Key Points From the Uber/Grab Transaction You Need to Know for Your Next Transaction

In December 2020, the Competition Appeal Board ("**Board**") upheld the decision of the Competition and Consumer Commission Singapore ("**CCCS**") in respect of the sale by Uber to Grab of Uber's Southeast Asian business.

The decision of the Board highlights certain aspects of the merger control regime in Singapore that potential merging parties should bear in mind:

(a) CCCS is not obliged to accept voluntary commitments offered by the parties even if these commitments are sufficient to address all potential competition concerns, in particular if there are other considerations that would suggest that an infringement decision (and/or a penalty) would be more appropriate. In determining whether there is a substantial lessening of competition ("**SLC**") for a completed merger, CCCS will review the transaction as it was completed and may disregard any changes brought to the transaction by the parties after completion (e.g., a divestiture).

(b) The current regime allows CCCS to proceed with an infringement decision while negotiations over commitments are pending. While the parties should have an opportunity to be heard (including to offer voluntary commitments) and to understand CCCS' competitions concerns, CCCS is not required to engage parties specifically on the adequacy of the commitments that were offered and has no obligation to inform the parties on the specific form of commitments that would satisfy their requirements.

(c) The Board has noted that it is within CCCS' discretion to deviate from its published guidelines. This follows Uber's contention in the appeal that CCCS did not follow the same procedures in the investigation as with a notified merger as provided by their guidelines.

(d) The procedure in which CCCS imposes its penalty allows a "margin of appreciation" to CCCS as long as the overall penalty is just and proportionate. This is notable as CCCS does not publish its calculations on penalty, including the starting percentage used to determine the same.

(e) CCCS is obliged to provide discovery of internal documents if they have relied on the same in their decision.

Summary of the Uber/Grab Decision

In 2018, Uber sold its Southeast Asian ride-hailing business to Grab.

The parties informed CCCS shortly before the merger of their intentions, including their intention to complete the transaction upon signing and to file a merger notification *after* closing. When the parties sought to subsequently file the merger notification, CCCS informed them that it had already opened an investigation and rejected the merger notification.

While the investigation was ongoing, Go-Jek, a new entrant to the ride-hailing market announced its intention to enter the Singapore market, and began preparations for entry. Throughout the course of the merger investigation, both Uber and Grab proactively reached out to CCCS to discuss voluntary commitments to deal with competition concerns, and made several proposals in respect of the same. Each time, the parties also engaged CCCS for feedback on their proposed commitments, to deal with CCCS' concerns.

However, the parties' last proposal and request for feedback on 17 September 2018 was not answered. Instead, CCCS issued its final decision on 24 September 2018, without further reference to the parties, with directions that largely reflected the parties' proposed commitments with only one material change (that it had not specifically requested of the parties). The parties were each fined approximately S$6 million, based on their respective turnover, without taking into account any of the driver and rider incentives they had paid out, which CCCS determined (and the Board agreed) was not in the intrinsic nature of the market.

Key Points From the Uber/Grab Decision

We set out below several important takeaways from the Board's decision that merger parties should bear in mind in their next transaction.

CCCS is not obliged to accept commitments offered by the parties even if the commitments are sufficient, if there are other considerations that would suggest that an infringement decision (and/or a penalty) would be more appropriate. In determining whether there is an SLC for a completed merger, CCCS will review the transaction as it was completed and may disregard any changes brought to the transaction by the parties after completion (e.g., a divestiture).

Uber asserted that the commitments that the parties had proposed would have addressed the concerns of CCCS. In response, CCCS stated, among other things, that it would not be obliged to accept commitments even if such commitments were appropriate. The Board, while taking the view that the commitments offered were not sufficient, upheld CCCS' position.

In so finding, the Board noted that Section 60A of the Competition Act provides that CCCS "may" accept commitments, which suggests that it was permissive only. It took the view that, while voluntary commitments are a "*relevant consideration that CCCS should have regard to … this does not mean that CCCS* must*, if it comes to the view that voluntary commitments offered are sufficient for addressing any SLC arising from the Transaction, as a matter of course, accept the voluntary commitments offered and find that s 54 has not been infringed".*

The Board further added that it was "*open to CCCS to take into account the need for deterrence in deciding whether it would be appropriate to impose a penalty. Even if commitments have been offered, adverse effects may have taken place in the interim where completed mergers are concerned. The reversibility of the merger, and the extent to which the competitive effects may be mitigated or remedied in other ways if it is not reversible, would also clearly be relevant considerations"*.

The Board's comments are interesting as this is not a position previously articulated by CCCS. That said, it now seems clear that CCCS is permitted an element of discretion in determining whether to accept commitments. It is notable, in this context, that CCCS would not have been able to impose a penalty if it had accepted the parties' commitments and cleared the merger.

We would respectfully suggest that, if voluntary commitments are sufficient to address the competition concerns arising from a merger, then an argument could be made that "adverse effects" in the interim should not be relevant concerns; nor should a penalty be imposed. It would be helpful if CCCS could clarify the circumstances under which it would find an infringement despite the parties' having offered commitments sufficient to deal with any concerns.

Negotiations over commitments may be terminated without notice (pending review of the CCCS' Guidelines on the Substantive Assessment of Mergers).

As noted above, the parties had put forth several commitment proposals to CCCS, including a set of commitments on 17 September 2018. Although the parties stated their willingness to discuss the commitments, CCCS did not engage with the parties but instead issued its decision on 24 September 2018, with directions which largely, although not exactly, mirrored the parties' commitments.

The Board, after noting that CCCS is obliged to give the merger parties an opportunity to be heard and to provide reasons for its infringement decision, agreed with CCCS that it is not required to "*engage parties specifically on the adequacy of the commitments offered*" which it said was an "*untenable*" position.

This position ultimately means that CCCS, on top of not having to accept commitments which might be sufficient, is not obliged to let parties know that it does not intend to engage with them. Parties may therefore expend significant time and effort to engage CCCS on proposed voluntary commitments without knowing whether CCCS has any intention of accepting them.

CCCS has now sought to partially address this issue in its proposed amendments to its new guidelines under the section on Remedies, Directions and Penalties. The proposed new guidelines provide that, for notified mergers, CCCS will specify a time period within which parties have to offer commitments, failing which it may potentially issue an infringement decision. (Our earlier update on the proposed new guidelines is available here).

CCCS has not yet confirmed whether the proposed guidelines will be implemented, following a period of public consultation.

CCCS has the discretion to deviate from its published guidelines (following Uber's contention in the appeal that CCCS did not follow the same procedures in the investigation as with a notified merger as provided by their guidelines).

One of the issues raised in the appeal was that CCCS failed to follow the same procedures in its investigation of this merger as it did with notified mergers, including providing an issues letter to parties so that they could fully address CCCS' concerns. CCCS' Guidelines on the Substantive Assessment of Mergers provides that it would endeavour to follow the same procedures in investigations. The Board noted that CCCS had stated that it could not follow this process as it needed to obtain information from third parties, and the Board took the view that this was a reasonable decision within CCCS's exercise of discretion.

The Board did not address why this meant, for instance, that CCCS could not provide parties with an issues letter. In any event, the Board took the view that the parties did not suffer any prejudice from any deviation from CCCS's own guidelines as CCCS's concerns would have been made apparent to the merger parties by way of the Proposed Interim Measures Directions and the Interim Measures Directions. The Board reiterated that the guidelines did not have the force of law, although they could give rise to expectations as to how a merger would be investigated.

Since then, as mentioned in our previous update, CCCS, in its proposed new guidelines, has sought to remove the statement that they would follow the same procedures in investigations as with notified mergers. This would mean that parties who do not notify their mergers which are then subject to investigation by CCCS, will not be able to determine how CCCS will proceed with the investigation. Pending further guidance by CCCS, the removal of this provision suggests it would have full discretion to determine the timelines or manner in which the investigation is conducted.

The procedure in which the CCCS imposes a penalty allows a "margin of appreciation" to CCCS as long as the overall penalty is just and proportionate. It should, however, be noted that CCCS does not publish its calculations on penalty, including the starting percentage used to determine the same.

Uber had challenged the financial penalty imposed by CCCS on several bases, including the manner in which CCCS had calculated the penalty was incorrect, and compared the fine to that imposed by CCCS for cartel conduct.

In its decision, the Board took the view that "*[T]he imposition of a financial penalty is not a scientific exercise, nor is it capable of being reduced to a mechanical calculation according to a predetermined mathematical formula. Instead, a margin of appreciation should be granted to CCCS as long as the [Board] is satisfied, on the whole, that the penalty imposed is just and proportionate".* It further stated that *"[T]he focus is on whether the overall penalty imposed is appropriate for the infringement in questions, in light of the twin objectives of punishment and deterrence, and there ought not to be a minute examination of the individual steps applied by the CCCS pursuant to its guidelines*".

This is particularly notable because CCCS does not publish its calculation of fines. Thus, other than the party being penalised, the public is not aware of the starting percentage used in each case, or how CCCS calibrates the fine other than the general guidance provided in the Guidelines on the Appropriate Amount of Penalty (which does not publish ranges or other guidance on the percentages to be applied).

CCCS is required to provide internal documents where they have relied on the same.

In the appeal, Uber asserted that CCCS failed to provide adequate access to the file. This included CCCS' failure to provide documents on the basis that they were internal documents, and therefore not required to be provided.

In an interlocutory application before the Board prior to the appeal being heard, Uber successfully obtained the internal documents relied on by CCCS in its decision. Uber had requested these documents on the basis that they would only be able to fully defend itself if it had an unredacted copy of CCCS' infringement decision, including documents specifically mentioned in the decision, but not provided to the parties. To address CCCS's concerns on the confidentiality of the information, Uber had proposed that the documents be provided only to its external legal counsel and economic advisers, and subject to confidentiality undertakings to be provided by them. CCCS resisted production.

The Board allowed Uber's application, and directed CCCS to provide the documents subject to confidentiality undertakings from Uber's external legal counsel and economic advisers. This is noteworthy as CCCS's practice prior to this has been to redact information in the final decisions where it deems such information confidential or internal documents, even to the parties subject to the decision.

Conclusion

The decision has important ramifications for merger control in Singapore, and demonstrates the wide powers available to the regulator, even in a voluntary regime. Parties considering a significant merger in Singapore should carefully assess their transaction to consider whether notification may be necessary.

The effect of this decision is that, while Singapore ostensibly has a voluntary merger regime, and permits parties to notify even after completion, parties to a merger that may potentially require commitments should seriously consider notifying the same before completion. Failure to do so may result in CCCS rejecting the commitments, *even if they are sufficient*, and impose a financial penalty.

If you would like information or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:

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