Grab-Uber merger: observations and implications for Singapore's competition regime[*]

I. Introduction

1. For months on end in 2018, consumers were enthralled by the long and sustained competition between Uber and Grab – two ride-hailing giants that have been spearheading paradigm changes in the commerce landscape, massively disrupting the transport industry in the process. More importantly, consumers were benefitting heavily from the price war as both entities furiously doled out attractive discounts and incentives to shore up their market share. The protracted battle was extremely costly – according to *Wall Street Journal*, Uber was losing approximately USD$200 million per year, and in 2017 it posted a net loss of USD$4.46 billion.[1] Analysts observed that the price war was unsustainable[2] and true enough, the dramatic end came when Grab announced the acquisition of Uber's Southeast Asian business in consideration of Uber holding a 27.5% in Grab and Uber's Chief Executive Officer Dara Khosrowshahi joining Grab's board.[3]

2. However, the spectacle was far from over, with the Competition and Consumer Commission of Singapore ("CCCS") immediately intervening to investigate the transaction, having reasonable grounds for suspecting that section 54 of the Competition Act[4] had been infringed.[5] On 5 July 2018, the CCCS released its

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1 Greg Bensinger, Newley Purnell and Julie Steinberg, "Uber Agrees in Principle to Exit Southeast Asia for Stake in Rival" *The Wall Street Journal* (8 March 2018) <https://www.wsj.com/articles/uber-near-deal-to-exit-southeast-asia-for-stake-in-rival-1520521744> (accessed 10 November 2018).

2 Samantha Tay, "Grab Vs Uber – Breaking Down The Economics Behind Their Price War And Sustainability" *Vulcan Post* (5 February 2017) <http://www.asiaone.com/singapore/grab-vs-uber-breaking-down-economics-behind-their-price-war-and-sustainability> (accessed 10 November 2018).

3 See "Grab Merges with Uber in Southeast Asia", *Grab* (26 March 2018) <https://www.grab.com/sg/press/business/grab-merges-with-uber-in-southeast-asia/> (accessed 10 November 2018).

4 Cap 50B, 2006 Rev Ed. All sections subsequently referred to will be under the Competition Act (Cap 50B, 2006 Rev Ed).

5 See "Uber/Grab Merger: CCS Proposes Interim Measures Directions in Order to Preserve and/or Restore Competition and Market Conditions", *Competition and Consumer Commission Singapore* (30 March 2018) https://www.cccs.gov.sg/media-and-publications/media-releases/uber-grab-interim-measures-direction (accessed 10 November 2018). See also "Grab-Uber merger investigation: A timeline" *Channel News Asia* (24 September 2018) <https://www.channelnewsasia.com/news/singapore/grab-uber-merger-investigation-a-timeline-10751796> for a timeline of the investigations (accessed 10 November 2018).

provisional infringement decision against the parties,[6] and on 24 September 2018, the CCCS released its final directions and penalties to be imposed.[7]

3. This essay aims to discuss the CCCS's infringement decision, rationalise and draw observations on the approach that has been taken. This essay will argue that the CCCS' response was unfortunately less robust than desired, which spells negative implications for Singapore's competition regime.

II. The infringement decision

4. In the infringement decision, the CCCS expressed its opinion that the transaction between Grab and Uber had infringed section 54 of the Competition Act, by removing competition between the two closest prevailing competitors in the chauffeured point-to-point transport platform services market.[8] It noted that in this particular market, barriers to entry and expansion were high due to the strong network effects prevailing.[9] In fact, the CCCS found that Uber would not have left the Singapore market if not for the merger.[10] The CCCS also found that effective fares on Grab's end had increased between 10% and 15%.[11]

5. With the aim of mitigating the anti-competitive impact of the merger, the CCCS ordered the following remedies:

   (a) Removing any exclusivity obligations imposed on Grab drivers.

   (b) Removing Grab's exclusivity arrangements with any taxi fleet in Singapore.

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6 See "Grab/Uber merger: CCCS Provisionally Finds that the Merger Has Substantially Lessened Competition, Proposes Directions to Restore Market Contestability and to Impose Financial Penalties", *Competition and Consumer Commission Singapore* (5 July 2018) <https://www.cccs.gov.sg/media-and-publications/media-releases/grab-uber-merger-pid> ("CCCS Provisional Infringement Decision") (accessed 10 November 2018).

7 See "Grab-Uber Merger: CCCS Imposes Directions on Parties to Restore Market Contestability and Penalties to Deter Anti-Competitive Mergers", *Competition and Consumer Commission Singapore* (24 September 2018) https://www.cccs.gov.sg/media-and-publications/media-releases/grab-uber-id-24-sept-18 ("CCCS Final Decision") (accessed 10 November 2018).

8 Competition and Consumer Commission Singapore, CCCS Provisional Infringement Decision, *supra* n 6, at [4].

9 *Id*, at [5]. Network effects arise where the value of a product or service increases with the number of other customers consuming the same product or service. This arises especially in two-sided markets, which caters to two or more groups of customers and network effects are generated as more customers join one or the either side of the market. See Richard Whish & David Bailey, *Competition Law* (Oxford University Press, 7th Ed, 2012) at pp 11-12.

10 Competition and Consumer Commission Singapore, CCCS Final Decision, *supra* n 7, at [4].

11 *Id*, at [5].

(c) Maintaining Grab's pre-merger pricing algorithm and driver commission rates.

(d) Requiring Uber to sell Lion City Rentals to any potential competitor who makes a reasonable offer based on fair market value, and preventing Uber from selling the vehicles to Grab without the CCCS's prior approval.[12]

6. In addition, the CCCS imposed financial penalties of S$6,582,055 and S$6,419,647 on Grab and Uber, respectively, for proceeding with the merger despite having anticipated competition concerns.[13]

III. Why was the CCCS only able to intervene after the merger had been proceeded with?

7. To the layman, it might appear puzzling that the CCCS only intervened and commenced its investigations after Grab and Uber had officially announced their deal. As a forum contributor sharply opined, the immediate and instinctive impression one may get is that the CCCS is a "toothless tiger".[14] While this is an understandable reaction, it would be better to first understand how different merger notification systems operate and what Singapore's rationale was in designing its system was. This would also help shed light on why the CCCS's hands were tied in this case.

A. Notification systems – mandatory versus voluntary

8. There has been a wide proliferation of merger control in the last few decades, with well over 100 national and supranational authorities enforcing merger control regimes.[15] While these regimes all aim to ensure that mergers do not produce adverse effects for consumers and the competitiveness of markets, they implement this through different ends. In this regard, one of the most distinguishing features between different regimes has been the choice between a mandatory or voluntary notification system.

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12 *Id*, at [9].

13 *Id*, at [10]-[12].

14 Gabriel Cheng Kian Tiong, "Competition watchdog shouldn't wait till deal is done to react" *The Straits Times* (17 April 2018) at <https://www.straitstimes.com/forum/letters-in-print/competition-watchdog-shouldnt-wait-till-deal-is-done-to-react> (accessed 10 November 2018).

15 Whish & Bailey, *Competition Law*, *supra* n 9, at p 812.

9. A vast majority of merger control regimes in the world employ the mandatory notification system.[16] This dominant model follows that of the model adopted in the United States. Specifically, the United States Hart-Scott-Rodino Antitrust Improvements Act of 1976 mandates the notification of mergers exceeding certain transaction value thresholds and prevents the consummation of the transaction till the end of the waiting period, which is thirty days following the receipt of the notification. This is subject to further extensions by the antitrust authorities for additional information, or early termination of the waiting period.[17] Similarly, the European Union adopts a similar mechanism, via the mandatory notification system as established by the Council Regulation No 139/2004, applicable for transactions which cross certain transactions value thresholds.[18]

10. On the other hand, a small number of jurisdictions employ the voluntary notification system, notably Australia, New Zealand, the United Kingdom, and Singapore.[19] This means that parties may voluntarily seek the competition authorities' opinions on the legality of their transaction prior to consummating it, or not do so at all, but with the attendant risk of the competition authority challenging the merger that was not notified.

B. The rationale and costs of the mandatory notification system

11. The fundamental rationale that has been argued in favour of mandatory notification systems is the need to give competition authorities sufficient time to review and challenge mergers.[20] It also avoids the complicated process of unscrambling a completed merger.[21] However, it is clear that the mandatory notification system is a highly costly regime for all parties involved.

12. From the perspective of the merger parties, they face compliance costs such as those attributed to ascertaining whether notification and filing requirements are met;

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16 Lynette Chua Xin Hui, "Merger Control in Small Market Economies" (2015) 27 Singapore Academy of Law Journal 369 at [30].

17 Hart-Scott-Rodino Antitrust Improvements Act 15 USC (US) §18a (1976).

18 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

19 Chua, *supra* n 16.

20 Chongwoo Choe & Chander Shekar, "Compulsory or voluntary pre-merger notification? Theory and some evidence" (2010) 28 International Journal of Industrial Organization 10 at 10.

21 *Ibid*.

complying with unduly burdensome filing requirements, such as translation and formatting requirements; and costs generally associated with unnecessary delays in the filing and review process.[22] These costs exponentially increase when the merger in question is cross-jurisdictional in nature, which has become a new norm with globalization.[23] A PricewaterhouseCoopers study has estimated that the average external costs associated with notification procedures for cross-jurisdictional mergers are upward of 3.28 million Euros, with an average review duration of approximately seven months.[24]

13. From the perspective of the competition authorities, large costs stem from the reviewing of every single case of which it has been notified. More importantly, authorities face opportunity costs in not being able to devote resources that could be otherwise be used for other enforcement activities. Statistics have shown that out of the 2,471 cases that were notified to the European Commission from 2000 to 2007, only 4.1% of notified mergers raised concerns to the extent of meriting subsequent investigation.[25] This demonstrates that the notification threshold requirements are not effective in filtering out mergers which actually generate anti-competitive effects and require investigation by the authorities, resulting in an inefficient system.

14. This is because the thresholds are founded on a crucial assumption that the potential anti-competitive effects of a merger are directly and unequivocally related to its size. However, this is far from the case. The factors affecting the potential anti-competitive effects of a merger are multi-fold, such as the characteristics of the specific market and firms in question, the type of good or service in question, and consumer characteristics, amongst others.[26] The problem that arises is that the anti-competitive analysis would

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22 Mergers Working Group Notification and Procedures Subgroup, International Competition Network, *Report on the Costs and Burdens of Multijurisdictional Merger Review* (November 2004) ("*Costs and Burdens of Multijurisdictional Merger Review*") at p 2.

23 ICC Commission on Competition, International Chamber of Commerce, *ICC Recommendations on Pre-Merger Notification Regimes* (March 2015) at p 1.

24 Mergers Working Group Notification and Procedures Subgroup, *Costs and Burdens of Multijurisdictional Merger Review*, *supra* n 19, at pp 6–7.

25 Aldo Gonzalez & Daniel Benitez, "Pre-merger Notification Mechanisms: Incentives and Efficiency of Mandatory and Voluntary Schemes" (September 2008) < http://lawprofessors.typepad.com/antitrustprof_blog/files/merger_notification_oct22.pdf> at 15 (accessed 10 November 2018).

26 See generally Lim Chong Kin and Corinne Chew, "Mergers" in Cavinder Bull and Lim Chong Kin (eds), *Competition Law and Policy in Singapore* (Academy Publishing, 2nd Ed, 2015) at 05.057–05.090.

often be more qualitative than quantitative in nature. The factors are also difficult to reduce to clear, measurable and objective thresholds, and thus it is difficult to determine when notification of a transaction is required.[27] Therefore, competition authorities are left with little choice but to strike a compromise of using the value of a transaction as the filtering threshold. Consequently, this comes with the attendant risk of judgment errors where many mergers with low anti-competitive risks are reviewed only because of their size, while others triggering large competitive concerns are not reviewed due to their small size.

C. The allure of the voluntary notification system

15. Due to the large and often unnecessary compliance costs associated with mandatory notification regimes, it is no surprise that the global business community is overwhelmingly in favour of voluntary self-assessment systems.[28] While the majority of competition authorities retain the mandatory notification regime, the practices of the minority jurisdictions has arguably demonstrated that compulsory notification is in fact not necessary to the effective functioning of merger control policy.

16. A widely cited example is Australia's *quasi-compulsory* system, where empirical evidence has demonstrated that parties are in fact highly incentivised to voluntarily notify their transactions to the Australian Competition and Consumer Commission ("ACCC").[29] A study conducted by Shekhar and Williams in 2004 showed that from the proportion of self-reported mergers increased from 50 percent in 1996 to 75 percent in 2001.

17. The ACCC has a reputation of being a well-resourced and vigorous litigant, willing to seek substantial financial penalties on parties that undertake questionable mergers without first consulting it, especially when it was willfully done.[30] Australian case law

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27 *Id*, at 6.

28 ICC Commission on Competition, *ICC Recommendations on Pre-Merger Notification Regimes*, *supra* n 23, at pp 13–14.

29 See generally Chander Shekhar & Philip L. Williams, "Should the Pre-Notification of Mergers Be Compulsory in Australia?" (2004) 37(4) The Australian Economic Review 383.

30 *Id*, at 384–385.

has also demonstrated that deterrence is the primary objective when setting a pecuniary penalty, and penalties for anticompetitive practices must be substantial and significant:

> "[The penalty] must be fixed with a view to ensuring that the penalty is not such as to be regarded by [the] offender or others as an acceptable cost of doing business… [T]hose engaged in trade and commerce must be deterred from the cynical calculation involved in weighing up the risk of penalty against the profits to be made from contravention".[31]

Further, in a 2018 speech by the Chairman of the ACCC, Rod Sims, the ACCC pledged its commitment to ensuring that large businesses bear penalties that are commensurate to their size.[32]

18. Additionally, the voluntary notification system affords parties with the opportunity to negotiate with the regulator to reach a mutually accommodating outcome. While this opportunity is arguably similarly present in the mandatory notification system, the voluntary notification system has the added benefit of better aligning the interests and incentives of both the competition authorities and the notifying parties,[33] fostering a better working relationship.

D. Singapore's choice of the voluntary notification system

19. Singapore finds itself in a unique position as it is a small market economy. As the name suggests, small market economies are present in countries where domestic demand is small relative to the minimum efficient scale of production or distribution.[34] This can be attributed to various factors, such as limited natural resources, a small population pool and a small domestic market, therefore resulting in high reliance on import and export markets.[35] The need to tailor competition policies that are aligned with

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31 *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20 at [62]–[63], endorsed in *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54.

32 Rod Sims, Chairman of the Australian Competition and Consumer Commission, "2018 compliance & enforcement priorities" (20 February 2018) <https://www.accc.gov.au/speech/2018-compliance-enforcement-priorities> (accessed 10 November 2018).

33 Shekar & Williams, *supra* n 29, at 389.

34 Chua, *supra* n 16, at [6].

35 *Ibid*.

Singapore's needs and circumstances is therefore evident, and has indeed been articulated in Parliament during the introduction of the Competition Bill.[36]

20. Particularly, Singapore has clearly demonstrated a pragmatic approach in adopting the voluntary notification system. Consistent with empirical evidence which has been discussed in earlier sections, it recognised that most mergers are in fact unlikely to raise competitive concerns and therefore the adoption of the mandatory notification system would have a twofold disadvantage – imposing onerous requirements on businesses and creating unnecessary costs.[37] The need to avoid unnecessary costs for the CCCS is especially germane, in light of the fact that it already faces higher administrative expenses relative to authorities in larger market economies. To illustrate, the CCCS's budget ratio in 2009 was three times greater than that of Japan relative to Japan's gross domestic product, and two and a half times the ratio of the United Kingdom's budget relative to the latter's gross domestic product.[38]

21. Ultimately, Singapore is a comparatively minor player in the international competition domain and is hampered in its cost competitiveness relative to other foreign authorities. As such, its choice of the voluntary notification system which can demonstrably produce similar, if not more desirable outcomes compared to the mandatory system, has long been justified as wise and prudent. Unfortunately, as demonstrated by the unprecedented case of Grab and Uber, the system is becoming susceptible to exploitation, which creates problems for the CCCS.

IV. Are the ordered remedies sufficient to address the competition concerns?

22. Grab and Uber clearly attempted to game the competition system, and the ball was in the CCCS's court to make sense of and ameliorate the situation. As stated above, the burning question is whether its response was sufficiently robust, and it would be seen that this is doubtful, though not necessarily by the fault of the CCCS.

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36 *Singapore Parliamentary Debates, Official Report* (19 October 2004) vol 78 at cols 863–919 (Dr Vivian Balakrishnan, Senior Minister of State for Trade and Industry).

37 *Singapore Parliamentary Debates, Official Report* (21 May 2007) vol 83 at cols 726–749 (Lee Yi Shyan, Minister of State for Trade and Industry).

38 ICN Special Project for the 8th Annual Conference, *Competition Law in Small Economies* <http://www.internationalcompetitionnetwork.org/uploads/library/doc385.pdf> at p 11 (accessed 10 November 2018).

A. Greater reliance on behavioural remedies

23. Given that a merger fundamentally involves a structural change to the market, the CCCS has always considered that structural remedies are preferable to behavioural remedies, as they directly address the market structure issues and require less monitoring by the CCCS.[39] Yet, it is clear from the CCCS' decision that it has placed greater reliance on behavioural remedies, over structural remedies. In contrast to structural remedies, behavioural remedies permit the merger to proceed, subject to conditions aimed at preventing the merged entity from acting in a way that subsequently undermines market competition.

24. Section 69(1) of the Competition Act provides the CCCS with a wide latitude to impose directions as it considers appropriate to remedy and mitigate the adverse effects of the merger. Given the broad prerogative accorded to the CCCS, it may theoretically unwind the merger and require Uber to continue providing services independently of Grab.[40] However, realistically speaking, it would surely be harsh to compel Uber to continue its operations, given how Uber has already unequivocally expressed its intentions to exit the South-east Asian market following its protracted battle with Grab.

25. By analogy, most law students would be familiar with the House of Lords decision of *Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*.[41] Briefly, the crux of the case was the issue of whether specific performance ought to be ordered against the defendant supermarket to keep its outlet open for retail trade, though it was unprofitable to do so. In refusing to grant specific performance, the House of Lords clearly expressed its pro-business disposition, as neatly encapsulated in the following quotation from Lord Hoffman's judgment:

> … the defendant, who *ex hypothesi* did not think that it was in his economic interest to run the business at all, now has to make decisions under a sword of

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39 Competition and Consumer Commission Singapore, *CCCS Guidelines on Merger Procedures 2012* (July 2012) at paras 6.6 and 6.25; see also Lim Chong Kin and Corinne Chew, "Mergers" in Cavinder Bull and Lim Chong Kin (eds), *Competition Law and Policy in Singapore* (Academy Publishing, 2nd Ed, 2015) at p 221.

40 Adrian Lim, "Grab-Uber merger: What's next" *The Straits Times* (6 April 2018) at <https://www.straitstimes.com/singapore/grab-uber-merger-whats-next> (accessed 10 November 2018).

41 [1997] 2 WLR 898.

> Damocles which may descend if the way the business is run does not conform to the terms of the order. This is, as one might say, no way to run a business.[42]

26. Clearly, the House considered that a court order to keep a business in operation would be tantamount to gross and unjustified interference.[43] Such a judicial attitude arguably finds its underpinnings in the quintessential principles of freedom of contract, the spirit of individualism and of *laissez faire* which are (in principle) hallmarks of a capitalist system.[44] Transposed to the present situation of Uber, a complete unwinding of the merger would arguably be criticised as draconian as well.

27. Aside from the harsh consequences, the practical infeasibility of fully unwinding the effects of merger is another point for consideration. Another comparison can be drawn with the United Kingdom acquisition case of Metalloxyd Ano-Coil Ltd by Alanod Aluminum in July 1999.[45] In that case, the Office of Fair Trading (now superseded by the Competition and Markets Authority) only commenced its investigation into the merger after it was completed, as the United Kingdom, like Singapore, adopts the voluntary notification system. By that time, Ano-Coil had already been substantially integrated with Alanod – its technical, sales and marketing functions had already been dismantled and Ano-Coil was operating solely as a production plant.[46] This had serious repercussions on the type of remedies feasibly available to the OFT – an effective divestiture remedy was undermined as Ano-Coil was no longer operating as a viable independent business, but only as a production plant, which greatly narrowed the scope of potential purchasers who would be interested in it. As such, a combination of behavioural remedies was proposed instead, such as price controls and cancelling certain exclusive distribution agreements.[47]

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42 *Id*, at 13.

43 See Yeo Hwee Ying, "Remedy of Specific Performance – Supervision and Changing Trends" (1998) Singapore Journal of Legal Studies 150 at 162.

44 *See generally* Friedrich Kessler, "Contracts of Adhesion – Some Thoughts about Freedom of Contract" (1943) 43(5) Columbia Law Review 629 at 629–630.

45 *See* Competition and Markets Authority, "Understanding past merger remedies: Report on case study research" (April 2017) at pp 52–57.

46 *Id*, at p 54.

47 *Id*, at pp 53–54.

28. Some similarities may be observed when comparing our present situation to the case of Alanod and Ano-Coil. Immediately after the announcement of the merger deal, it was clear that Uber had commenced the process of winding down its operations, with staff vacating the office premises and being put on paid leave.[48] Following this, discussions were also held by Grab to hire and integrate Uber's existing staff into its operations.[49]

29. However, it is also clear that Uber's case presents more difficulties. Even though Ano-Coil was highly integrated with Alanod, it nevertheless was still a physical manufacturing entity that could be divested away from Alanod. In Uber's case, the interim measures implemented by the CCCS only required it to continue operating its ride-sharing platform until 7 May 2018.[50] Following that, aside from its ownership in Lion City Rentals, Uber no longer had any form of business or operating presence in Singapore; it had simply exited the market. In essence, unlike the case of Alanod and Ano-Coil, there is no separate business or operation that could be divested; the only way to fully rescind the effects of the anti-competitive merger would be to require Uber to return to the Singapore market, which is arguably draconian.

30. Given these considerations, the structural remedy which CCCS was able to order was therefore and unfortunately more circumscribed, *viz* relating only to the divestment of Lion City Rentals.

B. The fallibility of behavioural remedies

31. The CCCS has explained its reason for preferring structural remedies over behavioural remedies as the latter generally require more monitoring, which

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48 Zhaki Abdullah, "Uber staff on paid leave following acquisition, Grab says it will try to rehire them" *The Straits Times* (26 March 2018) <https://www.straitstimes.com/singapore/uber-staff-on-paid-leave-following-acquisition-by-grab-which-says-it-will-try-to-re-hire> (accessed 10 November 2018).

49 Zhaki Abdullah, "Grab to offer positions to Uber staff" *The Straits Times* (27 March 2018) <https://www.straitstimes.com/singapore/transport/grab-to-offer-positions-to-uber-staff> (accessed 10 November 2018).

50 "Uber/Grab merger: CCCS Issues Interim Measures Directions", *Competition and Consumer Commission Singapore* (13 April 2018) <https://www.cccs.gov.sg/media-and-publications/media-releases/uber-grab-imd-13-april-18> (accessed 10 November 2018).

incurs additional compliance and administrative costs.[51] This implies a trade-off in the amount of resources that it is able to allocate to other enforcement activities and is a serious issue, given its resource constraints. Nevertheless, this essay argues that the problems with behavioural remedies, especially in the context of the present case, go far beyond the issue of costs, further impeding its effectiveness.[52]

32. First, there is the difficulty of fully specifying in detail the behavioural remedy and what is expected of Grab.[53] For instance, one of the remedies ordered by the CCCS is the maintenance of Grab's pre-merger pricing algorithm and driver commission rates. This is aimed at mitigating the anti-competitive effects of the merger by ensuring that Grab does not exploit its newfound position in the market to shore up its profit margins. However, is this really the complete picture as to how consumers and drivers can be affected by Grab's actions and, conversely, how Grab can influence its profit margins?

33. Take the perspectives of consumers as an example. They are concerned not only with the price of the service they are paying for, but also with the quality of the service they receive. However, regulating and monitoring service entails many complications and subtleties.[54] Among these difficulties is the fact that the quality of service is difficult to measure accurately: one, because they are not readily observable, unlike quantitative factors such as price; two, because the quality of a service is a matter of perception and varies according to consumer preferences and demands.[55] As such, it can be seen why and how the CCCS's behavioural remedy only sought to address the pricing of Grab's services, but not the quality provided, even though both are inextricably intertwined.

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51 Competition and Consumer Commission Singapore, *CCCS Guidelines on Merger Procedures 2012*, *supra* n 35, at para 6.6.

52 It is beyond the purview of this essay to suggest what would have been a better solution in this regard; however, given Singapore's resource constraints and business-oriented policies, there may be none.

53 John E. Kwoka and Diana L. Moss, "Behavioural merger remedies: Evaluation and implications for antitrust enforcement" (2012) 57(4) The Antitrust Bulletin 979 at 999.

54 *See generally* David E.M. Sappington, "Regulating Service Quality: A Survey" (2005) 27(2) Journal of Regulatory Economics 123.

55 *Id*, at 124–125.

34. Second, there is also an issue concerning the interpretation, and consequently the enforcement of the behavioural remedy. For instance, what does it actually mean to maintain pre-merger pricing algorithms? Surely this cannot mean that Grab's pricing algorithms and decisions must remain unchanged forever, and Grab should still be allowed to make commercial decisions based on the market environment, including demand and supply and the strategies of rivals. Moreover, the CCCS has specifically clarified that it is generally not within the purview of the Competition Act to review or to regulate pricing decisions.[56] This is a sensible position for the CCCS to take, because in a *laissez faire* market the market itself should determine what the price of a good or service should be.[57] With these considerations obfuscating how this behavioural remedy ought to be implemented and monitored, this potentially renders the CCCS's enforcement effort useless as the remedy falls short of its intended purpose.[58]

35. Third, and in a related vein, behavioural remedies are in constant conflict with the firm's fundamental profit-maximising incentive.[59] This of course, depends on the assumption that all businesses are rational and self-interested, and therefore will always seek to maximise their profits, but it largely holds true. Coupled with the fact that the interpretation of the remedies is already inherently debatable, we can expect Grab to get creative in attempting to skirt the boundaries of the remedies, or at least minimise the negative effects on its profit margins.

36. An example that would strike a chord with many of Grab's regular users would be the overhauling of its discounts system. Following the merger, commuters have reported forking out more money for their rides, as Grab no longer dishes out promotional codes and discounts like it used to.[60] In response, Grab has been

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56 Competition and Consumer Commission Singapore, "CCS Responds to Fee Increase by NETS" (25 June 2007) <https://www.cccs.gov.sg/media-and-publications/media-releases/ccs-responds-to-fee-increase-by-nets> (accessed 10 November 2018).

57 Richard Whish, "Abuse of a Dominant Position" in Cavinder Bull and Lim Chong Kin (eds), *Competition Law and Policy in Singapore* (Academy Publishing, 2nd Ed, 2015) at p 172.

58 Kwoka and Moss, "Behavioural merger remedies: Evaluation and implications for antitrust enforcement", *supra* n 48, at 1000.

59 *Id*, at 1000–1001. See also John Kwoka, "Merger Remedies: An Incentives/Constraints Framework" (2017) 62(2) The Antitrust Bulletin 367 at 372.

60 Cynthia Choo, "The Big Read: When the music stops, Uber-less reality hits commuters and drivers"

quick to defend that its fare structure has remained the same[61] and that they are simply shifting towards a "more exciting" rewards-based system where points earned from taking Grab rides can be exchanged for other goods and services.[62] In reality, it is obvious that this is part of Grab's strategy to recoup its losses from the days of fierce competition for market share,[63] and is arguably not caught by the remedies ordered by the CCCS.

V. Is the imposition of financial penalties a sufficient deterrent?

37. By now, one can imagine just how tied the CCCS's hands were when dealing with the merger and attempting to address its anti-competitive effects. It had one last measure in its arsenal of tools – the imposition of financial penalties – a punitive measure to reflect the seriousness of the infringement of the Competition Act and to deter both the infringing parties and other undertakings from engaging in anti-competitive practices.[64] In this case, the option to impose financial penalties on Grab and Uber was open, as it was clear that the infringement was committed intentionally, pursuant to section 69(3) of the Competition Act. Again, the pertinent question is whether the penalties would actually have sufficient teeth to achieve its policy goals. Unfortunately, this essay argues that this is not the case.

A. The statutory limit in the Competition Act

38. First, the statutory limit provided by section 69(4) of the Competition Act on the financial penalty that the CCCS is able to impose on Grab and Uber is 10% of the respective parties' annual turnover in Singapore. The concept of a statutory limit is in line with international practice, as most jurisdictions provide for a maximum amount of pecuniary penalties that can be imposed for competition law infringements.[65]

Channel NewsAsia (22 May 2018) <https://www.channelnewsasia.com/news/singapore/no-uber-grab-hits-commuters-drivers-hard-no-incentives-promos-10253762> (accessed 10 November 2018).

61 *Ibid*.

62 Low Youjin, "Loyalty rewards more exciting than promo codes, says Grab Singapore head" *Today Online* (7 May 2018) <https://www.todayonline.com/singapore/loyalty-rewards-more-exciting-promo-codes-says-grab-singapore-head> (accessed 10 November 2018).

63 Choo, "The Big Read: When the music stops, Uber-less reality hits commuters and drivers", *supra* n 55.

64 Competition and Consumer Commission Singapore, *CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases 2016* (December 2016) at para 1.7.

65 Organisation for Economic Co-operation and Development, "Pecuniary Penalties for Competition Law Infringements in Australia" (2018) at p 52.

39. However, a major point of divergence is that the prevailing practice by major jurisdictions such as the European Union and the United Kingdom pegs the limit to a percentage of the relevant undertaking's worldwide, instead of local turnover.[66] Given that Singapore is a small market economy, Singapore's choice to peg the limit to the undertaking's annual local turnover would undoubtedly reduce the deterrence effect of the penalties on multinational corporations such as Grab and Uber.

40. A more serious problem lies on a theoretical level. A statutory limit with clear and assessable indicia inevitably reduces the penalty to a sum that is easily quantifiable and estimated ahead of the merger, thus allowing parties to a merger transaction to factor this sum into the deal as a transaction cost. Anecdotal evidence in the context of cartels have demonstrated that businesses often treat administrative fines as collateral costs of doing business, often because the illegal profits they are able to earn would exceed these fines.[67] Indeed, investigations by the CCCS revealed that Grab and Uber had already structured a mechanism in their deal to apportion eventual financial penalties.[68] Arguably, the idea of a statutory limit undermines the policy objective of deterrence, as the penalties are simply reduced to a quantifiable factor to be considered in a cost-benefit analysis whether or not to act in conformity with or in contravention of competition law.[69]

B. The penalties are only limited to corporate fines

41. Another factor limiting the punitive effect of the CCCS's response is the fact that the penalties in the Competition Act are limited to corporate fines, without any individual liability on the part of officers of the entities. This stands in contrast to some jurisdictions, like the United States,[70] which have embraced the idea of criminalising

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66 *Ibid*.

67 William E. Kovacic, Florian Wagner-von Paap, Daniel Zimmer and Andreas Stephan, "Individual Sanctions for Competition Law Infringements: Pros, Cons and Challenges" (2016) Concurrences Review N° 2-2016 14 at 41.

68 Competition and Consumer Commission Singapore, CCCS Provisional Infringement Decision, *supra* n 6, at [16].

69 Kovacic et al., "Individual Sanctions for Competition Law Infringements: Pros, Cons and Challenges", *supra* n 62, at 30.

70 In the United States, violation of the Sherman Act is felony and corporations and individuals involved in cartel activity have been pursued in criminal proceedings. *See* Sherman Antitrust Act 26 Stat. 209, 15 USC (US) §2 (1890).

particular infringements of competition law. This is underpinned by similar notions of deterrence, except that it targets directly the individual actors who are the masterminds of anti-competitive schemes. As eloquently put by Liman:

> For the purse snatcher, a term in the penitentiary may be little more unsettling than basic training in the army. To the businessman, however, prison is the inferno, and conventional risk-reward analysis breaks down when the risk is jail. The threat of imprisonment, therefore, remains the most meaningful deterrent to antitrust violations.[71]

42. However, while the ideological rationale for criminalising infringements of competition law is clear and strong, the reality is that criminalisation remains a hotly contested and controversial issue. Some critics have argued that criminalisation is an extreme form of regulatory control.[72] Furthermore, given that criminal law is unique in having a moral signaling function, it would be wrong to use criminal law to enforce competition law offences when they are not clearly underpinned by the prevention of social harm and by morality.[73] Therefore, the trend towards "over-criminalisation" simply for the aim of achieving deterrence risks eroding the credibility of criminal law.[74] As such, jurisdictions are far from unanimous in criminalising infringements of competition law. Where they do so, it is usually reserved only for what is perceived to be the most egregious infringement, *viz* cartelisation.

43. A less controversial alternative to consider would be director disqualification orders. This was spearheaded by the United Kingdom, where under the Company Directors Disqualification Act 1986, the Competition and Markets Authority can seek the disqualification of an individual from holding company directorships for a maximum of 15 years if the individual has been a director of a company that has infringed competition law, either on a national or supranational (European) law.[75] Director disqualification, while undoubtedly not as strong a deterrent as imprisonment, can nevertheless be more effective than civil fines on individuals, which can be readily

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71 A.L. Liman, "The Paper Label Sentences: Critique" (1977) 86 Yale Law Journal 619 at 630–631.

72 Kovacic et al., "Individual Sanctions for Competition Law Infringements: Pros, Cons and Challenges", *supra* n 62, at 41.

73 *Ibid*.

74 *Ibid*. See also Alison Jones and Rebecca Williams, "The UK Response to the Global Effort Against Cartels: Is Criminalization Really the Solution?" (2014) Journal of Antitrust Enforcement 1 at 11–16.

75 Company Directors Disqualification Act 1986 (UK) s 9A.

indemnified by the corporation.[76] It may also have a stigmatic effect and send a moral message[77] that as part of their fiduciary duties, directors are responsible for actively ensuring compliance with competition law.[78]

VI. What now?

44. At present, Grab has accepted the CCCS' decision and (presumably) paid the S$6.42m anti-competition fine, while Uber's separate appeal is now before the Competition Appeal Board.[79] Nevertheless, the parties appear to have emerged largely victorious in its midnight merger scheme. They had exploited the fact that the CCCS operated on the voluntary notification system, which resulted in repercussions on the types and range of remedies the CCCS was realistically and practically able to order. The effectiveness of the remedies may also be subject to further questioning. Further, due to a sanctions framework in place that is arguably lacking teeth, the deterrence and punitive effect of the CCCS's imposed penalties would unfortunately be less than optimal.

45. This unprecedented case demonstrates serious implications for Singapore's competition regime and policy. The sharing economy has burgeoned at an unprecedented rate in the recent decade and has been estimated to generate a market worth more than USD$335 billion by 2025.[80] It has ushered in a paradigm change as to how business is being done in the twenty-first century, and as *Wall Street Journal* aptly puts it – there's an Uber for everything now.[81] In the local scene, we are already

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76 Wouter P.J. Wils, "Is Criminalization of EU Competition Law the Answer?" in Katalin J. Cseres, Maarten Pieter Schinkel and Floris O.W. Vogelaar (eds), *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States* (Edward Elgar Publishing, 1st Ed, 2006) at pp 86–87.

77 *Ibid*.

78 See Competition and Markets Authority, "Competition Disqualification Orders: Draft guidance" (26 July 2018) at 9–10.

79 See "Grab will pay S$6.42m anti-competition fine but Uber appealing Singapore watchdog's decision" *The Business Times* (22 October 2018) <https://www.businesstimes.com.sg/transport/grab-will-pay-s642m-anti-competition-fine-but-uber-appealing-singapore-watchdogs-decision> (accessed 9 June 2019) and Zhaki Abdullah, "Uber's $6.58m fine suspended amid appeal" *The Straits Times* (2 April 2019) <https://www.straitstimes.com/singapore/transport/ubers-658m-fine-suspended-amid-appeal> (accessed 9 June 2019).

80 PricewaterhouseCoopers, "The Sharing Economy" (2015) <https://www.pwc.fr/fr/assets/files/pdf/2015/05/pwc_etude_sharing_economy.pdf> at 14 (accessed 10 November 2018).

81 Geoffrey A. Fowler, "There's an Uber for Everything Now" *Wall Street Journal* (5 May 2015) <https://www.wsj.com/articles/theres-an-uber-for-everything-now-1430845789> (accessed 10 November 2018).

witnessing a flurry of movement of such entities into the Singapore market – in the ride-sharing industry alone, the departure of Uber has almost immediately attracted the influx of new competitors such as Ryde and Go-Jek.[82] The Grab-Uber merger may well be the tip of the iceberg of a new generation of mergers as we usher in this new era of the sharing economy.

46. Law and policies are never static as they continuously evolve to adapt to the changing times. On an international level, the sharing economy revolution has already triggered discussions on how competition tools that are used to define markets, assess market power and efficiencies, may be better re-designed or re-interpreted.[83] The time for the CCCS and the legislature to likewise react and update its regime is long overdue.

82 See, *eg*, Nitin Pangarkar, "Commentary: When Go-Jek enters Singapore, what consumers, drivers and delivery services can expect" *Channel NewsAsia* (7 June 2018) <https://www.channelnewsasia.com/news/commentary/commentary-when-go-jek-enters-singapore-what-to-expect-10395436> (accessed 10 November 2018).

83 See, *eg*, Organisation for Economic Co-operation and Development, "Rethinking Antitrust Tools for Multi-Sided Platforms 2018" (April 2018).