The Grab-Uber deal

Merger or market-sharing agreement?

The Grab-Uber merger has implications for competition law and long-term commuting behaviour, and deserve careful scrutiny, say two experts

Burton Ong

For The Straits Times

Now that the Grab-Uber deal is being carefully scrutinised by the Competition and Consumer Commission of Singapore, there is immense public interest in whether, realistically, anything can be done to prevent the market from being monopolised by the reduction in the number of private vehicle ride-hailing service providers from two to one.

This may well depend on how the competition authority chooses to characterise the conduct of the parties, raising interesting legal and policy questions about the intersection between Sections 34 and 54 of the Competition Act.

While many may have described the Grab-Uber deal as a "merger" between these market players, closer scrutiny of the factual details that have emerged may suggest that this may not the most accurate way of understanding the nature of this transaction and that it might be better understood as a market-sharing agreement.

Section 54 of the Competition Act prohibits mergers that have resulted, or may be expected to result, in a substantial lessening of competition within any market in Singapore.

Mergers are defined in the Act as occurring when two previously independent undertakings become one single undertaking; when one undertaking acquires direct or indirect control over another undertaking; or when an undertaking acquires ownership of another undertaking's assets, thereby placing the former in a position to replace the latter in the business that the latter was engaged in before the acquisition.

In the case of the Grab-Uber deal, what exactly does Grab acquire from Uber in exchange for 27.5 per cent of Grab's shares? The transaction has been described by industry watchers as "asset light" because the deal does not entail Grab's acquisition of Uber's vehicles, which are owned by Uber's Lion City Rentals.

Neither does it cover Uber's employees or contracts with Uber drivers. It may or may not cover any of Uber's algorithms – but this is unlikely, given that such trade secrets are of immense strategic value in the other markets outside South-east Asia where Uber will continue to operate.

It may include Uber's customer data, but the value of this asset is not going to be very significant if we assume that most of Uber's customers have already installed Grab's application on their mobile devices, submitting their phone numbers and other personal data through their interactions with Grab. There is no merger of the Uber and Grab mobile apps, and it appears that Grab does not get any rights to use any of the intellectual property rights protecting the Uber brand. Uber simply vanishes from the market.

In the light of the above, even if this were a "merger" that the competition authority was prepared to block for violating the Section 54 prohibition, the remaining market player would continue to reap the economic benefits of the absence of its only serious market rival in the "post-merger" market.

Short of compelling Uber to re-enter the market and resurrect its business operations, it would appear that unwinding this "merger" would do little to rectify the anti-competitive effects of this transaction. New market entrants might try to enter the market, but it seems highly unlikely that they will be in a position to offer a serious competitive challenge to Grab. Any aspiring market entrant would have to be prepared to burn heaps of cash to get drivers and passengers to switch service providers. The relatively small size of the Singapore market, the availability of reliable public transport options and the extensive land transport regulatory framework should make potential competitors think thrice before going up against the incredibly well-funded and well-established Grab.

Might it be more accurate to regard the Grab-Uber deal as a market-sharing agreement instead of a merger? In essence, should the deal be regarded, instead, as Grab "paying" for Uber's exit from the Singapore market with a substantial stake in Grab's business?

If so, then the competition authority has an additional legislative tool at its disposal to tackle the competition problems arising from the transaction.

Section 34 of the Competition Act prohibits agreements that have as their object or effect the prevention of competition. This prohibition would include agreements between competitors to divide up markets between themselves – whether on a 50 per cent to 50 per cent basis or a 100 per cent to 0 per cent basis. Market-sharing agreements are, in essence, agreements between competitors not to compete in each other's "designated" territories. They are specifically identified in the commission's guidelines as paradigm examples of anti-competitive agreements. Uber may be construed to have agreed not to compete with Grab in South-east Asia, while Grab may be construed to have agreed to stay out of other markets where Uber continues to operate in.

In Europe, pharmaceutical companies which manufacture brand-name versions of medicines have had heavy fines imposed upon them by competition authorities for striking deals with generic drug manufacturers to keep the latter out of the market. The proceedings that have been brought against Lundbeck and Servier, drug makers from Denmark and France, respectively, are illustrative of these so-called "pay-for-delay" agreements, where one party essentially agrees to compensate the other for not competing in the market, thereby allowing the former to maintain its position of market dominance and charge higher prices than it would have been able to if it had to face competition. Similarly, paying off one's competitor to exit the market might also be regarded as an anti-competitive agreement that attracts similar legal sanctions.

In Singapore, the competition authority has had plenty of experience levying fines on competitors that have engaged in price-fixing, bid-rigging, the sharing of sensitive price information as well as collusion with each other against a common rival to achieve their anti-competitive objectives. Perhaps the time has come to add a decision on market-sharing conduct to its repertoire?

It is submitted that a substance-over-form approach should be taken when evaluating the conduct of the parties in the Grab-Uber deal. That the parties failed to notify the competition authority of their "merger" before the deal was closed and implemented raises many questions about their underlying strategic motivations.

The challenge for our national competition authority and the competition authorities of all the other South-east Asian jurisdictions affected by the deal (most of which also have similar competition laws prohibiting anti-competitive agreements) is to provide a robust response to this bold, and slightly obvious, attempt to eliminate competition in the private vehicle ride-hailing market.

stopinion@sph.com.sg

• Burton Ong is Associate Professor, Faculty of Law, National University of Singapore.

That Grab and Uber failed to notify Singapore's competition watchdog of their "merger" before the deal was closed and implemented raises many questions about their underlying strategic motivations, says the writer. ST PHOTO: KUA CHEE SIONG

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