

## Competition law

# Why dominant and small players are treated differently

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For The Straits Times

Having issued a provisional infringement decision against Grab for violating Singapore's competition law prohibition against mergers that substantially lessen competition, the Competition and Consumer Commission of Singapore (CCCS) has proposed a number of striking behavioural remedies to help restore the competition that was eliminated when Uber ceased its local operations and "merged" with Grab.

In March, news broke that ride-hailing company Grab acquired its US-based competitor's Singapore and South-east Asian operations for an undisclosed sum.

Uber exited the market in return for a 27.5 per cent stake in Grab.

The CCCS found that the merger had substantially lessened competition, made it harder for new competitors to enter the market and resulted in higher prices. It proposed a series of remedies for Grab to comply with.

One of these is a restriction on Grab's ability to engage drivers on an exclusive basis, a measure that facilitates the contestability of the private vehicle ride-hailing market, by keeping the market open to new market entrants that require access to as many drivers as possible to service their customers.

Is it unfair to forbid Grab from having exclusive dealing arrangements with its drivers, while its smaller rivals remain at liberty to engage in such commercial practices?

Are such restrictions "one-sided" and do they employ a

"double standard" against Grab?

Perhaps. However, there are legitimate reasons why the competition authority might restrict a dominant firm's freedom to engage in certain forms of conduct that would otherwise be unobjectionable if carried out by another competitor that lacked the same market power.

Exclusivity arrangements can be pro-competitive or anti-competitive, depending on the market circumstances in which such practices are deployed.

On the one hand, they can enhance the competitiveness of a smaller market player by enabling it to expand its operations by taking on more jobs, secure in the knowledge that it has the undivided attention and resources of its exclusive partners.

On the other hand, they can be harmful to competition by raising barriers to market entry, protecting the market position of a dominant incumbent by preventing new rivals from gaining access to the service providers or resources they need to compete effectively in the market.

The experience of competition authorities around the world has been that exclusivity arrangements are more likely to be harmful to competition when they are imposed by entities in a position of market dominance.

Because they wield enough market power, they can exclude their rivals from the market by "locking in" suppliers, distributors or other service providers that all market players need access to in order to compete effectively.

In contrast, such market foreclosure effects are unlikely to arise if the exclusivity arrangements are pursued by non-dominant market players.

Instead, a smaller market player

that is able to convince others to partner with it on an exclusive basis might be able to mount a stronger competitive challenge against the dominant incumbent in the marketplace, thereby keeping the latter's market power in check.

It is thus disingenuous for market players to cry foul when the competition authority imposes behavioural restrictions on one of them but not the others.

Unlike competitions of sporting skill or creative ability, the "level playing field" for competitors in the marketplace does not mean absolute equality between all contestants.

Sure, when it comes to boxing, heavyweight fighters do not compete in the same ring as featherweight contestants.

Cooking competitions do not pit amateur home cooks against professionally trained chefs.

But in the realm of commerce, big supermarkets compete with neighbourhood convenience shops. Enterprises of vastly different sizes are expected to jostle with one another for the same customers.

The "level playing field" that competition law is concerned with is ultimately about ensuring markets are open to competition, prohibiting conduct or imposing remedial measures that are necessary to create, and sustain, opportunities for competition to take place.

What this means is that conduct which, if carried out by a competitor with market power, might exclude competitors from the market and damage the competitive process as a whole should be regarded as unlawful.

For those who are watching the confrontation between Grab and the CCCS closely, the tricky question is whether the Uber-Grab merger has, in fact, elevated Grab into a position of market dominance.

Well, that depends on how the relevant market is actually defined.

For a start, we should distinguish between the market for providing ride-hailing booking services – what the CCCS has called the provision of chauffeured point-to-point transport platform services – and the market for the provision of passenger transportation services.

The former market consists of the total volume of all the bookings made by passengers seeking single-trip transportation by car, while the latter consists of all the fleets of cars controlled by taxi

companies, vehicle rental companies and private individuals. Grab is not a market player in the latter market and it does not have any vehicular assets of its own.

To determine if Grab is a dominant market player in the market for taking ride-hailing bookings from the public, and matching passengers to drivers who provide point-to-point transportation services, one needs to look at the volume of such bookings made over Grab's network vis-a-vis other booking platforms.

It is in this light that the CCCS' findings that "taxi-booking services pose an insufficient competitive constraint... with less than 15 per cent market share" should be understood.

Finally, the remedial measures proposed by the CCCS are intended to last only as long as they are needed to facilitate competition in the market – which is in itself a very open question, given the fluidity of the current market circumstances.

Any prohibition against Grab entering into exclusive dealing with its drivers will not be entirely absolute or perpetual – it may be revised, relaxed or removed as the degree of market power changes with the entry and growth of new rivals.

Here is where we have to acknowledge that competition law is not an exact science.

Much like the culinary arts, the goal is not to produce a single ideal state of affairs, but rather to steer the behaviour of market players within a zone of palatable outcomes. Expecting the market to "sort itself out" or letting market forces reach their own equilibrium is akin to asking a chef to disregard the temperature of his oven or the volume of liquid in his broth and hope that his ingredients end up coalescing into something edible.

Just as the chef must concoct a sauce that will complement the flavours of the particular protein he is cooking with, the competition authority should be expected to devise specific remedial responses targeted at reversing the anti-competitive effects of a dominant firm's misconduct.

In this case, what is sauce for the goose should not be regarded as sauce for the gander.

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Any prohibition against Grab entering into exclusive dealing with its drivers will not be entirely absolute or perpetual, says the writer. It may be revised, relaxed or removed as the degree of market power changes with the entry and growth of new rivals, he adds.  
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