IN THE COMPETITION APPEAL BOARD OF THE REPUBLIC OF SINGAPORE

[2020] SGCAB 2

Appeal No 1 of 2018

In the matter of Infringement Decision 500/01/18 issued by the Competition and Consumer Commission of Singapore in relation to the sale of Uber's Southeast Asian business to Grab in consideration of a 27.5% stake in Grab

Between

(1) Uber Singapore Technology Pte Ltd
(2) Lion City Holdings Pte Ltd
(3) Lion City Rentals Pte Ltd
(4) LCRF Pte Ltd
(5) Lion City Automobiles Pte Ltd

… *Appellants*

And

Competition and Consumer Commission of Singapore

… *Respondent*

DECISION

[Competition Law] — [Mergers]

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v
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29 June, 1-2 July 2020

29 December 2020 Decision reserved.

Introduction

1 The Competition and Consumer Commission of Singapore ("CCCS") issued an infringement decision on 24 September 2018 ("the Infringement Decision") arising from the sale of the Southeast Asian business of Uber to Grab on 26 March 2018 ("the Transaction"). As in the Infringement Decision, references in this decision to "Uber" may refer to Uber Technologies, Inc, its subsidiaries and any other related entities including but not limited to Uber Singapore Technology Pte Ltd, Lion City Holdings Pte Ltd, Lion City Rentals Pte Ltd ("LCR"), Lion City Automobiles and LCRF Pte Ltd.[1] Similarly, references to "Grab" may refer to Grab Inc, its subsidiaries and any other related entities, including but not limited to GrabCar Pte Ltd, GrabTaxi Holdings Pte Ltd, GrabTaxi Pte Ltd, Grab Rentals Pte Ltd and Grab Rentals 2 Pte Ltd.[2] Collectively, the parties to the Transaction are referred to as "the merger parties".

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1 See Infringement Decision footnote 4.

2 See Infringement Decision footnote 3.

2 In the main, CCCS found that the Transaction would lead to a substantial lessening of competition ("SLC") in the market for two-sided platforms matching drivers and riders for the provision of booked chauffeured point-to-point transport services ("the Platform Market") in Singapore. Further, Grab would have the ability and incentive to tie chauffeured private hire car ("CPHC") rental companies and drivers who rent from them in exclusive arrangements and reinforce its position in the Platform Market by increasing barriers to entry (see Infringement Decision at [178(a)] and [346]). Accordingly, CCCS found that the Transaction infringed s 54 of the Competition Act (Cap 50B, 2006 Rev Ed), directed a set of remedies (see Annex A) and imposed financial penalties upon the parties.[3]

3 This is an appeal brought by Uber Singapore Technology Pte Ltd, Lion City Holdings Pte Ltd, LCR, LCRF Pte Ltd and Lion City Automobiles Pte Ltd (collectively "the appellants") against the entire Infringement Decision. The appellants submit that the Infringement Decision should be set aside and that the Competition Appeal Board ("CAB") should find that the Transaction did not infringe s 54 of the Competition Act whether it is considered without any voluntary commitments, with the commitments proposed by the merger parties, or with the merger parties giving commitments in the form of the directions imposed in the Infringement Decision (the "Final Directions"). In the alternative, the appellants submit that the infringement was not intentional or negligent, and the part of the Infringement Decision imposing a penalty should be set aside, or alternatively, that the fine be reduced.[4]

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3 CCCS decided on 20 November 2020 to release the directions imposed on Grab in the Infringement Decision, stating that it considered it "timely" to do so "with a sectoral regulatory framework now in place".

4 Appellants' closing submissions para 8.1.

4 After hearing the parties, we reserved judgment. Having considered the evidence and the parties' submissions, we dismiss the appeal, and set out the main reasons for our decision in these grounds.

Background facts

5 On 9 March 2018, CCCS sent a letter to Grab and Uber explaining Singapore's merger notification regime (see Infringement Decision at [2]).[5] Amongst other things, this letter stated that while merger notification in Singapore is voluntary, merger parties should assess whether their transaction may be prohibited under s 54 of the Competition Act, and that CCCS can investigate a merger where it has reasonable grounds for suspecting that the s 54 prohibition will be or has been infringed.[6] Subsequently, on 19 March 2018, Uber sent a letter to CCCS stating that it would reach out to CCCS in the event it entered into an agreement with effects on competition in Singapore.[7]

6 On 23 March 2018, the merger parties informed Mr Herbert Fung Chi Ho ("Mr Fung"), Senior Director of the Business and Economics Division in CCCS, of the proposed Transaction and their intention to submit a post-closing merger notification to CCCS.[8] This was a few days before the Transaction documents were executed. It is common ground that during this call, Mr Fung stated that there was a possibility that CCCS might impose interim measures, although it is disputed whether he went further to say that CCCS had the power

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5 1 CB 28-29; CCCS's closing submissions at Annex A.

6 1 CB 28-29.

7 1 AB(A) 73.

8 Notice of Appeal at para 11; Mr Fung Chi Ho's Witness Statement at para 2.

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to investigate unnotified mergers despite Singapore's voluntary merger notification regime.[9] It is not disputed that CCCS did not request or direct Uber not to proceed with the Transaction.[10]

7 Shortly thereafter, Uber International CV, Apparate International CV and Grab Holdings Inc entered into a purchase agreement dated 25 March 2018 (the "Purchase Agreement") in respect of the Transaction, which closed the same day (specifically, 26 March 2018 Singapore time).[11]

8 CCCS sent a letter on the same day requesting details of the Transaction and asking whether the parties intended to notify it of the Transaction (see Infringement Decision at [3]). On 28 March 2018, the merger parties sent a joint response to CCCS indicating that they intended to submit a joint merger notification in relation to the Transaction no later than 16 April 2018, and that they would "continue to engage with [CCCS], and be available to answer all [of CCCS's] queries".[12] This letter attached a copy of the Purchase Agreement and stated that the merger parties firmly believed that the Transaction did not and would not give rise to any SLC in the Singapore market, alleging that, amongst other things, the pricing of transportation services offered by Grab would continue to be constrained by taxi fares and the possibility that well-funded international players like Lyft or Go-Jek could operate in Singapore. They further stated that a "reversal of changes in the Grab and Uber platforms (in that

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9 Transcript, 2 July 2020, page 18, lines 12 to 19; File Note by Mr Herbert Fung at para 8.

10 Appellants' closing submissions at para 2.3; Transcript, 2 July 2020, page 12, lines 4 to 24.

11 Notice of Appeal at para 13.

12 1 AB(A) at p 88.

[the merger parties] continue to operate separate platforms in Singapore) is not practically, commercially, or operationally possible", pointing to the "loss of consumer and driver confidence in a separate Uber platform with the Transaction announced". It asserted that a requirement to reverse the Transaction and for the merger parties to separately operate the assets sold to Grab would be unprecedented, and that the anti-trust regulations provided for other remedies to address the concerns. In this regard, it pointed to Exhibit 6.4(b) of the Purchase Agreement ("Proposed Remedies and Cost-Sharing Mechanism", which contained possible commitments that the merger parties had contractually agreed to.[13]

9 On 30 March 2018, CCCS issued its Notice of Proposed Interim Measures Directions ("PIMD"). Uber's response on 4 April 2018 indicated that the transfer of the assets acquired by Grab had commenced from the point of closing. In particular, contracts with, and certain data on, riders, drivers, "eaters" and delivery partners in Singapore were transferred on 26 and 27 March 2018. The response also indicated that Uber's Singapore business had shrunk significantly since the Transaction was announced – […].[14] Grab sent responses to the PIMD to CCCS on 6 April 2018 and on 10 April 2018.[15] Subsequently, the Interim Measures Directions ("IMD") were issued on 13 April 2018 under s 67 of the Competition Act. After Smith & Williamson LLP was appointed the independent monitoring trustee, it found three breaches of the IMD between the point it was appointed and 3 September 2018, including that (a) Uber's platform was not available for 9 hours and 51 minutes; (b) Grab received operational data

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13 1 AB(A) at pp 90 to 92 and 271 at paras 1.16, 1.21 and 1.22; see also Notice of Appeal at para 131(a).

14 1 CB 153 at para 23.

15 1 CB 182; CCCS's closing submissions Annex A.

from Uber in or around June or July 2018 and also retained the personal data of Singaporean riders that had not chosen to move to the Grab platform following the data transfer; and (c) Grab entered into agreements with at least […] "New Drivers" on an exclusive basis (Infringement Decision at [10]).

10 On 16 April 2018, CCCS received a joint notification from the merger parties under s 58 Competition Act for a decision on whether the Transaction had infringed s 54 Competition Act. CCCS replied on 24 April 2018 to state that since it had commenced an investigation with effect from 27 March 2018 (and informed the merger parties of this on 30 March 2018), the application under s 58 no longer needed to be made. However, CCCS confirmed that it would take into consideration the information submitted with the application in its investigations.[16] The following steps, amongst others, were subsequently taken by the merger parties and CCCS:

(a) 14 June 2018: Grab submitted its first set of voluntary commitments.[17] This was accompanied by a report prepared by economic consultants engaged by the merger parties, Charles River Associates ("CRA").[18]

(b) 18 June 2018 and 25 June 2018: the merger parties met with CCCS for the state-of-play meetings. In these meetings, CCCS promised to provide feedback on the voluntary commitments.[19]

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16 2 CB 471 at paras 4 and 5.

17 2 CB 570.

18 1 AB(G) at p 123.

19 Bundle of Witness Statements Vol 1 at pp 39 and 40; paras 36 to 39.

(*cont'd on next page*)

(c) 4 July 2018: Grab submitted clarification and responses to observations made by CCCS during the first two state-of-play meetings.[20]

11 On 5 July 2018, CCCS issued the Proposed Infringement Decision ("PID"). Subsequently, the merger parties made further representations, including:

(a) 26 July 2018: the merger parties submitted written representations on the PID and their respective sets of voluntary commitments ("the Second Set of Commitments").

(b) 2 August 2018: the merger parties made oral representations on the PID and the Second Set of Commitments.[21]

(c) 3 August 2018: Grab submitted written representations on the second file inspection documents.

(d) 3 and 6 August 2018: Further responses were submitted by Uber to questions posed by CCCS.

(e) 3 and 6 September 2018: Written representations were submitted following the (third) file inspection and on the confidentiality ring documents.[22]

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20 Bundle of Witness Statements Vol 1 at p 40; para 39.

21 CCCS's closing submissions Annex A; Bundle of Witness Statements Vol 1 at p 41 para 46.

22 CCCS's closing submissions Annex A.

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(f) 11 September 2018: Third state of play meeting requested by the merger parties took place. CCCS gave the merger parties until 5pm on 13 September to provide further submissions on the voluntary commitments.[23]

(g) 13 September 2018: Grab submitted its proposed revisions to its set of voluntary commitments submitted on 26 July 2018. Uber sent a letter to CCCS setting out its responses to the comments made by CCCS and indicating that it would send a revised set of voluntary commitments the next day.[24]

(h) 17 September 2018: Uber submitted its revisions to the Second Set of Commitments.[25]

12 As alluded to above, the merger parties were also allowed to inspect CCCS's case file at various points, although concerns have been raised as to the extent to which access was allowed. The revised commitments proposed by the merger parties in September are collectively referred to as "the Third Set of Commitments". CCCS then issued the Infringement Decision on 24 September 2018 in which it found that the Transaction infringed s 54 of the Competition Act, issued directions (see Annex A below) and imposed financial penalties requiring that Uber pay S$6,582,055 and Grab pay S$6,419,647 (Infringement Decision at [439]). In the interest of brevity, we set out CCCS's findings in the Infringement Decision, as well as the parties' submissions on appeal, as they become relevant in the sections below.

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23 Appellants' closing submissions at para 2.9.

24 3 CB 560 – 568.

25 3 CB 569.

Issues to be determined on the appeal

13 The present appeal raises a large number of closely interrelated questions. The parties helpfully agreed on a list of issues, which we draw from to a large extent. In our judgment, the issues to be determined are:

(a) what the standard of review to be applied in this appeal is ("Issue 1");

(b) whether, in considering whether the Transaction resulted in a SLC, CCCS (and by extension the CAB) is concerned with assessing the Transaction *as modified by* the voluntary commitments offered by the merger parties and, relatedly, the extent to which CCCS had a discretion *not* to accept the commitments offered by the merger parties ("Issue 2");

(c) whether the Transaction resulted in a SLC ("Issue 3"):

(i) what the appropriate counterfactual was;

(ii) what the relevant market was;

(iii) whether Go-Jek's entry was sufficient in likelihood, scope and timeliness to pose a sufficient competitive constraint on Grab post-Transaction particularly in light of the barriers to entry (if any); and

(d) to the extent relevant, whether the voluntary commitments offered by the merger parties were sufficient and appropriate to address the competition concerns (if any) arising from the Transaction ("Issue 4").

(e) whether there was a breach of due process in CCCS's conduct of the investigation on the Transaction which would vitiate the finding of infringement ("Issue 5"); and

(f) assuming that the Transaction infringed s 54 of the Competition Act, whether the appellants committed the infringement intentionally or negligently; and if the infringement was intentional or negligent, whether the penalty imposed in the Infringement Decision was appropriate ("Issue 6").

14 The parties also each relied on evidence from their economic consultants: CCCS on Mr Benoît Durand of RBB Economics LLP ("RBB") and the appellants on Dr Cristina Caffarra of CRA. We turn now to address each of these issues in turn.

Issue 1: Standard of review

15 The parties disagree on what the standard of review before the CAB is. We note here for completeness that there initially appeared to be some dispute as to whether evidence of events which transpired after the Infringement Decision had been issued can or should be taken into account for the present appeal.[26] However, CCCS's closing submissions made clear that its position is that the CAB has a:[27]

> … wide discretion in considering post-[Infringement Decision] evidence, whether from a historical perspective (to assess the correctness of CCCS's [Infringement Decision] in 2018), or from a forward-looking perspective (to make a decision of a kind that CCCS, if still seized of the matter, could have made on the basis

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[26] See, for example, Transcript, 2 July 2020, page 48, line 22 to page 49, line 8.

[27] CCCS's closing submissions at para 39.

> of the material now available). In the present appeal, the material piece of post-[Infringement Decision] evidence is Go-Jek's actual entry. CCCS submits that, when Go-Jek's entry is viewed in its proper and complete context, it does not lead to a conclusion that the Transaction did not result in an SLC, be it from a historical or forward-looking perspective. … Therefore, *CCCS agrees that CAB may consider post-[Infringement Decision] evidence on Go-Jek's entry in this case*. In fact, CCCS urges CAB to consider the full context of such evidence.
>
> [emphasis in original omitted; emphasis added in italics]

16 The excerpt above from CCCS's closing submissions puts to rest much of any disagreement on the extent to which the CAB may consider post-Infringement Decision evidence. We therefore proceed, in this decision, on the basis that the CAB may admit and consider post-Infringement Decision evidence. This position would in any case *prima facie* accord with the plain language of reg 22(2) of the Competition (Appeals) Regulations (Cap 50B, Rg 5, 2006 Rev Ed), which states that the CAB "may admit or exclude evidence, whether or not the evidence was available when the contested decision was made".

17 Nevertheless, there appears to be some disagreement as to whether the appeal in the present case is a "*de novo*" hearing. The appellants argue that the present appeal is a *de novo* hearing on the merits, referring to s 73(8) of the Competition Act, pursuant to which the CAB may give such direction, take such other step, or make such decision as CCCS could itself have made. The Standard of Review by Courts in Competition Cases, produced by CCCS and submitted to the Organisation for Economic Co-operation and Development ("OECD") dated 29 May 2019 ("OECD Note") states that the CAB is vested with the right to "review on all points of fact and law *de novo*",[28] including an unlimited

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[28] Appellants' closing submissions at para 3.3.

review of the evidence and a full review on the merits. This was contrasted with judicial review, under which the CAB would be concerned with the legality of the decision made by CCCS. Accordingly, the appellants contend that it is unnecessary to show that there has been a manifest error or that the Infringement Decision is one which no reasonable authority would have made.[29]

18 In contrast, CCCS submits that this appeal is *not* a *de novo* hearing "akin to the exercise of original jurisdiction … [to be conducted] as if the original hearing did not take place [emphasis from original]". This is since s 71(1) of the Competition Act indicates that the appeal is "against, or with respect to" CCCS's decision, and the statutory framework means that the CAB must focus its inquiry on CCCS's decision instead of considering the matter afresh. This means that the CAB must "take into account [CCCS's] findings on the matter" as a starting point.[30] The appeal should be determined on the basis of whether CCCS's decision was *wrong in a material respect*.[31] This is the test adopted under the relevant provisions of the UK Competition Act 1998, which contains similar provisions to those under Singapore's Competition Act. Material errors may include failing to take account of relevant evidence, taking into account irrelevant evidence, failing to properly construe significant documents or evidence, drawing inferences of fact about relevant matters which are illogical or unjustified, or failing to adequately or sufficiently investigate an issue which the appellate board considers to be relevant or material (citing *The Competition and Markets Authority v Flynn Pharma Limited and others* [2020] EWCA Civ 339 ("*Flynn Pharma*") at [145]). On this approach, the CAB may conclude that

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29 Appellants' closing submissions at paras 3.3 and 3.4.

30 CCCS's closing submissions at para 8.

31 CCCS's reply submissions at para 5.

(*cont'd on next page*)

the approach taken by CCCS and its resultant findings were reasonable in all the circumstances and refrain from interfering upon that basis.[32]

Our decision

19 There is no question that the present hearing is one in which the CAB is to assess the substantive correctness of CCCS's decision and is entitled to substitute CCCS's decision with its own. The main question is whether any deference should be given to the CAB's decision, or if the matter should be considered afresh (see *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [41]). Specifically, the question is whether the CAB may interfere with CCCS's decision even if the Infringement Decision was not wrong in a material respect.

20 Before we go into the issue of the standard of review, we highlight that the parties are now in agreement that the CAB may consider post-Infringement Decision events, particularly, Go-Jek's entry (see [15] above).

21 In our view, the task before the CAB is to conduct a full review on the merits, as CCCS itself stated in its OECD Note, and, in appropriate cases, to substitute its own decision for CCCS's. As we explain below, this may be where CCCS's decision was wrong in any material respect, or where this is necessitated by new evidence not available to CCCS at the time of its decision.

22 In *Flynn Pharma* ([18] *supra*), which we were referred to by both parties, the English Court of Appeal considered the role and limits of appellate

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[32] CCCS's closing submissions at paras 7 to 13.

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intervention by the Competition Appeal Tribunal ("CAT") with the CMA's decision. The parties each contend that the decision in *Flynn Pharma* supports their position.[33] In gist, the relevant portions of *Flynn Pharma* hold that the existence of a margin of discretion accorded to a competition authority does not dispense with the requirement for an "in depth review of the law and of the facts" by the supervising judicial body (at [140]), and that:

> 141 Notwithstanding the above the jurisdiction of the [CAT] is not unfettered. This flows primarily from the fact that the appeal is not a *de novo* hearing but takes the decision as its starting, middle and end point. … The appellant must identify the decision under appeal and set out why it is in error. …
>
> 142 The Tribunal can hear evidence, including fresh evidence not before the CMA, and make findings of both fact and law. …
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> 143 In *T-Mobile v Ofcom* [2008] EWCA Civ 1373 it was observed that the task of the [CAT] was not to serve as a "fully equipped duplicate regulatory body waiting in the wings just for appeal". It is to "look into whether the regulator has got something materially wrong". The reference to materiality is important. The [CAT] should interfere only if it concludes that the decision is wrong in a material respect. Whether an error is material will be a matter of judgment for the [CAT]. …
>
> 144 First, materiality is not an exact science. The Tribunal might be able to do no more than conclude that an error might make a difference to the final outcome or to some significant component thereof; certainty might not be possible. …
>
> 145 Second, there is no fixed list of errors that the [CAT] might consider material. Case law indicates that the following might be relevant: failing to take account of relevant evidence; taking into account irrelevant evidence; failing properly to construe significant documents or evidence; drawing inferences of fact from evidence about relevant matters which are illogical or unjustified; failing adequately or sufficiently to investigate an issue that the [CAT] considers to be relevant or potentially relevant to the analysis. Ms Bacon QC, for Flynn, cited Case C-272/09P *KME Germany v Commission* EU:C:2011:810 (8th December 2011) at paragraph [94] as illustrative and analogous. The Court, in the context of a judicial review,

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[33] Appellants' closing submissions at para 3.7; CCCS's reply submissions at para 5.

> explained that because the Commission enjoyed a "margin of discretion with regard to economic matters" that did not mean that the Court would refrain from reviewing the Commission's interpretation of the evidence, its factual accuracy, its reliability, its consistency and also "…whether that evidence contains all of the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusion drawn from it…".
>
> 146 Third, but importantly, it is consistent with a merits appeal for the [CAT], even having heard the evidence, to conclude that the approach taken by the CMA and its resultant findings are reasonable in all the circumstances and to refrain from interfering upon that basis. If the [CAT] considers that the findings of the CMA are reasonable it might be difficult to say that any findings that it arrives at which differ from those of the CMA are material. The [CAT] in the present case indicated as much at various points in the Judgment. This point was also made by the Tribunal in *Albion Water v Water Services Regulation Authority* [2008] CAT 31 at paragraph [72]. Because the [CAT] has a full merits jurisdiction and can hear fresh evidence there could of course arise circumstances where the [CAT] finds that on the evidence before the CMA it arrived at a reasonable conclusion but on the basis of the new evidence before the [CAT] the CMA's conclusions were nonetheless wrong. Such cases may be rare, but the possibility necessarily arises because of the power of the [CAT] to receive and assess fresh evidence.
>
> [emphasis from original omitted]

23 We accept that *Flynn Pharma* is persuasive as to the position in Singapore on the limits of appellate intervention by the CAB. The above passages, in our view, quite clearly indicate that the CAB's task is to conduct an in-depth, full review of the law and the facts, examining the areas in which the appellants contend that CCCS erred in the Infringement Decision, and *ascertaining whether CCCS had erred in any material respect*. They also indicate the "rare" circumstances in which the CAT finds that, although the CMA arrived at a reasonable conclusion based on the evidence before it, the conclusion is nonetheless wrong in light of the new evidence before the CAT. In the present case, we are of the view that the decision of CCCS was reasonable

and there were no errors in any material respect, as discussed subsequently in these grounds.

24 We turn now to consider the substance of the appeal before us.

Issue 2: The merger to be considered and voluntary commitments offered

25 We now consider two inter-connected questions. The appellants contend that in reviewing the Transaction, the merger which CCCS should have been concerned with was that *as modified by the commitments proposed* by the merger parties. This submission is closely intertwined with whether CCCS is *obliged* to accept voluntary commitments which are appropriate "for the purpose of remedying, mitigating or preventing the substantial lessening of competition or any adverse effect".[34]

26 In considering these questions, we set aside for the time being the question as to whether the commitments offered by the merger parties were, in the present case, *in fact* adequate or appropriate.

Parties' submissions

The appellants' submissions

27 The appellants argue that CCCS cannot reject voluntary commitments which are appropriate "for the purpose of remedying, mitigating or preventing the substantial lessening of competition or any adverse effect".[35] Their position is that CCCS was obliged to assess the transaction *as modified by* the

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[34] Appellants' closing submissions at paras 5.18 and 5.33.

[35] Appellants' closing submissions at para 5.33.

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commitments offered in determining whether there was a SLC since that would be the merger that the parties propose to implement.[36] In support of this contention, the appellants referred to the fact that CCCS had taken into account changes in fact or circumstances which transpired between the time the Transaction was entered into and the time the Infringement Decision was issued.[37] CCCS had also considered changes made to the transaction by the merger parties in *Re Merger between The Thomson Corporation and Reuters Group PLC* [2008] SGCCS 5 ("the Thomson Reuters merger").[38] No distinction is made between anticipated mergers and completed mergers under s 60A and in the Guidelines on Mergers issued by CCCS.[39]

28 The appellants further argue that: (a) the word "may" in s 60A(1) of the Competition Act is coupled with a duty to exercise the power conferred when the relevant conditions are met (relying on Ruth Sullivan, *Statutory Interpretation* (Irwin Law, 2nd Ed, 2007) ("Ruth Sullivan") at p 74);[40] (b) "established principles" in the EU and the UK as well as international best practices are that prohibitions are a measure of last resort, to be used only where the voluntary commitments offered are inadequate;[41] (c) allowing CCCS discretion to find infringement despite appropriate voluntary commitments

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36 Transcript, 29 June 2020, page 21, line 18 to page 22, line 7; Transcript, 2 July 2020, page 101, lines 17 to 22; Appellants' closing submissions at para 5.18.

37 Appellants' closing submissions at para 5.18.2.

38 Appellants' closing submissions at para 5.17.

39 Appellants' closing submissions at para 5.6 to 5.11.

40 Appellants' opening statement at para 5.10; appellants' closing submissions at para 5.32.

41 Appellants' opening statement at para 5.11; Marsden's report at para 16 and Annex C; Appellants' reply submissions at paras 2.6 and 2.7.

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having being offered and discussed would be disproportionate and create legal and commercial uncertainty;[42] (d) any discretion conferred on CCCS pursuant to s 60A(1) cannot include considering the "irreversible" nature of the Transaction or the fact that the merger parties had not notified CCCS prior to entering into the Transaction;[43] and (e) CCCS has not explained when, in its view, appropriate post-completion commitments are to be disregarded.[44]

CCCS's submissions

29 In response, CCCS argues that it is *not* obliged to accept commitments offered in the course of an investigation. Section 60A of the Competition Act provides that CCCS *may* accept voluntary commitments, and provides it with a discretion to do so. If CCCS must always accept commitments that can have the effect of mitigating a SLC, this would mean that parties to a merger can always irreversibly merge before notifying CCCS since CCCS would be unable to find infringement as long as the parties are prepared to offer commitments that mitigate a SLC but fall short of unwinding the merger, *even if* the infringement had been intentional or negligent. This would be a serious fetter on CCCS's discretion. Apart from considerations of sufficiency and proportionality, CCCS must take into account broader policy implications, *eg*, deterrence, in determining if a commitment should be accepted. CCCS may reject commitments if it is of the view that an infringement decision with

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42 Appellants' opening statement at para 5.12; appellants' closing submissions at para 5.26.

43 Appellants' opening statement at para 5.13; see also appellants' reply submissions at paras 2.4 and 2.5; appellants' closing submissions at para 5.20.

44 Appellants' reply submissions at para 2.2.

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accompanying directions would be more appropriate,[45] for example, because it is necessary to punish past intentional or negligent behaviour and to deter anti-competitive practices. It was relevant to consider when the commitments were offered, since the appellants had wilfully ensured that the Transaction would be irreversible and structural remedies impossible. This is also in line with the practice of other competition authorities operating in voluntary merger notification systems (citing the Australian case of *ACCC v Pioneer International Limited and Pioneer Building Products (QLD) Pty Ltd* (1996), and the New Zealand case of *Commerce Commission v First Gas Limited* [2019] NZHC 231), which CCCS argues underscored the importance of deterrence in voluntary clearance regimes.[46]

30 CCCS also submits that while it may be correct to review anticipated mergers as modified by proposed voluntary commitments, this approach cannot be taken for completed mergers. The Thomson Reuters merger was one CCCS had been notified of in advance of its completion. However, where *completed* mergers are concerned, CCCS's position is that it must *first* assess whether the completed transaction gives rise to a SLC, before considering whether the commitments should be accepted or an infringement decision imposed. This is for three reasons: (a) the merger has taken place; (b) the adverse effects have taken effect; and (c) the adverse effects may be irreversible.[47]

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45 CCCS's oral opening at para 10; CCCS's closing submissions at paras 120, 122, 125 and 126.

46 CCCS's closing submissions at paras 120, 127 to 130.

47 CCCS's closing submissions at para 17; CCCS's reply submissions at paras 8 and 10.

Our decision

31 Sections 60A and B of the Competition Act read:

> 60A.—(1) The Commission *may*, at any time before making a decision pursuant to an application under section 57 or 58 or an investigation under section 62(1)(*c*) or (*d*) as to whether —
>
> > (*a*) the section 54 prohibition will be infringed by an anticipated merger, if carried into effect; or
> >
> > (*b*) the section 54 prohibition *has been infringed by a merger*,
>
> accept from such person as it thinks appropriate, a commitment to take or refrain from taking *such action as it considers appropriate* for the purpose of remedying, mitigating or preventing the substantial lessening of competition or any adverse effect which —
>
> > (i) may be expected to result from the anticipated merger, if carried into effect; or
> >
> > (ii) has resulted or may be expected to result from the merger.
>
> …
>
> (3) The Commission may, at any time when a commitment is in force, accept —
>
> > (*a*) a variation of the commitment; or
> >
> > (*b*) another commitment in substitution,
>
> for the purpose referred to in subsection (1), (1A) or (1B), whichever is applicable, and any reference to a commitment accepted under any of those subsections includes a reference to a commitment varied or substituted under this subsection.
>
> …
>
> 60B.—(1) *Where the Commission has accepted a commitment under section 60A(1),* and subject to subsection (2), the Commission shall make a decision that −
>
> > (*a*) the section 54 prohibition will not be infringed by an anticipated merger, if carried into effect; or
> >
> > (*b*) *the section 54 prohibition has not been infringed by a merger,*

> *as the case may be.*
>
> …
>
> [emphasis added]

32 We agree with CCCS that it should *first* determine whether the transaction contractually agreed upon between the merger parties has resulted or may be expected to result in an SLC or any adverse effect *before* considering the appropriateness of the voluntary commitments offered. Put in another way, in determining whether an SLC arises from a completed merger, CCCS should consider the merger *apart* from any voluntary commitments offered by the parties. In our view, this is suggested by a plain reading of s 60A(1), pursuant to which CCCS may, before issuing a decision on whether s 54 has been infringed, accept a commitment for the purpose of remedying, mitigating or preventing the SLC or any adverse effect. This would suggest that CCCS should first determine that an SLC arises from the transaction before considering whether the commitment offered remedies, mitigates or prevents the SLC.

33 The appellants contend that "disregarding" proposed changes to a merger, whether anticipated or completed, would lead to absurd results: for example, if merger parties offer to address any SLC by divesting an overlapping business, CCCS "cannot disregard the proposed divestiture to find an infringement because of the overlap, as that would not be the transaction the merger parties had proposed to implement" [emphasis from original omitted].[48] We do not agree. In short, if the example provided by the appellants concerns a completed merger, our view is that CCCS should look at the *completed transaction* in determining whether there has been an SLC. In this regard, we accept that there is a principled difference between anticipated and completed

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[48] Appellants' closing submissions at para 5.18.1.

mergers. Where a completed merger is concerned, and particularly where steps have been taken in order to put into effect the transaction entered into, *eg*, through the transfer of data (see [9] above), it can fairly be said that the adverse effects have already begun to take place. This case illustrates the last point. As noted above at [9], within days of the Transaction being announced, trips on the Uber platform had already fallen. Simply put, the transaction the merger parties began to implement, and contractually agreed to implement, was *not* that as modified by the voluntary commitments. We therefore do not agree with the appellants' suggestion that CCCS must consider the commitments and the Transaction as a *whole* in determining whether a SLC has arisen or is likely to arise. Rather, we consider that voluntary commitments should only be considered where the transaction gives rise to an SLC.[49] If the unmodified transaction does not give rise to any SLC, there is no need to go on to consider or invite voluntary commitments.

34 We have no difficulty with the proposition that CCCS is obliged to *consider* the voluntary commitments offered by merger parties and to come to a view as to whether such commitments are appropriate and should be accepted. Indeed, it seems to us that, at least in the absence of exceptional circumstances, the voluntary commitments offered would be a relevant consideration that CCCS should have regard to. However, in our view, this does not mean that CCCS *must*, if it comes to the view that the 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.

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[49] CCCS's reply submissions at para 10.

35 As a matter of statutory interpretation, there is no principled basis on which to read the word "may" in s 60A(1) of the Competition Act as imposing an obligation on CCCS to accept the voluntary commitments offered by the parties. Indeed, Ruth Sullivan[50] states that in the absence of evidence to the contrary, powers conferred by "may" are taken to be discretionary unless an obligation arises from the context in which the words appear. The author further states that:

> … where failure to exercise the *power would tend to defeat the purpose of the legislation, undermine the legislative scheme, create a contextual anomaly, or otherwise produce unacceptable consequences*, the courts readily conclude that the power was meant to be exercised, that it is a power coupled with a duty. In particular, where exercising a power is made conditional on specific findings or the fulfilment of a set of conditions, the courts are apt to conclude that the power must be exercised once all the relevant findings are made or the conditions all are met.
>
> [emphasis added]

36 Reading s 60A permissively would be consistent with the emphasis, in the provision, on CCCS's assessment of the *appropriateness* of the commitments to be accepted. Section 60A(1) provides that CCCS *may*, before making a decision following an investigation, accept from *such person as it thinks appropriate* a commitment to take or refrain from taking *such action as it considers appropriate* for the purpose of remedying, mitigating or preventing the SLC *or any adverse effect* which may be expected to result from the merger. This permissive reading would not, in our view, create a contextual anomaly or produce unacceptable consequences.

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[50] Appellants' opening statement at para 5.10; appellants' closing submissions at para 5.32.

37 The appellants contend that allowing CCCS full discretion to reject voluntary commitments that are identical to the directions it intends to issue would only create legal and commercial uncertainty, and also undermine the voluntary merger control regime. We disagree. The fact that Singapore has a voluntary merger control regime does not mean that there are no *risks* to proceeding with a merger before first notifying CCCS. In a slightly different context, the then-Minister of State for Trade and Industry said that "… merger parties are expected to self-assess and decide if they should notify a merger to [CCCS] for a decision … parties will be allowed, *at their own risk*, to proceed with an anticipated merger or to further integrate a merger, while a notification or investigation is pending [CCCS's] decision [emphasis added]" (*Singapore Parliamentary Debates, Official Report* (21 May 2007) vol 83 at col 730). Where merger parties decide to go ahead with a merger without informing CCCS, particularly in circumstances where the merger is irreversible, the merger parties run the risk of CCCS finding that s 54 has been infringed. They run the further risk that CCCS finds any voluntary commitments offered by the merger parties post-completion to be inadequate or inappropriate. In this context, the fact that CCCS may then consider factors such as whether a punitive measure is necessary, for instance, for reasons of deterrence, does not undermine the voluntary notification regime.

38 There may be principled reasons why, even if the commitments offered by the merger parties would remedy, mitigate or prevent the SLC, CCCS may nevertheless decide that it would be inappropriate to accept the commitments. Section 60B requires CCCS to decide that the merger did not infringe s 54 when it accepts a commitment under s 60A(1). Accepting the appellants' contention would mean that *even if*, for example, the merger parties *intentionally* enter into a transaction which gives rise a serious SLC, and only later offered voluntary

commitments (which were sufficient to *mitigate* the SLC), CCCS would be unable to find an infringement and to impose a penalty, even if adverse effects had taken place in the interim. This would severely limit the scope of s 69(2)(*d*) of the Competition Act. In CCCS's Guidelines on the Appropriate Amount of Penalty in Competition Cases 2016, financial penalties are said to (a) reflect the seriousness of the infringement and (b) deter the infringing undertakings and other undertakings from engaging in anti-competitive practices.[51] While these guidelines are certainly not binding, they point to the real need for CCCS to have flexibility in considering such policy concerns in deciding whether to issue an infringement decision or to accept voluntary commitments, such that, as they contend, businesses do not regard an infringement of competition laws as a mere business cost (see *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20 at [62]-[64]).[52]

39 We note, in this regard, that s 60A refers not only to remedying, mitigating or preventing the SLC, but *also* to "any adverse effect" which has resulted or may be expected to result from the merger. This leaves open the possibility that CCCS may consider other implications of the mergers being considered when deciding whether to accept the commitments offered other than whether or not an SLC arises. To be clear, in our view it is 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

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51 CCCS's closing submissions at para 110.

52 CCCS's closing submissions at para 112.

competitive effects may be mitigated or remedied in other ways if it is not reversible, would also clearly be relevant considerations.

40 For the above reasons, in our judgment, CCCS has a discretion whether or not to accept voluntary commitments, even if these are sufficient to remedy or prevent any SLC arising from the transaction being considered.

Issue 3: Whether the Transaction resulted in a SLC

41 In the Infringement Decision, CCCS stated that in evaluating the potential impact of the Transaction, it considered the following theories of harm (Infringement Decision at [55]):

(a) the removal of competition between the merger parties, which were each other's closest competitor in the provision of chauffeured point-to-point transport ("CPPT") platform services in Singapore, would likely result in the merged entity being able to increase effective price and/or reduce quality and/or output to the detriment of drivers and riders;

(b) post-Transaction, there might be an increased likelihood that CPPT platform services providers may coordinate their behaviour to raise prices and/or reduce quality and/or output to the detriment of drivers and riders; and

(c) post-Transaction, Grab might have the ability and incentive to tie chauffeured private hire car rental companies and drivers who rent from these companies in exclusive arrangements and reinforce its position in the provision of CPPT platform services in Singapore by increasing barriers to entry.

42 Consistent with this, on appeal, CCCS submits that the Transaction led to a SLC given: (a) the elimination of competition between the merger parties who were each other's closest competitor and the two largest entities in the relevant market with a combined market share of […]%; (b) the sharp reduction in rider discounts post-Transaction; (c) the presence of high barriers to entry and expansion due to strong indirect network effects and the use of exclusivities and loyalty incentive schemes; (d) lack of evidence that entry by new competitors would be sufficient in likelihood, scope and timeliness; and (e) absence of countervailing buyer power.[53] In contrast, the appellants argue that the Transaction did *not* result in a SLC, arguing that, amongst other things, Go-Jek's entry was sufficient in likelihood, scope and timeliness, and that CCCS was wrong to reject the Third Set of Commitments, which it contended would have been sufficient to address the SLC, and that CCCS should not have abruptly terminated the discussions.[54]

43 As we alluded to above at [13], in considering whether the Transaction resulted in a SLC, the following questions, amongst others, arise for determination:[55]

(a) The correct counterfactual;

(b) The relevant market; and

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53 CCCS's closing submissions at para 14.

54 Appellants' opening statement at paras 1.8, 2.1 and 2.2.

55 Appellants' closing submissions at para 4.2.

(c) Whether entry by new competitors, in particular, Go-Jek, was sufficient in likelihood, scope and timeliness, considered in light of the barriers to entry.

44 We turn now to examine each of these questions.

The counterfactual

The Infringement Decision

45 CCCS assessed that, in the absence of the Transaction, Uber would not have exited Singapore in a "barefoot" manner, meaning that it would not have simply terminated the business without extracting the residual value from its assets, branding and goodwill. Instead, it would have continued operating in Singapore while exploring other strategic options such as a collaboration with another market player or a sale to an alternative buyer. This was therefore the counterfactual identified by CCCS. An implication of this, according to CCCS, was that regardless of which strategic option Uber took under the counterfactual, "there would be no loss of close rivalry between [the merger parties] in the immediate term" (Infringement Decision at [62] and [88]). In this regard, CCCS noted that Uber did not provide any internal documents to show that it would have exited Singapore in a "barefoot" manner in the absence of the Transaction. Instead, CCCS took the view that the merger parties' presentations to their respective boards indicated that Uber did not view an exit as a concrete option, and that Grab had viewed Uber's stay in Singapore to be a concrete possibility, respectively (Infringement Decision at [66]-[74]).

46 Uber had also commenced a collaboration with ComfortDelgro Corporation Limited ("CDG" and the "CDG Collaboration") in January 2018 and also launched a complex new service, UberFlash, on 19 January 2018 and

UberCommute on 13 March 2018. CCCS considered that it was likely that "not an insubstantial amount of capital investment" had been contemplated for such launches and was therefore of the view that these launches lent weight to the finding that Uber would not have left the Singapore market in the near to medium term in the absence of the Transaction (Infringement Decision at [75]-[78]).

47 At a regional level, Uber had […] – while such a […] was "far from a foregone conclusion", the negotiation was consistent with Uber's broad strategy to continue operations in Southeast Asia while exploring other strategic possibilities (Infringement Decision at [79] to [83]).

48 CCCS noted that the economic consultant engaged by the merger parties, CRA, had also said that it was not realistically possible to identify one specific counterfactual, although there was a range of possible outcomes if it had failed to agree terms with Grab. Uber might have opened negotiations to sell its business to a third party or it might have adopted a "wait and see" approach while stemming losses in the near term. CCCS considered this to be largely consistent with its finding that Uber would not have exited barefoot but instead continued its operations while exploring strategic alternatives. Third-party feedback that the Platform Market could sustain more than one major player supported the finding under the counterfactual identified by CCCS that, regardless of the strategic option Uber might eventually have taken in the absence of the Transaction, there would have been no loss of close rivalry between the merger parties in the immediate term (Infringement Decision at [84] to [87]). CCCS then used the merger parties' own projection of funding and […] under a […] scenario in estimating the effective price levels in the counterfactual, and stated that it had not made any conclusions as to whether

pre-Transaction discounts and promotions were sustainable (Infringement Decision at [90]).

Parties' submissions

(1) The appellants' submissions

49 In their Notice of Appeal and Reply, the appellants asserted that CCCS adopted an incorrect counterfactual since the conditions prevailing pre-merger can only be adopted as the counterfactual if the prospect of these conditions continuing is realistic: relying on CCCS's Guidelines on the Substantive Assessment of Mergers 2016 ("Guidelines on Mergers") at para 2.1). They contended that in the present case, the evidence clearly indicated that the level of losses incurred by the appellants in Singapore was unsustainable, and CCCS's conclusion that Uber would have continued to operate in Singapore while incurring heavy losses was based on a misreading of the appellants' internal documents.[56] The CRA report dated 16 December 2019 took the position that CCCS was incorrect to find that the counterfactual was the prevailing situation prior to the merger.[57] Rather, Uber's management had clearly stated its intention, throughout 2017 and 2018, to reduce its losses in advance of its […] in 2019.[58] A more logical and likely counterfactual was that Uber might have continued operating in Singapore while negotiating an exit, but with a much lower cash burn for subsidies, and that if this had been

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56 Notice of Appeal at paras 34 to 37; Reply at para 59.

57 Bundle of Witness Statements Vol 3 at pp 9 and 41 – CRA report dated 16 December 2019 at paras 7 and 112.

58 Bundle of Witness Statements Vol 3 at p 43 – CRA report dated 16 December 2019 at para 116.

(*cont'd on next page*)

considered, the post-Transaction price increases would not have been seen as evidencing a SLC.[59]

50 While CRA acknowledged that the short-run effect of the Transaction would have been to raise prices, the question, according to CRA, was not whether the Transaction led to a short-run increase in prices, but whether this would be dissipated by entry and competition quickly enough.[60] There would be no SLC as long as entry is likely to be timely and effective enough to reverse the impact of immediate price responses, and the merged entity cannot go on to enjoy material and persistent improvement in performance relative to the counterfactual. CCCS's guidelines "do not require entry to *immediately* resolve any merger-specific effects to resolve competition concerns" [emphasis from original].[61]

51 In their closing submissions, the appellants submit that the precise scenario of the counterfactual, *ie*, whether Uber would have competed on a standalone basis or through merger/collaborating with another party, is not critical. Instead, what is critical is the level of competition that Grab would have faced. The appellants reiterated that the pre-Transaction losses could not have been sustained. Given the significant losses sustained by Grab and Uber, CCCS's position that Grab would have faced stronger competition in the absence of the Transaction was implausible.[62]

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59 Notice of Appeal at para 40.

60 Bundle of Witness Statements Vol 3 at p 219 – CRA report dated 16 March 2020 at para 15.

61 Bundle of Witness Statements Vol 3 at pp 219 and 220 – CRA report dated 16 March 2020 at para 16 and 17.

62 Appellants' closing submissions at paras 4.6 and 4.7.

(2) CCCS's submissions

52 CCCS submits that the Infringement Decision took into account the plausible market dynamics in two key respects, specifically (a) Uber's strategic alternatives in the absence of the Transaction, excluding a barefoot exit; and (b) the merger parties' pricing strategies under the "[…]" and "[…]" scenarios until 2021 as indicated in their internal documents.[63] Contrary to the appellants' suggestion otherwise,[64] CCCS did not take a static view on the counterfactual and in fact took a longer term view than the appellants.[65]

53 RBB, who produced an expert report for CCCS, identified three counterfactual scenarios it claimed merited further consideration: (a) a rapid barefoot exit of Uber from Singapore; (b) Uber's continued presence in Singapore as a standalone ride-hail operator and competitor to Grab at least for the foreseeable future; and (c) acquisition of Uber's Singapore business by a third party or a similar tie-up/collaboration. It stated that it is reasonable to suppose that, absent the Transaction, Uber could and would have sold its Singapore business in preference to an immediate barefoot exit, and that Uber's Singapore ride-hail assets would have continued to compete with Grab in one form or another.[66]

54 CRA's view had also been that the Transaction *would* result in price increases in the short-run and that it was not surprising that Grab would have

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63 CCCS's closing submissions at para 18.

64 Bundle of Witness Statements Vol 3 at pp 57 and 216 – CRA report dated 16 December 2019 para 169; CRA report dated 16 March 2020 at paras 4 to 5.

65 CCCS's closing submissions at para 18.

66 Bundle of Witness Statements Vol 3 at pp 297 and 301 – RBB report dated 20 February 2020 at paras 8 and 29.

sought to take advantage of the initial decline in the intensity of competition post-Transaction. While RBB agreed that the losses incurred by the merger parties could not be sustained indefinitely, it was not inevitable that prices would increase at the same time as the Transaction. Even if the Transaction had only caused price increases to occur sooner rather than later, this would still be an adverse effect on competition and consumers. It is reasonable to expect that the lower prices would have endured for a longer period of time but for the Transaction, and […].[67]

55 The "inescapable" conclusion drawn by CCCS from the plausible scenarios, which Dr Caffarra (from CRA, the appellants' expert) also considered to be possible counterfactuals, was that there would still have been an Uber-entity, separate and independent from Grab, that would have continued to compete with the latter in Singapore. A barefoot exit had been ruled out by both the appellants and CCCS.[68]

Our decision

56 We agree, in principle, that what is critical is the level of competition that Grab would have faced, and that this is in fact the purpose of the attempt to identify an appropriate counterfactual situation. Having considered the expert reports and the parties' submissions, we agree with RBB's position that it is reasonable to suppose, absent the Transaction, Uber could have sold its Singapore business to another party, or otherwise collaborated with such other

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67 Bundle of Witness Statements Vol 3 at pp 302 and 303 – RBB report dated 20 February 2020 at paras 31 to 34 and 36.

68 CCCS's closing submissions at paras 18 and 19; Transcript, 1 July 2020, page 128, line 6 to 9.

(*cont'd on next page*)

party. This is not *entirely* contrary to the position taken by the appellants in the Notice of Appeal, which was that Uber might have continued operating in Singapore while negotiating an exit, but with a much lower cash burn for subsidies.[69]

57 We do not understand either party to be contending that a barefoot exit was a likely or appropriate counterfactual. Indeed, on this point, we agree with CCCS's reasoning, as set out in the Infringement Decision. The appellants contend that the Infringement Decision was premised on a misreading of the slides used for a board presentation in mid-March 2018 ("March slides"). CCCS had reasoned that in seeking board approval for the Transaction, Uber had itself compared its […] by projecting that it would have to […] without the Transaction. According to CCCS, if an exit was a concrete option, it would have been logical for Uber's board to be presented with such a scenario (see Infringement Decision at [68]). The appellants asserted in their Notice of Appeal that this was erroneous since, amongst other things, the documents had been prepared by staff who were not privy to the discussions on an exit.[70] While this might have been the case, the appellants have not pointed us to any internal documents or any evidence from any factual witnesses which demonstrate that the possibility of a different exit had been seriously contemplated by Uber. In the absence of evidence that Uber had been prepared to exit the Singapore market on a barefoot basis, the indications that Uber had made detailed operational plans for at least […] months of 2018, that there had been […] and business performance reported in February and March 2018, as well as the estimated funding projection for Singapore would seem to suggest that Uber

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69 Notice of Appeal at para 40.

70 Notice of Appeal at para 41.

intended to continue to invest heavily in Singapore (see Infringement Decision at [71] to [74]). Indeed, the extent to which Uber had already invested in Singapore was another factor which might reasonably indicate that a "barefoot" exit was unlikely.

58 In this context, RBB's conclusion that it is reasonable to suppose that, absent the Transaction, Uber could have sold its Singapore business to another party, or otherwise collaborated with such other party, appears to us to be sensible and correct. As CCCS noted in the Infringement Decision, Uber had also attempted to enter into a collaboration with CDG, with some effort having gone into planning that collaboration. While the appellants note that the fact Uber had been exploring this possibility showed that they had made a strategic decision not to continue to operate in the same way going forward,[71] in our view, this in fact corroborates RBB's position that a tie-up with a third party was a likely counterfactual, and supports CCCS's submission that there would still have been an Uber-entity, separate and independent from Grab, that would continue to compete with Grab in Singapore. Even if Uber had sold its Singapore business to a third party, this would still have meant that its business would have continued to impose competitive constraints on Grab, albeit in a modified way. The appellants' counsel candidly stated that Uber had been speaking with various people and exploring collaborations.[72] In this regard, Dr Caffarra testified that, in her view, Uber had been intending to exit and had been looking to do so quickly.[73] In the light of the facts pointing *away* from a

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71 Notice of Appeal at para 46.

72 Transcript, 2 July 2020, page 124, lines 17 to 25.

73 Transcript, 1 July 2020, page 131 lines 15 to 23.

barefoot exit, this supports CCCS's position that Uber or its assets would have continued to compete with Grab in Singapore.

59 As we indicated above, the precise identification of the counterfactual in the present case is perhaps not determinative. However, to the extent that the counterfactual is a relevant consideration, we would agree with CCCS's position that, in the absence of the Transaction, Uber's Singapore business, in one way or another, would continue to have competed with Grab. We note that CCCS had also taken into account the merger parties' own projections of price increases under the […] counterfactual scenario.[74] In this regard, CCCS referred to the following figure in the Infringement Decision at [290]: […]

This showed that the no-merger counterfactual prices were lower than the projected prices following the merger. It thus appears to us that CCCS's decision in this regard was neither wrong in a material respect nor unreasonable.

Relevant markets

The Infringement Decision

60 CCCS identified the relevant question for market definition to be whether the switching between different products (if any) in the context of the existence of close substitutes (if any) by customers is sufficient to constrain a profitable increase in the price of the focal product (Infringement Decision at [123]). It identified the relevant markets for the competition assessment on the Transaction to be (Infringement Decision at [178]):

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[74] CCCS's closing submissions at paras 20 and 21.

(a) two-sided platforms matching drivers and riders for the provision of booked CPPT services in Singapore (*ie*, the Platform Market); and

(b) the provision of rental of CPHCs to CPPT drivers in Singapore (the "Rental Market").

61 In both cases, the geographic market was said to be national in scope. CCCS also expressly stated that while it concluded that street-hail, public transport and the broader labour market should be excluded from the relevant market, it nevertheless took into consideration the degree of competitive constraints posed by each, consistent with the fact that the assessment should ultimately be focused on the effects of the Transaction (Infringement Decision at [179]).

62 The primary question before the CAB in relation to the relevant market is whether CCCS should have included *street-hail* taxis within the relevant market.[75] In this regard, the appellants asserted in their Notice of Appeal that the relevant market would "in fact" be larger, but that it would suffice for them to show that the relevant market should at least include taxi companies (including street-hailed taxi trips).[76] Notably, while they maintain that the relevant market should at least include street-hailed taxis, their position in closing submissions was that the CAB can *leave open* the question of the precise market definition in deciding the appeal.[77] CCCS stated in the Infringement Decision at [133] that it broadly agreed with the merger parties' submission that the ultimate focus is

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75 See Notice of Appeal at para 62.

76 Notice of Appeal at para 53.

77 Appellants' closing submissions at para 4.10.

on the *effects* of the Transaction. Nevertheless, given that whether taxi trips should have been included in the relevant market was a source of dispute between the parties, we make a number of observations for completeness. In summarising CCCS's decision in the Infringement Decision, it is this aspect that we focus on.

(1) Platform Market

63 The merger parties overlapped in the provision of CPPT platform services and the provision of booking and matching of drivers and riders for both taxis and CPHCs. However, services such as buses, trains, taxis and CPHCs were excluded from the focal product as the merger parties did not operate them (Infringement Decision at [125]). CCCS found that the merger parties' operations were primarily focused at the platform level. The merger parties' terms of use showed that they merely provided a matching/booking service for riders and drivers, with the underlying transportation service being provided by the drivers to the riders. The merger parties viewed drivers as their "customers" rather than as agents for their own provision of the underlying transportation service. This was consistent with their submissions on their relevant market turnover for the purpose of calculating financial penalties, in which only commission from drivers, which is turnover at the platform level, was included. However, CCCS noted that the CPPT platform services and underlying CPPT transportation services booked through these platforms are interrelated, and also assessed other transport options and the spectrum of closeness of substitution between each transport option, CPPT services and CPPT platform services (Infringement Decision at [129]-[131])).

64 On the rider-side of the product market, CCCS first noted that there was evidence that the merger parties did not consider alternative intra-city

transportation options to be close competitors, *eg*, the documents provided of Grab's board meetings did not include developments in street-hail, public transport and private cars. Uber's documents also reflected discussions on Grab but not any other forms of transportation. It was also significant that the Purchase Agreement contained restrictions on the transfer of any portion of the share capital or assets of LCR to other specified third-party CPPT platform service providers, suggesting that such service providers were viewed as the merger parties' closest competitors (Infringement Decision at [134]).

65 Nevertheless, CCCS considered each alternative intra-city transportation option from the perspective of closeness of rivalry with CPPT platform services. Having done so, CCCS concluded that, first, the evidence suggested that taxi *booking* services are sufficiently close substitutes for the merger parties' CPPT platform services and within the relevant market, although third-party feedback suggested that these were instead viewed as more expensive than CPHC offerings and thus were not considered "perfect substitutes" (Infringement Decision at [135] to [137]).

66 However, as stated above, CCCS concluded that street-hail was *outside* the relevant market although CCCS had, in the IMD, included street-hail in considering the relevant market before it conducted a detailed assessment. Third-party feedback reflected street-hail to be an imperfect substitute that is not as convenient and may, in some circumstances, be more difficult to procure. The relevant question was whether riders would switch away from CPPT platform services to street-hail taxis in response to a small but significant and non-transitory increase in the prices of CPPT platform services. Empirical data did not show substitution from Uber to street-hail, although CCCS stated that it also assessed and found that the Transaction would result in a SLC even if the relevant market included street-hail (Infringement Decision at [138]-[144]).

Finally, public transportation, private cars and other transport options such as on-demand bus services, bike-sharing services did not pose sufficient competitive constraints on the merger parties and were not feasible substitutes for CPPT platform services (Infringement Decision at [152] to [155]).

67 On the driver-side, CCCS considered that it was likely drivers would switch between accepting CPHC bookings across various CPHC platforms. While CPHC drivers could not switch to driving taxis unless they acquired the relevant license, CDG had recently expanded its fleet, reportedly due to drivers switching away from driving CPHCs, and CCCS concluded that, from a driver's perspective, accepting taxi bookings fell within the same relevant market as accepting CPHC bookings (Infringement Decision at [159] and [160]). CCCS found that street-hail was outside the relevant market. Street-hail would not be an option for drivers with only a Private Hire Car Driver Vocational License ("PDVL") (as opposed to a Taxi Driver's Vocational License ("TDVL"), for which requirements are more stringent). The relevant question was identified to be whether drivers would switch away from CPPT platform services in response to a small but significant and non-transitory increase in the prices (*ie*, commissions) of CPPT platform services. Put in another way, the issue identified was whether drivers would forego providing CPPT services, including booked taxi services, and instead offer street-hail taxi services in response to such an increase. CCCS noted that taxi drivers are able to offer both booked and street-hail taxi services, and providing booked services would still provide additional revenue (as compared to street-hail taxi services) as long as the booking fee received by the driver is not completely captured by the CPPT platform through the commission (Infringement Decision at [161]-[163]).

68 CCCS also found that the wider labour market was not within the relevant market (Infringement Decision at [164]-[169]).

(2) Rental Market

69 Uber's vehicle rental business was not acquired by Grab in the Transaction and vehicle rental is thus not an "Overlapping Product". However, Uber, which owned LCR, acquired 27.5% of Grab, which owned Grab Rentals and has partnerships with various CPHC rental companies. Therefore, CCCS was of the view that the market for the provision of CPPT platform services and that for the rental of vehicles for CPPT services were materially interrelated. It suffices to note that CCCS found that: first, other CPHC rental companies other than those owned by the merger parties or which are their preferred rental fleet partners are within the same relevant market given that drivers can switch to renting a CPHC from those other companies, although the bundling of rental rates and incentives by some CPPT platform service providers (*eg*, by linking specified trip targets to lower effective rental price) as well as the difficulty for other CPHC rental companies to match the lower effective rental price might cause some drivers not to switch. Second, taxi rental is unlikely to be a sufficiently close substitute to CPHC rental because of the requirement of a TDVL. Third, it is unlikely for a driver who does not currently own a private car and who is renting a CPHC vehicle to switch to buying a private car for the purpose of providing CPHC services, and privately-owned cars are therefore not part of the relevant market. Fourth, private rental cars not appropriately registered under s 101(1) of the Road Traffic Act (Cap 276, 2004 Rev Ed) to provide CPHC services and rented cars for leisure or personal use do not form part of the relevant market (Infringement Decision at [173] to [176]).

Parties' submissions

(1) The appellants' submissions

70 The appellants submit that the precise definition of the "relevant market" is not fundamental to the SLC analysis in the present case, since, regardless of how this is defined, the voluntary commitments offered by the merger parties would have been sufficient and appropriate, as evidenced by Go-Jek's "sufficient entry".[78] CRA opined that while CCCS agreed that the Transaction should be assessed based on competitive effects and not market definition, in practice, the Infringement Decision operated on the basis of a narrow market definition, considering mode-by-mode whether a transport-type is in the same market.[79]

71 Nevertheless, the appellants maintain their position that street-hail taxi services are substitutes "offering a similar product at a similar price".[80] They assert the following:[81]

> (a) Both street-hail taxis and CPPT services were able to serve passenger and driver needs. Taxis and CPHCs are closely substitutable, with the majority of respondents to CCCS's requests for views as to alternatives to the merger parties' services indicating that street-hail taxis are a substitute for the merger parties' ride-hailing services;

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78 Appellants' closing submissions at para 4.9.

79 Bundle of Witness Statements Vol 3 at p 50 – CRA report dated 16 December 2019 at para 144.

80 Appellants' closing submissions at paras 4.8 to 4.10.

81 Notice of Appeal at paras 54 to 57.

(b) The internal documents of the appellants did not consider street-hail (amongst other forms of transportation) as more traditional forms of transportation did not grow or innovate at the same pace and the appellants therefore did not invest the same resources in analysing their performance; and

(c) There were errors in CCCS's process, for example that its conclusion was not supported by quantitative evidence,[82] that it confused the closeness of competition and the relevant market,[83] wrongly considered the merger parties' terms and conditions in determining the bounds of the market,[84] failed to consult any of the five companies other than CDG about substitutability,[85] and relied on a graph purportedly showing the evolution of the number of street-hail rides before and after Uber left the market that was problematic.[86]

72 The appellants also asserted, in their Notice of Appeal, that CCCS erred in deciding that there were "separate markets for taxi drivers who take street-hail trips and for drivers who accept booking jobs". In this regard, they argue that the appellants compete for drivers on a broad labour market and are constrained by the need to ensure their services remain attractive compared to

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82 Bundle of Witness Statements Vol 3 at p 50 – CRA report dated 16 December 2019 at para 148.

83 Notice of Appeal at para 57(c)(iv).

84 Bundle of Witness Statements Vol 3 at p 50 – CRA report dated 16 December 2019 at para 149.

85 Notice of Appeal at para 57(b)(ii).

86 Notice of Appeal at para 57(d).

(*cont'd on next page*)

other occupations in the market since switching costs are low and there is a high level of turnover. Obtaining a TDVL would not be unduly burdensome.[87]

(2) CCCS's submissions

73 CCCS's submissions are in line with the conclusions it reached in the Infringement Decision. In particular, the relevant market is said to be the market for CPPT platform services, with the overlapping service between Grab and Uber being the *matching service* which operates to match riders and drivers, and not the provision of the underlying transport services. This is clear from the terms of use of the merger parties, and is confirmed by their submissions on the relevant turnover, which did not include trip fare. The merger parties' responses confirm that their revenue originates solely from operating the platform. As such, it is misleading for the appellants to submit that public transport providers and the wider job market are also competitors. CCCS asserts that Dr Caffarra, the appellants' expert, also opined that none of the other modes of transport are a close substitute to CPPT platform services.[88]

74 Street-hailed taxi services were correctly not included in the relevant market. This is supported by actual trip data between January 2018 and July 2018 showing that there had been no significant switching from ride-hailed trips to street-hailed trips for months after Uber had ceased its CPPT platform services in Singapore, (a) despite Grab's significant reductions in promotions and discounts to riders in the same period and (b) a significant increase in the number of rides booked through Grab. The period considered, specifically,

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87 Notice of Appeal at 58 to 61.

88 CCCS's closing submissions at paras 23 to 27; Transcript, 1 July 2020, page 194, lines 11 to 17.

January to July 2018, was more than sufficient given that the sharp increase in Grab rides and decrease in Uber rides to zero were substantially completed by May 2018. Further, CRA also wrongly considered *all* taxi trips, both booked and street-hailed, in arguing that there had been an overall downward trend in "total taxi trips".[89] RBB stated that even the "downward trend in street-hailed trip numbers … observed until November 2017" had ceased before the Transaction took place, and that even if this was extrapolated to the counterfactual, it would not change the clear conclusion that Uber customers diverted principally to Grab post-Transaction.[90] In so far as the appellants rely on a survey conducted by Blackbox,[91] almost six months after the Infringement Decision had been issued, this should not be given any weight since by then consumers were faced with very different market conditions, including reduced choice of competing platforms. Finally, only ride-hail drivers with a TDVL and with access to a taxi can switch from ride-hail to street-hail, and an effective driver-side constraint on ride-hail from street-hail would require enough ride-hail drivers fulfilling these criteria to switch *away* from ride-hail driving to street-hail work in response to a small increase in ride-hail commissions or reduction in driver incentives. RBB stated that the evidence does not establish this to be the case.[92] RBB also concluded that "almost none" of the evidence presented by CRA in support of broad labour market constraints on the driver side has any probative value. CCCS therefore urges the CAB to find that the

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89 CCCS's closing submissions at paras 27 to 29.

90 Bundle of Witness Statements Vol 3 at p 312 – RBB report dated 20 February 2020 at para 63.

91 CCCS's closing submissions para 30.

92 Bundle of Witness Statements Vol 3 at p 318 – RBB report dated 20 February 2020 at paras 87 to 89 and 98, 99.

(*cont'd on next page*)

relevant market is one for CPPT platform services. In any event, even including street-hail trips, the eventual finding would still be that there had been a SLC.[93]

Our decision

75 At the outset, we note that the appellants asserted in their Notice of Appeal that if taxi companies (including street-hail trips) had been factored into the relevant market, the combined market share of the merger parties would have been […]%, below the recommended threshold for notification.[94] We note that CCCS disputes the manner in which this has been calculated.[95] In any event, we would not have been persuaded by the appellants' assertion in this regard since (a) the thresholds set out in the Guidelines on Mergers are merely indicative guidelines and have no legal effect; and (b) even if the combined market share of the merger parties had been […]%, this would still have crossed the alternative indicative threshold for competition concerns set out in Guidelines on Mergers as the merged entity would have a market share of between 20% to 40% and the post-merger aggregate market share of the three largest firms ("CR3") would be 70% or more, specifically, close to […]% (see also [85] below).[96]

76 It appears to be common ground between the parties that the precise definition of the relevant market would not be determinative.[97] Indeed, it is apparent that the crucial question is the competitive effects of the Transaction

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93 CCCS's closing submissions at para 31.

94 Notice of Appeal at para 50.

95 Defence at para 78(b).

96 Defence at para 78(a).

97 Defence at para 78(c); Appellants' closing submissions at paras 4.9 and 4.10.

(see also Competition Law and Policy in Singapore (Lim Chong Kin and Cavinder Bull gen ed) (Academy Publishing, 2nd Ed, 2015) at para 02.014). Nevertheless, we are persuaded that street-hailed taxi services should not be included in the relevant market and set out our views here for completeness. While we do not propose to address each of the appellants' many arguments, we set out our views on what we consider to be the more significant points raised. In doing so, we note also that the parties do not dispute that booked taxi trips form part of the relevant market.

77 We agree with CCCS's view that the merger parties' operations are primarily focused at the platform level (Infringement Decision at [129]), with the derivation of its revenue from the platform usage, excluding the commission paid to the drivers. The merger parties' terms of use, while not conclusive, is suggestive of the kind of services they provided, particular given the clear terms with which they state that Grab and Uber do not provide transportation services.[98] These can fairly be construed as indicating that the service or focal product of the merger parties was the matching of the riders and drivers, and not strictly the provision of transportation services. This was the business model employed by the merger parties, which is relevant in considering what the relevant market is for present purposes.

78 Empirically, the evidence adduced by the appellants is not persuasive enough to convince us that street-hail taxis are a sufficiently close substitute for the CPPT services. This does not mean that street-hail taxi services cannot exert *any* competitive constraints on the providers of CPPT platform services. However, in our view, the evidence indicates that such competitive pressures

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98 See CCCS's closing submissions at para 23.

are not sufficiently strong such that riders would switch away from CPPT services to street-hailed taxis in response to a small but significant and non-transitory increase in the prices of CPPT platform services. This is evident from the fact that the number of street-hail trips remained stable after Uber ceased its CPPT platform services in Singapore. In contrast, the number of rides booked through Grab increased significantly during the same time period. We note also that the effective price paid by riders per CPHC trip matched on the Grab platform increased over the same period (see Infringement Decision at [293]) and the fact that the number of street-hailed trips remained comparatively constant would again indicate that street-hailed trips were not close substitutes.

79 Further, to the extent that the appellants contend that CCCS's investigations were not sufficiently robust, for instance, because it did not adequately solicit the views of five other taxi companies or because it relied on a self-serving statement from […] (to the effect that consumers who are used to the certainty (in terms of price), convenience (in terms of, *eg*, pick-up location), comfort and familiarity of on-demand chauffeured private-hire car services will not revert back to street-hailing (see Infringement Decision at [140])),[99] we do not think this detracts from the persuasiveness of the data concerning the number of street-hail trips after Uber ceased its CPPT platform services in Singapore. Indeed, from a practical point of view, it would appear that there may be a marked difference in certainty and convenience between booked and street-hail rides. The fact that procuring street-hailed taxi rides might have been more difficult further distinguished street-hailed taxi rides as an imperfect substitute.

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[99] Notice of Appeal at para 57(b) and (c).

80 To the extent that the appellants referred us to a survey conducted by Blackbox, we agree that findings indicate a significant degree of substitutability.[100] However, as CCCS noted, the survey, having been conducted under very different market conditions, should be treated with caution.[101]

81 For completeness, we note two points. First, that CRA referred us to a graph which showed that the estimated monthly taxi trips in Singapore since 2005, both including and excluding the number of trips booked through the Grab and the Uber platforms, were relatively stable through to 2015, after which they began to decline. It asserted that this was consistent with users who once used traditional taxis switching to ride-hailing services.[102] However, it appears to us that this is not strong evidence of substitutability, without more, particularly since the graph did not distinguish between booked and street-hailed taxis. Any argument that CPPT and street-hail taxis are substitutes requires more rigorous evidence than we have before us.

82 Second, while we did look into the results from the econometric studies including GUPPI, the results are at best inconclusive and the assumptions involved are controversial. As such we do not attach too much weight to these studies.

83 We turn now to make brief observations on the appellants' submissions on the driver-side analysis. We considered, amongst other things, the survey

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100 See Bundle of Witness Statements Vol 3 at p 53 – CRA report dated 16 December 2019 at para 156.

101 CCCS's closing submissions at para 30.

102 Bundle of Witness Statements Vol 3 at p 18 – CRA report dated 16 December 2019, Figure 5.

(*cont'd on next page*)

conducted in May 2018 by […] ("the […] survey"), cited to us by CRA. These results were said to show that substantial numbers of drivers leave driving in favour of other occupations, that drivers leave for a broad range of alternative occupations, and that they see earnings as the overriding consideration for choosing between services and occupations.[103] We accept that the survey results show that earnings are the drivers' primary consideration. However, the pertinent question would have been whether the drivers would switch away from being a driver in response to an increase in *CPPT platform fees*, which would only be one factor influencing the amount earned by the drivers. Indeed, CRA noted the same when it stated that the earnings that drivers can expect from driving depend in part on the average fare drivers receive per trip (net of any service fee paid to the ride-hailing service) but also on the time spent waiting to receive trips and travelling to pick up riders.[104] The […] survey results also indicated that 26% of drivers changed service "because their prior service did not offer enough trips".[105] Driver-side price increases by Grab may therefore have resulted in limited switching to alternative labour market options given the expansive network Grab would have had post-Transaction. Finally, while the appellants submit that CPHC drivers can obtain a TDVL and switch to accepting street-hail rides, this would require that the drivers switch to renting a taxi *and* fulfil the requirements of the TDVL.[106] The former requirement in particular might present a significant limitation on the extent to which it would have been

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103 Bundle of Witness Statements Vol 3 at pp 80 to 82 – CRA report dated 16 December 2019 at paras 238 to 243.

104 Bundle of Witness Statements Vol 3 at p 64 – CRA report dated 16 December 2019 at para 188.

105 Bundle of Witness Statements Vol 3 at p 83 – CRA report dated 16 December 2019 at para 244.

106 Defence at para 76(e).

open to drivers to make such a switch. In any case, as we noted above, the parties appear to be in agreement that nothing strictly turns on whether street-hail falls within the relevant market.

Go-Jek's entry and barriers to entry

Barriers to entry and countervailing buyer power

84 The key dispute identified by the appellants in their closing submissions is whether Go-Jek's entry was sufficient in likelihood, scope and time to address any SLC.[107] This discussion must be situated in the context of the market structure as well as barriers to entry and expansion in the relevant market.

85 On the market structure, CCCS observed in the Infringement Decision that the Guidelines on Mergers provide that competition concerns are unlikely to arise in a merger situation unless (a) the merged entity will have a market share of 40% or more; or (b) the merged entity will have a market share of between 20% to 40% and the CR3 in the market is 70% or more. The merger parties' market shares exceeded these indicative thresholds (Infringement Decision at [180]). Where the Platform Market is concerned, CCCS agreed with Uber that the number of trips matched could be an accurate indicator of actual market position. Using this measure, the merger parties' combined market share was […]% (more than five times the size of the next biggest player, CDG) and CR3 had been consistently close to 100%. Grab's post-Transaction market share of […]% in June 2018 was close to the merger parties' pre-Transaction total market share of […]% and the CR3 remained close to […]%. The merger parties' collective market shares and individual shares had also been increasing

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107 Appellants' closing submissions at para 1.3.

since their entry in 2013 at the expense of other CPPT platform service providers. While the merger parties argued that market share figures in highly dynamic markets were not indicative of market power, there were no recent examples of successful disruption to CPPT platform companies like the merger parties (Infringement Decision at [182], [183], [186] and [187]).

86 In relation to the Rental Market, post-Transaction, […]% of CPHC companies would be related to the merger parties either by equity affiliation or contractual relationships, which was likely to allow them to exercise substantial market power in terms of the vertical relationship between the Rental Market and Platform Market. While Grab only had a […]% market share in the Rental Market, it […] and had the resources to further expand its fleet (Infringement Decision at [188]).

87 On the barriers to entry and expansion, the findings made by CCCS in the Infringement Decision included the following:

> (a) Drivers: While the indirect network effects (*ie*, where riders and drivers value a CPPT platform more when there are more drivers and riders respectively) might have been surmountable if both drivers and riders are able to use multiple platforms at any point in time, the evidence showed that most of Grab's trips had been undertaken by drivers who single-homed (*ie*, […]%), and Uber estimated that […]% of active drivers single-homed. Exclusivity clauses in drivers' rental contracts and the structure of the incentive schemes offered by Grab indicated that drivers might be obliged to drive exclusively for Grab or less willing to multi-home, respectively. The interdependence of drivers and riders give rise to a "virtuous circle" in which the merged entity may be able to attract more riders by signing up more drivers on an exclusive

basis, and the larger pool of riders may incentivise other drivers to drive exclusively for the merged entity (Infringement Decision at [189], [199], [201], [202] and [204]). The provisions in drivers' rental contracts, which might include fees for early termination, added to the difficulty in building up a pool of drivers for new entrants (Infringement Decision at [205], [208] and [222]).

(b) Incentive schemes and investment: A new entrant would have to incur significant costs, including on incentive schemes and promotions, in order to build up a competing network of sufficient scale particularly given the indirect network effects (Infringement Decision at [214]). The investment of the parties, in particular Uber, showed that a new entrant would expect to incur significant costs to build and maintain sufficient network and scale (Infringement Decision at [227]).

(c) Vehicles: A new entrant would have to either purchase its own fleet of vehicles, which would require significant upfront investment, or acquire and/or enter into partnerships with potential fleet partners. The latter would be difficult since third-party rental companies were not of sufficient scale and size, and might not have been able to offer competitive rates. The Purchase Agreement also allowed Grab to request that Uber not sell LCR to […] identified potential competitors, including […] (Infringement Decision at [218] and [219]). All but one taxi operator were then restricted to working with Grab […] (Infringement Decision at [225]).

Actual and potential competition and buyer power

88 In assessing actual and potential competition, CCCS considered whether entry by new competitors was "sufficient in likelihood, scope and time" to deter

or defeat any attempt by the merger parties or their competitors to exploit the reduction in rivalry flowing from the Transaction (Infringement Decision at [232], citing the Guidelines on Mergers at paras 5.46 to 5.59). CCCS concluded that entry by new competitors would not be sufficient in likelihood, scope and time to constrain the merged entity post-merger. Specifically, it concluded that the evidence did *not* suggest that: (a) CDG would expand its CPPT platform services to include third-party taxi or CPHC services and compete more closely with Grab; (b) Go-Jek's potential entry into the Platform Market had been *confirmed*; (c) Ryde's entry was sufficient to pose a competitive constraint on Grab; and (d) non-CDG taxi operators offering CPPT platform services would have the incentive and ability to expand their CPPT platform services to compete more closely with the merged entity (Infringement Decision at [236]). Third-party feedback (specifically, this appeared to be […]) also indicated that actual and potential competitors would have difficulty imposing sufficient competitive constraints on Grab in view of, *inter alia*, the barriers to entry limiting the supply of vehicles and drivers, which in turn would render it difficult for new entrants to optimise rider experience, as well as the incentive schemes the merger parties had been employing. Successful entry and expansion was said to be contingent on CCCS's intervention and mitigation of the effects arising from the Transaction (Infringement Decision at [237]).

89 The appellants' submissions on appeal focus primarily on what is described as the imminent entry of Go-Jek, and we therefore focus on this aspect of CCCS's decision here. As set out above, CCCS stated that while it was aware of reports indicating that Go-Jek intended to enter the Singapore Platform Market in the near future, the evidence did not show that its potential entry had been "confirmed". Instead, […] as the Transaction introduced significant obstacles to the Singapore market. Specifically, […] entry heavily depended on

[…]. […], *inter alia*, the incentive schemes offered by the merger parties, which rendered entry unattractive, the increased ability of Grab post-Transaction to engage in a price war as well as barriers to entry and expansion including indirect network effects (Infringement Decision at [245]-[248]).

90 The merger parties had emphasised the fact that Go-Jek's President, Mr Andrew Soelistyo, had confirmed Go-Jek's plans to enter the Singapore market within a few months. There was also evidence that […]. Go-Jek also had a war chest of $500m though this was also meant for its possible expansion into the Vietnam, Philippines and Thailand markets. Go-Jek had indicated that it prioritised the latter markets over Singapore. While CCCS considered the possibility that Go-Jek's statements might be self-serving in assessing their probative weight, Go-Jek had also been made aware of the potential consequences of providing false information. In any event, even if Go-Jek's entry was confirmed, CCCS did not think the evidence suggested that its entry was likely to be sufficient in timeliness and extent as to impose a sufficient constraint on the merged entity's market power such as to avert any SLC. This was in view of the high barriers to entry and expansion and the fact that Go-Jek had predominantly operated platform services for motorcycle rides in places such as Jakarta with significantly different characteristics from the Singapore market. Moreover, the Purchase Agreement allowed Grab to request for Uber not to sell LCR […] and the latter might therefore not have been able to purchase vehicles from LCR if not for the IMD (Infringement Decision at [249] to [252]).

91 CCCS also considered that individual drivers and riders did not have any buyer power and the level of countervailing buyer power possessed by corporate customers was insignificant to the merged entity in the Platform Market (Infringement Decision at [273]). Countervailing buyer power was insignificant in the Rental Market (Infringement Decision at [276]).

Competition assessment

92 The Transaction raised the possibility that the market might tip towards a monopoly (Infringement Decision at [211]).Where non-coordinated effects were concerned, CCCS concluded that the Transaction caused Grab to increase its market power, manifesting in its ability to raise prices (or reduce quality or choice) because of the elimination in competition between the merger parties. In particular, the contemporaneous internal documents and funding estimates of the merger parties indicated that they expected the Transaction to increase Grab's ability to increase effective price, and there had been a significant reduction in promotions and incentives post-Transaction, and consequently, an increase in the effective price for trips. Third parties have also raised concerns in this regard and entry by new competitors had not been demonstrated to be sufficient in likelihood, scope and timeliness to deter or defeat any attempt by the merger parties to exploit the reduction in rivalry flowing from the merger (Infringement Decision at [280]). While the merger parties submitted that pre-Transaction prices were unsustainable and would have risen irrespective of the Transaction, CCCS did not take a view on the appropriate and sustainable price levels. In assessing whether there would be non-coordinated effects amounting to an SLC arising from the Transaction, CCCS only needed to demonstrate an increase in the merger parties' *ability* to raise prices, reduce quality or choice gained through the Transaction. CCCS did not need to demonstrate an actual increase in price (Infringement Decision at [281] and [282]). CCCS observed that while the driver incentives and rider discounts had been decreasing even prior to the Transaction, the rate of decrease steepened significantly post-Transaction. CCCS found that the Transaction was likely to have led to non-coordinated effects by the merged entity and consequently a SLC to the detriment of riders and drivers (Infringement Decision at [304] and [305]).

93 However, CCCS concluded that the evidence available did *not* suggest that the Transaction was likely to have resulted in coordinated effects (Infringement Decision at [314]). In contrast, while it was not necessary to establish vertical effects in order to find a SLC given the findings on non-coordinated effects, CCCS found that post-Transaction, Grab would have the ability and incentive to reinforce its position in the Platform Market by increasing the barriers to entry and expansion, including by tying CPHC rental companies (including LCR) and drivers who rent from these companies in exclusive arrangements (Infringement Decision at [321]).

94 The merger parties submitted that the Transaction was expected to generate efficiency benefits through (a) scale economies leading to more efficient utilisation of drivers and shorter wait times; and (b) service improvements in relation to experience and safety of passengers and drivers. Efficiencies demonstrated with detailed and verifiable evidence, which are merger specific, timely and sufficient in extent, *must* be taken into account where they increase rivalry in the market such that no SLC results. They *may* be taken into account where they do not avert an SLC but nevertheless results in net economic efficiencies. CCCS stated that it was unable to conclude that the claimed efficiencies either averted a SLC or were sufficient to outweigh the detriment to competition caused by the Transaction. This was since, *inter alia*, (a) the merger parties had not demonstrated that the claimed efficiencies arising from a higher network density are merger specific and could not be attained by feasible alternative scenarios, *eg*, a multi-player scenario where drivers and riders multi-home; (b) the claimed efficiencies had not been demonstrated or quantified; (c) feedback from most third parties indicated there were no efficiencies to be gained from the Transaction; and (d) the merger parties had not made submissions on the quantum of any cost savings arising from the

merger. Effective prices had in fact increased and the claimed efficiencies had not led to lower prices in the Platform Market (Infringement Decision at [327]-[334]).

Parties' submissions

(1) The appellants' submissions

95 The appellants submit that the concerns about the likelihood and efficacy of Go-Jek's entry, raised by CCCS, were largely unjustified and overstated.[108] We note that CRA's opinion was that the barriers to entry were surmountable and ride-hailing was not an industry that was likely to "tip" towards a "winner takes all" outcome. The presence of indirect network effects did not in itself mean that ride-hailing was prone to tipping given the diminishing returns of such network effects, *ie*, the effects decline rapidly with initial increases in the new entrant's scale,[109] product differentiation between the different firms in the ride-hailing industry,[110] and the ease with which consumers and drivers may download and use multiple ride-hailing apps.[111] CRA also pointed to evidence of new entrants successfully challenging incumbent ride-hailing companies in markets including Singapore.[112]

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108 Appellants' closing submissions at para 4.13.

109 Bundle of Witness Statements Vol 3 at pp 43 and 44 – CRA report dated 16 December 2019 at paras 118 and 122.

110 Bundle of Witness Statements Vol 3 at p 44 – CRA report dated 16 December 2019 at paras 121 and 122.

111 Bundle of Witness Statements Vol 3 at p 44 – CRA report dated 16 December 2019 at para 123.

112 Bundle of Witness Statements Vol 3 at p 45 – CRA report dated 16 December 2019 at para 125.

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96 The appellants assert that the evidence available at the time of the Infringement Decision, both publicly available and provided by them, amply demonstrated that Go-Jek's entry was sufficient in likelihood, scope and time. They further assert that this was *conclusively proven* by the empirical data after Go-Jek's entry barely months after the Infringement Decision.[113] In particular, the appellants refer to the fact that:

(a) On 26 February 2018, a Reuters article reported that Go-Jek had raised US$1.5bn.[114]

(b) On 27 March 2018, a Reuters article quoted Go-Jek's Chief Executive and founder Mr Nadiem Makarim stating that the Transaction was a "great opportunity" since fewer players meant a smoother path to market leadership.[115] Since then, Mr Vikarama Dhiman, an engineer from Go-Jek, in an article dated 26 August 2019, has stated that Go-Jek viewed Uber's exit as the "perfect opportunity" for entry into South-East Asia and Singapore.[116]

(c) On 24 May 2018, Go-Jek issued a press-release announcing that it would enter, *inter alia*, Singapore within "the next few months", stating that this followed many months of detailed planning and market research.[117] This contradicted its statement to CCCS […] that it had been

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113 Appellants' closing submissions at para 1.3.

114 Appellants' closing submissions at para 4.17.

115 Appellants' closing submissions at paras 2.13 and 4.17; 1 CB 117.

116 Appellants' closing submissions at para 2.13; 3 CB 636.

117 2 CB 548-553.

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assessing […].[118] In July 2018, it confirmed that it would enter Singapore in 2018.[119]

(d) Documents from Go-Jek showed that it had been preparing to launch in Singapore on an accelerated timeline after the Transaction was announced. Specifically, Go-Jek incorporated a corporate vehicle for providing ride-hailing services in Singapore on 17 April 2018;[120] its launch team was assembled in May/June 2018[121] and its launch operations had been "looking good" by mid-August 2018;[122] […];[123] in early September 2018, Go-Jek's marketing team was given the go-ahead to prepare for a November 2018 launch.[124] This was despite Go-Jek's claim on 23 May 2018 that it only had […].[125]

97 The appellants also submit that Go-Jek would not have difficulty securing access to a fleet of a sufficient size since, by the time of its soft launch in November 2018, the only vehicles unavailable to it were Grab Rental vehicles and SMRT taxis. Only 6,454 vehicles out of a total of around 65,000 vehicles that could be used to provide ride-hailing services were unavailable to Go-Jek at the time of its soft launch.[126]

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118 Appellants' closing submissions at para 4.21.1; 2 CB 475.

119 3 CB 122-123.

120 3 CB 360-361.

121 3 CB 636; Appellants' closing submissions at para 2.15.1.

122 3 CB 640; Appellants' closing submissions at para 2.15.4.

123 3 CB 415; Appellants' closing submissions at para 2.15.3.

124 3 CB 641; Appellants' closing submissions at para 2.15.5.

125 Appellants' submissions at para 4.21.2.

126 Appellants' closing submissions at para 4.14.

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98 The appellants also contend that post-Transaction data confirms that Go-Jek's entry restored effective competition to the levels which prevailed absent the Transaction, and did so in a timely manner. Go-Jek's soft launch took place two months after the Infringement Decision was issued, and CCCS's guidelines indicated that entry within two years would be timely. Go-Jek's entry was also sufficient in scope and triggered an immediate competitive response from Grab, […].[127] As the Guidelines on Mergers recognise, it is unnecessary for Go-Jek to replicate the market position of Uber.[128] There is no evidence that Go-Jek lacked the necessary funds to compete. The fact that Grab's effective prices […] is consistent with CCCS's recognition that effective rider-side prices would have risen even in the […] scenario. Driver promotions and incentives also […] after Go-Jek's entry.[129]

(2) CCCS's submissions

99 CCCS's position remains that Go-Jek's entry was not sufficient in likelihood, scope and time to be able to assert sufficient competitive constraints on Grab, especially without the Final Directions, due to the high barriers to entry and expansion at the time the Infringement Decision was issued.[130] Whether Go-Jek's entry had been "confirmed" was one relevant factor which had been considered in assessing the likelihood of its entry.[131] Go-Jek had stated in response to CCCS's statutory requests for information that its Singapore plans

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127 Appellants' closing submissions at paras 4.27 to 4.30.

128 Appellants' closing submissions at para 4.39.

129 Appellants' reply submissions at paras 3.7 and 3.8.

130 CCCS's closing submissions at para 32.

131 CCCS's closing submissions at para 33.

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were uncertain, and CCCS rightly gave more weight to these responses (which carried criminal sanctions under s 75 of the Competition Act) than whatever might have been reported in the press.[132] CCCS had also stated at [252] of the Infringement Decision that regardless of whether Go-Jek's entry had been confirmed, the evidence available did not suggest that its entry was likely to be sufficient in timeliness and extent such that any SLC would be averted in the absence of CCCS's intervention. While the appellants emphasised the size of Go-Jek's funding, there is no evidence these funds would be invested into Singapore as opposed to higher priority markets elsewhere. This should be seen in the context of the fact that Grab's estimated funding continued to outmatch Go-Jek's.[133] Further, the efficacy of any new entrant to competitively constrain Grab was uncertain, as acknowledged by Dr Caffarra. CRA had also, in their 14 June 2018 report, indicated that the new entrants such as Ryde and Jugnoo could competitively constrain Grab. However, Jugnoo has now exited the market and Ryde remains […] player.[134]

100 The evidence concerning Go-Jek's entry after the Infringement Decision did not disprove the finding of a SLC.[135] RBB's opinion is that it is not evident that Go-Jek's entry has restored competition to the levels that would have prevailed but for the Transaction, despite the impact of the Final Directions.[136] CCCS submits that Go-Jek had relied on the Final Directions, as evidenced by

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132 CCCS's oral opening at para 24.

133 CCCS's closing submissions at paras 32 to 35.

134 CCCS's closing submissions at paras 32 to 36.

135 CCCS's reply submissions at para 12.

136 Bundle of Witness Statements Vol 3 at p 325 – RBB report dated 20 February 2020 at para 123.

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the fact that […]% of drivers are "multi-homing", which it claimed demonstrated Go-Jek's heavy reliance on CCCS's directions in removing Grab's exclusivities with drivers.[137] If the new entry took place as a result of the directions, it cannot provide basis to conclude that there was no SLC. The potential effect of CCCS's intervention has not been adequately taken into account by either the appellants or CRA.[138]

101 Go-Jek has not achieved […]% market share since its entry and is […] than the post-Transaction Grab entity. While Grab's effective prices […] after Go-Jek's entry, they have […].[139] The evidence indicates that even after the entry of Go-Jek, […], although the pertinent comparison is with the prices that would have prevailed but for the Transaction. Go-Jek has not been able to replicate the market position that Uber held pre-Transaction as […].[140]

Our decision

102 As CCCS notes, there is no precise threshold, whether in qualitative or quantitative terms as to what constitutes a SLC, although a merger is more likely to substantially lessen competition if it leads to a significant and sustainable reduction of rivalry between firms over time to the likely detriment of customers (See Guidelines on Mergers at para 4.5). In considering whether the Transaction led to a SLC, we consider the effects of the Transaction and Go-Jek's entry against the various barriers to entry and expansion.

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137 CCCS's closing submissions at para 40.

138 Bundle of Witness Statements Vol 3 at p 330 – RBB report dated 20 February 2020 at paras 151 and 152.

139 CCCS's closing submissions at paras 42 to 44.

140 Bundle of Witness Statements Vol 3 at pp 329 and 330 – RBB report dated 20 February 2020 at paras 144 to 148.

103 We begin by considering the various barriers to entry and expansion. In their closing submissions, the appellants made three main points: first, that Go-Jek would not have had difficulty securing access to a fleet of sufficient size since, as at the time of the Infringement Decision, out of the total of 65,000 vehicles that could be used to provide ride-hailing services, almost 52,000 vehicles had been available.[141] As we understand it, this had been calculated on the basis that, for instance, LCR (which owned around 9,000 vehicles at the time of the Infringement Decision) could be sold to Go-Jek.[142] However, this overlooks the fact that in the absence of the IMD, the Purchase Agreement would have allowed Grab to request that Uber not sell LCR to […] under certain circumstances (see Infringement Decision at [195(a)]). As CCCS, notes, as of 12 November 2018, the fleet partners with whom Go-Jek had been in negotiations with had only been a fraction of the size of Grab's fleet.[143] Further, as CCCS found in the Infringement Decision, Grab would also have had the ability and incentive to reinforce its dominant position in the Platform Market by entering into exclusivity arrangements with CPHC rental companies and their drivers in the absence of CCCS's intervention (see [93] above). We therefore do not agree that CCCS overstated the barriers to Go-Jek's entry on this aspect in the Infringement Decision.

104 Second, the appellants assert in their closing submissions that while RBB suggests that market entry would require the mobilisation of large financial resources, RBB did not quantify the sums necessary, nor did it suggest

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141 Appellants' closing submissions at para 4.14.

142 Reply at para 97.

143 Defence at para 84.

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that Go-Jek did not have the financial means to successfully enter the market.[144] We find this submission unpersuasive. The fact that it would have been difficult, if not impossible, for RBB and CCCS to quantify the sums which Go-Jek or any other potential new entrant would have to invest is beside the point. While the evidence suggests that Go-Jek had raised substantial amounts of money, *eg*, a Reuters article dated 26 February 2018 stated that Go-Jek had raised US$1.5bn, or that Go-Jek had estimated funding of $3.3bn as of 5 December 2018, CCCS noted that Grab's funding was significantly more (apparently, $6.6bn).[145] While CRA noted that it is unclear how much of Grab's fundraising remains,[146] it is reasonable to infer, from these figures, that Grab had deeper pockets and would have been able to invest more heavily in Singapore in order to maintain the competitive advantages derived from the Transaction.

105 The comparison between Grab and any potential new entrant, such as Go-Jek, was relevant since it is not disputed that even the merger parties, including Grab, would not have been able to maintain the levels of investment and spending pre-Transaction. The size of Go-Jek's alleged war chest must therefore also be seen in light of the heavy losses accumulated by the merger parties since their market entry – in this regard, we note that, as indicated at [227] of the Infringement Decision, there is evidence that Uber had invested around US$[…] since its entry into Southeast Asia, and that Uber had expected to spend […]. These projected sums must be seen in the light of the fact that Uber had an established presence in the region and the indirect network effects discussed below. It would therefore be reasonable to expect that any new entrant

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144 Appellants' closing submissions at para 4.15.

145 Defence at para 84.

146 Bundle of Witness Statements Vol 3 at p 29.

would have to invest more heavily, and the figures cited in respect of Go-Jek must be seen in this regard. In other words, even the amount spent by Uber prior to the Transaction would not be a good indicator of the extent of expenditure that would have been necessary in order for an entrant such as Go-Jek to compete effectively with Grab, which would have been in a stronger position post-Transaction. Seen in this context, it was entirely reasonable to conclude that the incentive schemes and investments that a new entrant would have to make presented a significant barrier to entering the Singapore market. As Dr Durand noted, it was foreseeable that Grab would react to a new entrant by increasing its own spending on drivers' incentives and riders' promotions, which would have necessitated that new entrants plan for even greater spending in order to acquire riders and drivers. This went towards showing that a new entrant, post-Transaction, could expect to have to incur even greater expenditure in order to build a competitive network.[147]

106 More broadly, although we accept that a new entrant need not fully replicate the size of the incumbent's network as there would be an element of diminishing returns, we agree that the nature of the Platform Market would have presented strong indirect network effects, in which both riders and drivers would be more likely to utilise a platform which was used by more drivers/riders. This would result in shorter wait times for the users of the platform, which might be attractive to users even if the platform offers higher fares and charges larger driver commissions.[148] The utilisation rates of the platform by other riders would also have a significant effect on the pooled or

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147 Bundle of Witness Statements Vol 3 at p 327 – RBB report dated 20 February 2020 at para 135.

148 Bundle of Witness Statements Vol 3 at p 326 – RBB report dated 20 February 2020 at para 129.

shared services offered. This would have been a significant advantage that might have reinforced the position of the incumbents in the market, particularly when the market share of Grab post-Transaction is considered. The appellants pointed us to the fact that when Grab entered the Singapore market, the percentage of ride-hailing trips matched by Uber fell from 100% to […].[149] This was an attempt to persuade us that it is difficult for an incumbent to maintain its position, where ride hailing services are concerned, in the face of new entry. However, the appellants' submission glosses over the extent to which both Grab and Uber had to invest in Singapore – which the appellants sought to persuade us had been done at unsustainable levels. Further, Grab's entry took place at a time where the market for ride-hailing in Singapore was much smaller and newer[150] – the rapid expansion seen in the years thereafter cannot reasonably be expected to continue, at least at the same rate, with Go-Jek's entry. As CRA noted, while the number of trips booked through Grab and Uber increased by more than […] rides per month from January 2015 to late 2017, the growth of ride-sharing trips levelled off "somewhat" in the second half of 2017.[151] We therefore do not think that Grab's experience shows that new entrants can overcome first-mover advantages,[152] or that it would have been likely that new entrants such as Go-Jek would have been able to do so. In this regard, it is unclear to us to what extent referring to examples of successful entry by other players in different markets is helpful, since this would require a more detailed study of each of those examples and markets than the evidence before us allows

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149 Appellants' closing submissions at para 6.7.3.

150 See Dr Caffarra's slides dated June 2020 at p 4.

151 Bundle of Witness Statements Vol 3 at p 118 - CRA report dated 14 June 2018 at para 3.4.

152 Bundle of Witness Statements Vol 3 at p 126 - CRA report dated 14 June 2018 at para 4.1.1.

for. For completeness, we accept that individual drivers or riders would have limited countervailing power and would not be in a sufficiently strong bargaining position.

107 Third, the appellants point to a number of statements made by Go-Jek or its employees which suggest or state that the Transaction presented a good opportunity for it to enter the Singapore market. For instance, an article dated 26 August 2019 stated that, in early September 2018 (after the Transaction had been announced but before the Infringement Decision was issued on 24 September 2018), the Go-Jek marketing team were given the go-ahead to prepare for a late November launch.[153] However, this did not equate to a decision for a launch and the capital commitments involved in a marketing campaign are starkly different from the losses that might have been incurred over a longer period of time if Go-Jek made a firm commitment to enter the Singapore market. Even with the marketing effort, which might have been planned as a contingency, the launch could still have been aborted subsequently

108 It would have been appropriate for CCCS to carefully scrutinise the public statements made by Go-Jek and its employees since the portrayal of its entry into the Singapore market would have been affected by other concerns, *eg*, the perception of its viability by employees or potential users of the platform. In this regard, it would not have been surprising if Go-Jek was less than forthcoming, at least publicly, with the difficulties with entering the Singapore market. The public statements were not intended to convey a careful or considered assessment of the effects of the Transaction and it would be

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153 3 CB 641.

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inappropriate to treat them as such. For instance, while the appellants referred to a Reuters article quoting Go-Jek's CEO as having said that the sale of Uber's Southeast Asian business to Grab was a "great opportunity" because "fewer players means a smoother path to continued and deepened market leadership",[154] this statement came just one or two days after the Transaction was completed and might not have been made with reference to the specific market conditions prevailing in Singapore at that time. In contrast, the […] to CCCS's statutory requests for information […] as the Transaction introduced significant obstacles to the Singapore market (see Infringement Decision at [245]) and would more appropriately have been given greater weight in light of the potential criminal sanctions under, for instance, s 77 of the Competition Act for knowingly providing information which is false or misleading in a material particular. To the extent that the appellants argue that CCCS should have obtained further documentation showing the true extent of Go-Jek's preparations, we note that […]. While […],[155] […].

109 More critically, any statements made *after* the IMD and Infringement Decision had been issued on 13 April 2018 and 24 September 2018 respectively may also have been affected by the provisions set out therein, which would have materially affected the conditions of the market for Go-Jek's entry. Comments such as the statement in August 2019 that "Uber exiting the region provided the perfect opportunity"[156] may have been made with the benefit of hindsight or may simply have been a reiteration of the comments made by Go-Jek's CEO shortly after the Transaction was announced (see [108] above). Considered in totality,

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154 1 CB 117.

155 Appellants' opening statement at para 5.22.

156 3 CB 636.

we were not convinced that these statements, particularly when assessed against the responses to CCCS's queries, showed that CCCS's assessment of the likelihood, timeliness or scope of Go-Jek's entry were unjustified, overstated or wrong in any material respect. To be clear, we accept that whether Go-Jek's entry had been *confirmed* was not determinative of the real question before CCCS, which was instead whether Go-Jek's entry had been sufficient in likelihood, scope and time to constrain any attempt to exploit the merged entity's increased market power.

110 While we fully acknowledge that there were objective indications that Go-Jek had been taking preparatory steps to enter the Singapore market, for instance, by hiring employees in Singapore and incorporating a subsidiary, these steps were not indicative as to the *scope* of its entry, or its timeliness. In other words, the fact that there was some suggestion Go-Jek intended to launch in November 2018 is not inconsistent with […] (see Infringement Decision at [245]). Further, as above, to the extent that Go-Jek had a sizeable war chest, it was unclear to what part of this would be used for its operations in Singapore.

111 As stated above, it is not disputed that the CAB may consider post-Infringement Decision evidence, although what weight to be attributed to it is a matter for the CAB to determine.[157] In our view, evidence relating to events that took place post-Infringement Decision should not be given significant weight in the present case given the intrinsic evidential difficulties involved. Go-Jek's entry took place in the context of the Final Directions made by CCCS, and it is difficult to ascertain whether the fact of and effects resulting from Go-Jek's

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157 Appellants' closing submissions at para 3.14.

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entry were affected or caused by the Infringement Decision and the Final Directions therein. As CRA fairly accepted, economic evidence cannot conclusively determine whether Go-Jek would have entered in the absence of the Final Directions.[158] For example, the IMD and the Final Directions imposed by CCCS sought to limit the effects of existing driver exclusivity provisions and to prevent Grab from imposing exclusivity obligations, lock-in periods and/or termination fees on drivers using its CPPT platform. It was in this context that Go-Jek entered the Singapore market and in which it operates. It seems clear to us that this would have had an effect on the drivers who were able to use Go-Jek's platform particularly in the light of the past policies of Grab Rentals and LCR's past policy of requiring its drivers to drive exclusively for Grab and Uber respectively (see Infringement Decision at [201]). In the witness statement filed by the Head of Business Intelligence at Go-Jek, Mr Amos Tay Swee Hui, he estimated that […]% of Go-Jek's drivers are "multi-homing" and the drivers who drive for both Grab and Go-Jek to comprise […]% of the monthly active drivers on the Go-Jek platform.[159]

112 While Go-Jek's entry was sufficiently timely, particularly when considered against the fact that CCCS has in previous merger cases considered entry within two years as timely entry (see Guidelines on Mergers at para 5.56), the post-Transaction data does not show that Go-Jek's entry has restored competition to the levels which prevailed "absent the [T]ransaction",[160] or that no SLC resulted. The appellants contend that Go-Jek's soft launch triggered an

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158 Bundle of Witness Statements Vol 3 at p 32 – CRA report dated 16 December 2019 at para 75.

159 Bundle of Witness Statements Vol 3 at pp 352 and 353.

160 See appellants' closing submissions at para 4.26.

(*cont'd on next page*)

"immediate competitive response" from Grab, with a […]. Dr Durand acknowledged that […].[161] Specifically, […]. […].[162]

113 CCCS submits, in our view, correctly, that the post-Infringement Decision evidence shows that Go-Jek's entry has *not* been sufficient in scope to provide a sufficient competitive constraint on Grab. […], although on a closer analysis, the figure below shows that the margin, at the time of Go-Jek's launch […].

114 […] following Go-Jek's soft launch is not, in our judgment, probative of the extent of competition posed by Go-Jek since it could be affected by other strategic concerns. Dr Caffarra's view was that Grab's margins following Go-Jek's entry was a significant factor in determining the extent of competitive pressure that a firm is under.[163] Although we fully accept that Go-Jek's entry posed a competitive constraint on Grab, […] is not, in our view, probative of the *extent* of such constraint. While the appellants refer to […], this concerned a short period of three months,[164] and might therefore be a poor indicator as to the extent to which competition has been restored to pre-Transaction levels. Further, it appears to us that […], and it is unclear to what extent they continued to do so.

115 Moreover, Grab's margins after Go-Jek's entry has to be seen against two points. First, as Dr Durand noted, Grab's margins […]. The margins just

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161 Appellants' closing submissions at para 4.30; Transcript, 1 July 2020, page 140, lines 17 to 23.

162 Appellants' closing submissions at para 4.31.

163 Transcript, 1 July 2020, page 86, lines 2 to 8.

164 Respondent's reply submissions at para 11.

(*cont'd on next page*)

prior to the merger may have been influenced by the pending Transaction, since, for instance, the merger parties may have been competing less aggressively in the light of the pending Transaction. In this regard, it appears the merger parties had been negotiating the Transaction since January 2018, if not before.[165] In other words, had the merger not been a possibility, Grab's actual margin at the time of the Transaction may have been much lower. It therefore may not be appropriate to compare Grab's margins at the time of the comparison with those after Go-Jek's entry. Second, Grab raised its effective prices significantly in the wake of the Transaction, and […] even after Go-Jek's entry.

116 It is significant that while Grab's effective prices […] after Go-Jek's entry, they […].[166] This goes towards showing that Go-Jek's entry had limited competitive impact. While it might be that the levels of expenditure incurred and the margins earned by the merger parties pre-Transaction were not sustainable and would have changed even in the absence of the Transaction, the fact that Grab was able to […] after Go-Jek's entry would suggest that Grab's situation was not as dire as the appellants seek to portray. We note also CCCS's analysis of Grab's reduction in discounts to riders as having intensified from end March to end July 2018 (see Infringement Decision at [294]), suggesting that it was at least contributed to in part by the reduction in competition brought about by the Transaction.

117 Further, as CCCS observes, Go-Jek's […], and relied on the following graph:[167] […]

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165 Dr Durand's introductory remarks at paras 26 and 27.

166 CCCS's closing submissions at para 43.

167 CCCS's closing submissions at para 42.

118 Although we accept that a new entrant need not duplicate the size and scale of the merged entity in order to present sufficient competition, the scale of the new entrant has a correlation to the competitive pressure that it can apply to Grab – Dr Durand testified that scale is required for such pressure to be exerted on a "durable basis".[168] In the context of the ride-hailing industry, the indirect network effects suggest that the market share of the entity would be particularly significant, even though we accept that there may be diminishing returns of such network effects past a certain point. In the present case, the stark disparity between Grab and Go-Jek's market shares, as well as Go-Jek's […] despite the Final Directions, militates against a finding that Go-Jek's entry was of sufficient scope to constrain any attempt by Grab to exploit its increased post-merger market power.

119 For these reasons, we find that, whether assessed as at the time of the Infringement Decision, or on the evidence currently before us, Go-Jek's entry was not sufficient in likelihood, timeliness and extent to address the SLC arising out of the Transaction.

Issue 4: Sufficiency of voluntary commitments offered

120 We have concluded above that CCCS was not obliged to accept the voluntary commitments offered by the parties *even if* these were sufficient to address any SLC arising from the Transaction. Nevertheless, in any event, our view is that the commitments offered by the merger parties were *not* economically equivalent to the Final Directions ordered by CCCS, contrary to

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168 Transcript, 1 July 2020, page 103, lines 1 to 6.

(*cont'd on next page*)

the appellants' contention,[169] or appropriate and sufficient to address the competition concerns arising from the Transaction. It is necessary to note that CCCS's position was that "not even the Final Directions were sufficient and/or appropriate (proportionate) to address the SLC concerns".[170]

121 For present purposes, we set aside the issue as to whether there had been breaches of due process by CCCS in allegedly prematurely terminating the investigative process by issuing the Infringement Decision instead of continuing to engage the merger parties, which we examine below from [152], as well as the question as to whether the merger parties had acted intentionally or negligently.

Infringement Decision

122 CCCS considered the commitments proposed on 14 June 2018 and subsequently on 26 July 2018 (*ie*, the Second Set of Commitments). The parties dispute whether CCCS also considered the commitments proposed by the merger parties in September 2018 (*ie*, the Third Set of Commitments).[171]

123 CCCS stated in the Infringement Decision that it analysed whether the commitments were appropriate remedies, taking into account how adequately the action would prevent, remedy or mitigate the competition concerns caused by the Transaction. It also considered the effectiveness of the proposed commitments, their associated costs and proportionality, and whether the proposed commitments are capable of ready implementation (Infringement

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169 Appellants' closing submissions at para 2.9.

170 CCCS's closing submissions at para 55.

171 Appellants' closing submissions at para 4.55; CCCS's reply submissions at para 19.

Decision at [341]). Having done so, CCCS did not consider it appropriate to accept the commitments proposed. In particular, CCCS stated that it had considered the Second Set of Commitments and noted that (Infringement Decision at [344]), amongst other things: (a) Grab's non-exclusivity commitments did not cover exclusivity restrictions on taxi rental fleet partners which would allow Grab to prevent its partners from agreeing to work with other operators; (b) Grab's proposal allowed it to continue imposing exclusivity obligations on drivers with ongoing exclusive contracts; (c) Uber's proposal that it or LCR is free to sell LCR's assets to any third party in the absence of a reasonable offer, (where offers will not be deemed to be reasonable if they are to acquire less than 75% of its assets (except for an offer for only unhired vehicles)) would render the proposed commitment to sell vehicles to a potential competitor ineffective in most cases and restrict a potential competitor's ability to access LCR's existing cars and drivers; and (d) that the proposal on the terms on which Grab would be released from its commitments may result in their premature cessation.

124 CCCS noted that the merger parties had themselves submitted that the Transaction could not be reversed and that it would not be possible to restore pre-merger conditions. CCCS also found that the merger parties had intentionally, or at least negligently, elected to irreversibly complete the Transaction despite knowing it was likely to raise competition concerns, without first ensuring that appropriate commitments had been offered and accepted by CCCS. CCCS accordingly held that it would not be appropriate to accept the Second Set of Commitments under s 60A(1) of the Competition Act and to make a decision of non-infringement on that basis (Infringement Decision at [345]). CCCS found an infringement of the s 54 prohibition (Infringement Decision at

[348]). The Final Directions made by CCCS in the Infringement Decision are reproduced in Annex A below.

Parties' submissions

(1) The appellants' submissions

125 The appellants assert that CCCS did not consider the Third Set of Commitments in the Infringement Decision.[172] Further, they contend that the fact CCCS did not order an unwinding or impose structural remedies, as it could have done,[173] but instead imposed behavioural remedies in the form of the Final Directions, indicates that CCCS was of the view that behavioural commitments were sufficient and appropriate to address its competition concerns.[174] This contradicted CCCS's claim that only structural remedies would have been appropriate. CCCS's position that only an unwinding would have restored competition wrongly assumed that new entry was impossible and was inconsistent with its own statement in the Infringement Decision that the Final Directions were "workable, proportionate and appropriate to address the SLC and any adverse effects arising from the Transaction".[175] In any event, the evidence of Go-Jek's entry and the reasoning in the Infringement Decision showed that structural remedies were unnecessary.[176]

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172 Appellants' closing submissions at para 4.55.

173 Appellants' closing submissions at paras 4.49 and 4.50.

174 Appellants' closing submissions at para 4.47.

175 Appellants' reply submissions at paras 4.2 and 4.3.

176 Appellants' closing submissions at paras 4.49 and 4.50.

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126 The voluntary commitments offered and Final Directions imposed covered four main areas: (a) the "sunset" condition; (b) the sale of LCR; (c) driver exclusivity; and (d) taxi fleet exclusivity.[177] CCCS and its expert did not adduce any evidence of any economic difference between the Third Set of Commitments and the Final Directions in respect of taxi fleet exclusivity, driver exclusivity, and the sale of LCR. Further, CCCS's insistence that a material difference exists between the sunset condition imposed by way of the Final Directions and that proposed in the Third Set of Commitments was premised on a misreading of the latter. If the sunset condition in the latter had been agreed to by CCCS, the remedies would still have been in place […], based on the merger parties' proposed threshold of 20% market share of a single competitor. This would have been sufficient to enable Go-Jek's entry, to the extent it needed any help.[178]

(2) CCCS's submissions

127 CCCS's position is that the Transaction was irreversible, and that the commitments offered by the appellants and Grab, and indeed, even the Final Directions, were not sufficient to address the SLC concerns. RBB found that even CCCS's Final Directions did not eliminate the possibility of an enduring SLC, and were instead a "second-best" remedy, constrained by the limited options available to CCCS in the circumstances. The effect of the Final Directions was weakened by the inevitable uncertainty about the precise timing

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177 Appellants' closing submissions at para 4.56.

178 Appellant's reply submissions at paras 4.4 to 4.12.

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and effectiveness of new entry.[179] In contrast, a commitment to "unwind the Transaction, or divest the [a]ppellants' network/assets to an alternative buyer, might have been found to be sufficient to restore pre-Transaction conditions". However, this was not possible and the merger parties consistently submitted that the Transaction could not be reversed as the appellants had already exited the market.[180] Having the Transaction dissolved would also not have been appropriate since this would merely result in a financial loss to Uber without restoring the market conditions to the pre-Transaction state. Keeping the Uber app platform technically alive in Singapore would not result in any real competition as Grab would be funding the operation of both the Grab and Uber applications post-merger.[181]

Our decision

128 The appellants place great emphasis on their allegation that the Third Set of Commitments had not been considered or mentioned in the Infringement Decision.[182] In response, CCCS points to [343(d)] of the Infringement Decision, which incorporated a proposed revision submitted in September 2018 to the commitment on the sale of LCR.[183] CCCS states that there had been no substantive revisions to the July commitments offered by Grab in its letter dated 13 September 2018 ("the 13 September 2018 letter") to CCCS to be incorporated in the Infringement Decision, although this had been considered

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179 CCCS's closing submissions at paras 48, 54 and 55; Bundle of Witness Statements Vol 3 at p 332 – RBB report dated 20 February 2020 at para 163.

180 Defence at paras 24 to 26.

181 CCCS's closing submissions at paras 47 and 49.

182 Appellants' reply submissions at para 4.5.

183 CCCS's reply submissions at para 19.

(*cont'd on next page*)

together with the other sets of commitments proposed by the merger parties.[184] We agree with CCCS that the Infringement Decision suggests it had considered the commitments offered by the merger parties in September, *ie*, the Third Set of Commitments. This is indicated not only by [343(d)] of the Infringement Decision, which incorporated the revisions made in the letter sent on behalf of the appellants on 17 September 2018 to the proposed commitment on the sale of LCR,[185] but also by the explicit acknowledgement in [343] of the revisions submitted by Uber on that date. There is also little reason to disbelieve CCCS's clear representation, in its submissions, that it had considered the Third Set of Commitments.

129 In any event, since we are of the view that the Third Set of Commitments was not sufficient or adequate, whether or not CCCS can be shown to have adequately considered them would not be decisive. In our view, the fact that CCCS did not order structural remedies does not contradict their position that even the Final Directions were not sufficient to address the SLC concerns. The fact that structural remedies were not ordered should be seen in the light of the position taken by the merger parties below, as indicated at [345] of the Infringement Decision, which had been that the Transaction could not be reversed and that it would not be possible to restore pre-merger conditions. For instance, in addition to the statement on 28 March 2018 that "a reversal of changes in the Grab and Uber platforms … is not practically, commercially, or

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184 CCCS's reply submissions fn 55.

185 3 CB 570 to 572.

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operationally possible"[186] (see [8] above), the appellants also submitted in their written representations dated 4 April 2018 that:[187]

> 4. The CCCS is seeking interim measures that would impose a significant burden on Uber as it would force Uber to reverse its decision to exit the Singapore market and to continue to allocate capital to its money-losing operations in Singapore. This move to reverse the purchase of Uber assets in Singapore by Grab, *and to require the Uber platform to remain in Singapore* in the same way prior to its exit, is in fact unprecedented.
>
> 5. Even if the CCCS were to demonstrate that the Transaction raises competition law issues such that interim measures are justified, *Uber Singapore would not be in a position to comply with the measures proposed given that (i) it does not have the necessary technology or funds, and (ii) it cannot compel third parties such as drivers, riders and employees to revert to the Uber platform.*
>
> [emphasis added]

130 It would have been inappropriate and unrealistic for CCCS to ignore such an express statement by the appellants that they would not have been able to comply with orders which would essentially require the unwinding of the Transaction, especially given the indications that usage of the Uber platform had already begun to drop. Notwithstanding the appellants' earlier statement that the Transaction was in effect irreversible, the appellants contend that it was nevertheless open to CCCS to require Grab to operate the Uber app separately until a new entrant was ready, and to divest the Uber assets to such new entrant.[188] However, the argument is devoid of any real force since the appellants have not sufficiently fleshed out the workability of this proposal either in their submissions or evidentially, particularly since the appellants had earlier contended that the Transaction was structurally irreversible.

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186 1 AB(A) 91 at para 1.16.

187 1 CB 149.

188 Appellants' closing submissions at para 4.50.

131 Contrary to the appellants' submission, therefore, the fact that CCCS stated that the Final Directions, which consisted of behavioural remedies, were "workable, proportionate and appropriate to address the SLC and any adverse effects arising from the Transaction" (Infringement Decision at [361]) does not contradict its position that only a commitment to unwind the Transaction or to divest the appellants' network or assets to an alternative buyer might have been sufficient.[189] We also do not agree that the position that only an unwinding would have restored competition assumes new entry would be impossible.[190] Rather, at best, it assumes that any new entry would not have addressed the competitive effects of the Transaction in a sufficiently timely and effective manner.

132 We turn now to consider the difference between the voluntary commitments proposed by the merger parties and the Final Directions. In particular, the main dispute between the parties pertained to the sunset condition and we therefore focus on this in these grounds. The sunset condition in the Final Directions provided that all Final Directions would be suspended on an interim basis if an open-platform competitor without any direct or indirect common control with Grab attains 30% or more of the total rides matched in the Platform Market for *one* calendar month. Under this condition, the merger parties would be *unconditionally released* from all Final Directions if this threshold is met for six consecutive calendar months (see [A.10] below).

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189 Appellants' closing submissions at paras 4.47 and 4.48; Appellants' reply submissions at paras 4.2 and 4.3.

190 Appellants' reply submissions at para 4.2.

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133 In the Third Set of Commitments, Grab proposed that the commitments automatically be suspended when the market share of a competitor exceeds 20% for a month, and where this threshold is exceeded for three months, that Grab be *released* from the commitments.[191] We note that the appellants take issue with CCCS's and Dr Durand's interpretation of the proposed commitment, which CCCS referred to as being that Grab be released from all commitments once "a single, or multiple competitors" achieved at least 20% of total rides.[192] It cannot be disputed that whether the threshold applied to a single competitor's market share or an *aggregate* market share would have been, at least potentially, significant. RBB noted that if the 20% threshold applied to an *aggregate* market share, the commitments would have been lifted once a new entrant achieved a market share of […]% (given the other providers' cumulative market share in Q2 2018). In the 13 September 2018 letter, Grab stated that:[193]

> **Automatic lapsing of commitments**: On the automatic lapsing of commitments, Grab understands that the CCCS is exploring two triggers based on the time period in which the market share of a competitor exceeds the set threshold. In other words, if the market share of a competitor exceeds the set threshold for a shorter period of time, this would trigger a *suspension* of the commitments. On the other hand, if the market share value of a competitor exceeds the set threshold for a longer period of time, this would trigger a *release* from the commitments. …
>
> With respect to the appropriate timeframe for the triggers, Grab has proposed a one month period and a three month period for the suspension of, and release from, the commitments respectively. Grab submits that this would appropriately strike a balance between market share fluctuations and sustainability of competition, and dynamic competition. …

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191 3 CB 567.

192 CCCS's closing submissions at para 55; Bundle of Witness Statements Vol 3 at p 335 – RBB report dated 20 February 2020 at para 181.

193 CCCS's closing submissions at para 57.

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[emphasis in italics from original; emphasis in underline added]

134 We agree with the appellants that the 13 September 2018 letter suggests that Grab had implicitly accepted or at least would have been open to accepting trigger events based on the market share of *a single competitor* in its proposal,[194] although, in fairness to CCCS, the shift in position to proposing a threshold for a single competitor could have been made clearer.

135 In our view, there are two main differences between the sunset condition proposed in the Third Set of Commitments and that incorporated into the Final Directions. First, in the former, the proposed threshold was 20% and in the latter 30%. The appellants submit that Grab had implicitly agreed to an aggregate threshold of 30% in the Second Set of Commitments, when it indicated that "any threshold set at more than 30% would be excessive".[195] Further, they submit that the 30% threshold was excessive and the proposed voluntary commitment had not been market tested. Their position is that the 20% threshold proposed was more than sufficient to address SLC concerns.[196] In response, CCCS emphasises that Grab ultimately offered a 20% threshold and there was no evidence that this aspect of its offer would have been improved upon.[197]

136 We do not accept that the Second Set of Commitments indicates with clarity that Grab would have agreed to the sunset condition in the Final Directions. In particular, while Grab stated in their letter dated 25 July 2018 that any threshold set at more than 30% would be excessive, this should be read in

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194 3 CB 567.

195 Appellants' closing submissions at para 4.63.

196 Appellants' closing submissions at para 4.68 to 4.70.

197 CCCS's closing submissions at para 61.

(*cont'd on next page*)

context of the fact that the threshold proposed therein would have been met if a "Significant Competitor" or *multiple competitors collectively* achieved the fixed percentage of the rides in CPPT transport aggregated against any 30 consecutive calendar day period.[198] Any concession that a 30% threshold would be acceptable therefore might not mean that the merger parties would similarly have agreed to a 30% threshold *to be met by a single competitor*. We therefore do not agree with the appellants that this statement made clear that Grab would have agreed to a 30% threshold for a single competitor.

137 Further, we do not think that a 20% market share threshold for a single competitor would have been economically equivalent to a 30% market share threshold, or that the latter was excessive. While CRA observed that an entrant triggering the threshold of 30% of all trips would be completing around […], a level Uber never reached,[199] this would be consistent with the fact that, post-Transaction, Grab is in a much stronger position than it had been, and that it would be more difficult for any new entrant to exert competitive effects as compared to Uber pre-Transaction. Further, when regard is had to Uber's market share by number of rides matched (see Infringement Decision at [182]), Uber's market share was *at least* 30% from Q3 2016 to Q1 2018 (with the exception of Q4 2017 where it was 29%). Uber's Singapore Monthly Business Update in January 2018 also projected that it was on track to obtain […]% market share in Singapore by June 2018 (although this was subject to the revised spend target stated) (see [Infringement Decision at [74]). Seen in the light of these facts, we are not persuaded that the threshold of 30% was disproportionate

198 3 CB 244.

199 Bundle of Witness Statements Vol 3 at p 237 – CRA report dated 16 March 2020 at para 81.

or unnecessary. Finally, as we have said above, our view is that, even taking into account the post-Infringement Decision evidence in the present case, we remain unable to conclude that the SLC arising from the Transaction has been remedied. In this regard, we note that Go-Jek's market share was […] (*ie*, close to the 20% threshold proposed).[200]

138 Second, the time period over which the competitor must maintain a market share above the threshold level was different in the Third Set of Commitments and the Final Directions. In the former, Grab proposed that it be automatically released from its commitments in the event that a competitor exceeds the set threshold for a three month period.[201] In contrast, in the Final Directions, this was a six-month period. The difference between the two is meaningful. Given that the market share may vary month on month (*eg*, see [182] of the Infringement Decision), we accept that a three-month period might not be sufficient to ensure the new entrant is of sufficient scale to warrant the *unconditional* release from the Final Directions. This would not be disproportionate given the provision on the suspension of the Final Directions.

139 As we have found that the sunset condition proposed by the merger parties and that imposed by the Final Directions were *not* economically equivalent, and that the latter was an appropriate measure for addressing the SLC concerns, there is no need for us to go on to consider the extent to which such differences were present in the other three areas (*ie*, the provision for sale of LCR vehicles, taxi fleet exclusivity and driver exclusivity provisions). This is particularly since we have held that, in any event, CCCS would not have been

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200 Appellants' closing submissions at para 4.65.

201 3 CB 567.

bound to accept the voluntary commitments offered. We therefore do not examine the other provisions at length, save to observe that it appears to us that there was a significant difference where the provision on the sale of LCR is concerned.

140 The appellants proposed that a potential purchaser would have to make a "reasonable offer" as defined in the proposed voluntary commitment. The definition of a reasonable offer included a requirement that a potential purchaser should take at least 75% of LCR's vehicles.[202] This may have been problematic in so far as it could have precluded a sale to new entrants *such as* Go-Jek. While the appellants submit that it is unclear how the 75% threshold would have undermined potential entry as indicated by the fact that Go-Jek had been able to enter the market with sufficient access to vehicles,[203] in our view, the sufficiency of the commitment proposed cannot be assessed solely with reference to Go-Jek, and the proposed commitment would have made it considerably more difficult for smaller entrants to purchase vehicles. In contrast, there appears to be little difference where the provisions on taxi rental fleet partners exclusivity and driver exclusivity are concerned. The appellants contend that, regarding the former, the merger parties had agreed to a blanket ban on taxi fleet exclusivities, contrary to CCCS's assertion otherwise, and that, regarding the latter, approximately […]% of the driver contracts with exclusivity provisions would be terminated within the six-month period. We are inclined to accept that the difference between the commitments proposed and the Final Directions were slight, if any, on these two provisions.

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202 Appellants' closing submissions at para 4.62.

203 Appellants' closing submissions at para 4.62.

Issue 5: Breach of due process

141 The appellants relied on the opinion of Professor Philip Marsden ("Prof Marsden"), who is, amongst other things, a former Deputy Chair, Inquiry Chair, and Senior Director, Case Decision Groups at the Competition and Markets Authority in the United Kingdom.[204] Prof Marsden's opinion was that CCCS's conduct was not in accordance with due process, with its guidelines and public statements or with internationally-observed standards and practice.[205] In this regard, Prof Marsden asserted that the following conduct raised concerns: CCCS did not apprise the merger parties of the timetable in its review of the Transaction, issued the PID without offering the promised feedback on voluntary commitments, terminated discussions on voluntary commitments to issue the Infringement Decision without notice, did not market test the merger parties' proposed voluntary commitments and instead conducted a market test of its own proposed remedies that may have led to biased results.[206] In his view, the proposition that a competition authority can freely reject appropriate remedies is contrary to established principles in the EU and UK.[207] CCCS should only have proceeded with an infringement decision if the merger parties were unable or unwilling to offer voluntary commitments that addressed its concerns.[208]

142 The appellants further argue, in the main, that:

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204 Bundle of Witness Statements Vol 1 at p 7 – Marsden's report at para 2.

205 Bundle of Witness Statements Vol 1 at p 9 – Marsden's report at para 7.

206 Bundle of Witness Statements Vol 1 at p 10 – Marsden's report at para 9.

207 Bundle of Witness Statements Vol 1 at pp 27 and 28 – Marsden's report at paras 73 and 74.

208 Bundle of Witness Statements Vol 1 at p 30 – Marsden's report at para 84(f).

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(a) The Third Set of Commitments, which in any case had been disregarded by CCCS, had not been intended as their final offer. The appellants made it clear that they were open to further discussions.[209] If CCCS had made clear that *only* commitments in the form of the Final Directions would have sufficed, the merger parties would have agreed to the changes necessary to bridge the gap. The abrupt termination of the discussions was therefore said to be a substantial breach of due process.[210]

(b) CCCS did not comply with its own guidelines and timelines, affecting the appellants' right of defence. Amongst other things, it failed to send an issues letter[211] and should have reverted to the s 58 procedure when the notification was filed instead of rejecting the notification on the basis that an investigation had been opened.[212]

(c) CCCS failed to provide sufficient access to its case file, in particular, to notes of meetings with third parties despite not confirming that the notes were not helpful to the appellants' case.[213]

143 These submissions were in addition to the appellants' arguments that CCCS failed to properly consider Go-Jek's entry by ignoring information which

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209 Appellants' closing submissions at para 2.8.

210 Appellants' opening statement at para 5.5; Appellants' closing submissions at para 2.10.

211 Appellants' closing submissions at paras 2.7 and 3.17.

212 Appellants' closing submissions at paras 2.6, 3.17 to 3.24; appellants' opening statement at para 5.19.

213 Appellants' opening statement at para 5.20.

(*cont'd on next page*)

undermined Go-Jek's statements to CCCS and by failing to obtain documents showing the true extent of Go-Jek's preparations,[214] and that CCCS should not have considered the "irreversibility" of the Transaction, both of which we have addressed above.

144 In response, CCCS argues that the onus was on the merger parties to offer commitments to CCCS, and that there is no statutory basis to require that it engages with the merger parties on their proposed commitments. The "state of play" meetings did not show that CCCS was obliged to engage in an interactive process and had been convened at the merger parties' request notwithstanding that such meetings are not provided for in the CCCS Guidelines on Merger Procedures 2012 ("Merger Procedures Guidelines"). Market tests of the proposed commitments had not been carried out as CCCS had not considered them to be suitable remedies, and it instead market-tested its proposed directions.[215]

145 There was no basis for CCCS to have assessed the Transaction following the process for a notified merger as its investigation had already commenced by 16 April 2018, as the merger parties had known. CCCS could not follow the same process used in notified merger situations since it needed to promptly obtain information from third parties, which it would not have been able to do until a later stage under the merger notification process.[216] CCCS noted that the process it followed may have been in accordance with due process even if it did not follow the review process set out in its guidelines. For example, while an

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214 Appellants' opening statement at paras 5.20 to 5.22.

215 CCCS's closing submissions at paras 73, 75 and 77.

216 CCCS's closing submissions at paras 68, 69 and 71.

(*cont'd on next page*)

issues letter was not provided, the competition concerns had been stated in the PIMD on 30 March 2018, and later in the IMD on 13 April 2018.[217] The appellants made representations on no less than 11 occasions before the Infringement Decision was issued, received CCCS's detailed competition concerns in the PID, and inspected the case file. This went beyond what was afforded under the merger notification process.[218]

146 On the contention that CCCS failed to provide sufficient access to its case file, CCCS submits that access was given to the fullest extent permitted under s 89 of the Competition Act read with reg 8(2) of the Competition Regulations 2007 (S 348/2007). The CAB has also made the disclosure orders it deemed fit, and if the appellants do not otherwise succeed in the appeal after having had access to such information, then whether CCCS provided sufficient access to its files during the investigation cannot constitute a separate ground to allow the appeal as the appellants would not have suffered any injustice.[219] CCCS also contended that it had thoroughly considered the question of Go-Jek's entry by way of the s 63 notices sent to Go-Jek, and that it had taken proper steps to verify these statements. For example, CCCS had requested further information from Go-Jek after receiving information from Uber […]. Go-Jek was not under investigation, and Dr Caffarra, who had the same information as CCCS, also took the view that the timing and effectiveness of any entry by Go-Jek was uncertain.[220]

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217 CCCS's closing submissions at paras 70 and 76.

218 CCCS's closing submissions at para 70.

219 CCCS's closing submissions at paras 79 and 80.

220 CCCS's closing submissions at paras 81 to 83.

Our decision

147 At the outset, we note that the guidelines produced by CCCS do not have legal effect, although these guidelines may give rise to certain expectations on the part of the merger parties as to how CCCS would investigate their merger. In this regard, the appellants contend that the deviation from or disregard for CCCS's own guidelines would create "extreme uncertainty" for the business community.[221] For the reasons we explain below, we do not think that any deviation from CCCS's guidelines in the present case would cause such uncertainty.

148 CCCS's position is that the present case proceeded as an investigation as opposed to a notified merger. The appellants note that the Merger Procedures Guidelines limit the circumstances under which CCCS may "reject" a notification. This would appear to be a reference to para 4.14 of the Merger Procedures Guidelines, which provides that CCCS may refuse to accept an application under s 57 or 58 of the Competition Act if it is incomplete, not accompanied by the relevant supporting documents or the appropriate fee, not substantially in the prescribed form, or non-compliant with any requirement under the Competition Act or any regulations made thereunder. In our view, the mere fact that the Merger Procedures Guidelines provide that an application may be rejected for these defects should not be taken to mean that applications cannot be rejected for other reasons. For instance, it appears to us that it should be open to CCCS to reject an application on the basis that its investigations are already underway, and that the timelines that would ordinarily apply to merger applications cannot or should not be applied. Importantly, para 1.7 of the

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221 Appellants' closing submissions at para 1.10.

Merger Procedures Guidelines provides that, in applying the guidelines, the facts and circumstances of each case will be considered. Further, the examples given in the guidelines are not exhaustive and do not set a limit on the investigation and enforcement activities of CCCS.

149 In this regard, we note that the phased review process set out in the Merger Procedures Guidelines do not strictly apply to investigations, although para 5.2 states that CCCS would endeavour, wherever *possible*, to follow the same process for own-initiative investigations as for notified merger situations. There was a limit on what the merger parties could reasonably expect. We do not understand CCCS's position to be that it will deviate from the procedures set out in its guidelines without good reason. Indeed, in the present case, CCCS explained that it could not follow the same process used in notified merger situations since it needed to promptly obtain information from third parties, which it would not otherwise have been able to do.[222] This appears to us to be a reasonable decision made within CCCS's exercise of discretion – while CCCS had the ability to impose interim measures, this would not have been a replacement for the certainty that would have been afforded by a decision on whether s 54 had been infringed.

150 In any event, it appears to us that the appellants did not suffer any prejudice from the alleged deviation from CCCS's guidelines and the alleged deviation did not deprive them of the opportunity to be heard. While CCCS did not, for instance, provide an issues letter, this does not *ipso facto* mean that the appellants were not sufficiently apprised of the concerns CCCS had. At the

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222 CCCS's closing submissions at paras 68 and 69.

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latest, the concerns would have been made apparent to the merger parties by way of the PIMD and the IMD. The appellants also made written and/or oral representations to CCCS on no less than 11 occasions prior to the issuance of the Infringement Decision.[223] In this context, it cannot be seriously argued that any deviation from CCCS's guidelines breached the appellants' due process rights. Indeed, the appellants were afforded more than a reasonable opportunity to be heard.

151 The appellants contend that CCCS's failure to follow its well-established timelines affected the appellants' right of defence, because this meant that the appellants did not know "whether or when to propose commitments and, in particular, when was the last opportunity to do so".[224] This meant also, according to them, that they were deprived of the ability to resolve CCCS's concerns, "let alone early on". This submission engages the question as to whether CCCS is duty bound to explain to the merger parties why their proposed commitments are inappropriate or to engage them in an iterative process.

152 In our view, CCCS is obliged to give the merger parties an opportunity to be heard, and, if it decides to issue an infringement decision, to provide reasons for its infringement decision. However, requiring CCCS to engage parties specifically on the adequacy of the commitments offered is untenable. This would mean that, taken to its logical conclusion, the merger parties would essentially be given the discretion as to whether to accept the "commitments" envisioned by CCCS, failing which, CCCS would issue a final direction. This

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223 CCCS's closing submissions at para 70.

224 Appellants' closing submissions at para 3.17.

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would place the discretion largely with the merger parties being investigated. In addition, while we note that the appellants' counsel made clear that his position was not that a discussion on commitments should be allowed to go on indefinitely, but that the process should be an "open and iterative" one,[225] it is in any case unclear to us when the appellants suggest that this "iterative" process ought to come to an end. In some cases, a protracted period of uncertainty and negotiations may reasonably be considered by CCCS to be inappropriate. The mere fact that CCCS issued the PID without providing feedback on the First Set of Commitments is not, in our view, significant, since the PID would have been helpful in shedding light on CCCS's concerns. While CCCS's release of the Infringement Decision might have been abrupt from the point of view of the merger parties, we think that, seen in light of the fact that this followed *three* sets of voluntary commitments, the merger parties were given sufficient and more than reasonable opportunity to put forward such commitments as they deemed appropriate.

153 In this regard, we note that the appellants had been able to revise the commitments offered in the light of what CCCS indicated in the PID, and had also had at least one meeting with CCCS in which the latter provided feedback on the commitments offered. The letter sent on behalf of Grab on 13 September 2018 setting out the revised commitments expressly stated that CCCS had provided feedback on, for instance, the limited transition period that had previously been suggested by Grab and also sought clarification on aspects of the commitments proposed.[226] CCCS had also acceded to the merger parties'

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225 Transcript, 29 June 2020, page 48, lines 17 to 20.

226 Transcript, 29 June 2020, page 39, lines 14 to 24; 3 CB 564 to 566.

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request for a release condition, although the appellants contended that they had not known what "level" (presumably, the threshold) CCCS wanted.[227] In our view, the process can fairly be said to have been an iterative one.

154 The appellants claimed at various points that they would have agreed to CCCS's directions if they had known what CCCS wanted. For instance, the appellants contend that they would have agreed if CCCS had insisted on removing the requirement in relation to LCR that a potential purchaser take at least 75% of LCR's vehicles or on the 30% threshold for the sunset condition,[228] we do not see any basis for finding that CCCS must inform the merger parties of the specific form of voluntary commitments it would have been prepared to accept. That would have gone beyond allowing the appellants an opportunity to address CCCS's concerns. Consistent with this, as CCCS notes, in *General Electric Company v Commission of the European Communities* [2005] ECR II-5575 ("*General Electric*") at [52], the Court of First Instance of the European Communities held that the Commission is not responsible for:

> … technical or commercial gaps in the commitments in question (which led it to conclude that they were insufficient to permit it to approve the merger at issue); nor, more specifically, can those gaps be attributed to any unwillingness on its part to accept that other commitments, of a behavioural nature, might be effective. It was for the parties to the merger to put forward commitments which were comprehensive and effective from all points of view …

In response, the appellants note that the court in *General Electric* observed that the Commission in that case had informed the applicant as to why the

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227 Transcript, 2 July 2020, page 133, lines 15 to 20.

228 Appellants' closing submissions at paras 4.62 and 4.63.3.

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commitments had to be rejected (at [53]).[229] However, this is distinct from a proposition that an omission by the Commission to do so would have in itself been a breach of due process, particularly where, as in the present case, some feedback had in fact been provided on the Second Set of Commitments, as we referred to above.

155 We note that in Prof Marsden's experience, in the EU or the UK, a competition agency would, in the context of considering a merger, typically inform parties about the shortcomings of their proposed commitments as soon as possible after their submission. His evidence was that established practices in other major jurisdictions envisage that if an authority concludes that the transaction as modified by voluntary commitments addresses its competition concerns, it should conditionally approve, and not prohibit, the transaction. Amongst other things, Prof Marsden cited the Executive Summary of the Roundtable on Agency Decision-Making in Merger Cases: From a Prohibition Decision to a Conditional Clearance dated 17 October 2017 ("OECD Executive Summary"), in which OECD said that prohibitions are a measure of last resort, only used when the proposed remedies are inadequate.[230] The OECD Executive Summary makes clear that it does not necessarily represent the *consensus view* of the Working Party, but instead identifies the key points from a roundtable discussion, contributions from the delegates and expert panellists, and a "background note" prepared by the OECD Secretariat.[231] The question that arises from this is what *legal value* such discussions would have to the analysis we have to conduct. Put in another way, even if CCCS did not comply with what

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229 Appellants' reply submissions at para 4.10.

230 Bundle of Witness Statements Vol 1 at pp 27 and 28 - Marsden's report at paras 72 and 75.

231 Bundle of Witness Statements Vol 2 at p 354.

some consider to be international best practices, it would not necessarily follow that the merger parties' due process rights were breached, or that CCCS was *legally obliged* to accept the voluntary commitments, even if it found the commitments adequate to address the concerns arising from the Transaction. We therefore do not think that Prof Marsden's opinion, or the practices in other jurisdictions, are particularly helpful in the instant situation.

156 The appellants referred us to the decision in *Schneider Electric SA v Commission of the European Communities* (Case T-310/01) ("*Schneider*"). In that case, the court considered that the statement of objections must contain an account of the objections cast in sufficiently clear terms to achieve the objective ascribed to it by the European Community regulations, namely, to provide all the information the undertakings needed to defend themselves properly before the Commission adopts a final decision. The statement of objections was said to be intended not only to spell out the complaints and give the undertaking to which it is addressed the opportunity to submit comments in response, but also to give the notifying parties the chance to suggest corrective measures (at [440] and [442]). The court then found that the statement of objections in that case did not permit Schneider to assess the full extent of competition problems to which the Commission claimed that the concentration would give rise. This was the context in which the court went on to find that Schneider had not been given an opportunity to submit its observations on the Commission's arguments, which might have led to a different decision being reached. As such, Schneider had to be regarded as not having been afforded the opportunity to submit, properly and in good time, proposals for divestiture which were sufficiently extensive to provide a solution to the competition problems identified by the Commission on the relevant markets. The effect of the irregularities was that the decision was vitiated by "an infringement of the rights of defence" (at [453] to [463]).

157 We are not persuaded that the decision in *Schneider* assists the appellants: the crux appeared to be that Schneider had not been given an adequate understanding of the *competition problems* identified. As we understand it, *Schneider* does not go so far as to expound on the extent to which the regulator must engage the undertaking in an "iterative" process specifically on the commitments proposed, save that the undertaking must be given an opportunity to assess the full extent of competition problems which the Commission claims might arise, and thereafter to propose remedies which might be approved by the Commission. The appellants in the present case were *not* deprived of the opportunity to offer voluntary commitments, which they did more than once. The competitive concerns of CCCS were also adequately explained to the merger parties, not least in the PID on 5 July 2018, following which two further sets of voluntary commitments were proposed. In this context, we do not think it can be said that, despite the fact the merger parties might not have known that the Third Set of Commitments would be the last, that the merger parties were deprived of an adequate opportunity to offer voluntary commitments or to understand CCCS's competition concerns.

158 We address two further points made by the appellants. First, to the extent that the appellants contend that the alleged lack of adequate access to CCCS's case file might have affected their ability to address CCCS's concerns, and to understand the evidence that was being relied upon in CCCS's finding of an infringement, this was, in our view, adequately addressed by the disclosure orders we made. Since then, the appellants have been given the opportunity to consider the evidence disclosed by CCCS within the confidentiality ring we ordered, and to make submissions thereon. Any prejudice suffered by the appellants would therefore have been remedied.

159 Second, while the appellants assert that CCCS should have market tested the commitments proposed, it seems to us that the real question is whether, given the evidence before CCCS, there was sufficient basis for its decision. CCCS market tested its proposed directions which eventually led to the Final Directions,[232] and the appellants accepted that this included some of the merger parties' proposed voluntary commitments.[233] It is unclear to us to what extent the failure to specifically obtain third-party feedback on the voluntary commitments offered undermined either the appellants' due process rights or any expectations they might have had of CCCS's investigative process. More fundamentally, it is not apparent to us what the effect such breach should have on the Infringement Decision given the conclusion we reached above that CCCS would in any event have had the discretion to reject the commitments in favour of an infringement decision.

160 For the above reasons, we are of the firm view that there was no material breach of due process.

Issue 6: whether intentional or negligent and the penalty imposed

The Infringement Decision

161 A threshold condition for the imposition of financial penalties is that the infringement must have been committed either intentionally or negligently. An infringement is intentional if the undertaking "must have been aware that its conduct was of such a nature as to encourage a restriction or distortion of competition", and it is "sufficient that the undertaking could not have been

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232 CCCS's closing submissions at para 77.

233 Reply at para 155(a).

unaware of the same, without it being necessary to show that the undertaking also knew that it was infringing the Act" (Infringement Decision at [375], drawing from *Napp Pharmaceutical Holdings Limited and subsidiaries v Director General of Fair Trading* [2002] CAT 1 at [456]). In contrast, CCCS stated that it is likely to find that an infringement has been committed negligently where an undertaking "ought to have known that the merger would, or was reasonably likely to, result in a SLC" (Infringement Decision at [376]).

162 CCCS found that the merger parties had intentionally or negligently infringed the s 54 prohibition. The evidence suggested that the merger parties were aware or ought to have been aware that there were competition concerns with the Transaction (Infringement Decision at [377] and [391]).

163 While the merger parties claimed that they had obtained legal and economic advice that there was no SLC and that it was difficult to assess effects, given that they had not waived legal privilege, their claim that they had taken legal advice that there was no SLC is not substantiated by any contemporaneous documentary evidence (Infringement Decision at [385] and [386]). In this regard, CCCS noted that Grab's board presentation on the Transaction included a slide on […], which suggested that such considerations had been known to Grab in its contemplation of the Transaction (Infringement Decision at [377]). Similarly, Uber's board presentation included a slide titled […]. Further, the Purchase Agreement clearly contemplated possible competition concerns and investigations and, *inter alia*, provided for the agreed apportionment between the merger parties of any financial penalties and the costs of any competition investigations imposed by any competition authorities arising out of the consummation of the Transaction. Such provisions were not common. In contrast, in […] (Infringement Decision at [378] and [390]). Grab had also been advised by […] in its Financial Due Diligence Report on Uber that […], and

that […]. Grab thus ought to have been aware of the price effects driven by the change in competition and market conditions (Infringement Decision at [380]).

164 The merger combined by far the two largest providers of CPPT platform services in Singapore and eliminated significant competition *inter se* (Infringement Decision at [385]). CCCS had sent a letter to each merger party on 9 March 2018 to explain the merger notification regime and CCCS's corresponding powers, but the merger parties nevertheless proceeded to complete the Transaction and began the transfers of the acquired data immediately, despite their view that Uber's exit would not be reversible. This suggested that the merger parties had elected to deal with the competition issues retrospectively, after implementing the Transaction in a manner that could not be reversed (Infringement Decision at [379]). The call with CCCS on 23 March 2018 should also have highlighted that the Transaction would risk giving rise to reasonable grounds for suspecting that the s 54 prohibition would be infringed (Infringement Decision [389]). For these main reasons, CCCS found that the parties had intentionally or negligently infringed the s 54 prohibition.

165 On the quantum of the penalty, CCCS fixed the starting point at […]% of relevant turnover for each of the parties by taking into account the nature of the infringement, the nature of the product, the structure of the market, the market shares of the merger parties as well as the potential effect of the Transaction on riders, drivers, competitors and other third parties. It found that the infringement was a serious one that resulted in the removal of the closest competitor from the market. The Transaction had been implemented in a way which made it impossible for CCCS to impose a full and effective remedy despite the fact that the merger parties knew or ought to have known that the Transaction would raise competition concerns. CCCS received numerous complaints regarding the decrease in product/platform choices, promotions and

incentives, which should be seen in the light of the finding that Uber would likely have continued to compete intensively with Grab for market share at least in the short to medium run (Infringement Decision at [396]-[401]).

166 The relevant turnover was defined as the turnover of the merger parties attributable to the provision of CPPT platform services in Singapore (*ie*, commissions) (Infringement Decision at [404]). Uber's relevant turnover for the financial year ending 31 December 2017 was S$[…] (Infringement Decision at [421]). Uber submitted that amounts remitted to drivers are considered a reduction in revenue or "contra revenue", and therefore that CCCS should consider Uber's net revenue of S$[…] instead. Paragraph 1 of the Schedule to the Competition (Financial Penalties) Order 2007 (No S 372/2007) states:

> Unless the circumstances otherwise require, the applicable turnover of an undertaking, other than an association of undertakings, shall be limited to the amounts derived by the undertaking from the sale of products and the provision of services falling within the undertaking's ordinary activities in Singapore after deduction of sales rebates, goods and services tax and other taxes directly related to turnover.

167 Uber had not shown that the "contra revenue" was directly related to the amounts of the turnover derived by Uber from the Platform Market. In any event, as the incentives were part of driver acquisition costs in a deliberate strategy by Uber to acquire driver and market share at the expense of short-run profit, the amount of commission collected, without the deduction of "contra revenue" reflected the true scale of Uber's activities. CCCS thus rejected Uber's submission that the "net revenue" should be used. Applying […]% to the relevant turnover, the starting amount was therefore S$[…] (Infringement Decision at [423]-[425]). CCCS then considered that the duration of infringement should be fixed at one year (Infringement Decision at [410] and [426]).

168 CCCS did not […]. It observed that while the merger parties submitted that they had been loss-making, it was not in the intrinsic nature of the Platform Market to have "low margins", which instead resulted from a deliberate commercial strategy by the merger parties to sacrifice profit to gain market share over its competitors. The turnovers provided by the merger parties did not include the trip fares paid by riders, but only the commission charged against the drivers (Infringement Decision at [411]-[413]). The merger parties' cooperation with CCCS and the mitigating factors they relied on had to be balanced against their decision to enter into and complete the Transaction in an irreversible manner despite the fact they knew or ought to have known it would infringe s 54. Their responses and compliance with the IMD were required under s 63 and s 67 of the Competition Act respectively, and their engagement of CRA was to assist in their own defence (Infringement Decision at [411]-[416] and [427]).

169 CCCS stated that it may adjust the penalty as appropriate to achieve policy objectives, in particular (Infringement Decision at [417]):

> the deterrence of the [merger parties] and other undertakings from completing and consummating anti-competitive mergers that result in an SLC. Under the Singapore merger notification regime, deterrence is necessary to ensure that merger parties undertake self-assessment and notify a potentially anti-competitive merger to CCCS timeously. …

However, it considered that the figure of S$[…] was sufficient to act as an effective deterrent and did not make adjustments to the penalty. This sum also did not exceed the maximum financial penalty CCCS could impose, which was S$[…]. CCCS therefore imposed a financial penalty of S$6,582,055 (Infringement Decision at [428] and [429]).

Parties' submissions on appeal

The appellants' submissions

170 The appellants argue that CCCS has not shown with sufficiently strong evidence that any s 54 infringement was intentional or at least negligent, and as such, that no fine can be imposed. It is insufficient for CCCS to simply show that the appellants appreciated that the Transaction could raise a possible competition risk or that "there [were] competition concerns" (see Infringement Decision at [377]). Relying on *Sainsbury's Supermarkets Ltd v Mastercard Incorporated and others* [2016] CAT 11 at [322], the appellants contended that CCCS must prove that the appellants knew or should have known that the Transaction was clearly unlawful or probably unlawful.[234]

171 From the appellants' perspective, there was little to no risk of a s 54 infringement for five main reasons. First, the appellants actively engaged CCCS in its investigation, including putting forward revised voluntary commitments twice. The facts "have shown" that behavioural commitments were sufficient to address the competition concerns. CCCS had never taken the position, prior to the present case, that it would reject appropriate commitments.[235] Second, the appellants knew that it would be very difficult for an incumbent to maintain its position in the face of new entry where ride hailing services are concerned, since there was ample evidence of successful entry and erosion of "first movers"

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234 Appellants' opening statement at paras 6.1 to 6.3; Appellants' closing submissions at para 6.9.

235 Appellants' closing submissions at para 6.7.2; Appellants' opening statement at para 6.4.1.

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worldwide.[236] Third, the appellants knew from experience, consumer surveys and common sense that the relevant market should at least include taxis (including street hail).[237] Fourth, the appellants knew that Go-Jek was planning to expand into Singapore and that it had enormous financial resources to compete aggressively.[238] Fifth, the appellants had clear commercial reasons for notifying CCCS of the Transaction post-merger and for not seeking CCCS's confidential advice.[239]

172 The fact that the appellants had considered possible "antitrust" issues before entering into the Transaction was common and prudent and the provisions in the transaction agreements apportioning possible "antitrust" fines was in line with customary practice. These did not evidence any knowledge of the parties that the Transaction was clearly or probably unlawful. Further, if there was the slightest risk that one of the eight jurisdictions impacted by the Transaction would impose fines, it would have been appropriate for the lawyers to deal with this risk in the agreements, particularly since Uber would otherwise pay a greater proportion of any fines imposed.[240] The appellants also believed, on the basis of CCCS's guidelines, that where the commitments proposed were appropriate, they would be accepted, and did not expect CCCS to unilaterally terminate the discussions on voluntary commitments without notice.[241]

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236 Appellants' closing submissions at para 6.7.3.

237 Appellants' closing submissions at para 6.7.4.

238 Appellants' opening statement at para 6.4; Appellants' closing submissions at para 6.7.5.

239 Appellants' closing submissions at para 6.71; Appellants' reply submissions at paras 6.21 and 6.22.

240 Appellants' opening statement at para 6.5.2; Appellants' closing submissions at paras 6.8 and 6.9.

241 Appellants' reply submissions at para 6.4.

173 The appellants also contend that CCCS had erred in its calculation of quantum of the penalty imposed. Their contention is four-fold. First, that CCCS adopted gross revenue instead of net revenue, which ignored the significant incentives granted to its drivers (which are treated as contra revenue under GAAP rules). This was also inconsistent with the CAB's previous reductions of penalties on account of high turnover and low margin (citing *Re Price-fixing in Modelling Services: Bees Work Casting Pte Ltd, Diva Models (S) Pte Ltd, Impact Models Studio and Looque Models Singapore Pte Ltd* [2013] SGCAB 1 ("*Bees Work*")). The merger parties' large market share meant that the high turnover and low margin nature of their business should have been indicative of the industry norm. The incentives and commissions paid out by Uber were rebates or discounts.[242]

174 Second, CCCS's application of a starting percentage of 5% to the inflated revenue figures is commensurate with the percentage used for serious cartel cases and is grossly excessive. There was no basis to institute such a high starting percentage, particularly given the numerous novel points of law.[243] Instead, the basis suggested for the high percentage, to deter others from filing post-merger, showed an inexplicable intention to deter what is expressly permitted by the Competition Act.[244]

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242 Appellants' closing submissions at paras 7.4 to 7.7.

243 Appellants' opening statement at paras 7.1 to 7.3; Appellant's closing submissions at paras 7.2 to 7.7.

244 Appellants' closing submissions at para 7.3.

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175 Third, CCCS failed to consider mitigating factors when calculating the fines, for instance, the appellants' high turnover and low margins[245] and the fact that the appellants could not have known that CCCS would refuse voluntary commitments.[246]

176 Fourth, CCCS erred in using a duration of one year for the purpose of calculating the penalties, when the appropriate duration should have been three months.[247]

CCCS's submissions

177 CCCS's position is that the appellants intentionally, or at the very least negligently, infringed the s 54 prohibition. It suffices to show that an undertaking could not have been unaware of the anti-competitive nature of its conduct and whether the undertaking properly characterised the conduct as an infringement of the Competition Act is not relevant (relying on *Marine Harvest ASA v Commission* Case T-704/14). The evidence showed that the merger parties intended to stop competing with each other in the markets where they both operate and to benefit from the reduction in competition arising from the Transaction. The objective evidence, including the provisions of the Purchase Agreement, showed that the merger parties were aware the Transaction would be illegal and/or potentially infringe competition laws. These were not standard contract terms. CCCS's confidential advice could also have been sought prior to the Transaction. Seen in the context of CCCS's communications with the

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245 Notice of Appeal at para 162; Reply at para 263.

246 Reply at para 271.

247 Reply at para 272.

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merger parties in March 2018, the only logical conclusion is that the appellants intended to circumvent the merger regime and thereafter pretend to engage CCCS in good faith when they knew that structural remedies had already become unavailable.[248] The appellants should not escape the imposition of penalties because of their erroneous belief that CCCS had to accept the commitments offered. They were at the very least negligent, and there was no contemporaneous evidence to show that they had obtained legal advice to the effect that the Transaction would not have infringed the s 54 prohibition. Rather, Dr Caffarra's evidence that she had advised Uber throughout that remedies were necessary strongly suggests that there was awareness a SLC would have arisen.[249]

178 CCCS also contended that the quantum of the financial penalties had been correctly determined in the Infringement Decision. The starting percentage of […]% was neither high nor excessive, having regard to the seriousness of the infringement. On the "contra-revenue", the Schedule to the Competition (Financial Penalties) Order 2007 (see [166] above) is relevant in determining what should be deducted from the applicable turnover. The appellants provided CPPT platform services and the amounts derived by it for the provision of services therefore were the commissions paid by drivers to the appellants for the use of the Uber platform. CCCS had not used the "gross revenue", contrary to the appellants' assertion, as trip fares were deducted.

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248 CCCS's closing submissions at paras 85 to 94.

249 CCCS's closing submissions at paras 95 to 97.

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179 Incentives are not "sales rebates", which should be a proportion of, and hence directly related to, the value of sales generated.[250] Incentives were not paid on a per-transaction basis or based on the quantum of driver commission. CRA had also considered driver and rider incentives as business costs rather than as "contra-revenue". Parties should not be allowed to deduct incentives as "contra-revenue" based on the accounting standard they have elected to adopt, and the financial penalties were commensurate with the true scale of their activities in the relevant market.[251]

180 CCCS clarified that it did not treat the fact that notification was only made after the Transaction was completed as an aggravating factor *per se*. Rather, higher penalties were "reflected by way of a lengthened duration of infringement to reflect the irreversibility of the harm done". A strong message that infringements are inexcusable was necessary given that the merger parties' conduct was egregious. Notwithstanding the fact that CCCS had in the PIMD required that the merger parties not integrate, scale down or wind down the appellants' business pursuant to the Transaction that may prejudice CCCS's ability and options to direct divestment of any business operations in the affected markets subsequently, the appellants proceeded with the migration of information and data to Grab, and the closure of their Singapore operations.[252] The alleged lack of profits by the appellants was not a mitigating factor. In so far as the appellants rely on *Bees Work*, that concerned whether a significant proportion of gross revenue that is passed on to independent parties should be deducted from the relevant turnover. In the present case, the relevant turnover

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250 CCCS's closing submissions at paras 101 and 102.

251 CCCS's closing submissions at paras 103 to 106.

252 CCCS's closing submissions at paras 111 and 114.

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had been determined on the basis of revenue collected after deducting the monies passed onto the drivers.[253]

181 On the period of infringement, CCCS submits that (a) the period of one year did not fully account for the impact of the infringement, as evidenced by the fact that the Final Directions are still in place (at least at the time of its submissions); and (b) the CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases 2016 provides at para 2.10 that infringement over part of a year may be treated as a full year.[254]

Our decision

Whether intentional or negligent

182 We first address the question as to whether the infringement was intentional or negligent. In *Re Price Fixing in Bus Services from Singapore to Malaysia and Southern Thailand: Konsortium Express and Tours Pte Ltd, Five Stars Tours Pte Ltd, GR Travel Pte Ltd and Gunung Travel Pte Ltd* [2011] SGCAB 1 at [141] to [143], the CAB applied the test identified by the CAT in *Argos Ltd and another v Office of Fair Trading* [2005] All ER (D) 439 (Apr) at [221] in determining whether the infringement in that case had been committed intentionally or negligently:

> … an infringement is committed intentionally for the purpose of section 36(3) of the Act [i.e. the English Competition Act 1998, which in substance is similar to section 69(3) of our Act] if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition. An infringement is committed negligently … if the undertaking ought to have

253 CCCS's closing submissions at para 107.

254 CCCS's closing submissions at para 109.

> known that its conduct would result in a restriction or distortion of competition.

The CAB also referred to *Luxembourg Brewers* COMP/37.800/F3 (December 2001) at [89] for the proposition that an infringement is intentional if the parties are aware that the object or effect of the act is to restrict competition, and it is not essential for the undertaking to be aware that it is infringing a provision of the Competition Act. These are largely consistent with the tests applied by CCCS in the Infringement Decision at [375] and [376].

183 We are persuaded that the infringement was intentional, or at least negligent. The fact (which is not disputed by the appellants[255]) is that the merger parties were each other's closest competitor, and they were aware or must have been aware that the Transaction would have the effect of restricting competition. This is especially after CCCS had sent a letter on 9 March 2018 to each of the merger parties explaining Singapore's merger notification regime and stating that CCCS could investigate a merger if it has reasonable grounds for suspecting that the s 54 prohibition will be or has been infringed. Notwithstanding this, the merger parties entered into the Purchase Agreement on 25 March 2018 in respect of the Transaction.

184 The Transaction combined the two largest providers of CPPT platform services by far in Singapore as their combined market share pre-Transaction was more than five times the next biggest player (see [85] above). Based on the notification thresholds under the Guidelines on Mergers, the market share thresholds indicating potential competition concerns would have been crossed, *ie*, where the merged entity has a market share of 40% or more or the merged

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255 Appellants' closing submissions at para 4.8.

entity will have a market share of between 20% and 40% and the post-merger CR3 is 70% or more (see [85] above). The concerns were in effect acknowledged by Dr Caffarra. She accepted that Uber's exit reduced the immediate competitive pressure on Grab and said that it was "entirely appropriate" for CCCS to "effectively adopt measures that try and facilitate the entry [presumably, of new entrants] but also control price rises in the interim period".[256] In reply to a question about the directions imposed by CCCS to ensure market contestability, she testified that: [257]

> [PROF TAN]: … So basically what you are saying is that not only is there uncertainty about the precise timing, but you also agree that there was uncertainty about the effectiveness of new entry, and therefore, in this regard directions were necessary to ensure market contestability. Would that be a fair summation of what you intended to say in this portion of your report?
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> DR CAFFARRA: *To be precise, I think that undertakings were absolutely necessary. That has been my position throughout. Whether those undertakings were taking the form of voluntary commitments agreed and negotiated, or directions, is a legal matter that I don't really have qualification to discuss. But the point is that I was clear that the undertakings were necessary, because we are faced with a world of uncertainty, whether those were they voluntary commitments that were in discussion and were being put forward is the point. And my view is that the commitments should have absolutely dealt with any short-term issue and the directions took over.*
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> [PROF TAN]: … What you are, in fact, saying is that post-transaction, whether in the form of commitments or directions made by CCCS, you did feel that they were necessary in one form or the other to ensure that there was market

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256 Transcript, 1 July 2020, page 166, lines 20 to 25.

257 Transcript, 1 July 2020, page 167 to page 168 line 7.

> contestability? That would be a fair summation of what you are saying, isn't it?
>
> DR CAFFARRA: Example as a policy matter, I think it is appropriate to either have voluntary commitments or directions that deal with that period before entry.
>
> [emphasis added]

185 Further, as CCCS noted in the Infringement Decision at [280(b)], the merger parties' contemporaneous internal documents and funding estimates indicate that they expected the Transaction to increase Grab's ability to increase effective price.

186 In light of the above, including Dr Caffarra's testimony, we find that the appellants must have been aware, or could not have been unaware, that the Transaction would have the effect of restricting competition in Singapore. Thus, the appellants' infringement of the s 54 prohibition was intentional, or at least negligent.

187 We are however not persuaded by two reasons provided by CCCS in support of its finding that the merger parties had intentionally or negligently infringed the s 54 prohibition. First, the redacted slide relied upon by CCCS, titled […] (see [163] above) does not clearly show, one way or another, whether or not the appellants were aware that their conduct would result in a restriction or distortion of competition. Secondly, the inclusion of provisions in the transaction agreements apportioning fines by CCCS is not in itself determinative of whether the infringement was intentional or negligent. CCCS argued that the specific apportionment of financial penalties (*ie*, […]%) was a precise number that showed that the merger parties had "given great consideration to the prospect of having to pay financial penalties (which could only have arisen from an intentional or negligent breach of competition

laws)".[258] CCCS also emphasised the appellants' admission that the reimbursement condition was included such that no party would pay more than 50% of the total fines imposed on the merger parties.[259]

188 While the provisions in the agreements were not template clauses and reflected some consideration by the merger parties, we are not persuaded that these are probative of the merger parties' state of mind. The fact that the merger parties were represented by experienced and competent competition law practitioners might equally mean that these provisions had been included as a matter of prudence. We therefore find their inclusion equivocal. Finally, we do not place any emphasis on the appellants' failure to notify CCCS of the anticipated merger or to seek CCCS's confidential advice for the purposes of the present analysis.

Quantum of penalty

189 We turn now to consider the quantum of the penalty imposed by CCCS.

(1) Starting percentage

190 The starting percentage was determined by CCCS by considering the seriousness of the infringement. The appellants contend that the starting percentage of […]% applied by CCCS was grossly excessive, as it is commensurate with the percentage used for serious cartel cases. In this regard, the appellants contend that while CCCS had sought to justify the starting percentage of […]% as "in or around the middle of the range of penalties

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258 CCCS's closing submissions at para 91.

259 CCCS's reply submissions at para 29.

(*cont'd on next page*)

endorsed by the [CAB]", the median derived from the cases cited by CCCS was […]%, and none of the cases cited related to a violation of s 54 of the Competition Act.[260] The appellants argued that the present case also raised numerous novel points of law, and CCCS should have taken this into account, in line with its decision in *Re CCS Imposes Financial Penalties on Two Competing Ferry Operators for Engaging in Unlawful Sharing of Price Information* [2012] SGCCS 3, in fixing the starting point.

191 We note that in *Re IPP Financial Advisers Pte Ltd* [2017] SGCAB 1 ("*IPP Financial Advisers*") at [26], the CAB held that the 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 CAB is satisfied, on the whole, that the penalty imposed is just and proportionate. Accordingly, the CAB in *IPP Financial Advisors* stated that the focus is on whether the overall penalty imposed is appropriate for the infringement in question, 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.

192 In our view, the starting percentage of […]% was justifiable in the present case. The Transaction removed the closest competitor to Grab, and in the light of the market share of the combined entity, as well as the fact that the appellants continue to benefit from the lessened competition in Singapore through their equity stake in Grab, we do not think the starting percentage identified by CCCS was inappropriate. While the cases referred to by CCCS were not factually comparable and we therefore do not place much weight on

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[260] Appellants' closing submissions at para 7.2.

them, they nevertheless lent support to the proposition that the starting percentage identified by CCCS was within the range of penalties imposed by CCCS. Further, for reasons we explain below at [200], we do not consider that any allegedly novel issues in the present case renders the starting point adopted by CCCS inappropriate.

(2) Relevant turnover

193 The appellants further argue that CCCS unjustifiably ignored "the fact that Uber does not earn anything more than the net revenue" and had instead been sustaining heavy losses by subsidising drivers and riders.[261] They explained in their Notice of Appeal that Uber had collected the fares paid by riders on behalf of the drivers, and remitted the fares to the drivers minus Uber's commission or service fee. In many instances, it also remitted its service fee to drivers, under the form of incentives and promotions.[262] The appellants therefore submit that the turnover used by CCCS to calculate the penalty should have been S$[…] (when amounts remitted to drivers are considered "contra revenue") instead of S$[…].[263]

194 The relevant provision is that in para 1 of the Schedule to the Competition (Financial Penalties) Order 2007, excerpted above at [166]. The appellants essentially contend that the incentives and commissions Uber paid out are rebates. CCCS offered no support for its position that the incentives and commissions were not rebates, and the amounts paid to incentivise drivers to

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261 Appellants' closing submissions at para 7.4.

262 Notice of Appeal at para 159.

263 Appellants' closing submissions at para 7.4.

(*cont'd on next page*)

accept a certain number of rides worked in the same way as discounts offered by retailers in order to incentivise a customer to purchase more goods.[264] The appellants also note that the incentives granted to its drivers are considered a reduction in revenue or "contra revenue" under the Generally Accepted Accounting Principles ("GAAP").

195 In our view, whether or not the amounts remitted to drivers can be deducted when computing the applicable turnover depends on whether these amounted to "sales rebates", and not for instance whether or not these amounts were deductible under GAAP. CCCS relies on a dictionary definition of "rebate" as being a "partial refund to someone who has paid too much for tax, rent or a utility" or a "deduction or discount on a sum of money due". CCCS also pointed us to the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.[265] This Notice referred to Art 5(1) of the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, and stated that:

> Article 5(1) provides for the 'deduction of sales rebates and of value added tax and other taxes directly related to turnover'. 'Sales rebates' mean all rebates or discounts which are granted by the undertakings to their customers and which have a direct influence on the amounts of sales.
>
> [emphasis added]

196 In turn, Art 5(1) provided that:

> Aggregate turnover within the meaning of this Regulation shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and

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264 Appellants' closing submissions at para 7.7.

265 CCCS's closing submissions at para 102.

> the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover. The aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4. …

197 CCCS argues that the incentives were not sales rebates because they were not directly granted from the commissions generated from its drivers, and instead represented the appellants' business costs to achieve scale.[266] Neither the Uber platform's terms and conditions nor vehicle rental agreement with LCR provided for the payment of incentives on a per-transaction basis, or based on the quantum of commission paid by the driver to Uber.[267] We agree with CCCS's analysis on this issue.

(3) Duration of infringement and other adjustments

198 We turn now to briefly deal with the remaining contentions made by the appellants. First, in their Reply, the appellants asserted that CCCS erred in using a duration of one year for the purpose of calculating the penalties, when the duration should have been three months instead since that would have represented the time between the closing of the Transaction and the time voluntary commitments were proposed.[268] We do not see why the latter date should be used, particularly given our conclusion above that CCCS is not bound to accept voluntary commitments offered by merger parties, even if these are sufficient to address any SLC arising from the transaction. Further, contrary to

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266 CCCS's closing submissions at paras 102 and 103.

267 CCCS's closing submissions at paras 102 and 103; CCCS's reply submissions at para 34.

268 Reply at para 272.

(*cont'd on next page*)

the appellants' assertion otherwise,[269] CCCS's conclusion that the Final Directions were appropriate to address the SLC concerns was not inconsistent with its statement that the adverse effects of the Transaction were likely to continue after the Infringement Decision. We have also found above that Go-Jek's entry has not been sufficient to restore the SLC caused by the Transaction.

199 On the appellants' submission on the "high turnover" and "low margins", we agree with CCCS that the incentives were part of driver acquisition costs and a deliberate strategy by Uber to acquire drivers and market share at the expense of short-run profit. In other words, these were essentially business costs that had been incurred in order to expand Uber's network in Singapore, and were not costs incurred by virtue of the *nature* of the industry. This was also indicated by the appellants' position that the incentives and promotions were being offered at unsustainable levels. Consistent with the reasoning in *IPP Financial Advisers* at [68] to [70], we are not persuaded that the appellants' low margins indicates that the penalty imposed was disproportionate.

200 The appellants also contend that, given the novel issues in this appeal, no fines should be imposed or alternatively that a lower starting percentage should be utilised.[270] In CCCS's Guidelines on The Appropriate Amount of Penalty in Competition Cases 2016 at para 2.15, "genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement" is said to be a mitigating factor. In contrast, CCCS argues that there is no novel point of law in whether or not a merger of the closest

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269 Reply at paras 273 to 274.

270 Reply at para 271; appellants' closing submissions at para 7.3.

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competitors in the market, representing the largest and second largest players by market share, will result in a SLC. CCCS points out the merger parties expected a prolonged merger review and must have meant that they believed CCCS would have significant SLC concerns with respect to the Transaction.[271] On this issue, we agree that there would have been no genuine uncertainty as to whether the Transaction constituted an infringement. Given the positions of the merger parties in the relevant Singapore market, the merger parties acting reasonably would have at least contemplated the risk of a SLC regardless of their view of the perceived novelty of the issues involved in a relatively new industry.

201 For completeness, in our view, it was not inappropriate for CCCS, having found that the Transaction infringed s 54 *and* that it was irreversible, to come to the conclusion that there was a need to deter parties from entering into irreversible transactions which give rise to an SLC. This would not undermine the voluntary notification regime, but rather, underscores the fact that merger parties run the risk of an unfavourable decision from CCCS where they choose not to notify pre-merger.

202 We therefore uphold the fine imposed by CCCS.

Conclusion

203 For the above reasons, we dismiss the appeal, with costs to be paid by the appellants to CCCS, save as provided otherwise in any cost orders previously made. Parties are to agree on the quantum of costs, failing which

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271 CCCS's reply submissions at para 32.

parties are to file their respective submissions within 21 days from the date of this decision.

Andre Yeap SC
Chairman

Tan Tee Jim SC
Member

Tan Chuan Thye SC
Member

A/P Tan Kim Song
Member

Alvin Yeo SC, Ameera Ashraf, Alma Yong, Ong Pei Chin and Ng Pei Qi
(WongPartnership LLP) for the appellants;
Tan Cheng Han SC, Lee Cheow Han, Lynette Chua, Caleb Tan and Michael Quilindo
(Competition and Consumer Commission of Singapore) for the respondent.

Annex A – Directions by CCCS

A.1 Grab shall remove all, and shall not impose any, exclusivity obligations, lock-in periods and/or termination fees on all drivers who drive on Grab's CPPT platform ("Grab Drivers"), and shall ensure that Grab Drivers are not penalised, directly or indirectly, as a result of the non-exclusivity.

A.2 The merger parties shall remove all, and shall not impose any, exclusivity obligations, exclusive lock-in periods and/or termination fees on all drivers who rent a vehicle from Lion City Rentals, Grab Rentals, and Grab's rental fleet partners, and shall ensure that these drivers are at liberty to use such vehicles to drive for any CPPT platform providing CPPT platform services and there shall be no discriminatory terms or any other impediments (*eg*, in relation to rental rates and/or insurance coverage) that limit their ability to drive for any CPPT platform. Existing Grab Driver Exclusivity Contracts[272] are permitted to remain in place for the remainder of the duration of these agreements, or six (6) months, whichever is shorter, provided that Grab shall not renew the term of these agreements and such drivers are permitted to terminate early the agreements at any time on their own initiative without penalty by Grab for the early termination.

A.3 Grab shall cease any exclusive arrangements with any taxi fleet in Singapore.

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[272] "Existing Grab Driver Exclusivity Contracts" shall be defined as existing contracts that Grab has with CPHC drivers which contain an exclusivity requirement on such drivers to drive exclusively for the Grab CPPT platform, excluding any existing contracts which were signed post-Transaction in breach of the IMD.

A.4 Lion City Rentals (or all or part of its assets) shall not be sold to Grab (directly or indirectly) without CCCS's approval. Any such purchase from the time of the Transaction to the date of any final decision by CCCS shall be reversed unless otherwise approved expressly by CCCS.

A.5 If any new entrant/existing CPPT platform service provider ("Potential Competitor") makes a reasonable offer based on fair market value[273] to purchase all of Lion City Rentals' shareholding, or all or part of the assets, Uber must accept the offer unless CCCS raises objection to the potential purchase.

A.6 Grab shall maintain its pre-Transaction pricing, pricing policies and product options (including driver commission rates and structures) in relation to all its products in the Platform Market including but not limited to JustGrab; GrabCar; GrabShare; GrabFamily; GrabCar Premium; 6-Seater (Economy); 6-Seater (Premium); Standard Taxi; Standard Taxi (Advanced Booking); Limo Taxi; and Limo Taxi (Advanced Booking). In particular, Grab shall maintain its pre-Transaction algorithm pricing matrix (for those variables that Grab is able to control) for Grab's ride-hailing services which existed on its CPPT platform in Singapore prior to the Transaction, which includes that Grab shall not adjust the surge factor and base fares beyond the surge factor cap ([…]) and base fares at the levels as of 25 March 2018, except for certain pre-defined events[274] for which the surge factor cap shall be adjusted to […]. For the avoidance of doubt,

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273 Fair market value shall be based on the price at which a willing seller would sell, and a willing buyer would buy, such Lion City Rentals' shares or assets having full knowledge of the relevant facts in an arm's-length transaction, without either party having time constraints, and without either party being under any compulsion to buy or sell, and taking into account a valuation of the assets or shares by a competent independent valuer and any competing offers or bids from other interested buyers and the terms offered.

274 […].

this direction does not prevent Grab from introducing new product options, or new pricing or commission structures provided that such product options, and pricing and commission structures do not replace or vary the product options or pricing and commission structures that existed pre-Transaction or render the direction set out in this paragraph substantially ineffective.

A.7 The merger parties shall modify the Purchase Agreement to remove any restriction on the acquirers to whom Lion City Rentals could be sold (*eg* sale to a Potential Competitor) and the merger parties shall not place any restriction in relation to the use of Lion City Rentals' vehicles by any Lion City Rentals acquirer.

A.8 The merger parties shall appoint a Monitoring Trustee to monitor the merger parties' compliance with CCCS's directions within seven (7) days of the issuance of the Infringement Decision. CCCS shall have the discretion to approve or reject the proposed Monitoring Trustee and to approve the terms and conditions of appointment of the Monitoring Trustee and the audit plan subject to any modifications CCCS deems necessary for the Monitoring Trustee to effectively fulfil its obligations:

(a) If only one (1) name is approved, the merger parties shall appoint or cause to be appointed, the individual or institution as Monitoring Trustee, in accordance with the terms and conditions of appointment approved by CCCS; and

(b) If more than one (1) name is approved, the merger parties shall be free to choose the Monitoring Trustee to be appointed from among the names approved.

A.9 CCCS may at any time vary, substitute or release Grab from one (1) or more of the directions on its own initiative or pursuant to an application by Grab to CCCS supported by reasons and evidence, including but not limited to any circumstances where the direction is no longer necessary or appropriate against the objective of CCCS in preventing the Transaction from resulting in a SLC.

A.10 Without prejudice to the generality of the foregoing, CCCS shall, on its own initiative or pursuant to an application by Grab to CCCS supported by reasons and evidence, suspend all Final Directions on an interim basis ("Interim Suspension") if an open-platform competitor without any direct or indirect common control with Grab,[275] attains 30% or more of total rides matched in the Platform Market for one (1) calendar month. CCCS shall unconditionally release the merger parties from all Final Directions if an open-platform competitor without any direct or indirect common control with Grab, attains 30% or more of total rides matched in the Platform Market monthly for six (6) consecutive calendar months ("Unconditional Release"). Any action taken by Grab during the period of Interim Suspension should duly take into account the fact that CCCS may reinstate all Final Directions, as long as an Unconditional Release has not been triggered. For the avoidance of doubt, any Interim Suspension or Unconditional Release shall only take effect upon CCCS's determination of the matter and informing the merger parties of the same.

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275 CCCS considered that "control" shall mean, with respect to an undertaking, the right to exercise, directly or indirectly, more than 30% of the voting rights of the undertaking; or the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of such undertaking (see para 3.10 of the Guidelines on Mergers).