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E-COMMERCE COMPETITION ENFORCEMENT GUIDE

THIRD EDITION

Editor
Claire Jeffs

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For further information please contact Natalie.Clarke@lbresearch.com

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Account Manager
Bevan Woodhouse

Editorial coordinator
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Production editor
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Subeditor
Anna Andreoli

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Publisher's Note

E-commerce has changed our homes – replacing books, CDs, DVDs and satellite dishes with downloads and streaming; automobiles with app-hailed rides; shopping bags with postal delivery boxes. It is changing our language too, adding terms such as 'phygital' for blending online and offline business. Yet, as noted by Claire Jeffs, Nele Dhondt and Jack Dickie in their introduction, competition authorities are evolving their existing tools to address e-commerce, not revolutionising how they apply antitrust law. Practical guidance for both practitioners and enforcers in navigating this challenging environment is critical.

This third edition of the *E-Commerce Competition Enforcement Guide* – published by Global Competition Review – provides such detailed guidance and analysis. It examines both the current state of law and the direction of travel for the most important jurisdictions in which international businesses operate. The Guide draws on the wisdom and expertise of distinguished practitioners globally, and brings together unparalleled proficiency in the field and provides essential guidance for all competition professionals.

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Competition and Consumer Commission of Singapore

Lee Pei Rong Rachel and Leow Rui Ping[1]

The rise of e-commerce, disruptive technologies and big data

The growth of e-commerce platforms in Singapore is facilitated by a population that has ready access to internet and smartphone devices. Internet usage rates in Singapore continue to grow steadily – in 2019, about 89 per cent of residents used the internet, up from 87 and 84 per cent in 2018 and 2017 respectively.[2] Similarly, mobile phone penetration in Singapore continues to grow, rising to a high of more than 150 per cent in the first half of 2019.[3] Even at home, almost all residents used internet-enabled mobile phones as their equipment of choice to access the internet, while the use of computers declined by 8 percentage points to 86 per cent.[4]

Likewise, businesses in Singapore continue to engage in e-commerce activities.[5] In 2019, the proportion of businesses engaged in e-commerce activities reached 19 per cent, an increase from 13 per cent in 2017.[6] Businesses in the education, wholesale and retail trade, and infocommunications and media sectors were more likely to engage in e-commerce activities compared to other sectors.

1 Lee Pei Rong Rachel is a senior assistant director of the Legal and Enforcement Divisions and Leow Rui Ping is an assistant director with the Policy and Markets Division of the Competition and Consumer Commission of Singapore.

2 IMDA. Annual Survey on Infocomm Usage in Households and by Individuals for 2019 report, last updated on 1 June 2020.

3 IMDA. Data on mobile penetration rate, last updated on 6 January 2020.

4 IMDA. Annual Survey on Infocomm Usage in Households and by Individuals for 2019 report, last updated on 1 June 2020.

5 In the context of the survey, 'E-commerce activities' refer to the sale or purchase of goods and services over computer-mediated networks or the internet. Payment and delivery of the good or service can be offline. IMDA, Annual Survey on Infocomm Usage by Enterprises for 2019 report, last updated on 1 June 2020.

6 IMDA, Annual Survey on Infocomm Usage by Enterprises for 2019 report, last updated on 1 June 2020.

The shift in consumption behaviour towards e-commerce has supported the emergence of a vibrant e-commerce platform industry in Singapore. There are a range of e-commerce platforms providing e-commerce services, such as marketplaces for new or used goods, groceries, food delivery services, point-to-point transport services and e-payment platform services. Sellers, based in Singapore or overseas, offer their products or services through these marketplaces. Many sellers, who had in the past only sold their products or services from a physical retail store, have also started to sell their products or services online. Furthermore, a range of ancillary service providers, such as third-party logistics providers, have emerged to support e-commerce activities in Singapore.

While the value of sales on e-commerce platforms is still relatively small compared to the number of offline transactions, the number is growing. For example, in November 2019, estimated total retail sales in Singapore was US$3.6 billion, of which online retail sales made up an estimated 8 per cent.[7] In June 2020, with the introduction of circuit-breaker measures in Singapore to address the impact of the covid-19 pandemic, the estimated proportion of online retail sales out of total retail sales value increased to 18.1 per cent.[8]

To capitalise on the opportunities from the digital economy, the Singapore government has been actively promoting the adoption of digital technologies as part of the strategy for Singapore's next stage of growth and development. For example, in June 2019, the Digital Industry Singapore (DISG) was created[9] to serve as a single interface between the government and the technology companies. The streamlined approach will enable DISG to better understand companies' needs, with a view to anchor global technology leaders, build local champions, and nurture future-ready talent in Singapore; and to establish Singapore as a leading technology hub with deep capabilities, strong infrastructure and a vibrant ecosystem of local and global enterprises.

As the digital economy becomes an integral aspect of Singapore's growth strategy, and more consumers and businesses engage in e-commerce, it is expected to become a more prominent aspect of the economy. In this context, this article seeks to explain how the CCCS considers competition issues in the digital economy, including highlighting the recent CCCS enforcement cases. This chapter also explains how the CCCS considers that collaboration with other regulators (e.g. in data protection) would be necessary as issues in digital markets are intertwined, and how it is important to monitor and conduct reviews into key developments in digital markets to ensure that its framework remains relevant for the rapidly evolving competition landscape.

7 Department of Statistics of Singapore, Retail Sales Index and Food & Beverage Services Index, November 2019. A part of these offline sales is likely to be spending by tourists that are temporarily in Singapore and are less likely to be converted to online shopping. It should also be highlighted that these figures pre-date the COVID-19 pandemic.

8 Department of Statistics of Singapore, Retail Sales Index and Food & Beverage Services Index, June 2020.

9 DISG is a joint office of the Economic Development Board, Enterprise Singapore and the Info-communications Media Development Authority. For more information, see www2.imda.gov.sg/for-industry/Digital-Industry-Singapore-DISG.

The functions of the CCCS

The CCCS was first established on 1 January 2005 as the Competition Commission of Singapore (CCS), following the enactment of the Competition Act (Cap. 50B) (the Competition Act).[10] The Competition Act is aimed at protecting businesses and consumers from anticompetitive conduct, and so assists to promote the efficient functioning of our markets and enhance the competitiveness of the Singapore economy.[11]

The CCCS administers and enforces the provisions of the Competition Act, which prohibits specified activities that adversely affect competition within a market in Singapore, including:

- agreements or concerted practices that prevent, restrict or distort competition;
- abuse of a dominant position; and
- mergers that substantially lessen competition.

With effect from 1 April 2018, the CCS was renamed the CCCS and has taken on responsibility for the additional function of administering the Consumer Protection (Fair Trading) Act (Cap. 52A) (CPFTA).[12] The CPFTA was enacted in 2003 and contains safeguards to protect consumers from unfair trading practices by retailers. As the administering agency, the CCCS will gather evidence and may file injunction applications with the court against errant suppliers that refuse to rectify their infringing practices.

These functions form the backdrop for the discussion in this article of the CCCS's enforcement practice in the digital economy.

The CCCS's enforcement practice in the digital economy

Anticompetitive agreements

In Singapore, section 34 of the Competition Act prohibits any agreements between undertakings,[13] decisions by associations of undertakings or concerted practices that have as their object or effect the prevention, restriction or distortion of competition within Singapore. 'Agreement' has a wide meaning and includes both legally enforceable and non-enforceable agreements, whether written or oral. What is required is that parties arrive at a consensus on the actions each party will or will not take.[14] 'Concerted practices' refers to any informal

10 The provisions of the Competition Act are found at https://sso.agc.gov.sg/Act/CA2004.

11 Speech delivered by then Senior Minister of State for Trade and Industry, Dr Vivian Balakrishnan during the Second Reading for the Competition Bill on 19 October 2004. This is found at https://www.cccs.gov.sg/~/media/custom/ccs/files/media%20and%20publications/speeches/second%20reading%20speech%20for%20the%20competition%20bill%20by/19oct042ndreadingspeechfinal.ashx.

12 The provisions of the CPFTA are found at https://sso.agc.gov.sg/Act/CPFTA2003.

13 Undertaking means any person, being an individual, a body corporate, and an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services. The key consideration in assessing whether an entity is an undertaking for the application of the section 34 prohibition is whether it is capable of engaging, or is engaged, in commercial or economic activity. CCCS Guidelines on the Section 34 Prohibition 2016, para. 2.5 to 2.6, found at https://www.cccs.gov.sg/-/media/custom/ccs/files/legislation/legislation-at-a-glance/cccs-guidelines/cccs-guidelines-on-the-section-34-prohibitions-2016.pdf.

14 CCCS Guidelines on the Section 34 Prohibition 2016, para. 2.10.

cooperation without any formal agreement or decision. It may be found to exist if parties, even if they did not enter into an agreement, knowingly substituted the risks of competition with practical cooperation between them.[15]

Data-sharing

In the context of digital markets, businesses might derive additional value from the sharing of data, particularly where consumers are also informed. Data-sharing may result in businesses deriving new insights beyond their own data sets or developing more targeted solutions to business problems. Hence, the sharing of data within the framework of existing rules can be pro-competitive. In general, it is unlikely that the competitive process will be harmed where the data shared is historical; sufficiently aggregated and cannot be attributed to a particular business; not sensitive, strategic or confidential; and shared with consumers or government agencies.[16] The sharing of data with businesses in other markets and industries is also unlikely to be problematic.[17]

In contrast, an appreciable adverse effect on competition is more likely where only a few companies operate in the market; where data sharing is frequent; where the data shared is commercially sensitive; and where the sharing is limited to certain participating companies in the market to the exclusion of their competitors and buyers.[18] Unless the sharing of data in those circumstances can result in net economic benefits,[19] it is likely to raise competition concerns.

Use of algorithms by digital platforms

The use of algorithms may bring about efficiency gains and promote market transparency to the benefit of consumers. For example, with automated pricing algorithms, firms can more easily adjust prices to offer competitive pricing to consumers, taking into consideration their competitors' pricing in real time.

15 CCCS Guidelines on the Section 34 Prohibition 2016, para. 2.18. See also Case C-8/08 *T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4592, para. 26 and the cases cited therein.

16 CCCS Guidelines on the Section 34 Prohibition 2016, paras 3.17 to 3.24

17 Competition concerns are generally unlikely to arise when businesses share data with other businesses in a different market or industry, including data analytics solutions providers and data aggregator firms. For example, the sharing of aggregated consumer profiles and spending patterns by credit card companies may help other businesses to generate better insights, conduct targeted marketing and offer more customised product to consumers. However, data sharing by businesses with other businesses from another market or industry, which has the object or effect to prevent, restrict or distort the competitive process in a specific market or industry would still be caught under section 34 of the Competition Act. For example, 'hub-and-spoke' cartels where competitors come together to share sensitive data via a third party (in another market or industry) that facilitates collusion among competitors would be caught under the Competition Act. Another example that would be caught under the Competition Act would be businesses in different markets coming together to share data for the purpose of jointly boycotting a particular common customer or supplier.

18 CCCS Guidelines on the Section 34 Prohibition 2016, paras 3.20 and 2.22.

19 CCCS Guidelines on the Section 34 Prohibition 2016, para. 4.1.

However, algorithms could potentially make it easier for companies to collude and fix prices. Businesses may use monitoring algorithms to collect and analyse real-time information concerning their competitors' prices, business decisions and other market data.[20] Algorithms may also prevent unnecessary retaliations through their ability to predict and distinguish between intentional deviations from collusion, and natural reactions to changes in market conditions or even mistakes.[21] The ease and speed with which competitors' actions can be monitored may facilitate collusive outcomes by reducing incentives for deviations, making collusion more efficient.

The CCCS has not yet issued an infringement decision in relation to algorithm-driven anticompetitive conduct. As such, it has not yet come to a firm position on some of the issues involved, such as the assessment of legal liability for self-learning algorithms. That said, where the use of algorithms by businesses is to support or facilitate any pre-existing or intended anticompetitive agreement or concerted practice, such cases fall squarely within the existing enforcement framework. Where algorithms are used in classic 'hub-and-spoke' scenarios that involve competitors colluding through a third-party intermediary, this would equally be caught by the section 34 prohibition. Such a scenario could arise, for example, where there is an industry-wide use of a single algorithm to determine prices, and competitors use and rely on that same third-party owned 'hub' (a pricing algorithm) to coordinate their pricing strategies.

Example of the CCCS's enforcement activity in relation to anticompetitive agreements in the digital market

In 2016, the CCCS issued an infringement decision against 10 financial advisers in Singapore. They were found to have infringed the Competition Act by engaging in an anticompetitive agreement to put pressure on their competitor, iFAST Financial Pte. Ltd. (iFAST), to withdraw its offer of individual life insurance products with a 50 per cent commission rebate to policy holders on the Fundsupermart.com website. The launch of iFAST's offer disrupted the financial advisory industry in the distribution of life insurance products in Singapore. The use of iFAST's established online platform to reach out to its wide client base was not only innovative but also efficient, allowing iFAST to save on distribution costs. These cost savings could then be passed on to consumers through a significant commission rebate. However, a few days later, iFAST withdrew the offer owing to collective pressure from the financial advisers. Investigations by the CCCS commenced after it noted media reports suggesting that iFAST had withdrawn the Fundsupermart offer due to unhappiness in the industry.

One of the financial advisers appealed to the Competition Appeal Board (CAB) on various grounds seeking a substantial reduction in the financial penalty imposed by the CCCS. After hearing evidence from the appellant's witnesses and arguments from both sides, the CAB affirmed the CCCS's decision and dismissed the appeal. The CAB stated that the result of the infringing conduct is that 'the market never returned to the state of competition that would

20 In relation to monitoring algorithms, see generally, section 4.3.1 of Organisation for Economic Co-operation and Development (9 June 2017), 'Algorithms and Collusion', DAF/COMP(2017)4.

21 Organisation for Economic Co-operation and Development (9 June 2017), 'Algorithms and Collusion', DAF/COMP(2017)4, page 20, para. 46.

have existed had the Fundsupermart Offer not been withdrawn'. Had iFAST's offer remained on the market, the parties might have had to make similar or new offers to respond to the competitive threat.

The disruptive entry of a new competitor with an innovative offering would inevitably cause displeasure and outcry among the existing market players. However, each market player should independently determine its own individual competitive response. The anticompetitive conduct by the parties in this case prevented consumers from enjoying benefits such as greater choice, greater convenience and more competitive prices. The conduct also prevented the market from becoming more competitive. This case underscores the importance of decisive enforcement action by the CCCS, to ensure that new and innovative players can access markets and compete fairly.

Abuse of dominance

Section 47 of the Competition Act prohibits any conduct amounting to an abuse of a dominant position, on the part of one or more undertakings, in any market in Singapore. According to the CCCS Guidelines on the Section 47 Prohibition 2016 (the Section 47 Guidelines), conduct that constitutes an abuse of a dominant position in a market includes conduct that protects, enhances or perpetuates the dominant position of an undertaking in ways unrelated to competitive merit.[22] In assessing whether the section 47 prohibition has been infringed, the CCCS will first consider whether an undertaking is dominant in a relevant market, and if it is, then whether it is abusing the dominant position in a market in Singapore.

An undertaking[23] will be considered to be dominant if it has substantial market power.[24] In assessing whether an undertaking is dominant, the extent to which there are constraints on an undertaking's ability to profitably sustain prices above competitive levels will be considered. Such constraints include the extent of competition from existing competitors, the possibility of new competitors entering the market (which is affected by barriers to entry), the ability of buyers to counter the exercise of market power by the dominant player, government regulation, etc.[25]

22 Section 47(2) of the Act provides an illustrative list of conduct that may constitute an abuse of dominance as follows: (a) predatory behaviour towards competitors; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and (d) making the conclusion of contracts subject to acceptance by other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of the contracts.

23 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. It includes individuals operating as sole proprietorships, companies, firms, businesses, partnerships, cooperatives, societies, business chambers, trade associations and non-profit-making organisations, whatever its legal and ownership status (foreign or local, government or non-government), and the way in which is it financed. See Section 47 Guidelines, para. 2.4, found at https://www.cccs.gov.sg/-/media/custom/ccs/files/legislation/legislation-at-a-glance/cccs-guidelines/cccs-guidelines-on-the-section-47-prohibitions-2016.pdf.

24 Section 47 Guidelines, para. 3.3.

25 Section 47 Guidelines, para. 3.4.

In the context of assessing market power in digital markets, the unique features of data-driven markets would need to be taken into consideration (e.g., network effects,[26] multi-homing,[27] availability and access to substitute data,[28] and the dynamism of digital markets).[29]

It is important to bear in mind that the mere accumulation of a large amount of data by a business, in and of itself, does not equate to the business occupying a dominant position. Dominance may be strengthened due to network effects, but may be weakened due to the existence of multi-homing, ease of access to customer data, substitutability of data and the rapid evolution of digital markets.

Even if a firm is assessed to be dominant, competition concerns will only arise when the firm engages in exclusionary conduct that has, or is likely to have, an adverse effect on the process of competition. The Section 47 Guidelines state that exclusionary behaviour may include, among others, refusal to supply, or vertical restraints (e.g., tying) that foreclose (or are likely to foreclose) markets or weaken competition.[30] Such conduct may be abusive to the extent that it harms competition; for example, by removing an efficient competitor, limiting competition from existing competitors, or excluding new competitors from entering the market.[31]

Based on the CCCS's experience, cases involving digital platforms typically involve the intermingling of a number of these concepts. The competition assessment in these cases typically requires a detailed consideration of all these features.

26 Network effects refer to how the use of a good or service by a user increases the value of the product to other users. For more discussion on this, refer to paras 166 to 170 of 'Data: Engine for Growth – Implications for Competition Law, Personal Data Protection, and Intellectual Property Rights', which is a joint occasional paper by CCCS, the Intellectual Property Office of Singapore and the Personal Data Protection Commission, published on 16 August 2017. It is available at www.cccs.gov.sg/media-and-publications/publications/studies-research-papers/occasional-papers/data-engine-for-growth.

27 The potential for customers to 'multi-home' in membership (in other words, to gain access to more than one platform for the same type of service) is a factor to consider in the assessment of market power. Where customers multi-home, they may be in a better position to resist attempts by an online platform to exert its market power (for example, by increasing prices) by switching to competing platforms. For more discussion on this, refer to paras 171 to 172 of 'Data: Engine for Growth – Implications for Competition Law, Personal Data Protection, and Intellectual Property Rights'.

28 In assessing market power in data-driven industries, two key questions should be asked: (a) whether the data could be replicated under reasonable conditions by competitors; and (b) whether the use of the data is likely to result in a significant competitive advantage. For more discussion on this, refer to paras 173 to 174 of 'Data: Engine for Growth – Implications for Competition Law, Personal Data Protection, and Intellectual Property Rights'.

29 E-commerce and other data-driven markets are characterised by rapid innovation, with new entrants being able to gain a foothold quickly under certain circumstances. For more discussion on this, refer to paras 175 to 177 of 'Data: Engine for Growth – Implications for Competition Law, Personal Data Protection, and Intellectual Property Rights'.

30 Section 47 Guidelines, para. 4.3.

31 Section 47 Guidelines, para. 4.3.

Examples of the CCCS's enforcement activity in relation to an abuse of dominant position in the digital market

A relevant example is the CCCS's investigation into the online food delivery market in Singapore in 2016.[32] It concerned an alleged anticompetitive practice by an online food delivery provider in Singapore. The online food delivery provider had entered into exclusive agreements with certain restaurants. This prevented the restaurants from multi-homing, using other online food delivery providers' services to reach out to a wider pool of customers and generate an additional revenue source. The exclusive agreements could also potentially reinforce network effects and foreclose the entry of new players or restrict the expansion of existing players.

However, at that point in time, the CCCS noted that the market remained dynamic and the presence of the exclusive agreements had not harmed competition. Online food delivery providers competed aggressively for market share and there was no clear dominant player in the market. As such, the CCCS opted to cease the investigation, and proceeded to monitor the market instead. The CCCS issued a media release[33] as a reminder to online food delivery providers that exclusive agreements may risk infringing competition law if the online food delivery provider becomes dominant, and that the CCCS will continue to monitor this industry and take enforcement action if necessary. In a recent market monitoring exercise following the issuance of its media release, the CCCS found that the online food delivery market has grown in size, and remained vibrant with the recent entry of a new player.

More recently, the online food delivery market was a subject of another investigation by the CCCS. In September 2019, acting on industry feedback, the CCCS commenced on an investigation[34] into the online food delivery and virtual kitchen[35] sectors in Singapore. In recent years, three main online food delivery providers in Singapore – Deliveroo, Foodpanda and GrabFood – have started to offer virtual kitchens to F&B operators. Smart City Kitchens (SCK), which competes to provide virtual kitchens to F&B operators, however, does not operate any online food delivery service, and consequently relies on the main online food delivery service providers to fulfil deliveries for the F&B operators that operate out of its virtual kitchens. The conduct investigated by the CCCS included the refusal to supply online food delivery services to F&B operators using SCK's virtual kitchens.

Following the CCCS's investigation, GrabFood and Deliveroo have started supplying their online food delivery services to F&B operators in SCK's virtual kitchens, which used to only have access to Foodpanda's online food delivery service. As a result, F&B operators using SCK's virtual

32 CCCS media release (25 August 2016), 'CCS investigation finds online food delivery industry to be currently competitive but exclusive agreements could be problematic in future', found at www.cccs.gov.sg/media-and-publications/media-releases/investigation-of-online-food-delivery-industry.

33 id.

34 CCCS media release (5 August 2020), 'CCCS concludes investigation into online food delivery and virtual kitchens sectors', found at https://www.cccs.gov.sg/media-and-consultation/newsroom/media-releases/online-food-delivery-and-virtual-kitchen-sector-5-aug-20.

35 Virtual kitchens are integrated and optimised commercial kitchen spaces provided to food and beverage operators ('F&B operators') for food preparation, predominantly for online food delivery services. Virtual kitchens provide another channel for F&B operators to start small and gradually expand their business through online food deliveries, without the costs associated with running a dine-in restaurant. Virtual kitchens also allow consumers to enjoy a wider and better choice of food for delivery.

kitchens now have the choice of using multiple online food delivery providers to expand their consumer reach. On 5 August 2020, the CCCS announced that it had ceased its investigation. The CCCS noted that competition in the virtual kitchen sector remains dynamic, with players entering and competing for market share, but it will continue to monitor market practices and take the necessary enforcement action against any anticompetitive conduct as appropriate in these sectors.

Mergers and acquisitions

Under section 54 of the Competition Act, mergers that have resulted, or may be expected to result, in a substantial lessening of competition within any market in Singapore for goods and services are prohibited. Section 54(4) of the Competition Act also provides that the creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity shall constitute a merger.

The focus of the CCCS's assessment of a merger is on evaluating how the competitive constraints on the merger parties and their competitors might change as a result of the merger. The CCCS's merger assessment typically starts with defining the relevant market(s), which provides a framework within which to identify and assess the competitive constraints a merged firm would likely face. The factors that the CCCS will consider when assessing if there is a substantial lessening of competition in the relevant market, both with and without the merger, include market shares and concentration, barriers to entry and expansion, and countervailing buyer power. In assessing these factors, the unique features of data-driven markets, as identified in the section above, such as network effects, multi-homing, availability and access to substitute data and the dynamism of digital markets, should also be taken into account.

Example of a CCCS investigation of an anticompetitive merger in the digital market

A recent example would be the CCCS's investigation into Grab[36] and Uber[37] in relation to the sale of Uber's Southeast Asian business to Grab in consideration for Uber holding a 27.5 per cent stake in Grab. On 26 March 2018, Grab and Uber announced and completed the transaction, and began the transfer of the acquired assets immediately. This included the transfer of information and data, such as contracts with riders and drivers, in Singapore. The CCCS commenced an investigation into the transaction the day after the announcement of the transaction.

36 The reference to 'Grab' refers to Grab Inc, and its subsidiaries and any other related entities including but not limited to GrabCar Pte Ltd, GrabTaxi Holdings Pte Ltd, GrabTaxi Pte Ltd, Grab Rentals Pte Ltd and Grab Rentals 2 Pte Ltd. Grab is a ride-hailing platform that is active in Southeast Asia. Aside from its transportation business (including shared bicycle and personal mobility devices services, and car rental businesses), Grab also offers food delivery services, and payment and financial services.

37 The reference to 'Uber' refers to Uber Technologies, Inc, and its subsidiaries and any other related entities including but not limited to Uber Singapore Technology Pte Ltd, Lion City Holdings Pte Ltd, Lion City Rentals Pte Ltd, Lion City Automobiles Pte Ltd and LCRF Pte Ltd.

Shortly after the commencement of its investigation, the CCCS issued interim measures directions[38] to Grab and Uber on 13 April 2018 to preserve and restore competition and market conditions to the pre-transaction state, so as to prevent action that may prejudice the CCCS's consideration of the transaction or the CCCS's issuance of directions or remedies at the conclusion of its investigation.

On 24 September 2018, the CCCS issued an infringement decision[39] setting out the grounds on which the CCCS had found that the transaction resulted in a substantial lessening of competition in the provision of ride-hailing platform services in Singapore. This market is a two-sided market connecting drivers on one side and riders on the other. The interdependence of drivers and riders gives rise to indirect network effects (namely, drivers are attracted to a platform with more riders and vice versa). However, a substantial percentage of the drivers in the private hire car and taxi fleet were exclusive to Grab. These exclusivity clauses would effectively prevent drivers from multi-homing and reinforce the network effect. In turn, this would greatly increase the time and upfront expenditure needed for a new potential entrant to build up driver and rider networks similar in scale and size to the parties. The barriers to entry and expansion in relation to the ride-hailing platforms are high due to these strong exclusivity-reinforced network effects.

In addition, the market for the rental of private hire cars has considerable barriers to expansion, such as the significant amount of time and upfront capital expenditure required to build a car rental network of sufficient scale, and a higher cost of maintaining private hire vehicles as compared to normal rental vehicles. Hence, such rental companies may not be able to expand and compete effectively without a tie-up with a ride-hailing platform. The CCCS was of the view that after the transaction Grab would be in a strong position to put in place exclusive arrangements with the private hire rental companies and the drivers who rent from those companies to reinforce its position in the ride-hailing platform services market.

Hence, the CCCS issued directions to Grab and Uber with the aim to lessen the impact of the transaction on drivers and riders, and to open up the market and level the playing field for new players. The directions require Grab to remove the exclusivity obligations on drivers and ensure that drivers and riders are free to choose their preferred platform. At the time of publication, these measures remain in place and the matter is pending an appeal by Uber.

38 CCCS Notice of Interim Measures Directions (13 April 2018), Acquisition of Uber's Southeast Asian business by Grab and Uber's acquisition of a 27.5 per cent stake in Grab, found at www.cccs.gov.sg/-/media/custom/ccs/files/public-register-and-consultation/public-consultation-items/uber-grab-merger/final-imd-notice-non-confidentialpublicpublished-7-may-2018.pdf?la=en&hash=415BECC6EF39BBACD27 7E57844B18B1A75067336.

39 CCCS media release (24 September 2018), Grab/Uber Merger: CCCS imposes directions on parties to restore market contestability and penalties to deter mergers, found at www.cccs.gov.sg/media-and-publications/media-releases/grab-uber-id-24-sept-18.

Example of a CCCS decision in relation to a merger notification in the digital market

In 2014, the CCCS considered a proposed merger of the online recruitment platforms operated by JobsDB Singapore and JobStreet Singapore, and correspondingly, their jobseeker databases.[40] The CCCS noted that quality jobseeker databases take time to build up and that jobseeker information was not something that a new entrant – even with resources – could collect overnight.

At the point of the CCCS's assessment, none of the alternative job portals had the reach and depth of candidates as the pool the merged entity would have access to. Any new entrant would have to invest heavily in advertising and marketing to garner a critical mass of jobseekers and recruiters to its platform, to overcome the significant network effects enjoyed by the merging parties. This represented a significant barrier to entry for a new entrant.

At the end of its assessment, the CCCS concluded that the proposed transaction would be likely to result in a substantial lessening of competition in the market for the supply of online recruitment advertising services. The CCCS noted that the proposed transaction would result in a loss of rivalry between close competitors, and that there was a lack of effective competitive constraints by existing and new competitors. The CCCS was concerned that the proposed transaction would result in the following non-coordinated effects:

- ability or incentive to change the structure of the market by demanding exclusive 'lock-in' contracts, which would prevent customers from switching away from the merged firm;
- ability or incentive to bundle and tie products across its two brands, which would have the effect or likely effect of preventing customers from switching away from the merged firm; and
- ability or incentive to impose price increases post-merger.

Behavioural commitments were offered by the merging parties to address those concerns. In particular, to address the concern that customers would no longer be able to multi-home on other online recruitment platforms, the merging parties committed not to enter into exclusive agreements with employer and recruiter customers. Those commitments sought to ensure that competing platforms could continue to enter and expand so that competition was preserved in the online recruitment advertising services market.

Collaboration with other regulators as issues in digital markets become more intertwined

While the growth of the digital economy brings about new opportunities for businesses, it also brings about regulatory challenges for regulators, who must move rapidly with the times to be perceptive, anticipative and adaptive. It is imperative that the regulators' policies and practices facilitate innovation or entry by new players. In particular, the policies and responses of various government agencies should be coherent and consistent. The regulator's role is further complicated by the increasing overlap between competition, consumer protection and data privacy

40 CCS 400/004/14, 'In relation to the Notification for Decision of the proposed acquisition of SEEK Asia Investments Pte Ltd of the JobStreet Business in Singapore pursuant to section 57 of the Competition Act' (13 November 2014), found at www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/proposed-acquisition-by-seek-asia-investments-pte-ltd-of-the-jobstreet-business.

issues in this digital era. To effectively handle these challenges, the CCCS has actively collaborated with other government agencies to ensure a coherent and consistent approach towards players in the digital market.

In this regard, the CCCS is partnering with the Personal Data Protection Commission (PDPC) on a joint initiative on data portability.[41] As data portability involves an overlap between competition law and personal data protection law, both agencies embarked on a joint study of the competition, consumer protection and personal data protection issues that might arise if a data portability requirement is introduced in Singapore. This joint study was necessary to ensure all relevant perspectives are taken into consideration when implementing a data portability requirement and determining the optimal approach to reaping maximum benefits from such a requirement while keeping impact and compliance costs manageable. A data portability requirement could give individuals greater control over their personal data by allowing them to request for their data held by an organisation to be transmitted to another organisation in a commonly used machine-readable format. The introduction of a data portability requirement also reduces switching costs for consumers, and could create the impetus for development of new products and services using the ported data. The joint study culminated in the publication of a joint Data Portability Discussion Paper, published on 25 February 2019.[42] Subsequently, in May 2019, the PDPC commenced a public consultation on a proposed data portability requirement in Singapore;[43] and in January 2020, the PDPC issued its response to public feedback and its proposed positions, taking into consideration the comments received.[44]

The joint initiative on data portability builds upon the CCCS's previous collaboration with PDPC and the Intellectual Property Office of Singapore in 2017 on a joint study of the data analytics and data-sharing landscape in Singapore, and the implications of the same on competition policy and law, personal data protection and intellectual property rights. This collaboration culminated in the publication of a joint research paper, which includes an analysis of the interplay between all three areas of law.[45]

Ensuring a future-ready framework: Market studies on online travel booking and e-commerce platforms

In addition to collaborating with other regulators, it is important to monitor key developments in digital markets and proactively conduct reviews to understand the impact of these developments on market competition and consumers. For example, against the backdrop of Singapore consumers increasingly turning to online channels to make their travel bookings, the CCCS

41 www.mti.gov.sg/Newsroom/Speeches/2018/04/Speech-by-SMS-Koh-at-the-Official-Launch-of-the-Competition-and-Consumer-Commission-of-Singapore1.

42 www.cccs.gov.sg/resources/publications/occasional-research-papers/pdpc-cccs-data-portability.

43 PDPC, Public Consultation on Review of the Personal Data Protection Act 2012 – Proposed Data Portability and Data Innovation Provisions, 22 May 2019, https://www.pdpc.gov.sg/news-and-events/announcements/2019/05/public-consultation-on-proposed-data-portability-and-data-innovation-provisions.

44 PDPC, Response Note to the Public Consultation on Data Portability and Data Innovation Provisions, 20 January 2020, https://www.pdpc.gov.sg/news-and-events/announcements/2020/01/response-to-public-consult-on-dp-and-di.

45 www.cccs.gov.sg/media-and-publications/publications/studies-research-papers/occasional-papers/data-engine-for-growth.

embarked on a market study in July 2018 to better understand the industry landscape for the online provision of bookings for flight tickets and accommodation to Singapore consumers, the commercial arrangements and practices adopted by online travel booking providers and the specific competition or consumer protection issues that can arise. In September 2019, the CCCS released the findings and recommendations of the market study.[46] The CCCS identified four common practices of online travel booking providers that give rise to consumer protection concerns, such as drip pricing, pre-ticked boxes, strikethrough prices and pressure selling using false or misleading claims. Following the study, the CCCS has developed a set of guidelines on price transparency to assist suppliers of all consumer-facing industries in their display and advertisement of prices to avoid misleading consumers and infringing the CPFTA. These guidelines (forthcoming) apply to both online and offline transactions. The market study did not find evidence that other commercial practices and arrangements in the online travel booking industry, such as price and non-price parity clauses, search ranking and ownership and tying or bundling, gave rise to harm to competition or consumers that would warrant intervention.

More recently, alongside the growing prevalence of e-commerce platforms in Singapore, the CCCS noted that there is a growing trend of e-commerce platforms that compete across multiple market segments offering distinct products and services in Singapore and the region. The rise of 'super apps' in Singapore and Asia is one such example. Companies such as Grab have embarked on journeys to become regional 'super apps', which bundle together a range of services like e-payment, marketplaces, ride-hailing and food delivery services within a single app. Against this backdrop, the CCCS commenced a market study in August 2019 to better understand e-commerce platforms that compete or potentially compete across multiple market segments offering distinct products or services. The aim of the market study is to gain an in-depth understanding of the business models of such e-commerce platforms and the competitive dynamics within which they operate. The market study also seeks to identify potential competition and consumer issues that may arise from the proliferation of such e-commerce platforms and recommend ways to ensure that the CCCS's assessment framework and toolkits are future-ready and appropriately contextualised to address the issues. The findings and recommendations of this market study are expected to be published in Q3 2020.

46 CCCS media release (30 September 2019), 'CCCS proposes guidelines on price transparency after online travel booking study raises consumer protection concerns', found at https://www.cccs.gov.sg/media-and-consultation/newsroom/media-releases/otb-and-price-transparency-guidelines-30-sept-19.

Conclusion

The growth of digital platforms is an area keenly studied by competition authorities around the world, in an effort to determine if existing competition policy should be revised to better deal with technology giants.[47] Similarly, the digital sector, including e-commerce platforms, remains one of the CCCS's focus areas in the foreseeable future. The CCCS continues its efforts to deepen its understanding of technological and market developments, and continues to review the sufficiency of its assessment and regulatory toolkit to meet the challenges of a rapidly evolving competition landscape.

Appendix 1

About the Authors

Lee Pei Rong Rachel
Competition and Consumer Commission of Singapore

Ms Rachel Lee is from the Singapore Legal Service and is currently a senior assistant director of the Legal and Enforcement Divisions at the Competition and Consumer Commission of Singapore (CCCS). Rachel provides legal advice to the CCCS on a wide range of legal issues spanning competition law, consumer protection law, administrative law, contract law, criminal law, public procurement and statutory interpretation. She also performs case work and investigations, appeal work, legal and outreach activities, legal research and policy-related work. Prior to her current appointment at the CCCS, Rachel served as a deputy public prosecutor and state counsel at the Attorney-General's Chambers, Criminal Justice Division. Rachel holds a Bachelor of Laws degree from the National University of Singapore and a postgraduate diploma in EU competition law from King's College London.

Leow Rui Ping
Competition and Consumer Commission of Singapore

Ms Leow Rui Ping is an assistant director with the Policy and Markets Division of the Competition and Consumer Commission of Singapore (CCCS). She currently advises government agencies on competition matters, conducts market studies and investigates potential infringement of Singapore's Competition Act. Rui Ping holds a Bachelor of Social Sciences (Honours) majoring in economics and a Master of Social Sciences (applied economics) from the National University of Singapore. She also holds a postgraduate diploma in EU competition law from King's College London.

Competition and Consumer Commission of Singapore
45 Maxwell Road #09-01
The URA Centre
Singapore 069118
Tel: +65 6325 8282
Fax: +65 6224 6929
cccs_feedback@cccs.gov.sg
www.cccs.gov.sg

Increasingly, competition enforcement in digital markets is moving on from a discussion of whether established competition tools and laws are sufficient for the new challenges of the online world, to specific and targeted enforcement against tech companies. This fully updated *E-commerce Competition Enforcement Guide*, edited by Claire Jeffs, looks at this evolution and discusses its impact on companies, consumers and indeed competition itself. Drawing on the collective wisdom and expertise of distinguished experts from around the world, the Guide provides insight on the differing approaches adopted by enforcement agencies and whether a balance is being struck between maintaining a vigilant approach to the digital economy and allowing competition to flourish.

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