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Roundtable on recent developments in merger control standards

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Unveiling Malaysia's Impending Merger Control

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UNVEILING MALAYSIA'S IMPENDING MERGER CONTROL

In 2012, Malaysia's general competition legislation, the Competition Act 2010 ('the Competition Act'), came into force. While Malaysia was not the first ASEAN country to implement such legislation, it wasn't the last either, with Brunei and the Philippines following suit in 2015. However, unlike most competition law regimes globally, including those in ASEAN, the Malaysian Competition Act has a significant drawback: it only prohibits anti-competitive agreements and abuse of dominance, without addressing the critical aspects of merger control.

As of 2024, Malaysia holds the dubious distinction of being the only nation in ASEAN whose competition commission lacks the authority to regulate mergers and acquisitions (M&A) transactions.

However, this is about to change.

After a dozen years in operation, the Malaysian Parliament has finally approved the implementation of a merger control regime, set to be in place by the end of this year. On obtaining cabinet policy approval in December 2021 to introduce this regime, the Malaysian Competition Commission (MyCC) has released its Consultation Paper on the Proposed Amendments to the CA in April 2022, seeking comments and feedback from interested stakeholders and the public.

This article aims to briefly discuss the proposed merger control regime based on the details outlined in the Consultation Paper, which is available on the MyCC official website¹.

Brief History of Merger Control in Malaysia

Currently, there are only two sector-specific laws and guidelines regulating the antitrust aspects of M&A in Malaysia: the communication and multimedia sectors, and the aviation services sector. These are enforced by the Malaysian Communication and Multimedia Commission (MCMC) and the Malaysian Aviation Commission (MAVCOM), respectively.

Communication & Multimedia Sectors

The communication and multimedia sectors in Malaysia are governed by the Communications and Multimedia Act 1998 (CMA). It is worth noting that the competition regulation regime established by the CMA does not contain any express provisions for merger control and assessment. However, Section 133 of the CMA, which prohibits any conduct with the purpose of substantially lessening competition in a communication market, does encompass mergers involving telecommunications and multimedia licensees according to MCMC's Guideline on Substantial Lessening of Competition.

As such, there is no statutory legal requirement or established process for parties to an M&A to notify the MCMC about such transactions. Despite the lack of explicit provisions, the MCMC has indicated that it will assess mergers affecting the

¹ <https://www.mycc.gov.my/public-consultation>

communications and multimedia sector that are voluntarily submitted to it, following the procedures outlined in the M&A Guidelines.

The Aviation Sector

The competition laws surrounding the aviation sector are governed by the Malaysian Aviation Commission Act 2015 (MACA). Currently, MACA represents the only statutory merger control regime in Malaysia. MAVCOM has established the following guidelines on mergers to regulate this sector;

- a) Guidelines on Substantive Assessment of Mergers: These guidelines provide the framework for how MAVCOM assesses the impact of a merger on competition within the aviation sector.
- b) Guidelines on Notification and Application Procedure for an Anticipated Merger or a Merger: These guidelines outline the process for notifying MAVCOM of a merger before and after it takes place.

Key Amendments to the Proposed Merger Regime under the Competition Act 2010

Pursuant to its Consultation Paper, MyCC proposes, among other changes, to introduce 20 new provisions that will establish a merger control regime of general application into the Malaysian legal landscape. At the time of writing this article, these proposed amendments have not yet been formally tabled in Parliament.

The merger control regime will prohibit mergers or anticipated mergers (if transacted), within or outside of Malaysia, that may result in a substantial lessening of competition ('SLC') within any market for goods or services within Malaysia.

Defining What Constitutes a Merger

According to the proposal put forward, MyCC will consider four circumstances in which a merger is said to have occurred;

- a) two or more previously independent enterprises combine into one single enterprise and cease to exist as separate legal entities;
- b) the acquisition of direct or indirect control of the whole or part of one or more enterprises;
- c) the acquisition of assets of one enterprise by another enterprise results in the acquiring enterprise replacing or substantially replacing the enterprise whose assets are being acquired, in the business or the part concerned of the business, in which the acquired enterprise was engaged immediately before the acquisition; or
- d) the creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity.

For clarity, MyCC has stated that the following will not amount to a merger;

- a) the control is acquired by a person acting in his capacity as a receiver or liquidator or an underwriter;
- b) all of the enterprises involved in the merger are, directly or indirectly, under the control of the same enterprise;
- c) the control is acquired solely as a result of a testamentary disposition, intestacy or the right of survivorship under a joint tenancy; or
- d) the control is acquired by an enterprise whose normal activities include the carrying out of transactions and dealings in securities for its own account or for the account of others where:
 - i. the securities are acquired on a temporary basis (i.e. twelve months from the date on which control of the other enterprise commences); and
 - ii. the acquiring enterprise must not exercise the voting rights with a view to determining the strategic commercial behaviour of the target enterprise or must exercise these rights only to prepare the total or partial disposal of the enterprise, its assets or securities

Proposed Implementation of the Substantial Lessening of Competition Test (SLC)

MyCC, in its Consultation Paper, has expressly stated that it is proposing to adopt the SLC test as the substantive standard for assessing the anti-competitive effects of mergers in Malaysia. As MyCC has yet to issue any guidelines detailing the factors to be considered in assessing the SLC test, MAVCOM's Guidelines on Substantive Assessment of Mergers can serve as a useful reference.

Under MAVCOM's guidelines, the SLC test would entail the following steps;

- a) Define the relevant market;
- b) Develop a theory or theories of harm;
- c) Develop a counterfactual scenario;
- d) Assess the competition in the relevant market and compare it with a counterfactual scenario.

In carrying out the SLC test, MAVCOM states that the following factors may be considered, whichever is applicable;

- a) Market definition;
- b) Market power and market concentration;

- c) Competitive effects arising from horizontal mergers, vertical mergers or conglomerate mergers;
- d) Entry and expansion; or
- e) Countervailing buyer power.

Proposed Notification Regime

The proposed merger control regime under the CA would be a hybrid regime instead of a pure voluntary regime whereby it:

- a) makes it mandatory to notify the MyCC of anticipated mergers which exceed the threshold to be prescribed by the MyCC ('applicable threshold'); and
- b) allows anticipated mergers or mergers which do not exceed the applicable threshold to be voluntarily notified to the MyCC, whether before or after the mergers or anticipated mergers have been transacted.

For mergers that surpass the relevant threshold, parties are prohibited from implementing any part of the merger before obtaining clearance from MyCC. Failure to comply with this requirement renders the merger void.

Additionally, parties failing to notify MyCC of mergers exceeding the applicable threshold will be in violation, subjecting them to a financial penalty of up to 10% of the value of the merger transaction or anticipated merger transaction.

MyCC has not yet determined or indicated what the applicable threshold would be. For comparison, MAVCOM, in its guidelines, has stated that it is more likely to investigate a merger or anticipated merger where:

- a) the combined turnover of the merger parties in Malaysia in the financial year preceding the transaction is at least 50 million Ringgit; or
- b) the combined worldwide turnover of the merger parties in the financial year preceding the transaction of the merger parties is at least 500 million Ringgit.

It is unsurprising to note that under the proposed regime, even if the prescribed thresholds are not met, MyCC will retain residual powers to investigate any merger or anticipated merger if it suspects the transaction has or may result in a substantial lessening of competition within any market. Such discretionary powers are common in other statutory merger control regimes.

Voluntary notifications may prove beneficial where parties seek assurance from MyCC that their transaction will not face investigation or prohibition. If parties opt for voluntary filing, they have the flexibility to complete the merger without awaiting MyCC's approval, but they bear the risk of MyCC potentially issuing a prohibition decision post-completion if it determines the merger results in substantial lessening of competition.

This risk mirrors those seen in other statutory merger control regimes that employ voluntary notifications, such as Singapore.

The primary challenge for MyCC lies in determining the appropriate thresholds. Setting them too high could overlook smaller transactions capable of causing substantial lessening of competition, while setting them too low might stifle M&A activity and inundate the Commission with applications, potentially overwhelming its operations. Careful calibration of these thresholds will be crucial to maintaining an effective balance in merger oversight.

Proposed Relief of Liability

The proposed amendments will introduce a mechanism for enterprises to seek exemption from merger prohibition on the basis that the economic efficiencies resulting from the merger or anticipated merger outweigh any adverse effects on competition. However, the burden of proof rests with the enterprise seeking this exemption to demonstrate the existence and significance of these economic efficiencies.

Excluded Transactions

The merger control regime under the CA will not apply to four categories of mergers that are set out in a revised First Schedule of the CA, namely:

- a) mergers involving commercial or economic activities regulated under industry-specific legislation, namely the Communications and Multimedia Act 1998, Malaysian Aviation Commission Act 2015, Energy Commission Act 2001, Petroleum Development Act 1974 (for upstream activities), Gas Supply Act 1993 and Postal Services Act 2012;
- b) mergers between enterprises licensed, approved, registered or prescribed by the relevant licensing or regulatory authority under the Financial Services Act 2013, Islamic Financial Services Act 2013, Development Financial Institutions Act 2002, Money Services Business Act 2011, Capital Markets and Services Act 2007, Securities Industry (Central Depositories) Act 1991, Labuan Financial Services and Securities Act 2010, Labuan Islamic Financial Services and Securities Act 2010 and Water Services Industry Act 2006;
- c) mergers engaged in order to comply with a legislative requirement; and
- d) mergers carried out in relation to an enterprise entrusted by the Federal or a State Government with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the merger prohibition would obstruct the performance of the task assigned to the enterprise.

While some may view the exclusion of certain sectors from MyCC's authority as a significant carve-out, this development may not necessarily be negative. The introduction of a merger control regime is poised to make MyCC one of the busiest

regulators in the country, and delegating oversight of these sectors to their respective regulators or authorities could afford MyCC much-needed breathing space.

Proposed Timelines

For mandatory notifications, MyCC aims to complete its initial review of the merger within the first 40 working days (Phase 1 Review). If further investigation is necessary, MyCC will proceed to a more detailed Phase 2 Review, which spans the next 80 working days. At the conclusion of Phase 2, MyCC may issue a decision to either:

- a) clear the anticipated merger unconditionally;
- b) clear the anticipated merger with a commitment that addresses the SLC concerns;
- c) block the anticipated merger.

MyCC has stipulated that if there is no response within the 120 working days allotted for Phase 2 of the review process, the anticipated merger will automatically be deemed approved, allowing parties to proceed with completing the merger.

To ensure compliance with timelines, MyCC has further specified that a merger notification will be considered withdrawn if the parties fail to provide requested information within the specified period. In such cases, parties have the option to submit a fresh notification to MyCC.

The 120-working-day review period for mandatory notifications can be halted or suspended in various scenarios, including when MyCC requests additional information from the enterprise. This "stop the clock" mechanism, akin to a chess clock, introduces uncertainty into transaction timelines and may potentially impact deal certainty. There is concern that MyCC could abuse this right by requesting information, whether relevant or not, to extend the review period. This uncertainty could hinder or jeopardize pro-competitive M&A transactions.

It is important to note that the 120-working-day review period does not apply to voluntary notifications. Therefore, MyCC is not bound by any specific timeline when reviewing voluntary notifications. While voluntary notifications offer benefits such as obtaining legal and transaction certainty, the absence of a defined review timeline could ironically lead to uncertainties regarding deal timing, even if parties proceed to close a merger falling below the prescribed thresholds.

Addition to Investigative Powers

The proposed amendments confer various powers of investigation onto the MyCC in relation to mergers and anticipated mergers, including:

- a) whether or not an anticipated merger or merger exceeds the applicable threshold;
- b) whether a merger has resulted, or anticipated merger may be expected to result, in a SLC within any market for goods or services; and

- c) whether there has been a violation of the mandatory notification requirement or the requirement to not consummate an anticipated merger before receiving a clearance decision from the MyCC ('merger violation').

Conclusion

Merger transactions are undoubtedly pivotal in Malaysia's economic landscape, driving growth, consolidating market influence, and shaping industry dynamics through strategic partnerships and acquisitions. The introduction of a merger control regime is essential for any competition authority to effectively uphold fair competition practices amidst a dynamic and evolving economy.

After the initial release of the Consultation Paper in April 2022, expectations were high for the CA's amendments to be tabled by October 2022, paving the way for the proposed merger control regime to take effect in October 2023. However, the slow pace of legislative change is a familiar hurdle in governance, requiring perseverance as new laws navigate through debates, committees, and revisions before enactment.

Despite its potentially significant impact on the business landscape, MyCC has adopted a cautious approach towards the proposed amendments. Keeping its cards close to its chest, the Consultation Paper outlines broad intentions rather than detailed clauses to be incorporated into the existing CA. While stakeholders have provided feedback to MyCC, the public remains unaware of the specific influence these inputs may have on the initial proposal outlined in the Consultation Paper.

However, anticipation for the introduction of a merger control regime in Malaysia remains high. This new authority is expected to significantly enhance MyCC's visibility among both businesses and the public, potentially resolving past awareness challenges once the amendments come into force.

As awareness of MyCC and the CA expands, businesses and members of the public are expected to take on the role of vigilant observers, actively reporting any potential anti-competitive conduct that could compromise efforts to maintain a market free from such practices.

What remains unequivocally clear is that the necessity of a robust merger control regime is essential for MyCC, marking a significant step towards safeguarding competitive markets in Malaysia.