

COMPETITION IN DIGITAL ECONOMY: THE STATE OF MERGER CONTROL ON CONSUMER TRANSPORTATION IN ASEAN

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Abstract: *Digital economy with advanced innovative technology has altered the business pattern and the consumer market by revolutionising the methods to sell and purchase products, goods or services. Digital technology has significantly disrupted the regulatory pattern and has altered the consumer transportation market pattern, safety, service as well as the price determination methods. Digital market in this context primarily comprised of platform-based business model, multisided markets network effects and economies of scale. This digital era has rendered competition issues more complex and impacted both positively and negatively the old economy pattern, traditional business setting and the related consumer welfare. The paper examines the scope and efficiency of merger control regime under the competition law and policy within the Competition Act 2010, Malaysia; Law Number 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business, Indonesia and Trade Competition Act B.E. 2560, 2017, Thailand. The paper reviews the state merger control with reference to Uber-Grab merger experience in South East Asia (SEA). The paper examines generally the impact and challenges of merger in digital economy on competition law and policy, and specifically with reference to Uber-Grab merger case with respect to its algorithmic pricing, collusion and disruptive innovation. Hence, paper proposes appropriate competitive regulatory principle and policy specifically with respect merger as basic requirement besides other regulatory tools to control anti-competitive merger to promote competition and safe-guard the consumer welfare in E-hailing industry in ASEAN with specific reference to Malaysia, Indonesia and Thailand.*

Keywords: *competition, merger, digital economy and consumer transportation.*

Introduction

In the globalised economy competition evidently has become increasingly important in the innovative digital era. Whereby, the vigorous competition between the firms is the lifeblood of an effective market and also helps consumers to get a good deal. However, the same competition is seen to sow the seeds of its own destruction, when it harms some participants for the benefit of the society or when successful entrepreneurs achieve positions which enable them to prevent others from competing and thereby damage the process as a whole (Maurice E. S. (2013), Furse, M., 2008). Hence, the Competition Law regulation (CL) on anti-competitive agreement, rule against dominance and anticompetitive merger became the centre stage of discussion to protect the process of competition.

Competition Law (CL) generally prohibit, restrict and regulate any actions having the purpose or effect of monopolization or restraint of trade or lessening of competition through a merger or acquisition (Law insider). Hence the primary purpose of CL to provide the framework for competitive activity as to remedy the situations in which the free market system breaks down (Hansard (HL), col. 1156 (1997, 30 October). In this context a comprehensive CL regime should have legal provision to prohibit, restrict or regulate actions having the purpose or effect of monopolization or restraint of trade or lessening of competition through a merger or acquisition, effecting domestic or international trade or economic development. (Law Insider) (UNCTAD, 2007).

Competition Law enacted in ASEAN nations under the imitative of ASEAN Economic Integration (AEC) agreement and recognised as an integral part of ASEAN member nation's economic liberty. The competition policy and its achievement under the AEC placed as a priority area for achieving a competitive economic region and so its role and importance clearly goes beyond as implied in the definition of competition policy in the ASEAN Regional Guidelines on Competition Policy (Lee, C. & Fukunaga, Y., 2014). In furtherance this objective ASEAN Experts Group on Competition (AEGC) created and endorsed by the ASEAN Economic Ministers (AEM) in as a regional forum to discuss and cooperate on competition policy and law (CPL). AEGC recognised as an official ASEAN body and its members comprise senior representatives ASEAN member States (AMS) competition authorities or agencies in charge of competition matters with a focus to strengthen the legislative regimes in AMS.

Digitalization has triggered technological and economic revolution; whose potential benefits and dangers are rather unpredictable. This uncertainty has rendered competition related issues to become complex because it significantly affected the old economy pattern, traditional business setting, regulatory pattern and the related consumer welfare. Whereby, computers, and related algorithms become the new actors rather than human being in setting prices and other related matters. In this respect, the entrance of E-Hailing service in the consumer transportation industry via companies like *Uber* and *Grab* has prominently disrupted the competition as well as the regulatory pattern in that industry. *Uber* and *GrabCar* entered ASEAN with digital technology that allowed their client to use the application on mobile phone or computer to book for transport or other services. Their digital application provides direct response to the direct need of customers with their Wi-Fi connected lifestyle and resolved various problems affiliated to the traditional taxi in the region. Their service although promoted cost reduction and efficiency in consumer transportation industry, their disruptive nature and digital character have stirred some anti-competitive issues which required attention. The most prominent one is the *Uber-Grab* merger transaction, effecting all the South East Asian (SEA) nations (ASEAN Today, 2018, 1 May). The merger transaction appears to not only allow Grab to take over

Uber's operation and assets but leads Grabs leadership as the most dominant cost-efficient Southeast Asian (SEA) E-hailing platform in Cambodia, Indonesia, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. Thus, the merger of the two digital companies is viewed and feared to harm E-hailing market competition and the related consumer welfare and pricing in SEA. In this respect, the paper examines the scope and state of merger control under CL regimes in SEA, specifically in Malaysia, Indonesia and Thailand. The paper discusses the challenges as well as the readiness of the respective states in facing-up the resulting impact of the anti-competitive merger and proposes much required appropriate competitive regulatory rules to control anti-competitive merger to enforce fair competition and safe-guard the consumer welfare in digital economy.

Effect and Challenges of Digital Economy Characteristics on Competition and Competition Law

Impact of Digital Economy on Market Competition

The revolution of digital technology has brought new effect and challenges as to how legal rules and regulations are to be adapted to the new characteristics of the digital economy with its manifold disruptive innovations and its related new critical role of data and data analytics (Kerber, W., 2017). This new trend has caused among others a significant decline in competition by precipitating concentrated market or market dominance, rising market power of large firms and slowing business dynamism (Foda, K and Patel, N, 2018). Hence, the theoretical and empirical evidence supports the argument that in many markets with standard competition the network effects promotes dominant entity to grow stronger and tips them toward a single, winner-take-all standard in the market (Liu, C. Z., et al., 2012).

Digital economy present challenges on how to think about and implement competition law and policy. Hence regulatory provisions and its interpretations objectives previously aimed at ensuring a level playing field and fostering a dynamic and inclusive economy must be revisited and reviewed to adjust to better reflect a growing reality. Competition Law and its regulators must inculcate contemporary factors such as the potential for scale of digital platforms, importance of intangible capital, (Foda, K and Patel, N, 2018) market concentration and transactional decisions of the consumers (when providing their personal data) (Ritter, E and Slyom, I, 2018) in assessing and ensuring level playing field and protecting consumer welfare.

Case of Merger Phenomena in Digital Economy: Is Merger and Acquisition a natural phenomenon?

Merger in digital economy is presently is a much discussed topic under the CL worldwide. Hence, is merger a new phenomenon or a natural repercussion of data-driven market in the digital economy?. Data-driven in this context refers to activity compelled by data, rather than by intuition or by personal experience. Whereby, being data-driven requires an analytics platform meanwhile being big-data-driven requires a predictive intelligence engine (Teshima, P., 2018, Burri, M., 2018). Predictive analytics brings together advanced analytics capabilities spanning ad-hoc statistical analysis, predictive modelling, data mining, text analytics, optimization, real-time scoring and machine learning. These tools help organizations discover patterns in data and go beyond knowing what has happened to anticipating what is likely to happen next (IMB, 2018). CL has is now seen as a disruptive force in the world of tech when it questions its mode of conduct which appears to interfere the competition. Digital markets and specifically their Big Data are questioned on their procedural aspects of merger control, as the mere accumulation of large sets of data does not always generate revenues which are sufficient

to meet the relevant merger notification thresholds because the digital markets, revenue and profit often only come years after the start-up phase. So the focus for a new player is to have a broad user-base to create network effects, where the services and products provided free of charge or only charge certain groups of users, especially on two-sided markets. Therefore, a company can accumulate a dominant share of users and secure a strategic market position while still not making significant, or any, revenue (Schoning, F. & Ritz, C., 2018). Hence, it appears that “Data-driven markets can lead to a ‘winner takes all’ result which causes concentration as a likely outcome of market success”? (OECD, 2014). If so than is the traditional merger analysis sufficient to effectively address the new phenomenon and its constantly changing circumstances?

Impact of Digital Economy on ASEAN Competition Law: Case of *Uber-Grab* Digital merger in SEA Consumer Transportation.

Merger under Competition Law Perspective

The term ‘merger’ generally incurs when enterprises combine under merger proper, amalgamation, acquisition of shares, voting rights, or assets, or acquisition of control over an enterprise. The merger control rule under CL is created on the basis that it may give rise to dominant market power and restraint the competition. Alternatively, merger also could potentially decrease the number of the competition enterprises and facilitate the remaining enterprises to coordinate their behaviour in terms of price, quantity or quality similar to a cartel-type arrangement especially in markets for homogeneous products. (Dhall, V, 2008).

Mergers are classified as horizontal merger, vertical merger or conglomerate mergers. Competition authorities particularly more concerned of horizontal merger. Horizontal merger encompasses anti-competitive unilateral effect and coordinated effect. Merger causes monopoly with substantially increased market power and market concentration. Monopolisation facilitates enterprise to potentially overcharge, charge excessively or otherwise abuse of dominant position.

The Case of Uber and Grab Digital-Merger in SEA: Effect and Challenges on Competition Law

Grab, is a well-established digital platform market in consumer transportation and online food industry in South East Asia's (SEA) with millions of users across eight countries (BBC News, 2018, 26 March). While, *Uber* is a ride-hailing service which offers peer-to-peer ridesharing, taxi cab hailing, food delivery, bicycle-sharing and other services from San Francisco, California (Wikipedia). Their e-hailing services have caused much dissatisfaction among the incumbent taxi drivers because it created unfair competition and escaped most of the regulatory requirements which otherwise need to be furnished in the consumer transportation industry in SEA. *Uber* and *Grab* disruptive digital app has altered and challenged the competition regulators and the consumer welfare. *Uber* merged with *Grab* by selling its Asian operations and withdrawing from Southeast Asia (SEA) on March 26, 2018. The merger contract secured *Uber* a 27.5% stake in Asian based *Grab* and a seat in the *Grab*'s Board of Directors (Kollewe, J., 2018 26 March). The merger agreement appeared as "asset light" because did not entail *Grab*'s acquisition of *Uber*'s vehicles, its employees or its contract with *Uber*'s drivers. The deal although did not indicate as to whether it included any of *Uber*'s algorithms, the experts predicted it would have negative implications on competition and deserves careful scrutiny (Ong, B., 2018 April 13). The merger notably, predicted to set SEA to undergo a massive structural overhaul of its tectonic proportions (Ong, B, 2018 March 30) and a hike in consumer

prices. Although the real effect of their market concentration was unclear but potentially on the long run would restrict competition and adversely affect the consumer welfare. Study revealed, it is difficult to distinguish anti-competitive motives from normal business strategies in digital economy merger transactions because it involves future markets (Gorp, N. V. & Batura, O., 2015) (Lee, W., 2018).

Singapore was among the first SEA state which raised serious concerns over *Uber-Grab* merger and its resulting repercussion as growing market dominance (by forming alliance with the taxi drivers' companies) in consumer transportation. The difficulties in identifying anti-competitive repercussion in digital economy was reflected when Singapore's regulator authorities admitted they had initially overlooked the ride-hailing apps danger to protect the interests of commuters and drivers. They also expressed dissatisfaction with the basic regulatory regime which has limited coverage and licensed only the drivers of the ride-hailing apps and vehicles. Singapore clarified that if one operator (such as *Grab*) becomes dominant; commuters may have to bear higher fares at lower service standards and may have to put up with the conditions set by the merged company. Hence, the Competition and Consumer Commission of Singapore (CCCS) regarded the merger deal as anti-competitive and declared as an "un-notified merger transition" under their Competition Act (The Straits Times, Singapore 2018, 14 April) (The Straits Times, Singapore, 2018, 13 April). The merger transaction also had caused the riders and the drivers confused with differing views on whether their takings and bookings collectively on both apps have changed since the acquisition. (The Straits Times (2018, May 04,) (Russell, J., 2018, 25 April). Singapore, Competition Act 2004 was enacted to provide a generic CL to protect consumers and businesses from anti-competitive practices of private entities.

Merger and acquisitions which substantially lessen competition and have no offsetting efficiencies are prohibited strictly under the Sec 54 of the Act. (CA 2004). However, the rule operates on the general assumption that not all mergers give rise to anti-competition issues because some mergers can be either pro-competitive (because they positively enhance levels of rivalry), or are competitively neutral. Hence to address this calamity fairly CCCS has adopted the pre-notification procedure to assess whether the merger would substantially lessen the competition by either resulting in an increase in prices above the prevailing level, lower quality, and/or less choices of products and services for consumers to decide its anti-competitive infringement.

Under their merger control regime CCCS found *Grab-Uber* agreement created an exclusivity arrangement, which potentially will burden new entrant to spend a lot of money to build up driver and rider networks similar in scale and size to the incumbents (Reuters, 2018, 27 July). On 24th September 2018, CCCS after month-long investigation conclusively decided the *Uber-Grab* transaction as anti-competitive and infringed Section 54 of their Competition Act (CA 2004) for substantially reducing the competition in ride-hailing platform market in Singapore. *Uber* (RM19.97 million) and *Grab* (RM19.36million) was fined in total SG \$13 million and *Grab* drivers ordered not be tied to *Grab* exclusively besides removing all the exclusivity arrangements with all taxi fleets. *Grab* was further instructed to maintain its pre-merger pricing algorithm and driver commission rate to prevent excessive price surge on consumer. CCCS also empirically found *Grab's* fare increased 10-15 percent after the merger and their market share grew to 80 percent in Singapore. The regulators assessed the average price for consumers after accounting for subsidies and discounts (although *Grab* denied and defined it as posted fare before any discounts) (Russell, J., 2018, Star Online, 2018, 24 September). CCCS also

evidently received "numerous complaints" from both riders and drivers on decrease in promotions and incentives, reflecting *Grab*'s ability to increase effective prices after the merger (Channel News Asia, 2018, 5 July). This case illustrates the resulting phenomena of the so called perfect competition in digital economy, which signifies if unmonitored could lead conscious parallelism which would legitimize and aid anti-competitive price-collusion and prejudice consumer choice and welfare.

The CCCS's case development and decisions on *Uber* and *Grab* alerted and triggered a sign of warning to other SEA government's regulators mainly Malaysia, Indonesia, Vietnam, Philippines and Thailand to monitor the implication of *Uber-Grab* merger repercussions on their shore. Unfortunately, *Uber - Grab* digital transaction is far only been effectively curtailed in Singapore and Philippines in SEA. Malaysia, Indonesia and Thailand although have initiated investigation on *Uber-Grab* deal but have yet to make any conclusive decision their status with respect to the anti-competitive repercussions resulting from their market concentration. Hence, what are possible options to address the anti-competitive merger in their respective nations requires further examination of their respective competition law regime as well regulators scope of power to overcome the challenges and address the digital economy merger phenomena in their respective country.

Digital Merger: Impact and Challenges in Malaysia

Malaysia following CCCS finding had called upon the Malaysian Competition authority or MyCC to investigation and monitor *Uber-Grab* digital merger for anti-competitive repercussions. (Russell, J. 2018, Star Online, 2018, 24 September). Although Malaysia has a comprehensive CL regulation under the Competition Act 2010 (CA 2010), it does have any specific provision to control anti-competitive merger although recommended in the ASEAN Regional Guidelines on Competition Policy (RCGP) (ASEAN, 2010).

The principal of CA 2010 on consumerism although different from Consumer Protection Act 1999 (CPA 1999, Malaysia), its principal essence of protecting market competition from any restraints ultimately objected to trickle down to consumer protection on the pricing and choice. The CA 2010 prohibits firstly, anti-competitive conducts or agreements under Section 4(1) any horizontal agreements between enterprises which have the objective to fix, directly or indirectly, a purchase or selling price or any other trading conditions such as share market or sources of supply, limit or control the production, market outlets or market access, technical or technological development, investment or perform an act of bid rigging under Section 4(2). Secondly, it prohibits the abuse of dominant position under Section 10 (1) by an enterprise, whether independently or collectively, which amounts to an abuse of a dominant position in any market for goods or services (CA 2010). Hence, the Act regulates anti-competitive agreements and abuse of dominant position under the name of anticompetitive practices. Meanwhile, merger control is not within the purview of the Act so the Malaysian Competition Commission (MyCC) does not have any merger control mandate. However, arguments suggests that since mergers are not expressly excluded from the scope of the CA 2010, competition regulator could only review and enforce powers in respect of behavioural conduct but not the merger control mandate (Kandiah,S.,2017). Therefore there is huge vacuum with respect to anti-competitive merger control mechanism in Malaysia with respect to its allocation, scope and prohibition. This out-turns MyCC with no power over the merger transaction or their terms of agreement like the other ASEAN neighbours. However notably there are some sector-specific laws and guidelines to regulate the antitrust aspects of mergers for aviation services, and communication and multimedia sectors, enforced by the Malaysian Aviation Commission (MAVCOM), and the Malaysian Communications and Multimedia Commission (MCMC)

respectively. This may not aid any help to reduce the strain in the present consumer transportation case of *Uber-Grab* merger.

Price fixing is generally controlled within the scope of Section 4(1) of the Act if the object or effect significantly prevent, restrict or distort competition in any market for goods or services. Whether this general provision have sufficient regulatory tools to regulate anti-competitive repercussion specifically with respect to the algorithmic pricing and anti-competitive merger phenomena in digitalised knowledge economy to protect consumer market is questionable? MyCC, itself admitted that they have no jurisdiction or authority over the ride- hailing firms merger (The SUNDAILY, 2018 10 April) but agreed to (The Malaysian Insight., 2018, 6 June) to examine *Grab's* operation for any anti-competitive agreements following the Singapore's findings on violations of competition laws. MyCC claims it is empowered to investigate and take action on parties abusing the monopoly status under Sec. 2 of the Competition Act 2010 if and when there is an incident of abuse of a dominant position (The Edge, 2018, 13 July).

Meanwhile, recent development in Malaysia suggest that *Grab's* attraction as a cheap and efficient way to travel is questionable because passengers complain that the popular ride-hailing service has become more expensive than the conventional taxis. The validity of the complaints evidenced during checks showed that some trips on taxis were cheaper by half the prices offered by *Grab*. Whereby, one-way trip which takes about 10 minutes (about 5km) costs about RM7 only using a taxi, compared to *Grab's* service which now costs about RM14 (Nurul Azwa Aris, FMT, 2018, 9 July). This suggest that Malaysia either losing control on its digital market pricing as well its consumer welfare or has left to the market competition to take its own terms of event. So what's the fate of the consumer transportation industry and e-hailing consumer is still rather a muddy situation especially without the right legal instrument to regulate and control it. Although the Malaysia's Land Transport Authority assured that it is going to work closely with relevant consumer and various regulatory agencies such as the MyCC to safeguard passengers from unfair terms (Singh,K., March 27, 2018), it has yet to directly address the merger phenomena on the market competition concentration issues in specific under CL.

Merger had been so far only been regulated as corporate action with respect to protecting the shareholders in Malaysia. The law governing mergers and acquisitions, mainly in Part IV Division 2 of the Securities Commission Act 1993 and the Malaysian Code on Take-overs and Mergers 1998 which operates only to protects the rights of the parties' involved not market or consumer welfare(Wan, Wan, & Ernie, 2013). Meanwhile *Grab-Uber* merger cannot come within the scope of the Competition Act 2010 or the MyCC jurisdiction presently because there is no notable evidence for a cause of infringement under Section 4 and Section 10 (CA2010) prohibition on the merger deal itself, as MyCC have no access to their merger agreement. The Competition Act 2010 itself is observed to be relatively still at an infant stage with very limited case-laws and interpretations for forming a constructive arguments on *Grab* under the current legal environment.

Effect and Challenges on Competition Law Perspective in Indonesia

Indonesia's Antimonopoly and Unfair Business Competition (Law No.5/1999) regulation provides specific provisions on the merger, acquisition, dominant position or controlling shares. The Law No.5 was enunciated based on the principles of the State Philosophy and their 1945 Constitution to promote economic democracy by providing equal opportunity (among the large, medium, and small-scale business enactors) and level playing field between the interests of

business actors, efficiency and consumers welfare. Hence, The Act prohibits monopolistic practices and unfair business competition to promote “effectiveness and efficiency in business activities” (1999, Law No.5, Indonesia) in Indonesia.

Law No.5/1999 was enacted widely with provisions to enforce the law as well as when necessary to provide advice to the government and or ministry office with on all competition aspects. The regulation generally prohibits anti-competitive conducts or agreements, abuse of dominant position and controls merger and acquisition. Article 26 to 29, Law No.5/1999 specifically provides regulation for merger, acquisition and liquidation (plus spin off under Corporation Law No.40/2007). While Article 29, instructed for Government Regulation to be issued to implement Article 26-29 rules concerning merger and acquisition (1999, Law No.5, Indonesia).The Indonesian Commission (Komisi Pengawas Persaingan Usaha or KPPU) have also published its Commission Regulation on Merger and Acquisition in Perkom No.13/2010 in 2010.

The highlight of the digital economy issues in Indonesia on online transportation includes cars as well as motorcycle. Although motorcycle was ruled by their Constitutional Court as not within the transportation (Constitutional Court Decision No.97/PUU-XV/2017), few online transportations namely, *GoJek/Go-Car*, *Grab* and others still utilise car and motorcycles. (Endang,W., 2017). Uber entered the market in 2014 and later became part of Grab to provide transportation service utilizing motorcycle and passenger’s car in Indonesia. (Kompas,2018). *Uber-Grab* merger operation went through in Indonesia without much difficulty, despite the various debates and differences on the recognition of the online transportation services between the Minister of Transportation and online industry (driver transportation association), as well as the Constitutional Court and Supreme Court judicial review decision on the Minister of Transportation Decree No. 108/2017(on recognition of the motorcycle online transportation).(Tirto, 2018).

Prior to the *Uber-Grab* merger, Indonesia have had various notable demonstration and resistance from the local E-hailing consumers and drivers against various controversial minister’s regulation (Minister of Transportation Regulation No: UM.302/1/21/Phb/2015) and orders (Law No. 22 /2009 on Traffic and Transportation with Government Regulation No. 74/2014 on Road Transportation) regulations which prohibits *Gojek* and *Uber*. Among the controversial regulations includes; Article 138 (3) Law No. 22/2009 provided road transportation could only be served with public transport and not private transportation; Article 139 (4) UU 22/2009 that stipulated that transportation provided must be conducted by state own companies, regional state companies or other type of legal entities ; and Article 173 (1) Law No. 22/2009 stated stipulated that transportation provider company must possess transportation permit to run their business (2009, Law No.22).

Meanwhile the Indonesian Law No.5/1999 enforcement on merger or acquisition only applies if and when, there is evidence to prove that the market power is abused or competition is reduced. Their law in Article 28 and 29 Law No.5/1999 is a *lex imperfecta*, because its implementation only takes effect after the Government Regulation is instructed under Article 28 (3) and 29 (2). Whereby, it requires only post-merger notification to KPPU within 30 days after the merger agreement is entered (Article 5 Government Regulation No. 57/2010 and Article 29 (1) Law No. 5/1999). In furtherance of this regulation, KPPU also requires the parties to furnish two (2) forms of evaluation that is: post-evaluation (notification) and pre-evaluation (notification) (Competition Commission Regulation, 2010, *Peraturan Komisi*

Pengawas Persaingan Usaha No.13 /2010, Article 29, Article 5 and Article 10 Government Regulation No. 57/2010).

The total value of sales and/or total asset accumulated from the merger or liquidation is calculated based on audited sum of latest annual sale's value and or asset plus sales value from the entire legal entities controlled by the merger companies. So, the asset value will cover up to the sale assets of all vertical companies from the mother company until the child or sister companies. The asset value is calculated based on the assets located in Indonesia and does not include internal or external export outside Indonesia. The mergers between affiliated companies without changing the market structure or the existing market competition will not be considered as merger for purpose of the regulation. This exclusion applies to merger between state own companies or companies which shares controlled by the state (2010, Competition Commission Regulation).

Therefore, the merger control enforcement in Indonesia only takes effect after the corporate actions to merge or acquisition is performed although studies have established that merger and or acquisitions can substantially increases market power or create monopoly power (CCR, 2010) if not monitored. Therefore, it is very essential for KPPU to address the corporate action in order to respond to its consequences which may affect competition, pricing mechanism and their consumer welfare. So, in Indonesia, Article 28 Law No.5/1999 does not specify the merger regulation but merely works as a reminder to check on its consequences. If the merger present negative effect on competition, the KPPU is empowered to cancel or nullify the merger under Article 47 (2)e and apply administrative sanctions such as cancellation, fines and damages.

KPPU's decision No. 07/KPPU-L/2007 on Temasek (Singapore State Own Company) and Supreme Court Decision No. 496 K/Pdt.Sus/2008 on 10 September 2008 further affirms the merger control and government who own company shares is not a business actor (2010, Competition Commission Regulation). KPPU Guidelines also regulates control over merger outside Indonesia but must be proved to have affected Indonesian domestic market.

KPPU had initially notified Grab to submit mandatory merger notification on the basis that it's accumulated value which exceeded the minimal requirement and merged asset of accumulated sales. Grab Indonesia responded to KPPU's call for notification on 3 April 2018, by stating that the transaction is solely corporate action on asset acquirement and there is no change on control in Uber Indonesia. Grab Indonesia further argued that Uber Indonesia does not have an office or legal entity or special entity in East Asia. Therefore the asset acquired by Grab does not include their information technology and intellectual property rights which still owned by Uber Indonesia who may be considered to remain as an active corporation on its own. So on its post-acquisition status, Uber Indonesia is considered as an minority shareholder in Grab Holding.

KPPU on the basis of Grab, Indonesia explanation decided that the transaction is solely and purely are asset acquisition as corporate action without change of control from Uber to Grab Indonesia. The transaction was determined as not a merger, because Uber Indonesia still existed as legal entity (not merged with Grab) in Indonesian perspective. As a result KPPU concluded not mandatory for Grab to report or notify KPPU on its transaction because it falls outside of Law No.5/1999 Government Regulation No. 57/2010. However, KPPU decided to actively monitor on its pricing and market competitiveness on online transportation to avoid potential

price leadership or price fixing or increasing conducts because the market potentially becoming more concentrated.

It is indeed interesting to observe the different approaches taken in Indonesia compares to Malaysia and Singapore who had responded to *Uber-Grab* transaction as not merger or asset acquisition but more of a corporate action which may impact on market competition despite having merger control provision within their competition law regime. Indonesia's approach perhaps is influenced by their legal formality based on Civil Law country in which interpreting the substance of the law was within KPPU's priority. However, KPPU decision fails to realise the possible impact on their consumer transportation market competition and consumer welfare. Arguably, KPPU should have conducted a thorough study from their economic and legal social perspective to forecast the market competition subsequent to the merger or acquisition. An economic study is definitely required in such cases but unfortunately, KPPU is did not have Economic Division then and now. Generally most of the Competition Commission which is empowered to control merger is required to conduct economic study to anticipate future market and behaviour as consequences of the corporate actions. The decision to rule merger as anticompetitive or not relies heavily on the economic study or prediction and mandatory economic analysis. In Indonesian KPPU had simply responded without any economic evidence or analysis that Uber and Grab transaction was a corporate action therefore does not fall within its competition regulation and as a result the asset acquisition was excluded from Law No.5/1999. KPPU merely settled the case by alternatively agreeing to observe and monitor whether their assets acquisition would create barrier to entry or lessening competition without any concern for the E Hailing consumer welfare.

However, KPPU as the enforcement authority in Uber-Grab case failed to conduct any market study to evaluate its impact and anti-competitive damages on the Indonesian transport industry. Although anti-competitive merger cases are largely dependent on the future performance or behaviour, an unmonitored merger, could potentially decrease the number of the competition enterprises and facilitate the remaining enterprises to coordinate their behaviour in terms of price, quantity or quality similar to a cartel-type arrangement especially in markets for homogeneous products. On the same note, any anti-competitive agreement with a flavour to evade CL by way of merger, is equally should be absolutely forbidden. (Dhall, V, 2008)). Perhaps KPPU should have played a pro-active part in digital merger cases because it is better to prevent the possibility for abuse of market power rather than to control the exercise of the market power after the merger has taken place. This is also, because the social and economic cost of de-merging is very heavy, involves tedious process and tough option for competition authorities.

On another note, Indonesian's national pride *Go-Jek*, had entered the market right after *Uber-Grab* merger was confirmed to launch its services in Singapore and welcomed the CCCS decisions (Retsy, W.Y., 2018). Unlike GRAB, Go-Jek only aimed to reach outside of its home country, in 2018, when the company announced a USD 500 million investment in regional expansion. *Go-Jek*, a needs to comply with various and different regulations across the region and due to its late entry in the South-Asian markets, *Go-Jek* has a lot of backlog compared to Grab, furthermore it does not to use the same brand name across the region (for example *Go-Viet* in Vietnam and '*GET*' in Thailand) which requires different applications to be downloaded in the different countries. This may be obstacle in considering the trend of regionalisation that is happening across South-East Asia. *Go-Jek* to win the market share from millions of satisfied *Grab* users, strategized by being cheaper for the user and giving more money to the driver is

their alternative. Go-Jek was claimed to have been suffering from stagnating growth and high cash burns due to their subsidy-driven schemes to draw users. How long the new entrant can hold-up and survive under this strategy to meet up their bigger and much established rival, *Grab* which needs no introduction as the only Asia's largest ride hailer (valued at USD 11 billion with its application been downloaded 125 million times and recently celebrated its second billion's ride) is questionable at this point of time (Global Fleet, 2018, Jan18, Jakarta Globe, 2018, 18 July, ASEAN Today, 2018, May 15)

Effect and Challenges on Competition Law Perspective in Thailand

Thailand's CL finally came to be re published in the Royal Gazette on 7 July 2017 (but only to become effective on 5 October 2017). The 2017 Act retains the principle in the 1999 Act by reaffirming that being a market dominant player does not automatically result in breach of the CL. Instead, in order to constitute an abuse of dominance, it is necessary to consider whether the market dominant player is acting in any of the manners stipulated. (Section 50, 2017 Act). The law imposed new requirements for pre-merger and post-merger requirement under the 2017 Act (in Sections 51-53). The post-merger notification is only required for business operator who engages in a business merger that may cause significant decrease of competition in a particular market pursuant to the criteria prescribed in the notifications of the Commission, who was notified the result of the merger to the Commission within 7 days from the date of merger. Pre-merger permission required for approval from the Commission for a merger of businesses which may result in monopoly or a business operator with market dominance (R&T Asia Thailand, 2017August).

Uber was introduced into Thailand in 2014. *GrabCar* which was operated by the Grab Group also operated as *GrabTaxi*, similar to *MyTeksi* in Malaysia, which was used to book regular taxis which have signed up for the application and meet its standards Drivers using the *GrabTaxi* application can also take advantage of surge pricing using the *JustGrab* application (GrabTaxi, 2017). However, the legal status of *Uber* and *GrabCar* was not clear under the existing regulations governing the taxi industry in Thailand. The lack of clarity caused various friction and disputation amongst interested parties and new issue from the perspective of Thai competition law. Thailand had serious problems with their traditional taxi industry which resulted with unsatisfied clients and negative image on their service. Taxi consumers were faced with impolite taxi drivers; denial of services whilst the taxi displays a sign signifying the taxi is available for hire; assault and even drop off clients on the roadside halfway to their destination (Droidsans, 2017, 26 March)

The introduction of *Uber* and *GrabCar* resolved consumer transportation problem by providing more options for their travel needs. In contrast, it created new issues when traditional taxi services accused *Uber*, *GrabCar* for providing an illegal service under the regulations. Siripha Sawsawat, the Country Manager for *Uber* Thailand, himself accepted that *Uber's* service is outside a legal framework and is seeking a resolution with Thai government. So the services of *Uber* in Thailand was only available in Bangkok and surrounding areas (Bangkok, 2017)

Generally *Uber* and *GrabCar* were operating illegally in Thailand. The taxi industry was heavily regulated whilst the sharing economy was not. For instance, the taxi industry is regulated under the Vehicle Act, B.E. 2522 (1979) as amended. Section 4 of the Act is quite clear in that a Public vehicle includes "a taxi which is employed for transporting not more than seven passengers or such vehicles other than a fixed route transport vehicle". The taxi driver must be a holder of a public vehicle driving licence (s 43) and pay vehicle taxes accordingly.

Under the Land Transport Act (No. 6), B.E. 2537 (1994) taxis are no longer regulated under that Act but under the Road Traffic Act B.E. 2522 (1979) as amended, the taxi driver cannot refuse a fare (s 93), charge more than shown on the meter (s 96), drive carefully (s 99), take the shortest route and not abandon a passenger (s 100) and wear a uniform (s 101). It was unclear whether *Uber* and *GrabCar* should be regulated as a taxi under the Road Traffic Act or be regulated under the provisions of the Land Transport Act. So they were treated as private drivers under the Acts. The current uncertainty had forced the Department of Land Transport, which is responsible for taxi regulation to find a solution on issues like commercial versus private fees and charges; the vehicle inspections and driver licencing. There were also concern about the “illegal” services being offered by *Uber* and *GrabCar* which disrupted and destroying Thai transportation industry. They also experienced similar outbreaks of violence among taxi drivers and *Uber* drivers (Blognone (online), 29 November 2014). However in March 2017 the Government announced that “unlicensed taxi drivers to be arrested but *Uber* not banned.(The Nation,2017, 9 March) but by June 2017 government approved ride hailing taxi service, but their required to be registered and the government was investigating the possibility of introducing ride hailing applications within their transport system(Thai PBS (online) (2017,26 June). *Uber* collaborated with regulated taxis, Howa, a major local taxi operator known for its green cars, and bring the company's 4,000 taxis that operate in Bangkok onto its ride-sharing app platform (Asian Review,2017 13 Dec)

Meanwhile, Sumet Ongkittikul, the Research director for Transport and Logistics at the Thailand Development Research Institute (TDRI) had raised concern that the merger might result in ‘unaffordable prices’ for consumers of ride hailing services. He revealed that the TDRI’s own research indicated that 15% to 20% of Thai taxi passengers are currently using the ride hailing services. TDRI wants ride hailing service to be recognised on condition that the cars and drivers comply with the same regulations of traditional taxis on the roads. It also revealed that there are 20,000 ride hailing cars on the roads, generating around 6-7 billion baht in income. Meanwhile, traditional taxis generate 43 billion baht with 60, 00 to 70,000 cars alone in Bangkok (Thai Examiner.com, 2018, 15 June).

Generally of all the *Grab* services available in Thailand, the only one that is illegal is *Grab car*, meanwhile *Grab taxi*, *Grab express*, *Grab bike* and *Grab deliver* are considered legal. Despite being illegal, it is estimated there are at least 2,000 *Grab* cars operating in Thailand at present. However In Bangkok, motorcycle taxi drivers protested outside the Grab Thailand office on May 17, 2018. They called on the company to stop the owners of motorcycles with white license plates from providing services via the *Grab* application (Dusita, M 2018, 2 October). Thai law is struggling to cope with the rapidly changing world, but it is essential that that it allow innovation to society. It is not only will benefit to people but also increase of people income. It makes money circular flow in the system.

Analysis, Recommendations and Conclusion

Presently although Grab officials maintain their merger agreement is legal but from the anti-competition perspective may not have fulfilled some regulatory requirements in some ASEAN nations. However regulations in ASEAN differ from country to country. The new entrance of *Go-Jek* in ASEAN may have a prospective to provide a competition but they do not yet have the volume of drivers to make enough impact on Grab’s market share. *Grab*’s price hike could be an advantage for them but what in reality what may work for *Go-Jek* in Indonesia not necessarily would succeed in other AMS. Despite CCCS decision, *Uber* has left SEA and *Grab* is already largely making gains in Southeast Asia without a competitive rival. Malaysia doesn’t

have laws allowing review of proposed mergers and Thailand appears to have no record of successful enforcement actions. Furthermore, *Uber's* investment has helped Grab continue their progress in SEA more widely.

The reality of the present situation is the existing regulations are not equipped to effectively protect consumers against these new digital savvy, fast-growing ride-hailing tech giants with extensive reach and deep pockets. Although Grab argues that there is competition from new entrants like *Ryde*, Singapore and *PT Go-Jek* of Indonesia, the reality of going digital requires high capital investment in setting up the data centres and the digital infrastructures. Though promising but the possibilities of successfully entering the concentrated market is limited and going to be more difficult for new comers. Furthermore the threat of disruption is higher in digital economy, arguably can easily unseat the incumbents leading to more social-political issues.

So are we headed into an economy dominated by digital tech and large firms who can own it? Is concentrated market is the new norm in the platform based market? The answer lies in the political will to change (from the conventional practice) and/or improvise the current regulatory instruments to be able to address the characters in the digital economy. In particular, to address the gap of knowledge and control of the merger phenomena in digitalised knowledge economy consumer market. CL and its regulators should be facilitated with sufficient powers and control tools to constantly check with periodic amendments and improvements because merger control is concerned about negative impact in future where there is possibility of the market being less competitive and more concentrated later.

Some improvements are very much required. Perhaps for a start firstly, the general definitions and ways to determine the relevant market seems out-dated because it must now take into account the access to data during the dominance test in the case of digital markets must be addressed. Meanwhile economic assessment must be utilized to assess its dominance impact on the market. Therefore more economic tools are needed to quantify consumer benefits in market where algorithmic pricing used rather than traditional pricing method.

Secondly, we need specific merger control provisions to be able to specifically address and scrutinize transactions merger in the digital space that bring about highly potential growth for one party to avoid market concentration. Every national as well as regional authority must be equipped with regulatory tools to enforce the competition prohibition rules independently. Empowerment of the Competition Commissions in their respective regime is essential and reflects the government policy on the matter. As promoted by the ASEAN regional guidelines on competition policy, the efficacy of competition laws also depends on ancillary legislations that establish the relevant enforcement agencies. ASEAN must utilise its regional ties and co-operation via AEGC to address cross-border merger cases to improve digital merger atrocity in ASEAN region.

Thirdly, competition regulators must play an active advocacy role to notice and notify the fallouts in the CL in digital market such as provision for merger control, market assessment as well as capacity building to tackle the unique characters digital market economy. The case of *Grab -Uber* merger is just the beginning of many more digital mergers in other platform based industry, so it timely to address the legal gap in the system remedy and reform before they monopolise the market and impact the competition.

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