Uber merger, CCCS assessed that there are strong indirect network effects in the market for the provision of ride-hailing platform services, given its two-sided nature where riders use the platforms to book ride-hailing services with drivers of taxis or private hire cars.

15. Prior to the merger, Grab had imposed exclusivity obligations on taxi companies, car rental partners, and some of its drivers. Post-merger, Grab had the ability and incentive to continue such exclusivity arrangements in order to impede expansion by existing competitors as well as new entry. By signing up more drivers on an exclusive basis, Grab

¹⁶ Effective fares refer to trip fares net of rider promotions.

¹⁷ Commission rates for drivers refer to the percentage of the drivers' earnings that Grab will receive for the drivers' use of its platform.

¹⁸ Market tipping is a phenomenon where a single firm becomes sufficiently large such that the market 'tips' in its favour, meaning that the firm captures a majority share of the market and its strong position is reinforced by the networks effects.

would have a bigger pool of drivers to attract more riders to use its services. This in turn would incentivise other drivers to drive for Grab too since there is a bigger pool of riders using Grab's platform. This would hamper the ability of potential competitors to access drivers and vehicles that are necessary for expansion in the market, such that they are unable to scale up to compete efficiently and effectively against Grab.

16. To prevent this situation, CCCS directed Grab to remove all, and not impose any, exclusivity obligations, lock-in periods and/or termination fees on all drivers who use Grab's ride-hailing platform ("Grab Drivers"). In addition, Grab had to ensure that Grab drivers were not penalised, directly or indirectly, as a result of the non-exclusivity. The removal of exclusivity arrangements meant that Grab drivers are free to use any other ride-hailing platform. Without the remedies, 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.

3.3. Remedy 3. Conditions on sales of asset

17. The Grab-Uber merger would have allowed Grab to request Uber not to sell LCR. LCR was a key asset in the provision of ride-hailing services in Singapore.

18. In purchasing a vehicle to provide ride-hailing services, the purchaser is required to bid for a Certificate of Entitlement ("COE") which is limited by a quota by the Land Transport Authority ("LTA"). Hence, for a potential new entrant, the purchase of its own fleet of vehicles would require significant resources given LTA's policy on the cap in the number of COE at 0% growth rate and high COE prices. Besides purchasing its own fleet of vehicles, a potential new entrant could acquire and/or enter into partnerships with potential fleet partners as well. However, potential new entrants found it difficult to do so as other third-party car rental companies, which do not have exclusive arrangements with Grab, besides LCR, only accounted for a small percentage of CPHC rental cars in Singapore. These third-party car rental companies were not of sufficient scale and size, and might not have been able to offer competitive economic rates, unlike LCR. This meant that a potential new entrant would have had to acquire and/or enter into partnerships with many third-party car rental companies in order to acquire vehicles of sufficient scale, to compete with Grab.

19. Hence, the lack of access to LCR's vehicle fleet could limit a new entrant's ability to gain sufficient scale, which was essential to build a certain minimum critical mass. Should Grab request Uber not to sell LCR, CCCS was of the view that this would make it more difficult for potential competitors to enter and expand quickly given that they are unable to access LCR's existing fleet of vehicles and drivers.

20. To prevent Grab and Uber from absorbing or hoarding LCR vehicles to inhibit the access to a vehicle fleet by a new competitor, CCCS required Uber to sell the vehicles of LCR to any potential competitor who makes a reasonable offer based on fair market value, and prevent Uber from selling these vehicles to Grab without CCCS's prior approval. Further, if any new entrant or existing ride-hailing platform service provider makes a reasonable offer to purchase LCR or all or part of the assets, Uber must accept the offer unless CCCS raises objection to the potential purchase.

4. Challenges in designing remedies in the ride-hailing platform market

21. The sections below set out the challenges CCCS faced in designing a set of appropriate remedies to address the competition harm brought about by the Grab-Uber merger.

4.1. Challenge 1. Data assets held by merging parties

22. In the Grab-Uber merger, Grab and Uber had already begun transferring Uber's data assets in relation to the ride-hailing platform services (this included information on historical trip data) to Grab, and migrating Uber drivers and riders to Grab's ride-hailing platform immediately after the merger was completed. The data asset included operational information of the entities (for example, historical trip data) and personal data of riders (for example, contact details). CCCS was keenly aware that the integration of the Parties' data was unlikely to be reversible and could not be easily rectified. This would prejudice the possibility of a sale of Uber's data and business to another third-party should CCCS decide to reverse the merger.

23. CCCS imposed interim directions to prevent any integration of operational data between Grab and Uber as CCCS had yet to complete its assessment of the importance of the data assets.¹⁹ The challenge CCCS faced was to ascertain how commercially valuable and important the data asset held by Uber was, and whether the integration of the operational data between the two companies would place Grab in such an advantageous position that other competitors would not be able to compete effectively with it post-merger as the data could not be easily collected or replicated.

24. During the investigation, contrary to its initial views, CCCS received feedback from third parties that the information on pricing practices of competing ride-hailing platforms could be easily obtained as they were reported online and regularly commented on in the media. Consequently, CCCS concluded that the operational data was not a critical key asset and thus, did not prevent the integration of operational data between Grab and Uber in its final directions.

25. It is therefore important for competition authorities to assess the data assets held by merging parties on a case-by-case basis, before ascertaining whether the integration of such data assets through a merger will substantially harm competition in the market.

4.2. Challenge 2. Continued relevance of behavioural remedies

26. As it was difficult to ascertain the appropriate duration of the remedies upfront, instead of imposing fixed timelines for the remedies, CCCS prescribed trigger events in respect of which remedies may be suspended on an interim basis, or released unconditionally, in the event that any open-platform competitor²⁰ attains a certain threshold level of market shares for a certain period of time. However, the challenge remained for

¹⁹ Grab may only retain the personal data of drivers, riders and merchants (e.g. names, contact details, and supporting documents for vocation licence application) who have chosen of their own accord to expressly opt in and move to the Grab ride-hailing platform to the extent necessary to facilitate the on-boarding process of such users and to provide services to them.

²⁰ An open-platform competitor refers to any platform operator, which allows bookings to be accepted by third-party taxi or CPHC drivers/operators.

CCCS to determine the appropriate measure and threshold level of market shares of the trigger events that would evidence the sufficiency of competition in the ride-hailing platform market to establish that pre-merger competition conditions have been restored and/or it would be appropriate to release Grab from the final directions. Another related challenge was the need for CCCS to ascertain the duration for which the market shares gained by the open-platform competitor should be sustained that would be reflective of its ability to exert competitive constraints on Grab on a sustained basis.

27. CCCS considered that a threshold level well below Uber's pre-merger market share, which is between 30 to 40%, would not be sufficient to establish that pre-merger competition conditions have been restored and/or that it would be appropriate to release Grab from the final directions. Hence, CCCS considered that an open-platform competitor would be required to attain 30% or more of total rides matched in the ride-hailing platform services. In view of the above, CCCS considered that an *interim suspension* be granted should an open-platform competitor without any direct or indirect common control with Grab attain 30% or more of total rides matched in the ride-hailing platform services for one (1) calendar month. In addition, an *unconditional release* of all directions is granted should an open-platform competitor without any direct or indirect common control with Grab, attains 30% or more of total rides matched in the ride-hailing platform services market monthly for six (6) consecutive calendar months. It remains open to Grab to apply to CCCS for a variation, substitution, or release from any or all the directions.

4.3. Challenge 3. Effectiveness of monitoring to ensure compliance

28. In the Grab-Uber merger, CCCS directed the Parties to appoint a monitoring trustee to monitor the Parties' compliance with CCCS's directions within seven (7) days of the issuance of the infringement decision. The challenge for CCCS was to appoint a suitable monitoring trustee that has the necessary technical capabilities and competencies to monitor the Grab's compliance with the final directions. In particular, as CCCS directed Grab to maintain its pre-merger pricing algorithm, CCCS had to ensure that the appointed monitoring trustee has the abilities to audit the pricing algorithm so that monitoring is reliable and effective.

5. Conclusion

29. The formulation of appropriate remedies to impose in rapidly changing digital markets remains challenging, in particular, when competition authorities seek to find a balance between remedies that effectively address the competition harm while allowing the infringing companies to continue to innovate and respond effectively to market developments. In CCCS's experience, this process requires interaction and inputs from different stakeholders in the industry in order for CCCS to have a good understanding of the market, and in turn being able to design an effective set of remedies.