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# E-Hailing Services: Antitrust Implications of Uber and Grab's Merger in Southeast Asia

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**Keywords:** competition, merger, ridesharing, dominant position, substantial lessening of competition

## ABSTRACT

Uber-Grab's merger had attracted antitrust scrutiny by competition authorities in Southeast-Asia. The merger between the two had created a large giant company that provides various services through a platform such as ridesharing and food delivery services. According to the deal, Grab will take over Uber's assets (ridesharing and food delivery service), and in return, Uber will take a 27.5 percent stake in Grab. Although Grab claimed that the merger would create a cost-efficient platform in Southeast Asia and put it in a better position to serve consumers, there was a genuine concern that the merger will reduce competition in the market and provide incentives to Grab to engage in anti-competitive behaviour such as increasing the price of its services. This article aims to analyse how different countries in Southeast Asia responded to the Uber-Grab's merger and measures taken to address competitive concerns ex-ante and ex-post-merger. Unlike other competition jurisdictions in Southeast-Asia, the Malaysia Competition Act 2010 contains no merger control provision, which empowers the Malaysian competition authority to block any merger that has the effect of substantially lessening competition. The studies on how other countries evaluated the Uber-Grab merger could assist Malaysia's competition authority to regulate the future behaviour of the big digital platform in the Malaysian market. This article was written based on research that relies on both primary and secondary sources. Primary sources include statutory provisions on competition, decision, proposed decision, interim measures, and others. while secondary sources include journal articles, news, internet resources, and others. The article also adopts a comparative approach in order to analyse the approaches and measures taken by the various merger control regimes in Southeast Asia in dealing with the Uber-Grab's merger.

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## **E-HAILING SERVICES: ANTITRUST IMPLICATIONS OF UBER AND GRAB'S MERGER IN SOUTHEAST ASIA\***

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### **ABSTRACT**

Uber-Grab's merger had attracted antitrust scrutiny by competition authorities in Southeast-Asia. The merger between the two had created a large giant company that provides various services through a platform such as ridesharing and food delivery services. According to the deal, Grab will take over Uber's assets (ridesharing and food delivery service), and in return, Uber will take a 27.5 percent stake in Grab. Although Grab claimed that the merger would create a cost-efficient platform in Southeast Asia and put it in a better position to serve consumers, there was a genuine concern that the merger will reduce competition in the market and provide incentives to Grab to engage in anti-competitive behaviour such as increasing the price of its services. This article aims to analyse how different countries in Southeast Asia responded to the Uber-Grab's merger and measures taken to address competitive concerns ex-ante and ex-post-merger. Unlike other competition jurisdictions in Southeast-Asia, the Malaysia Competition Act 2010 contains no merger control provision, which empowers the Malaysian competition authority to block any merger that has the effect of substantially lessening competition. The studies on how other countries evaluated the Uber-

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Grab merger could assist Malaysia's competition authority to regulate the future behaviour of the big digital platform in the Malaysian market. This article was written based on research that relies on both primary and secondary sources. Primary sources include statutory provisions on competition, decision, proposed decision, interim measures, and others. while secondary sources include journal articles, news, internet resources, and others. The article also adopts a comparative approach in order to analyse the approaches and measures taken by the various merger control regimes in Southeast Asia in dealing with the Uber-Grab's merger.

**Keywords:** competition, merger, ridesharing, dominant position, substantial lessening of competition.

## **PERKHIDMATAN E-HAILING: IMPLIKASI ANTI-MONOPOLI OLEH PENGGABUNGAN UBER DAN GRAB DI ASIA TENGGARA**

### **ABSTRAK**

Penggabungan antara Grab-Uber telah menarik perhatian badan berkuasa persaingan Asia Tenggara untuk membuat kawalan anti-monopoli. Penggabungan tersebut telah membentuk sebuah syarikat gergasi besar yang menyediakan pelbagai perkhidmatan melalui pelantar seperti perkhidmatan perkongsian kenderaan dan penghantaran makanan. Menurut perjanjian tersebut, Grab akan mengambil alih aset Uber (perkhidmatan perkongsian kenderaan dan penghantaran makanan) dan Uber akan mengambil 27.6 peratus kepentingan dalam Grab. Walaupun Grab mendakwa penggabungan tersebut akan mewujudkan platform dengan kos yang optimum di Asia Tenggara dan meletakkannya dalam kedudukan yang lebih baik untuk memberi khidmat kepada pengguna, terdapat kebimbangan bahawa penggabungan itu akan mengurangkan persaingan di pasaran dan mendorong Grab untuk terlibat dalam kelakuan anti-kompetitif seperti menaikkan harga perkhidmatannya. Artikel ini bertujuan untuk menganalisa bagaimana negara-negara di Asia Tenggara bertindak balas terhadap penggabungan Uber-Grab dan langkah-langkah yang telah diambil untuk mengatasi masalah persaingan dalam penggabungan yang bersifat "ex-ante" dan "ex-post." Tidak seperti badan berkuasa persaingan yang lain di Asia Tenggara, Akta Persaingan Malaysia 2010 tidak mengandungi peruntukan kawalan penggabungan yang memberi kuasa kepada pihak berkuasa persaingan Malaysia untuk menyekat mana-mana penggabungan yang mungkin mempunyai kesan pengurangan

kompetitif yang besar. Kajian mengenai bagaimana negara lain menilai penggabungan Grab-Uber dapat membantu pihak berkuasa persaingan Malaysia untuk mengawal tingkah laku masa depan pelantar digital besar dalam pasaran Malaysia. Artikel ini ditulis berdasarkan kajian yang bergantung kepada kedua-dua sumber primer dan sekunder. Sumber utama termasuk peruntukan undang-undang mengenai persaingan, keputusan, keputusan yang dicadangkan, langkah interim dan sebagainya. Sumber-sumber sekunder termasuklah artikel jurnal, berita, sumber internet dan sebagainya. Artikel ini juga menggunakan metodologi perbandingan bagi menganalisa pendekatan dan langkah yang diambil oleh pelbagai rejim pengawal penggabungan di Asia Tenggara dalam menangani penggabungan Grab-Uber.

**Kata Kunci:** persaingan, penggabungan, kongsi-tunggalan, kedudukan dominan, pengurangan besar persaingan.

## INTRODUCTION

Uber was among the first online e-hailing platform in the world, founded in 2009.<sup>1</sup> The company is based in San Francisco and has been operating in almost all countries in the world. It started penetrating the Southeast Asian market by launching its operation base in Singapore in 2013.<sup>2</sup> On the other hand, Grab was launched in Malaysia in 2012, to operate an online platform for transportation, food and package delivery, mobile payments, and financial services.<sup>3</sup> Unlike Uber, Grab

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<sup>1</sup> Dan Blystone, "The Story of Uber," accessed January 4, 2020, <https://www.investopedia.com/articles/personal-finance/111015/story-uber.asp>.

<sup>2</sup> Jason Davis, "The Real Story Behind Uber's Exit from Southeast Asia | INSEAD Knowledge," accessed January 4, 2020, <https://knowledge.insead.edu/entrepreneurship/the-real-story-behind-ubers-exit-from-southeast-asia-10096>.

<sup>3</sup> Chua Kong Ho and Zen Soo, "How Grab's CEO Steered It from a Garage in Malaysia to Southeast Asia's Most Valuable Tech Unicorn/South China Morning Post," accessed January 4, 2020, <https://www.scmp.com/tech/article/2157177/how-grabs-ceo-steered-it-garage-malaysia-southeast-asias-most-valuable-tech>.

significantly focuses its services in the region of Southeast Asia.<sup>4</sup> Although there is a variety of services provided by Grab and Uber, the core business for both companies is to provide a platform that allows the customers to book transportation services.

On 26 March 2018, Grab made an announcement that it has acquired Uber's Southeast Asia operations. The transaction involved the acquisition of operations and assets of Uber in Cambodia, Indonesia, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam. Uber was given 27.5% of stakes in Grab as the consideration.<sup>5</sup> The purpose of the acquisition of the assets of Uber by Grab was to develop Southeast Asia's infrastructure, providing affordable transportation to riders, increasing the ability to earn livelihoods for drivers, growing Grab's user base, and improving network density and efficiency.<sup>6</sup> Uber was willing to sell its assets to formalize its exit from the Southeast Asia market since it had changed the strategy to focus on the market outside Asia.<sup>7</sup>

The acquisition of Grab by Uber has sparked the interest of many parties, especially the consumers, who have been enjoying the benefits of more accessible and cheaper transportation services. Most of the parties concerned that the acquisition would convert Grab into a corporate entity that monopolizes the e-hailing market, and reinforces Grab with the ability to increase the price. As the acquisition is a "domino effect" in nature, it challenges the competition regulatory bodies in Southeast Asia to show abilities in utilizing their power to take action against the anti-competitive merger.<sup>8</sup>

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<sup>4</sup> Dipen Pradhan, "How Grab Is Becoming an Everyday, Everything App in Southeast Asia," accessed January 4, 2020, <https://www.entrepreneur.com/article/334690>.

<sup>5</sup> "Grab Merges with Uber in Southeast Asia | Grab SG," accessed January 3, 2020, <https://www.grab.com/sg/press/business/grab-merges-with-uber-in-southeast-asia/>.

<sup>6</sup> *Sale of Uber's Southeast Asian Business to Grab in Consideration of a 27.5% Stake in Grab* (Notice of Infringement Decision, September 24, 2018, CCCS Case No.: 500/001/18), p 11, para 29.

<sup>7</sup> *Supra*, n2.

<sup>8</sup> Jon Russell, "Grab's Acquisition of Uber Southeast Asia Drives into Problems | TechCrunch," accessed January 4, 2020, <https://techcrunch.com/2018/04/24/grab-uber-deal-southeast-asia/>.

## MERGER DEFINITION

The definition of a merger under the Singapore competition law regime covers a wide range of activities. Under Section 2 of the Singaporean Competition Act, a merger occurs if two or more independent undertakings initiate to merge, one or more undertakings acquire direct or indirect control of the whole or part of other undertakings, or one undertaking acquires the assets of another undertaking. The Philippine competition law, on the other hand, separates the definition of merger and acquisition. Merger refers to the joining of two or more entities into an existing entity or to form a new entity. Acquisition refers to the purchase of securities or assets, through contract or other means, for the purpose of obtaining control. In the case of Grab-Uber, Grab gained control over by acquiring the assets of Uber, which caused Uber to exit from the market of Southeast Asia. Such a transaction was within the definition provided by the competition laws of Singapore and the Philippine. Hence, the Competition Commission of Singapore (CCCS) and Philippine Competition Commission (PCC) have the power to conduct the substantive assessment on the Uber-Grab deal.

On the contrary, the Indonesian Business Competition Supervisory Commission (BCSC) was of the view that the transaction purely an asset acquisition and without any transfer of control from Uber Indonesia to Grab Indonesia, and the transaction is also not a business combination since Uber Indonesia's legal entity is still in existence. The BCSC considered that such transactions are not part of a merger, which needs to be notified to the BCSC since the transaction is beyond the scope of the definition of the business combination, consolidation, or acquisition rules under the Law No. 5/1999 and Government Regulation No. 57/2010.<sup>9</sup> Nevertheless, the BCSC will conduct active monitoring on the development of competition and price in the online transportation platform, especially in preventing the possibility of the price increase as the result of higher market concentration and being a dominant position due to merger.<sup>10</sup>

The Vietnam Competition Commission (VCC) had taken an approach that is similar to the BCSC. The VCC had decided not to

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<sup>9</sup> "The Acquisition of Uber Assets in Indonesia – KPPU RI," accessed October 22, 2018, <http://eng.kppu.go.id/the-acquisition-of-uber-assets-in-indonesia/>.

<sup>10</sup> "The Acquisition of Uber Assets in Indonesia – KPPU RI."



proceed with the substantive assessment of the anti-competitive effect from the Uber-Grab merger, as the transfer of the assets from Uber Vietnam to GrabTaxi did not constitute an act of concentration under Clause 3, Article 17 of Vietnam Competition Law.<sup>11</sup> Accordingly, the transfer of assets did not lead the GrabTaxi to have managerial positions and any voting rights in the management in Uber Vietnam, which is crucial to constitute the element of control under Article 34 Decree No. 116/2005//ND-CP. Furthermore, VCC held that the transfer of assets from Uber Vietnam to GrabTaxi was not directly associated with GrabTaxi's control over Uber's activities in Vietnam, since the Netherlands-based Uber B.V. is the enterprise that directly manages and operates the Uber application in Vietnam.<sup>12</sup> Furthermore, the VCC is carefully trying to encourage business operations in the market while effectively implementing its competition laws, as e-hailing services are a new field in Vietnam.

## NOTIFICATION THRESHOLD

Singapore is one of the countries in the region of Southeast Asia that adopts voluntary notification, where the parties are not required to notify the CCCS about the merger in the event the merger has reached a certain threshold. The voluntary notification is chosen as most mergers in Singapore are unlikely to raise competition concerns and mandatory notification as they would appear onerous on business and impose unnecessary costs.<sup>13</sup> As such, the CCCS does not set the notification threshold. However, the CCCS can start an own-initiative investigation if the merged entity will have a market share of 40% or more, or the merged entity will have a market share of between 20% to

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<sup>11</sup> Vietnam Competition Council, "Decision on Handling Competition Case No 18 KX HCT 01," 2019, 20, [http://www.hoidongcanhtranh.gov.vn/App\\_File/laws/a6626d04-840f-47da-8540-e537c7ac452f.pdf](http://www.hoidongcanhtranh.gov.vn/App_File/laws/a6626d04-840f-47da-8540-e537c7ac452f.pdf).

<sup>12</sup> Ibid.

<sup>13</sup> Parliament of Singapore, "Singapore Parliamentary Hansard, Parliament No. 11, Session No. 1, Volume No. 83, Sitting No. 5, May 21, 2007," 2007, [https://sprs.parl.gov.sg/search/topic?reportid=027\\_20070521\\_S0004\\_T0003](https://sprs.parl.gov.sg/search/topic?reportid=027_20070521_S0004_T0003).

40% and the post-merger combined market share of the three largest firms is 70% or more.<sup>14</sup>

In the Grab-Uber case, The CCCS found that the parties' combined market share is 80% to 90%, which is significantly above the indicative threshold of 40%, and market concentration has been consistently close to 100%.<sup>15</sup> Further, the parties' collective market share and individual shares have been increasing rapidly since their entry in 2013 at the expense of other transportation platform service providers, which had approximately 90% to 100% of the market share in Q1 2013. The CCCS concluded that the market position of the parties post-transaction indicates that the merger will result in a substantial lessening of competition in the relevant market.

All three competition regulatory bodies in the region of Southeast Asia, which are the Philippines, Indonesia, and Vietnam adopt mandatory notification. The parties to the merger are required to notify the competition regulatory bodies if the merger meets the determined threshold. Regardless of such requirement, Uber-Grab proceeded to acquire the shares, without first seeking approval first from the respective competition regulatory bodies. Nevertheless, both PCC and VCA had commenced their own-initiative investigation on the merger.<sup>16</sup>

## RELEVANT MARKET

The CCCS took into account the nature of the product and the business model of the Grab and Uber. The product market in question involves a digital platform, which connects riders and drivers so that the drivers

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<sup>14</sup> Competition & Consumer Commission of Singapore, "CCCS Guidelines on Merger Procedures 2012," 2012, 100, <https://www.ccs.gov.sg/-/media/custom/ccs/files/legislation/legislation-at-a-glance/cccs-guidelines/cccs-guidelines-on-merger-procedures-2016.pdf?la=en&hash=DA3A55F7271B6DF81BB8C57D061ABDA0DCB5D2E7>.

<sup>15</sup> *Supra*, n 6, p 59, para 183.

<sup>16</sup> Under Rules 3.3 and 13 of the PCC Rules on Merger Procedure, the PCC may review a merger on its own initiative if there are reasonable grounds to believe that the provision of the prohibited mergers and acquisition has been infringed.

could pick-up and deliver the riders at the desired destination.<sup>17</sup> It is also important to note that a market that involves a platform must take into consideration the two-sidedness of the platform, i.e., both drivers and riders. The concern of the competition is not limited only to the riders. It extends to the drivers as well, as the drivers have been using the matching services platform to provide transportation services for the source of income.<sup>18</sup> In addition to that, the parties to the acquisition do not regard the drivers and riders as agents for them in the underlying transport service.<sup>19</sup> In the Uber-Grab merger case, the CCCS concluded that the focal product would be the provision of booking and matching of the drivers and riders for both taxis and chauffeur private hire cars as both Grab and Uber overlap in such service.

Based on the CCCS assessment, relevant markets for the assessment of the substantial lessening of competition that would be caused by the acquisition of Uber by Grab are:

- a) Two-sided platforms matching drivers and riders for the provision of booked chauffeured point-to-point transport services in Singapore (CPPT platform) including the underlying transportation service using the platform i.e. booked CPPT rides (platform market); and
- b) The provision of rental of chauffeured private hire cars (CPHC) to chauffeured point-to-point transport services in Singapore (rental market).<sup>20</sup>

In determining the scope of the relevant market, the CCSS considered the close substitutes for the focal products, including the functionalities of the focal products and its substitutes. As the focal product mainly involves the platform for matching between riders and drivers, some factors were considered, including the ability to match demand and supply between riders and drivers at the platform level, the ability to render transport services directly from point A to point B, level of comfort, on-demand, duration of travel and cost.<sup>21</sup>

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<sup>17</sup> Supra, n 6, p 38, para 126.

<sup>18</sup> Ibid, p 40, para 129.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid, p 56, para 178.

<sup>21</sup> Ibid, p 40, para 131.

In the case of CPPT platform services, any platform that matches the drivers and riders are close substitutes. This includes taxi booking platforms as the riders do not differentiate between a taxi or chauffeured private rental car in terms of the ability to get directly from point A to point B, level of comfort, on-demand, commute time (or duration of travel), level of comfort, and cost.<sup>22</sup> For example, UberFlash and JustGrab service matches riders with the nearest vehicle, which includes taxis and chauffeured private hire cars.<sup>23</sup> However, the CCCS did not consider street hailing, and public transport as the substitutes for the CPPT platform services due to different functionalities, including the convenience and level of comfort, duration of commute, and others.<sup>24</sup>

The concept of the CPHC is that the car rental companies provide the car to the platform companies, and subsequently, the platform companies provide the car to their drivers. Uber, which owns Lion City Rentals, has acquired 27.5% of Grab, which owns Grab Rentals and has formed partnerships with various CPHC rental companies.<sup>25</sup> In this regard, CCCS held that the market for the provision of CPPT services in Singapore and the market for the rental of vehicles for the provision of CPPT services are materially interrelated.<sup>26</sup>

The CCCS came to the conclusion that all CPHC systems are nearest substitutes to each other. In the absence of Uber, there was proof that the drivers were left with no choice but to switch to Grab, amid expectations that Grab would decrease the incentives for drivers and increase commission fees. On the riders' side, it is undeniable that CPHC platforms are the close substitutes where the riders are free to select which CPHC services that are convenient to them.<sup>27</sup>

Concerning the investigation conducted by the Philippine Competition Commission (PCC), the PCC has held that the relevant market only covers on-demand car-based private transportation online booking service through a mobile ride-hailing application in the area

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<sup>22</sup> Ibid, p 42, para 136.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid, p 43, para 139.

<sup>25</sup> Ibid, p 54, para 172.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid, p 49, para 159.

of Metro Manila, its surrounding areas and Cebu, due to the following factors:<sup>28</sup>

- a) Majority of riders would choose to continue using e-hailing service when faced with a hypothetical price of 5 to 10%, which is borne out by actual events post-merger;
- b) Prices for Grab and Uber are generally higher compared to other transportation services, including the ordinary taxis;
- c) There is a significant difference between e-hailing services and other modes of public transportation;
- d) Public pronouncements and internal documents of the merger parties show that the parties differentiate their services from taxis and look at each other as their sole competitor;
- e) Riders and other market participants consider e-hailing service separate and distinct from other transportation services; and
- f) Regulatory regimes that are applicable to transport network companies and transport network vehicles vis-à-vis other modes of public transportation significantly differ.

In Vietnam, the Vietnam Competition Authority (VCA) had conducted a preliminary investigation before the Vietnam Competition Council (VCC) stopped the further substantive assessment. The VCA had identified the parties to the acquisition, the relevant market, the market shares of the relevant market, and the signs of the infringement. The identified relevant market are as follows:<sup>29</sup>

- a) The intermediary services connecting passenger transport between the riders and the drivers of cars below nine seats on the software platform in Hanoi; and

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<sup>28</sup> Philippine Competition Commission, “Statement of Concerns Executive Summary, In the Matter of Acquisition by Grab Holdings, Inc. and MyTaxi.PH Inc., of Assets of Uber B.V. and Uber Systems, Inc. (M-2018-012),” 2018, 1, [https://phcc.gov.ph/wp-content/uploads/2018/05/PCC\\_CompetitionConcerns\\_ExecSummary\\_28May2018.pdf](https://phcc.gov.ph/wp-content/uploads/2018/05/PCC_CompetitionConcerns_ExecSummary_28May2018.pdf).

<sup>29</sup> *Supra*, n 11, p 13.

- b) The intermediary services connect passenger transport between the riders and the drivers of cars below nine seats on the software platform in Ho Chi Minh.

The relevant market is restricted to Hanoi and Ho Chi Minh City as both Grab and Uber were doing real business only in those two cities, and not the whole of Vietnam.<sup>30</sup>

### **THE ANTI-COMPETITIVE EFFECT CAUSED BY MERGER**

The CCCS held that the acquisition of the shares of Uber by Grab had increased the barriers of entry to the market, particularly the robust indirect network effects. Indirect network effects connote the situations where riders value an e-hailing service more when there are more drivers, and drivers value an e-hailing service provider more when there are more riders. The CCCS considered that the presence of a robust indirect network effect creates entry barriers in e-hailing service,<sup>31</sup> as it would be challenging for a new platform player to attract drivers without riders and to attract riders without drivers.<sup>32</sup> The exclusivity restrictions imposed by Grab, in which the riders are only allowed to serve as the driver for Uber once they make themselves as the parties to the exclusivity agreement, significantly limit the ability of multi-homing amongst drivers, reinforcing the indirect network effects and increasing the barriers to entry and expansion.<sup>33</sup> Such barriers to entry and expansion will not be insurmountable if ‘multi-homing’ is prevalent amongst both drivers and riders. The existence of de facto exclusivity in the form of incentive schemes (such as bonus and loyalty rebates) offered by the parties to the merger to the drivers further encourages the drivers to single-home and not to switch to other platforms.<sup>34</sup> Single-home by the drivers may allow Grab to exert its market power and prevent new entrants into the market.<sup>35</sup>

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<sup>30</sup> Supra, n 11, p 12.

<sup>31</sup> Supra, n 6, p 62, para 193.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid, p 61, para 189.

<sup>34</sup> Ibid, p 66, para 202.

<sup>35</sup> Ibid, p 70, para 209.

The indirect network effects have caused the new entrant to incur additional cost and expense in order to strengthen up a business network efficiently. The expense includes the upfront expenditure to attract drivers and riders to move over from the established e-hailing service, and to build up a critical mass of users.<sup>36</sup> In addition, a new entrant has to inject huge capital to provide incentive schemes and promotions for both drivers and drivers to attract customers, which would differ according to the capability of the business entities.<sup>37</sup>

The CCCS analysed the ability of Grab to increase the price and to reduce quality or output. In this situation, the CCCS did not need to prove that Grab increased the price after the acquisition. It is sufficient for CCCS to demonstrate that Grab has the ability to raise prices (or reduce quality or choice), gained through the acquisition.<sup>38</sup> The acquisition of Uber by Grab has led to the elimination of competition between two of the closest competitors. CCCS found that there was a significant reduction of promotions for riders and incentives for drivers and a significant increase in the price for trips, which signify the ability of Grab to increase price post-acquisition.<sup>39</sup> Besides, CCCS had received multiple complaints from both riders and drivers regarding the increase of price imposed on both drivers and riders post-acquisition period.<sup>40</sup>

The parties to the merger had raised the defence of economic efficiencies, arguing that the merger had increased the number of drivers and riders using the platform. Higher network density increases the overlap in routes, where one driver could pick up different riders on the same trip, hence it was argued that the merger has the potential of reducing costs.<sup>41</sup> However, the CCCS held that the parties failed to prove that the effect of higher network density is merger specific. The network density could be achieved through other ways, such as

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<sup>36</sup> Ibid, p 72, para 214.

<sup>37</sup> Ibid, p 72, para 214.

<sup>38</sup> Paragraph 4.6 of the CCCS Guidelines on the Substantive Assessment of Mergers 2016 (2016, December 1).

<sup>39</sup> Supra, n 6, p 94, para 280. The Parties' contemporaneous internal documents and funding estimates indicate that the acquisition increased the ability of Grab to increase the effective price to be imposed to the riders.

<sup>40</sup> Ibid, p 102, para 297.

<sup>41</sup> Ibid, p 108, para 326.

increasing the incentives for drivers to drive on a full-time basis and providing discounts to riders.<sup>42</sup> Furthermore, parties to the merger failed to prove that the benefits of economic efficiencies outweigh the harm of the anti-competitive merger.

The investigation conducted by the PCC found that the merger has resulted and will likely continue to result in a substantial lessening of competition in the relevant market of the Philippine.<sup>43</sup> The acquisition has the purpose or the effect of a substantial lessening of competition, based on the following grounds:

- a) The acquisition has led Grab to own 93% of transport network vehicle services, which creates or strengthens Grab's dominance in the relevant market;
- b) The acquisition has resulted in Grab with the ability to profitably increase prices as the riders will not shift to other modes of public transportation.<sup>44</sup> The parties have the ability to charge higher prices based on the variable range and surge rates even though there is price regulation imposed on the parties in the form of approved base fare, distance rate, and time rate;<sup>45</sup>
- c) The acquisition has escalated the barriers to entry, in which the new entrants could not impose competitive constraints against Grab. Historical data indicates that it would take a significant amount of time and cost for the new entrants to grow a driver and rider base sufficient to inflict competitive constraints on the dominant parties; and<sup>46</sup>
- d) The acquisition has motivated Grab to increase its price, but the quality of service is deteriorating.<sup>47</sup> Increased driver cancellation, forced cancellation of rides and increased waiting times were the

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<sup>42</sup> Ibid, p 109, para 329.

<sup>43</sup> Commission, "Statement of Concerns Executive Summary, In the Matter of Acquisition by Grab Holdings, Inc. and MyTaxi.PH Inc., of Assets of Uber B.V. and Uber Systems, Inc. (M-2018-012)," 1.

<sup>44</sup> Ibid, p 2.

<sup>45</sup> Ibid, p 3.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid, p 2.



shred of evidence found by PCC to suggest that the quality of services of Grab has decreased post-merger.<sup>48</sup>

As highlighted above, the Vietnam Competition Authority (VCA) had conducted the preliminary investigation before the Vietnam Competition Council suspended the further substantive assessment. During the preliminary investigation, the VCA held that the acquisition of the assets of Uber by Grab has violated the competition regulation in Vietnam.<sup>49</sup> Notably, the acquisition had infringed or violated Article 18 and Article 20 of Vietnam's competition law. Article 18 states that a merger will be prohibited if the enterprises involved have a combined market share of more than 50% in the relevant market while Article 20 of the same regulation requires that the notification of the merger must be submitted to the competition regulatory body when the combined share is between 30% to 50%.

### **DECISION OF THE COMPETITION COMMISSION OF SINGAPORE (CCCS)**

The decision of the CCCS was made to serve the objective of restoring market contestability and deterring anti-competitive mergers.<sup>50</sup> The directions issued by CCCS include:

- a) Ensuring Grab drivers are free to use any e-hailing service and not required to use Grab exclusively, which could increase choices for drivers and riders and make the market more competitive;

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<sup>48</sup> Ibid, p 3.

<sup>49</sup> "The Result of the Investigation of Grab's Acquisition of Uber - Vietnam Competition Authority," accessed December 14, 2018, <http://www.vca.gov.vn/NewsDetail.aspx?lg=1&CateID=527&ID=3950>.

<sup>50</sup> Competition & Consumer Commission of Singapore, "Grab-Uber Merger: CCCS Imposes Directions on Parties to Restore Market Contestability and Penalties to Deter Anti-Competitive Mergers," 2018, <https://www.cccs.gov.sg/-/media/custom/ccs/files/media-and-publications/media-releases/grab-uber-id-24-sept-18/media-release-id-against-grab-and-uber-24-sept-18.pdf?la=en&hash=F84E9FD0416382C518A186EDE290D62FBE4279E6>.

- b) Removing exclusivity obligations on all drivers renting a vehicle from Lion City Rental, Grab Rentals, and Grab's rental fleet partners;
- c) Removing Grab's exclusivity arrangements with any taxi fleet in Singapore to increase choices for drivers and riders;
- d) Maintaining Grab's pre-merger pricing algorithm and driver commission rates, while not affecting Grab's flexibility to apply dynamic pricing under normal demand and supply conditions or restricting the number of rider promotions and driver incentives Grab wishes to offer;
- e) Requiring Uber to sell the vehicles of Lion City Rentals to any potential competitor who makes a reasonable offer based on fair market value and preventing Uber from selling these vehicles to Grab without CCCS' prior approval; and
- f) The CCCS will unconditionally release the parties from all Final Directions if an open-platform competitor without any direct and indirect common control of Grab, attains 30% or more of total rides matched in the Platform Market monthly for six consecutive calendar months.<sup>51</sup>

Other than the above remedies, CCCS also took additional measures by imposing financial penalties on both Grab and Uber in order to deter completed, irreversible mergers that have caused a substantial lessening of competition. The financial penalties imposed for Uber were S\$6,582,055, and for Grab was S\$6,419,647.<sup>52</sup>

On the contrary, the PCC had granted conditional approval for the Grab-Uber transaction. The PCC had accepted the commitment proposal by Grab, which is sufficient to address the competition concerns raised in the Statement of Concern during the *motu proprio* review.<sup>53</sup>

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<sup>51</sup> Ibid, p 127, para 372.

<sup>52</sup> Ibid, p 142, para 439.

<sup>53</sup> Philippine Competition Commission, "Commission Decision No. 26-M-12/2018, In the Matter of Acquisition by Grab Holdings, Inc. and MyTaxi.PH Inc., of Assets of Uber B.V. and Uber Systems, Inc. (M-2018-012)," 2018, 2, <https://phcc.gov.ph/commission-decision-no-26-m-12-2018-acquisition-by-grab-holdings-inc-and-mytaxi-ph-inc-of-assets-of-uber-b-v-and-uber-systems-inc/>.

The core remedy in the proposed voluntary commitment was that Grab must eliminate the exclusivity provision in their agreements with drivers and operators that would forbid multi-homing,<sup>54</sup> in which the drivers and operators would be penalized if they break the exclusivity tie with Grab.<sup>55</sup> Grab shall submit to the PCC a report of all incentives provided to its riders or operators.<sup>56</sup> If Grab does not comply with the proposed voluntary commitment, the PCC will impose additional remedies, and such other measures as the PCC may deem necessary, including the nullification of the decision made by PCC.<sup>57</sup> The commitment also requires Grab to improve customer experience by maintaining the quality of services provided to the customers. Grab must also ensure that Driver Cancellation Rate (DCR) shall not exceed the determined percentage. The DCR refers to the percentage derived from the total number of trips canceled by Grab drivers during the relevant period and dividing it by the total number of booking requests accepted by Grab during the relevant period. Grab undertakes to maintain that its pricing behaviour post-merger should not be different from pre-merger. The Undertaking also includes Grab's commitment to ensure the transparency of fare trips, improve response time to rider complaints, and enhance driver performance standards.

## **ANALYSIS OF THE APPROACHES TAKEN BY THE ASEAN COMPETITION REGULATORY BODIES**

The CCCS was the first competition regulatory body in the region of Southeast Asia to impose directions on the parties to the acquisition to restore market contestability and penalties to deter anti-competitive mergers, as the acquisition has the effect or the purpose of a substantial lessening of competition of e-hailing market in Singapore. The infringement decision issued by CCCS is a wake-up call for Southeast Asia to come into the scene in dealing with the mergers that could liquidate the competitive momentum. In other words, the CCCS is the pioneer, which has triggered other competition regulatory bodies in Southeast Asia to initiate the movement of assessing the likelihood of

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<sup>54</sup> Ibid.

<sup>55</sup> Ibid, p 3.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid, p 7.

substantial lessening of competition effect caused by the acquisition of Uber by Grab.

Different jurisdictions adopt different definitions of a merger, which result in different treatment of Uber-Grab deals in Southeast Asia. As highlighted above, both Indonesia and Vietnam competition authorities considered the acquisition of assets as not part of the merger definition. Since the first threshold is not met, how both competition regulators assess the competitive effect of Uber-Grab deals remains to be seen. The flaw in the Indonesian competition regulation has been corrected by the newly introduced BCSC Regulation No. 3/2019, which revokes the previous Government Regulation No. 57/2010. Article 5 of the BCSC Regulation No. 3/2019 expands the scope of acquisition by including the asset-based acquisition as an object for notification for filing merger control.

The CCCS implements a voluntary merger control regime, which allows Uber and Grab to proceed with the merger deal without clearance from the CCCS. Voluntary notification creates less burden for both the competition authority and merging parties as there is no notification threshold required. The merging parties can proceed with their business decision promptly, and the competition authority does not need to handle each merger notification. However, in the event the notification is not made, parties to the merger in the voluntary regime would face the risk of high litigation cost as a result of the merger's review initiated by the competition regulatory body.<sup>58</sup> Nevertheless, some studies indicated that voluntary notification does not lead to more litigation than compulsory notification. Its cost savings "outweigh the welfare gains from negotiations" under the mandatory notification.<sup>59</sup> It is much easier for the CCCS to assess the substantial lessening of competition effect using the notification threshold guidance post-merger based on market shares as the merger between Uber and Grab had already occurred. Another drawback of the voluntary regime is that once a merger had happened, it is reversible. The CCCS did not impose

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<sup>59</sup> International Chamber of Commerce (ICC), "ICC Recommendations on Pre-Merger Notification Regimes," 2015, 13, <http://www.icc.nl/docman-standpunten/docman-commissies/docman-commissies-mededinging/69-icc-recommendations-on-pre-merger-notification-regimes/file>.

the direction for unscrambling the merger as it was not a suitable or appropriate remedy.<sup>60</sup>

The mandatory notification regime may create delays and high costs for both competition authority and the merging parties as they have to assess whether the merger meets the threshold for notification. However, merger parties are provided with the avenue of having a negotiation with the competition regulatory body before the merger is realized.<sup>61</sup> In this regard, the parties to the merger could prevent themselves from incurring the high cost of litigation and the risk of the dissolution of the merger.<sup>62</sup> In most situations, the competition authority needs to predict whether the anticipated merger will contribute to the substantial lessening of competition, which may lead to antitrust errors. However, the mandatory notification provides the competition authority a wide range of remedies. For example, the competition authority may prevent a merger if it will lead to a substantial lessening of competition. It will then reduce the burden of the authority to monitor the behaviour of a dominant firm post-merger transaction. In the case of Uber-Grab deals, the PCC however chooses to allow the Uber-Grab merger to proceed subject to specific commitments.

In online platform transportation booking services, both riders and drivers are considered as consumers. The anti-competitive effect arising from the merger of Grab and Uber had hit both the riders and drivers. The former loses the ability to substitute online platforms for transportation while the latter loses the ability to multi-home. Hence, in defining the relevant market, the competition regulatory body needs to look at both demand and supply, as well as drivers who are generally considered as consumers. In this regard, the CCCS and VCA had narrowed the definition of relevant market as the online platform that connects the drivers with the riders for the booking of transportation. CCCS also extends the relevant market definition to include chauffeured private hire cars to the e-hailing platform, as some drivers prefer to rent cars from Uber-Grab, given the high cost of car ownership in Singapore and the policy of Singaporean government in

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<sup>60</sup> Supra, n 6, p 124, para 362.

<sup>61</sup> Choe & Sekhar, "Compulsory or Voluntary Pre-merger Notification? A Theoretical and Empirical Analysis", (2006), University of New South Wales Research paper.

<sup>62</sup> Ibid.

limiting the ownership of the car. However, the PCC gave a broader definition, where the relevant market covers online private transportation services through mobile ride-hailing. Nevertheless, all those three competition regulatory bodies considered the e-hailing services as different from other transportation services such as normal taxi and public transportation. The existence of strong indirect network effects, incentives offered to both drivers and drivers, and exclusivity obligations also need to be considered in the determination of market power.

In Singapore and the Philippines, the merger between Uber and Grab had been consummated due to the voluntary nature of the notification system in the former and the commitment accepted by the competition authority in the latter. This demands dedicated efforts and high costs to monitor the behaviours of the dominant firm post-merger. A firm with market power has the tendency to exploit such power at the expense of consumers and its competitors. Common anti-competitive behaviour in the platform market includes price increase or quality decrease through the algorithm and exclusivity obligation imposed on the drivers or de facto exclusive, which may tie drivers or riders to the dominant firm and impair the ability of other competitors to compete equally in the market. Monitoring the conduct of the dominant firm is a daunting task, especially concerning pricing behaviour. In December 2019, PCC had imposed a fine of P16.5 million on Grab for violating its price and service quality commitment during the fourth quarter of the initial undertaking, marking the completion of PPC's first year of monitoring Grab on its voluntary commitment.<sup>63</sup>

## **THE WAY FORWARD FOR THE MALAYSIA COMPETITION COMMISSION (MYCC)**

Malaysia has been implementing its national competition law since 2012. However, the Competition Act 2010 does not contain a merger control provision as the legislature intended to encourage more mergers

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<sup>63</sup> "PCC Fines Grab P16.15M for Violating Commitments in May-August Rides | Philippine Competition Commission," accessed December 27, 2019, <https://phcc.gov.ph/press-releases/pcc-grab-fine-16-15m-eod-sdf-q4/>.

and acquisitions among enterprises to strengthen the economics of domestic and develop global corporate competition.<sup>64</sup> In a simpler sense, the non-intervention policy is adopted to boost the local corporates with the ability to stand on the top of the world with other international corporates. Currently, Malaysian Competition Commission could only respond to the anti-competitive merger after the merger/acquisition has been realised.<sup>65</sup> Anti-competitive effects arising from mergers will be dealt with under Section 10 of the Act relating to abuse of dominant position.<sup>66</sup> The drawback of this arrangement is that the Malaysia Competition Commission (MyCC) is not able to prevent a problematic merger from happening. Another possible way to deal with the anti-competitive merger is by invoking anti-competitive agreement provision under Section 4 of the Competition Act 2010.<sup>67</sup> Conventionally, the process of a merger involves executing and signing of agreements. In this regard, MyCC could evaluate and assess whether the merging parties have entered into an anti-competitive agreement, such as sharing sensitive information or market allocation during the merger process.

Grab may be holding a dominant position in the platform market since all drivers of Uber had been transferred to Grab even though there are other e-hailing companies such as MyCar, JomRides, MULA and others.<sup>68</sup> In determining whether Grab is holding a dominant position, market definition is fundamental to assess the competitive constraints that Grab may be facing as there are other alternative transportation services such as traditional taxi and public transportation. The two-sidedness of the platform, demand, and supply substitutability from both drivers and riders, the ability of the drivers to multi-home, and the existence of indirect network effect may be

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<sup>64</sup> Nasarudin Abdul Rahman and Haniff Ahamat, *Competition Law in Malaysia* (Selangor, Malaysia: Sweet & Maxwell Asia, 2016), 48.

<sup>65</sup> “Dewan Rakyat, Parlimen Ke-12, Penggal Ke-3, Mesyuarat Pertama, April 20, 2010,” 2010, 170, <http://www.parlimen.gov.my/files/hindex/pdf/DR-20042010.pdf>.

<sup>66</sup> Wilson Tay Tze Vern, “Competition Law in Malaysia: Renaissance and The Road,” *Malayan Law Journal* 2, no. xxiii (2015): 7.

<sup>67</sup> Vern, 7.

<sup>68</sup> Meng Yew Choong and Allison Lai, “42 E-Hailing Firms Licensed to Operate | The Star Online,” accessed January 5, 2020, <https://www.thestar.com.my/news/nation/2019/10/05/41-e-hailing-firms-licensed-to-operate>.

taken into account in competition law analysis. An online platform may be a distinct market, but the competition authority needs to consider the two-sidedness of the platform that matches the riders with drivers for online transportation booking.

A firm holding a substantial market power may tend to do abusive conduct. There were complaints from consumers that Grab had increased the transportation service fare after Uber was expelled from the market, which signifies that Grab may have abused its dominant position. Monitoring the pricing behaviour of the dominant firm is a daunting task, and MyCC may not be well-equipped to determine whether the fares or Commission imposed by Grab on drivers or riders through the algorithm is unfair or excessive. Non- pricing behaviour may be much easier to monitor. From the experience of Singapore and the Philippines, a dominant firm may tend to tie the entities using the platform in an exclusive arrangement in order to maintain or strengthen its market power. This may have a foreclosure effect on the dominant's competitors, especially in the existence of a strong indirect network effect.

Since the merger between Uber and Grab in Malaysia had been consummated, MyCC is now putting its efforts to monitor the behaviour of the firm ex-post-merger transaction. In the absence of the merger control provision, MyCC is empowered to investigate and take action on parties abusing the monopoly status and violating Section 2 of the Competition Act 2010, which deals with the abuse of a dominant position.<sup>69</sup> MyCC has provisionally found that Grab had abused its dominant position, in which Grab had imposed a number of restrictive clauses on its drivers which prevented the drivers from promoting and providing the advertising services for the competitors of Grab in the e-hailing and transit media advertising market.<sup>70</sup> As such, the conduct of Grab does not only affect the competitors and the e-hailing drivers, but also affects the consumers on the long run. MyCC had imposed a financial penalty of RM86,772,943.76 against Grab as well as a daily

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<sup>69</sup> "MyCC to Probe Grab-Uber Merger | The Edge Markets," accessed October 5, 2018, <http://www.theedgemarkets.com/article/mycc-probe-grabuber-merger>.

<sup>70</sup> Malaysian Competition Commission, "MyCC Proposes to Fine Grab RM86 Million for Abusive Practices," 2019, [https://www.mycc.gov.my/sites/default/files/pdf/newsroom/Proposed Decision against GRAB %28Eng%29 %281%29.pdf](https://www.mycc.gov.my/sites/default/files/pdf/newsroom/Proposed%20Decision%20against%20GRAB%20Eng%29%20%281%29.pdf).



penalty of RM 15,000 per day from the date of service of the Proposed Decision should they fail to take remedial action as directed by the MyCC in addressing the competition concerns.<sup>71</sup> While MyCC just released the Proposed Decision in October 2019, most of the merger control regimes in the region of Southeast Asia had concluded the case, regardless of whether the merger has infringed the prohibition on the anti-competitive merger provision or not. It can be inferred that the merger control mechanism is more effective in combating the anti-competitive merge, hence its provision is necessary to be inserted in the Malaysian Competition Act imminently.

The MyCC is in the process of amending its Competition Act 2010 to include merger control provisions. The learning experience from Singapore and the Philippines, and the adoption of a mandatory notification regime would be appropriate as the MyCC may block the potential problematic merger outright without the need to monitor the behaviour of the dominant firm ex post-merger regularly. Furthermore, a study suggested that less experienced competition regulatory bodies should adopt mandatory notification, based on the fact that voluntary notification is more appropriate for a competition regulatory body with more experience and knowledge in detecting the merger that has breached the notification rule and in deciding on which mergers deserve further investigation.<sup>72</sup> In order to minimize the number of notified mergers and optimize the resources, the MyCC may increase the level of the threshold for merger notification. Similarly, the definition of merger should cover a wide range of activities, including sale and purchase of assets. Finally, the MyCC needs to monitor and keep abreast of other countries' development in dealing with ex-ante and ex-post-merger activities. This will help the MyCC to design effective enforcement strategies in regulating big firms' activities in the Malaysian market.

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<sup>71</sup> Malaysian Competition Commission.

<sup>72</sup> Aldo Gonzalez and Daniel Benitez, "Pre-Merger Notification Mechanisms: Incentives and Efficiency of Mandatory and Voluntary Schemes," 2008, 37, [https://lawprofessors.typepad.com/antitrustprof\\_blog/files/merger\\_notification\\_oct22.pdf](https://lawprofessors.typepad.com/antitrustprof_blog/files/merger_notification_oct22.pdf).