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E-COMMERCE COMPETITION ENFORCEMENT GUIDE

Editor

Claire Jeffs

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E-COMMERCE COMPETITION ENFORCEMENT GUIDE

Editor

Claire Jeffs

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PART III

ASIA-PACIFIC

Competition and Consumer Commission of Singapore

Lee Pei Rong Rachel and Leow Rui Ping¹

The functions of the Competition and Consumer Commission of Singapore

The Competition and Consumer Commission of Singapore (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).² 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.³ The CCCS administers and enforces the provisions of the Competition Act.

The Competition Act prohibits specified activities that adversely affect competition within a market in Singapore, including:

- agreements and/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).⁴ The CPFTA was enacted in 2003 and contains safeguards to protect consumers from

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

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

3 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-and-publications/speeches/second-reading-speech-for-the-competition-bill-by-the-senior-minister-of-state-for-trade-and-industry-dr-vivian-balakrishnan>.

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

unfair trading practices by retailers. As the administering agency, the CCCS will gather evidence and potentially file injunction applications with the court.

Competition and consumer protection share a close and complementary relationship. Measures to enhance competition in markets can bring about benefits for consumers in the form of more choice, lower prices or improved quality. Similarly, measures that discourage and deal with the minority of suppliers that engage in egregious business practices will ensure that the playing field is level for law-abiding suppliers. The addition of the consumer protection function to the CCCS's ambit represents an expansion in its range of tools to achieve its mission of making markets work well to create opportunities and choices for businesses and consumers in Singapore.

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

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

In February 2017, the Committee on the Future Economy (CFE) outlined Singapore's key strategies to stay ahead in a challenging global climate.⁵ The CFE report noted that the world is in an 'era of rapid technological change', in which disruptive innovation can change and challenge incumbents through new technology and business models.⁶ The vision for Singapore's economy is rooted in the deepening and diversifying of Singapore's international connections, the continued support of free and open markets, and the deepening of digital capabilities.

To capitalise on the opportunities from the digital economy for the Singapore economy and society, the government has been actively promoting the adoption of digital technologies as part of the strategy for Singapore's next stage of growth and development. The economic opportunities arising from the growth of e-commerce are projected to be significant – in May 2016, Google and Temasek Holdings published a joint report⁷ predicting that Singapore's e-commerce market would grow to be worth US\$5.4 billion by 2025.

The rise of e-commerce has generated dynamic market developments and created both opportunities and challenges for businesses. E-commerce lowers the barriers to entry and expansion for businesses into markets, and enables businesses to overcome traditional limitations in Singapore such as rental costs, manpower shortages and a small market size. E-commerce also brings about challenges for incumbent businesses, as they have to transform their business models to respond to keener competition. In the face of such developments, a robust and adaptable competition regime is essential to ensure a level playing field for such businesses.

5 On 7 February 2017, the Committee on the Future Economy published its report after conducting its review of Singapore's economic strategies. The report can be found at https://www.gov.sg/~media/cfe/downloads/mtis_full%20report.pdf.

6 Committee on the Future Economy report, 7 February 2017, paragraph 6, found at https://www.gov.sg/~media/cfe/downloads/mtis_full%20report.pdf.

7 The report is titled 'e-economy SEA: Unlocking the \$200B Digital Opportunity' and can be found at <https://www.thinkwithgoogle.com/intl/en-apac/trends-and-insights/e-economy-sea-unlocking-200b-digital-opportunity/>.

New challenges for the CCCS

Naturally, the growth of the digital economy brings about new regulatory challenges for competition authorities and regulators, who must move rapidly with the times to be perceptive, anticipative and adaptive. Their policies and practices must not be seen as stumbling blocks to innovative new entrants with the potential to disrupt entire industries. In the face of rapidly developing digital markets, the CCCS has taken active steps to keep abreast of key market developments, and further develop competition policy and law in Singapore.

For example, in 2015 the CCCS commissioned a study to better understand the development and characteristics of e-commerce, the specific competition issues that e-commerce activities can give rise to, as well as the implications for competition policy and law in Singapore. The study identified several features and issues that are likely to be more prevalent in online markets and that may require particular attention when the CCCS conducts its assessments.⁸ The following issues were highlighted in the study:

- Online price information could facilitate collusion. While online shopping websites make it easier for consumers to compare prices between suppliers at their own convenience, it is possible that such price information could make it easier for companies to collude and fix prices. For instance, companies may use sophisticated systems to monitor their competitor's online prices to ensure that they do not undercut their rivals. This could result in consumers paying higher prices and diluting the benefits of searching for competitive prices online.
- Customer data may become an important source of market power as new entrants may find it difficult to replicate information collected by incumbents in the course of their normal business activities, thereby creating a barrier to entry and expansion. Online sales data enables a business to gather and analyse more detailed information about consumer demand patterns. While this can benefit companies in providing more targeted products and services, it may encourage anticompetitive conduct. For example, it is possible that customer information collected by incumbents in some circumstances may constitute an 'essential facility' if there is no alternative information available and may thus be considered a significant entry barrier.
- The market may 'tip' in favour of a small number of large e-commerce platforms. While there are benefits from having large online platforms, the strong network effects may mean that competition becomes *for* the market. This means that the most successful online platform is rewarded as the market tips in its favour, making it difficult or even impossible for new entrants to compete against the incumbent. However, the study noted that if consumers frequently use a number of different platforms or alternatives, this could facilitate the entry and expansion of competing platforms.

In addition, the CCCS recognises the importance of collaborating with competition authorities from other jurisdictions to exchange expertise and experiences in dealing with competition issues in digital markets, particularly within the Association of Southeast Asian Nations

8 On 2 December 2015, CCS published its research paper on e-commerce in Singapore, titled 'E-commerce in Singapore – How it affects the nature of competition and what it means for competition policy'. The research paper can be found at <https://www.cccs.gov.sg/media-and-publications/publications/studies-research-papers/occasional-papers/ecommerce-in-singapore>.

(ASEAN). Consistent rules and enforcement among ASEAN member states when dealing with identified growth sectors such as e-commerce will increase certainty for businesses across ASEAN, enhance intra-ASEAN trade and investment and improve ASEAN's competitiveness on a global scale.

In 2017, ASEAN member states worked together to produce a Handbook on E-Commerce and Competition in ASEAN.⁹ The handbook was commissioned by the CCCS and ASEAN member states contributed to the handbook by providing their input via a questionnaire. The handbook aims to increase the understanding of the current level of development of e-commerce in ASEAN and the challenges emerging for competition authorities in the region. It also aims to enhance ASEAN competition authorities' understanding of how best to respond to any such challenges when they arise so that any anticompetitive behaviour can be identified and addressed appropriately, while still promoting the development of e-commerce for the benefit of consumers and businesses.

Aside from ushering in the rise of digital platforms, advancements in technology have also dramatically increased the rate at which data is generated and collected. In 2017, the CCCS embarked on a research project to understand the data landscape in Singapore. As part of its research project, the CCCS commissioned KPMG Services Pte Ltd (KPMG) to conduct a study to map out the big data and data analytics landscape in Singapore.¹⁰ KPMG surveyed six sectors – digital media,¹¹ finance,¹² healthcare,¹³ consumer retail,¹⁴ land transport¹⁵ and logistics.¹⁶ It found that pure e-commerce platforms led the consumer retail sector in their usage of data analytics to improve customer experience and business operations. E-commerce platforms typically use data analytics to improve customer experience through the prediction of customer preferences and buying intent or to prompt a customer to complete a transaction through dynamic advertising.¹⁷

Further, in collaboration with the Personal Data Protection Commission, Singapore (PDPC), and the Intellectual Property Office of Singapore (IPOS), the CCCS also considered the

9 On 16 August 2017, Minister for Trade and Industry (Trade) Mr Lim Hng Kiang launched the 'Handbook on Competition & E-commerce in ASEAN'. The handbook highlights how e-commerce impacts traditional competition dynamics, as well as outlines policy considerations and advocacy strategies to address the challenges of enforcing competition law with the rise of e-commerce activities. The handbook can be found at <https://www.cccs.gov.sg/media-and-publications/publications/in-house-publications/asean-ecommerce-handbook>.

10 KPMG had conducted the study by gathering feedback from the relevant stakeholders on the use of data analytics, data sharing and data monetisation. A copy of KPMG's report, entitled 'Understanding the Data and Analytics Landscape in Singapore' can be found at <https://www.cccs.gov.sg/media-and-publications/publications/studies-research-papers/occasional-papers/data-engine-for-growth>.

11 The digital media sector refers to advertising platforms and other advertising technology companies.

12 The finance sector refers to the banking sector and the insurance sector.

13 The healthcare sector refers to public and private healthcare providers and research institutions.

14 The consumer retail sector refers to online retailers as well as brick-and-mortar retailers, with some businesses present in both segments.

15 The land transport sector includes a variety of services ranging from ride booking companies (for example, Grab and Uber), to public transport operators and private bus hiring companies.

16 The logistics sector includes both logistic service providers, which operate the delivery networks and collect data on customers' transactions, and e-commerce retailers, which generate delivery demand through end-customers' purchases.

17 KPMG Report, at pages 38 – 39, section 6.2.1.

implications of data analytics and data sharing on competition policy and law, personal data protection and intellectual property rights. The collaboration culminated in the publication of a joint research paper.¹⁸ The CCCS concluded that while the compilation of large data sets and proliferation of data analytics may be fresh developments, the existing analytical framework for competition assessment remains sufficiently flexible and robust to deal with competition issues that might arise in data-driven industries.

As the CCCS enters its second decade, it is faced with a rapidly evolving competition landscape. The advent of new technology-enabled business models; the disruption of existing business models in various sectors; and the increasing complexity of market structures and business conduct are all realities that the CCCS must face in its enforcement of the Competition Act in the digital economy. These studies and projects represent the CCCS's effort to keep up with the dynamic nature of the digital economy, and to ensure that it has a nuanced understanding of its impact, so as to be a more effective regulator.

The CCCS's enforcement practice in the digital economy

In the course of the CCCS's efforts to understand the key developments in the digital market and their implications, questions arose over how the existing legal framework might treat certain types of conduct or features that are unique to digital markets. The following section discusses how the CCCS might approach such issues, as well as the CCCS's previous enforcement practice in cases involving e-commerce and digital platforms.

Anticompetitive agreements

In Singapore, section 34 of the Competition Act prohibits any agreements between undertakings,¹⁹ 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.²⁰ 'Concerted practices' refers to any informal 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.²¹

18 CCCS, PDPC and IPOS's joint research paper is found at <https://www.cccs.gov.sg/media-and-publications/publications/studies-research-papers/occasional-papers/data-engine-for-growth>.

19 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 2.5–2.6, found at <https://www.cccs.gov.sg/legislation/cccs-guidelines>.

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

21 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.

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. 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.²²

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.²³ Unless the sharing of data in those circumstances can result in net economic benefits,²⁴ it is likely to raise competition concerns.

Another dimension of data sharing relates to the stakeholders involved in the sharing. There are unlikely to be competition concerns when businesses share data with consumers or government agencies. The sharing of commercially sensitive data such as current or future pricing or production capacity with competitors is likely to raise competition concerns unless such sharing gives rise to net economic benefits. Sharing of data with businesses in other markets and industries is unlikely to be problematic.²⁵

Use of algorithms by digital platforms

The use of algorithms by digital platforms may bring about efficiency gains and promote market transparency to the benefit of consumers.

However, algorithms also have the potential to 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.²⁶ 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.²⁷ The ease and speed with which competitors' actions can

22 CCCS Guidelines on the Section 34 Prohibition 2016, paras 3.17 – 3.24.

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

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

25 Data sharing by businesses with other businesses from another market or industry that 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 amongst competitors would be caught under the Competition Act. Another example would be businesses in different markets coming together to share data for the purpose of jointly boycotting a particular common customer or supplier.

26 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.

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

be monitored may facilitate collusive outcomes by reducing incentives for deviations, making collusion more efficient.

Further, with the advent of automated pricing algorithms, firms can more easily adjust prices to offer competitive pricing to consumers or align prices with competitors' real-time pricing.

The CCCS has not yet had the opportunity to consider 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.

Other forms of anticompetitive conduct in digital markets

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 policyholders 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 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.

Data as a source of market power

Market power is usually understood as the ability to price profitably above the competitive price level or to restrict output or quality below competitive levels. An undertaking²⁸ will be considered to be dominant if it has substantial market power.²⁹ 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.³⁰

In the context of digital markets, one of the key issues revolves around the treatment of data as an asset and as a source of market power. When assessing market power in data-driven industries, it is necessary to consider whether the data can be replicated under reasonable conditions by a business's competitors and whether the use of data is likely to result in a significant competitive advantage for the business.

In its consideration of this issue, the CCCS has been mindful of several unique aspects of data-driven markets.

Network effects

Network effects refer to how the use of a good or service by a user increases the value of the product to other users. E-commerce platforms are typically multi-sided platforms and the types of network effects that might arise in the context of such digital platforms include:

- *Traditional network effects.*³¹ This can be direct, in which the value of a platform's product to a user depends on the number of other users on the same side of the platform.
- *Spill-over effects.*³² Spill-over effects typically occur in a two-sided platform, when the increase in users on one side increases the value to the other side (e.g., more consumers shopping on an e-commerce platform attracts more sellers). Personal data magnifies these spill-over effects, as customised advertising leads to a higher probability of purchase and encourages more advertisers.

The existence of strong and numerous forms of network effects in digital industries increases barriers to entry and expansion for new or smaller firms. Once the number of users reaches a

28 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, co-operatives, 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 it is financed. See CCCS Guidelines on Section 47 Prohibition 2016, para 2.4, found at <https://www.cccs.gov.sg/legislation/cccs-guidelines>.

29 CCCS Guidelines on Section 47 Prohibition 2016, para 3.3.

30 CCCS Guidelines on Section 47 Prohibition 2016, para 3.4.

31 Maurice E Stucke & Allen P Grunes (9 June 2016). 'Big Data and Competition Policy'. Oxford University Press, pp. 162-169.

32 Maurice E Stucke & Allen P Grunes (9 June 2016). 'Big Data and Competition Policy'. Oxford University Press, pp. 189-199.

critical mass, the market could ‘tip’ in favour of one supplier (or sometimes, a few suppliers).³³ When the market has ‘tipped’, smaller firms will find it very challenging to compete effectively with the leading supplier, as they may not have access to the same number of users and consequently, may not have access to the same quantity and quality of data to continuously make their product better.³⁴ With network effects, the empirical question would be the level of the minimum scale that makes entry viable in order to overcome such network effects and whether the minimum efficient scale is achievable.³⁵

Multi-homing

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.

In cases where there exist high switching costs, multi-homing usage may be limited. Customers may be discouraged from using competing services sufficiently to enable them to switch from one provider to another easily. For example, e-commerce platforms or ride booking companies may have loyalty programmes that require customers to spend a minimum amount within a given period of time to maintain their membership status or to enjoy additional benefits.³⁶ This may increase switching costs and limit the extent of multi-homing between platforms. New entrants or smaller firms may therefore find it difficult to attract customers, which then limits the extent of information that they are able to collect. These switching costs, which could be both monetary and non-monetary in nature, should be considered in the assessment of market power.

Dynamism of digital markets

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 example, Facebook was able to displace the incumbent Myspace relatively quickly, despite the existence of network effects.³⁷ Market contestability can be crucial in the assessment of market power.³⁸

33 *ibid.* at pp. 203.

34 *ibid.* at pp. 204.

35 Daniel L Rubinfeld & Michal S Gal (2 September 2016). ‘Access Barriers to Big Data.’ *Arizona Law Review* 59(339), pp. 18.

36 These benefits may include discounts (i.e. monetary) or priority booking of rides (non-monetary).

37 French Competition Authority and German Federal Cartel Office (10 May 2016). *Competition Law and Data*, pp. 29-30.

38 Organisation for Economic Co-operation and Development (27 October 2016). ‘Big Data: Bringing Competition Policy to the Digital Era’. DAF/COMP (2016)14, pp. 17; and French Competition Authority and German Federal Cartel Office (10 May 2016). *Competition Law and Data*, pp. 29-30.

Relevant case studies involving digital platforms

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. Based on the CCCS's experience, cases involving digital platforms typically involve the inter-mingling of a number of these concepts. The competition assessment in these cases typically requires a nuanced and layered consideration of these features.

The CCCS investigation into the Grab-Uber transaction

A recent example would be the CCCS's investigation into Grab³⁹ and Uber⁴⁰ 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, drivers, eaters and delivery partners in Singapore; certain data about drivers and delivery partners, focused on contact and sign-up information; and certain data about riders and eaters, also focused on contact and sign-up information.

The very next day, the CCCS commenced an investigation into the transaction, which constitutes a merger under the Competition Act. 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.

Shortly after the commencement of its investigation, the CCCS issued interim measures directions⁴¹ 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 decision⁴² 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

39 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 which 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.

40 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.

41 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 <https://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=415BECC6EF39BBACD277E57844B18B1A75067336>.

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

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.

The CCCS investigation into the online food delivery market

Another relevant example is the CCCS's investigation into the online food delivery market in Singapore in 2016.⁴³ 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.

Section 47 of the 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. 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.⁴⁴

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 proceed to monitor the market

43 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 <https://www.cccs.gov.sg/media-and-publications/media-releases/investigation-of-online-food-delivery-industry>.

44 CCCS Guidelines on the Section 47 Prohibition 2016, para. 2.1.

instead. The CCCS also issued a media release⁴⁵ 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.

SEEK-JobStreet Merger

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.⁴⁶ 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/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/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/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.

45 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 <https://www.ccs.gov.sg/media-and-publications/media-releases/investigation-of-online-food-delivery-industry>.

46 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 <https://www.ccs.gov.sg/public-register-and-consultation/public-consultation-items/proposed-acquisition-by-seek-asia-investments-pte-ltd-of-the-jobstreet-business>.

Conclusion

The digital sector, including e-commerce, will remain one of the CCCS's focus areas in the foreseeable future. The CCCS's current efforts are directed at deepening our understanding of the technological and market developments, and reviewing whether our assessment toolkit is relevant and sufficient to meet the new business models that abound in the digital sector.

Based on the CCCS's enforcement experience, the current suite of enforcement tools has hitherto been sufficient to deal with competition issues arising from digital platform cases. That said, the CCCS will continue to do more work in the area of algorithms and artificial intelligence, as the technologies develop and evolve.

Appendix 1

About the Authors

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Ms Rachel Lee is from the Singapore Legal Service and is currently an assistant director of the Enforcement Division 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.

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The growth in the digital economy both powerfully drives competition, but also provides challenges to global antitrust enforcement. This E-commerce Competition Enforcement Guide, edited by Claire Jeffs, looks at whether established competition tools are sufficient to deal with the challenges of the online world. Drawing on the collective wisdom and expertise of 48 distinguished experts from 22 firms and competition authorities, 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.