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MERGER CONTROL REGIME IN MALAYSIA: PAST, PRESENT AND WAY FORWARD

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ABSTRACT

Merger control is one of the main pillars of a competition law regime. Without a merger control provision, a competition authority is unable to prevent a problematic merger that lessens competition in the market from being consummated. Malaysia, having its national cross-sector competition law regime in place only since 2010, has, apart from sectoral regulations, no merger control regime in place. The country has adopted a sectoral approach to merger control, empowering certain regulators to oversee merger activities in a specific market or industry. Since 2020, the Malaysia Competition Commission (MyCC) has been working on the proposed amendments to the Competition Act 2010 (CA 2010), aiming to incorporate a merger control regime as one of its main agendas. The primary objective of this paper is to explore the development of the merger control regime in Malaysia. The main contribution of this paper is the analysis of the merger control regime in the proposed amendment

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of the CA 2010 and an understanding of the issues and challenges involved in the enforcement of merger control provisions. The research is doctrinal, based on descriptive and analytical methods, and relies on both primary and secondary data. The research is doctrinal, utilising descriptive and analytical methods, and relies on both primary and secondary data. It also incorporates a comparative element by examining experiences from more developed jurisdictions, such as the European Union and the United States, which have extensive experience in enforcing merger control. Conclusions can be drawn from debates in these jurisdictions regarding potential adjustments to their respective merger control regimes.

Keywords: Competition Law, Merger Control, Substantial Lessening Competition, Dominant Position, Significant Impediment on Effective Competition.

REJIM KAWALAN PENGGABUNGAN: MASA LALU, MASA KINI DAN HALA TUJU MASA DEPAN

ABSTRAK

Kawalan penggabungan merupakan salah satu asas utama dalam rejim undang-undang persaingan. Tanpa peruntukan kawalan penggabungan, pihak berkuasa persaingan tidak dapat menghalang penggabungan bermasalah yang mengurangkan persaingan dalam pasaran daripada disempurnakan. Malaysia, yang mempunyai rejim undang-undang persaingan sejak 2010, tidak mempunyai rejim kawalan penggabungan kecuali untuk sector-sektor tertentu. Negara ini telah mengamalkan pendekatan doktrinal terhadap kawalan penggabungan, memberi kuasa kepada pengawalselia tertentu untuk mengawasi aktiviti penggabungan dalam pasaran atau industri tertentu. Sejak tahun 2020, Suruhanjaya Persaingan Malaysia (MyCC) telah merangka cadangan pindaan kepada Akta Persaingan 2010 (CA 2010), dengan tujuan untuk memperkenalkan rejim pengawalan penggabungan sebagai salah satu agenda utamanya. Objektif utama kajian ini adalah untuk meneroka perkembangan rejim kawalan penggabungan di Malaysia. Sumbangan utama kajian ini adalah analisis mengenai rejim kawalan penggabungan dalam cadangan pindaan CA 2010 dan memahami isu dan cabaran yang terlibat dalam penguatkuasaan peruntukan kawalan penggabungan. Penyelidikan ini bersifat doktrinal, berdasarkan kaedah deskriptif dan analisis, dan bergantung kepada data primer dan sekunder. Penyelidikan ini juga mengandungi elemen perbandingan dengan meneroka pengalaman dari negara-negara lain yang lebih maju seperti Kesatuan Eropah dan

Amerika Syarikat yang mempuyai banyak pengalaman dalam menguatkuasakan rejim kawalan penggabungan. Kesimpulan boleh diambil dari perbahasan di negara negara ini, mengenai penambahbaikan yang berpotensi dilaksanakan terhadap rejim kawalan penggabungan masing-masing.

Kata Kunci: Undang-Undang Persaingan, Kawalan Penggabungan, Pengurangan Persaingan Ketara, Kedudukan Dominan, Halangan Ketara kepada Persaingan Berkesan.

INTRODUCTION

Mergers and acquisitions (M&A) are seen by the market players as the fastest way to grow as opposed to organic growth. It is believed that the main rationale behind a merger is to achieve economic efficiency by allowing the merging entities to leverage on the economies of scale arising from the merger, to create a large pool of industry experience and talent management as well as to enable the merging companies to emerge as a larger group with better-established market positions, stronger branding, and vast experience.[1] A merger will also create various other forms of efficiencies such as eradication of overlapping operations, centralising R&D activities, improving the quality of capital management, reducing costs of capital, and facilitating the disposal of non-core assets.

However, efficiency is not the only motive being discussed in the context of the introduction of a general merger control regime in Malaysia. M&A are also important strategies to achieve broader objectives (so-called 'national objective')[2] such as promoting national champions, equity participation, and wealth redistribution. A merger may allow the merging parties to become the (global) leader in important and strategic sectors such as palm oil plantation, telecommunication, banking, and media industry forming a large conglomerate in Malaysia that can compete globally. In this respect, the debate is comparable to the 2019 Franco-German initiative for a European industrial policy in the 21st century around the EC's

[1] Awasi Mohamad and Vijay Baskar Tamarum Demudoo, "Mergers and Value Creation: A Case Study of Sime Darby Bhd" (Master diss., University of Malaya, 2008) 123.

[2] Ibid, pp116–117.

Siemens/Alstrom case[3] where the German and French ministers of economy have, in the end unsuccessfully, advocated for creating European Champions that would be able to successfully compete on the world stage.[4]

M&A in Malaysia are mainly regulated by the Securities Commission (SC).[5] The primary function of the SC is not to promote competition, but rather to protect the interest of investor's especially the minority shareholders to ensure that they are given fair treatment during the take-over process. There are only two regulators that have been given the mandate to oversee anti-competitive mergers in specific areas, namely, the Malaysia Communications and Multimedia Commission (MCMC) and the Malaysia Aviation Commission (MAC). The existing Competition Act 2010 does not contain a merger control framework. The increased regulatory control over mergers is often viewed as a hurdle for companies seeking to grow. However, as the country faces economic uncertainties, concerns arise about mergers among big companies potentially lessening competition and thereby harming consumers.

The main objective of this paper is to explore the development of merger control in Malaysia. Through a descriptive approach, the paper aims to understand the reasons for the delay in introducing the national merger control regime, the rationale for why the country needs an ex-ante mechanism in the form of a merger control regime to address anti-competitive issues arising from mergers, and the current implementation of the merger control regime in specific sectors. Through an analytical approach, the paper will analyse the proposed

[3] Case M.8677 - SIEMENS/ALSTOM (European Commission, decision of 6.2.2019)

[4] See "A Franco-German Manifesto for a European industrial policy (Network n.d.) for the 21st Century," BMWK, accessed July 31, 2024, https://www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf, 3.

[5] Which enforces the Securities Commission Act 1993 and the Capital Markets and Services Act 2007 (part IV, division 2). In 2010, the government amended the Malaysian Code on Take-Overs and Mergers 1998, replacing it with the Malaysian Code on Take-Overs and Mergers 2010 (2010 Take-Over Code), followed by the formulation of the 2010 Practice Notes. The 2010 Take-Over Code and 2010 Practice Notes were issued pursuant to section 217 of the Capital Market and Services Act 2007.

national merger control provisions, discuss issues and challenges, and provide some recommendations for the future implementation of the merger control regime.

REASONS FOR DELAY

The question of whether the national competition law should include merger control sparked policy debates before the enactment of the CA 2010. Strong resistance emerged from various quarters, including the existing regulators and market players. Opponents to merger control enforcement have argued that, in a small market economy, such a policy is not aligned with capital market development, particularly in encouraging M&A and ensuring the smooth running of the process. They believe that merger control would introduce bureaucratic conduct and uncertainty into business operations. Some argued that the then-proposed competition law should not address M&A and takeovers through the requirement for pre-merger notification and review. Pre-merger notification is deemed time-consuming and involves extensive filing of documents, adversely affecting economic operators. The process is also considered costly for firms, competition authorities, and merging parties, as it necessitates the involvement of skilled experts.

It was viewed that some mergers are necessary, especially when there are too many firms in a particular industry, which creates market inefficiency.[6] In such cases, rigorous merger policy is viewed as preventing efficiency-enhancing mergers from taking place and impeding the ability of the regulator to intervene promptly when the market structure is inefficient. In the retail industry for example, the entry of foreign players has increased the trend towards M&A. To avoid being acquired, other local supermarkets were also prompted to merge.[7] Competition legislation might undermine the ability of

[6] See Risen Jayaseelan, "Too Many M'sian Banks, Consolidation Needed," *The Star Online*, April 12, 2011, http://biz.thestar.com.my/news/story.asp?file=/2011/4/12/business/8463103&sec=business; See also Yap Leng Kuen, "Banking Consolidation Third Round," *The Star Online*, May 14, 2011, http://janandakumar.wordpress.com/2011/05/16/banking-consolidation-third-round-starbiz-malaysia/

[7] Shila Dorai Raj, "Development of Competition Policy and Recent Issues in East Asian Economies: Development of Malaysia's Competition Policy," (Paper presented at the 2nd East Asia Conference on Competition Law

businesses to adapt quickly to market changes. Mergers are always seen as the fastest way to grow to achieve maximum efficiency than through organic growth.

An argument was also brought forward about the need for mergers to increase international competitiveness. Mergers were seen as an important policy that would promote national champions by establishing market position and strong brands, increasing economies of scale, efficiency profitability and credit worthiness. The wave of mergers in 2001–2002 in the financial sector was undertaken with the motivation to provide strong, competitive, and large-capital-based financial institutions.[8] The consolidation process enables the core banks to emerge as leaders and national champions in a bid to survive in an intensely competitive environment, particularly with foreign banks. The big banks may avoid being acquired by others and enjoy the governmental 'safety net' that protects them from failure.[9] It was feared that the implementation of national merger control would impede or slow down the government's effort to pursue a national agenda such as national champions which may in the end increase market concentration and create an entity which is too big to fail.

Merger activities play a crucial role in advancing the government's political and national agenda. Allowing local firms to merge not only transforms them into strong and competitive businesses both locally and globally but also serves as a vehicle to promote income and wealth redistribution across economic sectors. This includes equity ownership, employment opportunities, talent management, tender and vendor development programmes, and more. The implementation of a national merger control mechanism is seen as a hurdle to achieving these intended objectives because, during the process, a merger may lead to market concentration, posing a risk of contravening competition laws. Initially, it was proposed that the competition law should primarily focus on post-merger notification for monitoring and

and Policy—Toward Effective Implementation of Competition Policies in East Asia, Bogor, Indonesia, May 3–4, 2005), 6.

[8] Ibid.

[9] Shamshubaridah Ramlee and Rasidah Mohd Said, "Current Trends and Practices in the Malaysian Financial Services Industry," in *Mergers and Acquisitions: Issues and Perspectives from the Asia Pacific Region*, ed. Ganesh (Asian Productivity Organization, 2009), 86.

assessing market structure and the status of competition. The threshold requirement should be set at a sufficiently high level, aligning with the government's policy to encourage firms to become national champions.

THE NEED TO HAVE MERGER CONTROL - THE PUSH FACTORS

The MyCC is currently in the process of amending the existing CA 2010 to incorporate a merger control provision. However, as of now, the proposed amendments have not been approved by the Parliament. While mergers can enhance the domestic economy and foster competition for local companies, unregulated mergers, in the long run, may disrupt the competitive process and harm consumers. It is essential to emphasise several push factors that have prompted the MyCC to initiate discussions with political authorities regarding the introduction of a merger control regime in the existing competition law.

The absence of merger control is seen as a lacuna or missing pillar in the competition law.[10] It means the MyCC is handicapped to deal with problematic mergers ex-ante[11] and anti-competitive behaviour may fall within the cracks.[12] As a result, the MyCC faces public outcry and criticism for its inability to respond to mergers that potentially create a monopoly or dominant entity. This was evident in the case of the Grab/Uber merger in Southeast Asia. Unlike Malaysia, other jurisdictions such as Singapore, the Philippines, and Vietnam have invoked their merger control regimes to assess the merger between the two major online platforms, concluding that it has led to a

[10] Asiah Siddiqah Abdurrahman, "The Introduction Of Merger Control Regime And The Impact On Businesses," *The Legal 5001,* February, 2023, https://www.legal500.com/developments/thought-leadership/the-introduction-of-merger-control-regime-and-the-impact-on-businesses/

[11] Organisation for Economic Co-operation and Development (OECD), "Merger Control in Dynamic Markets-contribution from Malaysia," *OECD Global Forum on Competition*, December 6, 2019, https://one.oecd.org/document/DAF/COMP/GF/WD(2019)28/en/pdf

[12] "Merger controls – The tiger's missing tooth," Zain & Co, accessed July 31, 2024,https://www.zain.com.my/en/insights/articles/2020/april/30/merger-controls-the-tigers-missing-tooth

substantial lessening of competition in their respective markets. The MyCC has received numerous complaints against the near-monopoly company, Grab, including concerns about price surges in Grab services post the Grab/Uber merger transaction. Without specific powers to address problematic mergers ex-ante, the MyCC has to rely on ex-post enforcement under section 10 of the CA 2010, which mandates the MyCC to closely and regularly monitor the behaviour of the dominant platform post-merger transaction. For instance, after receiving numerous complaints after the Uber/Grab merger, the MyCC eventually issued a proposed decision under section 10 of the CA 2010 against MyTeksi/Grab for imposing restrictive clauses preventing drivers from promoting other e-hailing services.[13] Public outcry persists with the recent proposed merger deal between Grab and Foodpanda, raising concerns about reduced competition in parcel and goods delivery (p-hailing). Foodpanda currently holds a substantial market share of 30-40%, and the public is worried about the possibility of a monopoly that could lead to higher prices and reduced choices[14] and urge MyCC to investigate the potential problematic merger despite the fact that the MyCC has no merger control power under the CA 2010.

Beyond mergers involving e-commerce platforms, attention has also been drawn to several other mergers, particularly in the cement and pharmaceutical industries. In 2019, YTL Cement Bhd acquired a 50% share in Lafarge Malaysia Bhd, leading to the renaming of Lafarge Malaysia as Malayan Cement Bhd. Prior to the merger, there were five cement producers in Malaysia: Lafarge, YTL Cement, CIMA, Hume Cement, and Tasek Industries. The merger was anticipated to bring about significant operational, distributional, and logistic synergies. However, it also raised competitive concerns as the market shares of the merged entity exceeded 50% post-merger.[15] By controlling eight

[13] However, the MyCC's proposed decision against Grab/MyTeksi was quashed by the High Court.

[14] MyCC, "Urged to Look Into Monopoly Threat Over Possible Grab's Food panda takeover," *News Straight Times*, November 13, 2023, https://www.nst.com.my/business/corporate/2023/11/977796/mycc-urged-look-monopoly-threat-over-possible-grabs-foodpanda

[15] "Malaysia's cement industry faces a host of strategic challenges," Consultancy.asia, accessed July 31, 2024,

out of 12 cement plants in Malaysia. After the merger, YTL owns over half of the country's production capacity.[16] There were complaints about price hikes of building materials after the merger was completed.[17] In 2021, Malayan Cement Bhd took over YTL Cement's cement and ready-mixed concrete, making it the biggest cement producer in Malaysia. According to a report, post-acquisition, Malayan Cement Bhd controls 65% of Peninsular Malaysia's cement production capacity.[18] Again, while there may be efficiency benefits resulting from the merger,[19] the merger between two big producers leads to further market concentration both at the upstream and downstream levels.

Another merger deal that sparks consumer concerns is the merger between the two largest retail pharmacy chains in Malaysia: BIG Pharmacy Healthcare Sdn Bhd and Caring Pharmacy Group. It is claimed that the said merger seeks to widen service access by combining expertise and resources.[20] The merger however creates a market leader in the retail pharmacy sector in Malaysia, with BIG Pharmacy owning 282 outlets and Caring with a total of 199 outlets across Malaysia. Both companies have been actively acquiring smaller retailers before they entered the deal.[21] Without merger review ex-ante,

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https://www.consultancy.asia/news/3403/malaysias-cement-industry-faces-a-host-of-strategic-challenges>

[16] "Displaying Item by Tag: Malaysia Competition Commission," global cement, accessed July 31, 2024, https://www.globalcement.com/news/itemlist/tag/Malaysian%20Competition%20Commission

[17] Alifah Zainuddin, "MyCC to closely monitor cement industry amid price hike complaints," *The Malaysia Reserve,* June 19, 2019, https://themalaysianreserve.com/2019/06/19/mycc-to-closely-monitor-cement-industry-amid-price-hike-complaints/

[18] "Malayan Cement's Completes Acquisition of YTL Cement, Positioning Itself for market Leadership," Bondsupermart, accessed July 31, 2024, https://www.bondsupermart.com/bsm/article-detail/malayan-cement-s-completes-acquisition-of-ytl-cement-positioning-itself-for-market-leadership-RCMS_262545

[19] Such as "improved synergies in distribution and procurement, while eliminating duplicated functions and corporate overheads; see Bondsupermart "Malayan Cement's."

[20] Jenny Ng and Vasantha Ganesan, "Big Pharmacy gets bigger," *The Edge Malaysia*, August 1, 2023, <https://theedgemalaysia.com/node/675906>

[21] Claudia Khaw, "BIG Pharmacy to acquire competitor Caring Pharmacy for RM900 million with plans to IPO," VULCAN POST, accessed July 31,

the impact of mergers and acquisitions on the market and consumers such as "quality and speed of service, opening hours, the stocks of medicines that the pharmacy has and waiting times"[22] could not be assessed and remedies could not be offered to address competition concerns.

Furthermore, it is also important to note that whilst the CA 2010 does not have a merger control regime (and where a merger does not fall within the jurisdictions of the Malaysia Aviation Commission Act 2015 (MACA 2015) and Communications and Multimedia Act 1998 (CMA 1998), a merger should still be assessed in light of the applicable merger control regimes in other jurisdictions. This is especially crucial where the parties to such a merger have a business presence outside of Malaysia.

An assessment would need to be carried out to ascertain whether the merger in question would need to be notified in other jurisdictions. To date, more than 150 jurisdictions have merger control regimes and considerations need to be considered in assessing whether the relevant jurisdictions apply mandatory or voluntary regimes, ex-ante or post-ante, full-function merger against any type of mergers, their respective thresholds as well as local effects.

Once the assessment is concluded and where a merger is required to be notified, parties would then need to proceed with the notification. It is also noteworthy to mention that some jurisdictions even require foreign-to-foreign mergers to be notified upon the threshold requirements being met. One of the notable transactions was the creation of a 50/50 joint venture between PETRONAS and Saudi Aramco in 2017 for the development and operation of the Refinery and Petrochemical Complex which forms a significant part of the Pengerang Integrated Complex in the Southern State of Johor. Whilst the joint venture is based and operates in Malaysia, and despite the absence of merger notification requirements under the CA 2010,

2024, https://vulcanpost.com/834724/big-pharmacy-caring-malaysia-7-eleven-acquisition/

[22] See for example, Nicole Leong, "Malaysia Competition Law : the Role of Merger Control Regime in Safeguarding Consumer Interests," *mondaq*, August 3, 2023, https://www.mondaq.com/life-sciences-biotechnology--nanotechnology/1350474/malaysia-competition-law-the-role-of-merger-control-regime-in-safeguarding-consumer-interests

merger notifications and clearances were successfully obtained in Brazil, China, Poland, South Korea, and Taiwan.

THE CURRENT ENFORCEMENT OF MERGER CONTROL – SECTORAL APPROACH

At present, Malaysia employs a sectoral approach to merger control, delegating specific regulatory mandates to two sector regulators: the Malaysian Aviation Commission (MAVCOM) and the Malaysian Communications and Multimedia Commission (MCMC). The Malaysian Aviation Commission Act, enacted in 2015, led to the establishment of MAVCOM as the regulator overseeing activities in the aviation sector. Conversely, the Communications and Multimedia Act, passed by the Parliament in 1998, predated the introduction of the CA 2010. The MCMC, established in 1998 under the Communications and Multimedia Commission Act 1998, is empowered to oversee activities in the communications and multimedia sector.

The Malaysian Aviation Commission Act 2015 (MACA 2015)

The MACA 2015 includes specific competition provisions related to mergers. While the MACA 2015 applies solely to licensees issued under the MACA 2015, it remains unclear whether mergers between licensees and non-licensees fall under the jurisdiction of MAVCOM. Section 54 of the MACA 2015 prohibits both anticipated and consummated mergers that lead to a substantial lessening of competition in the aviation market. MAVCOM has issued various guidelines to inform how the merger control provisions should be interpreted and enforced. The MACA 2015 adopts a voluntary notification regime[23] with no opportunity for the merging parties to seek consultation or guidance from the MAVCOM.[24] In terms of the merger notification threshold, the MACA 2015 relies on a turnover-

[23] Section 55 and section 56, Malaysia Aviation Commission Act 2015 (Malaysia); Malaysia Aviation Commission, "Guidelines on Notification and Application Procedure for an Anticipated Merger or a Merger," April 20, 2018, para 2.1, https://www.mavcom.my/wp-content/uploads/2018/04/Guidelines-on-Notification-and-Application-Procedure-for-an-Anticipated-Merger-or-a-Merger.pdf

[24] Malaysia Aviation Commission, "Guidelines on Notification," para 2.5

based notification, considering the combined turnover of the merger parties in Malaysia or the combined worldwide turnover of the merger parties.[25] During the merger assessment, the MAVCOM adopts the 'substantial lessening of competition' (SLC) legal standard, utilising economic analysis techniques such as defining the relevant market, assessing market power, developing a theory of harm, and conducting counterfactual analysis before issuing a decision on whether the merger should be cleared or blocked. In addition to the authority to clear or prohibit a merger, MAVCOM has the power to impose both structural and behavioural remedies to address competition concerns arising from the merger. The MACA 2015 also provides an exclusion and exemption regime based on both efficiency and non-efficiency grounds, including public interest or social benefits.[26]

Since the establishment of MAVCOM, no negative decisions have been issued on any mergers in the aviation market. The MAVCOM has conducted and cleared two merger assessments based on voluntary notifications and applications for anticipated mergers by the relevant parties in the aviation sector. One such case involved a merger between companies engaged in aviation maintenance services, with the parties to this merger being SIA Engineering Company Limited (SIAEC), Pos Aviation Sdn Bhd (PASB), and Pos Aviation Engineering Services Sdn Bhd (PAES).[27] The MAVCOM concluded

[25] The combined turnover of the merger parties in Malaysia in the financial year preceding the anticipated merger or the merger is at least RM50 million or the combined worldwide turnover of the merger parties in the financial year preceding the anticipated merger or the merger is at least RM500 million, see Malaysia Aviation Commission, "Guidelines on Notification," para 2.7

[26] Exemptions by the Minister under section 59 (2), Malaysia Aviation Commission Act 2015 (Malaysia); Relief of Liability under Section 50 of the Malaysia Aviation Commission Act on the ground of social benefits; see what may constitutes 'social benefits' in Malaysia Aviation Commission, "Guidelines on Substantial Assessment of Mergers," April 20, 2018, para 2.9, https://www.mavcom.my/wp-content/uploads/2018/04/Guidelines-on-Substantive-Assessment-of-Mergers.pdf

[27] SIAEC is a subsidiary company of Singapore Airlines Limited, engaged in providing aviation maintenance, repair, and overhaul (MRO) services and engineering services primarily in Singapore. PAES is a wholly-owned subsidiary of PASB, and PASB is a wholly-owned subsidiary of Pos

that the merger would not lead to an SLC and would not infringe the merger prohibition (section 54 of Act 771). This consideration was made considering that PAES does not have market power post-merger in aviation line maintenance services. Additionally, the MAVCOM ruled out the possibility of both unilateral and coordinated effects, as there are other independent line maintenance service providers at various airports in Malaysia. Furthermore, airlines can choose to self-handle the line maintenance services of their own aircraft without the need to apply for a ground-handling license.

Another merger assessment conducted by MAVCOM is in relation to a failing firm defence merger, with Korean Air Lines Co., Ltd. entering into a share subscription agreement with Asiana Airlines, Inc. on 17 November 2020. Upon assessing the merger notification, the MAVCOM cleared the merger. The purported share subscription agreement did not have a substantial effect on competition in the Malaysian aviation market.[28] The MAVCOM concluded that the anticipated merger will not create both unilateral and coordinated effects since the airfares are regulated by the relevant authority in South Korea[29] and the airfares submitted by one airline to the authority are not disclosed to other airlines which makes pricing coordination and

Malaysia Berhad (Pos Malaysia). PAES' business activities include providing line maintenance services, which involve aircraft maintenance certification and aircraft engineering services at various airports in Malaysia. The anticipated merger involved the proposed acquisition by SIAEC of 49% of the issued and paid-up share capital of PAES from PASB. Following the acquisition, PASB will continue to hold 51% of PAES. PAES will, therefore, maintain more than 50% of its shares held by a Malaysian entity, as required under PAES' Ground Handling Licence ("GHL") conditions issued by the MAVCOM. The anticipated merger falls within the scope of aircraft line maintenance in Malaysia. See Malaysia Aviation Commission, "Case number: MAVCOM/ED/CC/DIV4/2021 (2)," https://www.mavcom.my/wp-content/uploads/2023/06/230616-SIAEC-PAES-Final-Decision-For-Publication.pdf>

[28] Malaysia Aviation Commission, "Case Number : MAVCOM/ED/CC/DIV4/2021 (1)," para 77-78 https://www.mavcom.my/wp-content/uploads/2021/09/20210901-Final-Decision-Anticipated-Merger-Korean-Air-Lines-Co.-Ltd.-and-Asiana-Airlines-Inc..pdf

[29] Ibid, para 89

monitoring is difficult.[30] The merger between Korean Airlines and Asiana Airlines has secured approval from 12 other countries.[31] Different countries such as the UK and Japan have imposed different conditions to resolve the issue of SLCs that may arise from the merger, including divestment of slots on overlapping routes, and other behaviour.

The Communications and Multimedia Act 1998 (CMA 1998)

In contrast to the MACA 2015, the CMA 1998 has no specific provision for overseeing merger activities but instead relies on general provisions. Two important general merger-related provisions are outlined in sections 133 and 139 of the CMA 1998. Section 133 states that 'a licensee shall not engage in any conduct which has the purpose of substantially lessening competition in a communications market.' Sub-section 139(1) provides the MCMC with the power to 'direct a licensee in a dominant position in a communications market to cease a conduct in that communications market which has, or may have, the effect of SLC in any communications market.' Although the term 'conduct' is not explicitly defined in the CMA 1998, the MCMC interprets it to include commercial and other activities undertaken by a licensee in a communications market. [32] The MCMC considers M&A to constitute a form of conduct for the purposes of section 133 and subsection 139(1) of the CMA 1998.[33] In addition to these general provisions, the CMA 1998 has issued detailed guidelines explaining

[30] Ibid, para 95

[31] See for example, "Japanese Regulator Approves Korean Air's Merger with Asiana Airlines," CPI, accessed July 31, 2024, https://www.pymnts.com/cpi_posts/japanese-regulator-approves-korean-airs-merger-with-asiana-airlines/; Andrew Curran, "UK greenlights Korean Air/Asiana Merger," ch-aviation, accessed July 31, 2024, https://www.ch-aviation.com/news/125105-uk-greenlights-korean-air-asiana-merger

[32] Malaysia Communications and Multimedia Commission, "Guidelines on Mergers and Acquisitions," May 17, 2019, para 1.22, https://www.mcmc.gov.my/skmmgovmy/media/General/pdf/Guidelines-on-Merger-and-Acquisitions_1.pdf

[33] Ibid

the merger notification procedures and the MCMC's approach to assessing merger activities in communication markets.

Like the MACA 2015, the CMA 1998's merger control regime is voluntary. This implies that if the merging parties decide not to notify, there is a risk that the post-merger activity may face objection from the MCMC for contravening the prohibition in section 133 or may lead to the MCMC exercising its power under subsection 139(1) of the CMA 1998 by directing a licensee in a dominant position to cease a particular conduct in relation to that transaction.[34] The CMA 1998's voluntary notification regime enables merging parties to seek the MCMC's view on the impact of the merger on competition. In contrast to the MACA 2015 merger control regime, which relies on a turnover-based threshold, the MCMC adopts a dominance test approach. The MCMC will only be concerned about a merger if one of the parties to the M&A is a licensee already in a dominant position in a communications market, or if the M&A results in, or may result in, a licensee obtaining a dominant position in a communications market.[35] The indicative threshold for a dominant position is if the merged or acquired entity is likely to have a post-M&A market share of 40% or more.[36] This implies that the merger control regime under the CMA 1998 may also encompass a merger between licensees (issued pursuant to the Act) and non-licensees. It also includes a merger between entities operating in a communications market and entities operating outside the communications market, provided that the former can leverage its market power in a communications market.[37]

As in the case of MACA 2015, the CMA 1998 merger control regime also employs the SLC test. However, the assessment of the SLC depends on whether a licensee is a dominant or non-dominant entity. If a licensee is dominant, the MCMC will determine whether the M&A has the effect of substantially lessening competition in the market (subsection 139(1) of the CMA 1998). If a licensee is not dominant, the MCMC needs to determine whether the M&A has the purpose of

[34] Malaysia Communications and Multimedia Commission, "Guidelines on Mergers and Acquisitions," May 17, 2019, para 2.3, https://www.mcmc.gov.my/skmmgovmy/media/General/pdf/Guidelines-on-Merger-and-Acquisitions_1.pdf

[35] Ibid, para 3.17, 3.20

[36] Ibid, para 3.20

[37] Ibid, para 3.2.

substantially lessening competition in the market (section 133 of the CMA 1998). The parties to a merger may apply for authorisation under section 140 of the CMA 1998 before entering an M&A deal, and the authorisation may be granted if the M&A is in the national interest,[38] subject to certain restrictions or limitations imposed on the parties to the M&A by the MCMC.[39]

There is only one formal merger assessment conducted by the MCMC after the issuance of merger guidelines.[40] The proposed merger concerns a purchase agreement between Axiata Group Berhad (Axiata) and Digi.com, to combine their respective telecommunications businesses in Malaysia (i.e. Celcom and Digi). [41] Despite the possible anti-competitive effect of the proposed merger,[42] the MCMC approved

[38] Ibid, para 8.6.

[39] Ibid, para 8.8.

[40] Previously the MCMC did not carry merger assessment the impact of merger between Celcom and TM Touch as well as Maxis and Timecel on competition in the market, see Malaysia Communications and Multimedia Commission, "Assessment of Dominance in Communication Markets-Public Inquiry," August, 2002, 112, https://www.mcmc.gov.my/skmmgovmy/media/General/pdf/Commission-Guideline-on-Dominance-in-a-Communications-Market-Final.pdf

[41] Based on the proposed agreement, Digi.Com which the current holding company of Digi will assume full ownership of Celcom by way of the following transactions: (i) Axiata will transfer 100% of its equity interest in Celcom to Digi.Com; and (ii) Digi.Com will issue new shares to Axiata and Telenor Asia Pte. Ltd. such that each recipient entity will hold 33.10% of Digi.Com total issued share capital; and (iii) Axiata together with Malaysian institutional funds will own over 51% of the merged company (MergedCo). The MergedCo is expected to have a combined market share of 50% and total revenue share of 35% across the domestic fixed and mobile sectors exceeding the threshold for merger notification of 40% based on the guidelines of the MCMC, see "The Effect of Competition on the Merger of CELCOM and DIGI," @azmilaw Newsletter, accessed, July 31, 2024, https://www.azmilaw.com/insights/the-effect-of-competition-on-the-merger-of-celcom-and-digi/

[42] According to the MCMC's preliminary assessment, the proposed merger may raise competitive concerns in few relevant communications markets in which both parties operate, namely (i) the national retail market for mobile and low-speed fixed broadband, data services, mobile voice and Person-to-Person (P2P) messaging services, as well as (ii) the national wholesale market for mobile voice and P2P messaging services and

the transaction subject to both structural and behavioural remedies to address competition issues including spectrum divestment,[43] separation of wholesale business from retail business, [44] divestment of Celcom, Yoodo (which provides mobile virtual network including offering 5G under Celcom brand), [45]removing the existing exclusive arrangement etc.[46]

MERGER CONTROL REGIME UNDER THE PROPOSED AMENDMENTS TO THE CA 2010

In line with the wholesale amendment to the Competition Act 2010, the MyCC seeks to incorporate a merger control provision to increase its power to regulate mergers *ex-ante*. The definition of mergers under the proposed merger control regime covers various activities including the

mobile broadband services : "Undertaking to the Malaysian Communication and multimedia Commission -Pursuant to Section 140 (3) of the Communication and Multimedia Act 1998," para 3.3 https://www.mcmc.gov.my/skmmgovmy/media/General/registers/Undertaking-Public-Version.pdf

[43] Before the merger, both Celcom and Digi are two main players which has significant spectrum holdings. The proposed merger will result in spectrum concentration which likely to lead to anti-competitive effect in the market. Malaysia Communications and Multimedia Commission, "Public Inquiry (PI) on Allocation of Spectrum Bands for Mobile Broadband Service in Malaysia- Submission by U Mobile Sdn Bhd," August 30, 2019.

[44] The mergo is required to establish an independent wholesale business unit to manage Mobile Virtual Network Operators (MVNO).This is to ensure that the existing and new MVNOs are guaranteed continued access to wholesale service at terms no worse off than the current agreements including fair pricing and non-discriminatory access to the wholesale and retail service.

[45] It is expected that the merged entity will be the largest operator with the highest number of subscribers, particularly in the prepaid business. MCMC also prohibits the upcoming merged entity from directly or indirectly absorbing Yoodo's subscribers for a period of 3 years

[46] Focusing in certain areas such as Sabah, Labuan, Sarawak, Terengganu, Pahang and Kelantan within three years after the merger. At the same duration, the MergedCo is not allowed to enter any new exclusivity arrangement with exclusive distributors or other distributors in the region unless it is approved by the MCMC.

combination of two or more previously independent enterprises, acquisition of assets, a joint venture that seeks to perform, on a lasting basis, all the functions of an autonomous economic entity, and the acquisition of direct or indirect control of the whole or part of one or more enterprises.[47] The merger prohibitions apply to all kinds of mergers, horizontal, vertical as well as conglomerate mergers. Under the proposed merger control regime some activities are excluded, including when the control is acquired by an enterprise whose normal activities include the carrying out of transactions and dealings in securities[48] or when all the enterprises involved in the merger are, directly or indirectly, under the control of the same enterprise. [49]

The next section will delve into crucial aspects of the proposed merger control, including (1) Notification regime; (2) Merger notification threshold; (3) Substantive assessment; and (4) Exemption and exclusion. These four features of the merger control regime have sparked intense debates among the public, government agencies, legal practitioners, market players, and members of academia."

Voluntary vs mandatory notification regime (or hybrid)

The proposed merger control regime advocates for a pre-merger notification system, emphasising *ex-ante* review rather than a post-merger notification approach. This approach offers the advantage of preventing or limiting potential harm to competition and consumers in the future. A debated issue during the early stages of draft preparation

[47] An enterprise shall be deemed as having control of another enterprise where such enterprise has conferred the possibility of exercising decisive influence on the other enterprise by reason of rights, contracts or any other means either separately or in combination- Competition Bill, sec 10B.

[48] Provided that the securities are required on a temporary basis and 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, Competition Bill, sec 10C

[49] Other non-application includes: the control is acquired by a person acting in his capacity as receiver or liquidator or an underwriter, or acquired solely as a result of a testamentary disposition, intestacy or the right of survivorship under a joint tenancy, see Section 10C, Competition Bill (Malaysia).

and public consultation was whether the new competition law should adopt a voluntary or mandatory pre-merger notification regime. As highlighted in the previous section, both MACA 2015 and CMA 1998 currently embrace a voluntary pre-merger notification regime, granting merger parties the liberty to notify the merger if it meets certain thresholds. Importantly, even if a merger does not meet the threshold, regulators still have the authority to investigate if they reasonably believe that the merger will lead to an SLC in the market. This places the responsibility on merging parties to assess whether their merger will lead to an SLC and if notification to the competition authority is warranted. The appealing feature of this notification regime lies in its potential to reduce the number of merger notifications, as the failure to notify does not carry financial implications for the merger parties. Simultaneously, it eases the workload of competition authorities, particularly for smaller or newer competition authorities facing financial and resource constraints.[50] The limited capabilities to assess merger notifications may result in delays in the merger process, thereby increasing legal and operational costs for market players.

However, the downside of the pre-merger voluntary regime is the risk that a problematic merger may not be notified and could escape scrutiny under competition law, even though it has a significant impact on competition. While the competition authority retains the power to investigate unnotified mergers, it may be too late to prevent the merger or dismantle the dominant merged entity post-merger. This risk is exemplified by the experience of the Competition and Consumer Commission of Singapore (CCCS) in dealing with the merger of two giant e-hailing platforms, Grab and Uber. Both parties completed the merger despite having substantial market shares. By the time the CCCS investigated the merger, Uber had already exited the Asian market. This may undermine the effectiveness and credibility of the competition law in addressing anticompetitive mergers[51] limiting the remedies that the competition authority may impose.

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[50] United Nation Conference on Trade and Development (UNCTAD), "Challenges in the design of a merger control regime for young and small competition authorities," (Intergovernmental Group of Experts on Competition Law and Policy, Sixteenth Session, Geneva, July 5-7, 2017) 6, https://unctad.org/system/files/official-document/ciclpd45_en.pdf

[51] See Choogwoo, Choe & Chander, Shekhar, "Compulsory or Voluntary Pre-Merger Notification? Theory and Some Evidence," *MPRA Paper No.*

In contrast, the mandatory pre-merger notification regime compels parties to a merger to notify the proposed merger if it exceeds a predetermined threshold. Failure to notify itself is considered a violation under the merger regime. Additionally, if, upon investigation, the competition authority finds that the merger leads to an SLC, the merger parties are also liable for infringing a merger prohibition. Several advantages come with implementing a mandatory notification regime. Firstly, it provides legal certainty and predictability to market players regarding when to notify their merger transactions. Secondly, it offers the competition authority the opportunity to assess all mergers that meet the stipulated threshold, enabling them to provide appropriate remedies, including preventing or blocking proposed mergers. Simultaneously, the mandatory pre-merger notification regime equips the competition authority with the experience and skills to determine which mergers have a substantial effect on competition. However, the drawback of this regime lies in the significant costs and requirements associated with reviewing notifications, particularly when they involve cross-border or multinational corporations.[52] A well-equipped dedicated team is essential to complete merger assessments within strict stipulated timelines.

Recognising the potential advantages and disadvantages of both notification systems, the MyCC aims to strike a balance by proposing a hybrid notification system, which combines elements of both mandatory and voluntary notification.[53] The mandatory pre-merger notification model ensures that all problematic mergers do not go unnoticed. This hybrid system empowers the competition authority to prevent a problematic merger from the outset. Simultaneously, the voluntary pre-merger notification regime allows merger parties who are uncertain about the impact of their anticipated merger to notify, even if the transaction does not meet the merger notification threshold.[54] This is because, irrespective of the type of notification adopted and whether the transaction exceeds the stipulated merger threshold, the competition authority reserves the right to investigate a merger or anticipated merger. This investigation can occur whether or

13450, February, 2009, accessed July 31, 2024, https://mpra.ub.uni-muenchen.de/13450/1/MPRA_paper_13450.pdf

[52] Choogwoo et.al, "Compulsory or Voluntary Pre-Merger Notification?" 2.

[53] Section 10F, Competition Bill (Malaysia).

[54] Section 10H, Competition Bill (Malaysia).

not the mergers or anticipated mergers exceed the threshold, if the Commission has reasons to suspect that the merger or anticipated merger has resulted or may be expected to result in a substantial lessening of competition within any market for goods or services.[55] In the hybrid system, the parties to a merger, particularly SMEs, will have the opportunity for pre-notification consultation with the competition authority to assess whether the proposed merger will result in an SLC. This proactive step can help avoid future litigation and reduce legal costs.

However, in the hybrid system, the merger parties will be exposed to two important infringements. First, there is the merger violation provision, where parties violate the mandatory obligation to notify the merger (mandatory) or violate the requirement not to consummate the merger before approval is given by the Commission (gun jumping).[56] Second, there is a merger prohibition provision, applicable when the parties proceed with a merger without notifying the competition authority, and the merger, upon assessment, leads to an SLC. The drawback of this hybrid system is that it may overutilise the authority's resources and divert the competition authority's focus from other aspects of competition law enforcement, such as cartel and abuse of dominant position. To address this issue, the notification threshold plays an important role in filtering notifications. A higher threshold is needed to ensure that only mergers with the potential to impact competition will be notified.

The effect of the MyCC's hybrid merger notification proposal is akin to the effect of Article 22 of the European Union's (EU) Merger Regulation (EUMR) which allows the European Commission (EC) upon referrals made by the EU member states, to examine certain M&As, even where they do not meet the EU merger control thresholds. The EC lately has been seen actively reinvigorating Article 22 of the EUMR - a corrective mechanism of the EUMR which allows for one or more member states to request the EC to examine, for those member states, any 'concentration' that does not have an EU dimension but

[55] Section 34D, Competition Bill (Malaysia).

[56] Section 10G, Competition Bill (Malaysia). For merger violation, the Commission has the power to impose a financial penalty of uo to ten per cent of the value of the merger transaction or anticipated merger transaction - Section 43L, Competition Bill (Malaysia).

affects trade between member states and threatens to significantly affect competition within the territory of the members state or states making the request.[57]

Article 22 of the EUMR has been invoked by the EC to claw its reach over killer acquisitions of innovative start-ups. One of the recent landmark cases that stemmed from the EC's power under Article 22 of the EUMR is the case of Illumina/GRAIL[58] – a proposed transaction that did not meet the turnover threshold of the EUMR and was not notified in any of the EU member states, was referred to the EC for it to assess by France, Belgium, Greece, Iceland, the Netherlands and Norway. The EC found that the proposed transaction would affect trade within the single market and threatened to significantly affect competition within the territory of the member states that made the referral request and that a referral was appropriate because GRAIL's competitive significance is not reflected in its turnover.[59] The General Court has confirmed the Commission's view in this regard at first instance, however, the appeal case[60] is currently pending before the ECJ.

It is important to note that under the EUMR's Art. 22 system, the EC can, at its discretion, decide to take up a case referred by an authority of a member state to reduce the risk of the EC being overwhelmed with referrals. On the other hand, the proposed Malaysian merger control does not grant the MyCC discretionary power to decide. If a company voluntarily notifies a merger to the MyCC, the MyCC is then obliged to assess the merger. This may result in an influx of notifications and use up the authority's resources. Whilst a hybrid notification system may be useful for the competition regulators, including the MyCC to address their jurisdictional gaps in assessing M&As that may fall below the thresholds set but may have a significant effect on competition, this power should only be invoked

[57] Katalin J Cseres, "Re-Prioritising Referrals under Article 22 EUMR: Consequences for Third Parties and Mutual Trust between Competition Authorities," *Journal of European Competition Law & Practice*, 14 (7) (2023) : 410-422, https://doi.org/10.1093/jeclap/lpad044

[58] Illumina/Grail, GC, decision of 13.7.2022, case T-227/21 - ECLI:EU:T:2022:447

[59] Ibid.

[60] Case C-611/22 P.

upon clear guidance being issued and only confined in certain limited circumstances. Unnecessary intervention by the MyCC should be avoided as to allow certainties for businesses to conduct smooth business operations in the M&A space.

Merger notification threshold and threshold criteria

Another crucial aspect of a merger control regime is the notification threshold that triggers the obligation for merger parties to notify the competition authority. A notification threshold serves as a tool to screen out or filter transactions that are unlikely to result in a significant effect on competition in the market of a particular jurisdiction.[61] The appropriate notification threshold will help the merging parties avoid unnecessary transaction costs associated with notification and assist the competition authority in reducing public expenditure related to the review of a merger transaction.[62] It is crucial to note that the merger notification threshold only serves as a screening tool and does not curtail MyCC's power to investigate any transaction that does not meet the notification threshold but may lead to an SLC in the market. This is in stark contrast to the EU merger control regime where the merger thresholds set are binding on the EC and the companies for the sake of legal certainty and security. In view of the EC competition law, if the thresholds are not met, the EC cannot pick up the case, with the exception of (1) Art.22 EUMR and (2) post-merger control.

The biggest challenge lies in determining the most appropriate threshold to limit the influx of notifications for transactions that pose no competition concerns and ensuring that problematic mergers do not escape the competition authority's scrutiny. For the sake of flexibility, the notification threshold will not be incorporated in Malaysia's proposed new legislation but will instead be outlined in subsequent

[61] International Competition Network (ICN), "Setting Notification Thresholds for Merger Review "(Report to the ICN Conference, Kyoto Japan, April 2008) 4, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_SettingMergerNotificationThresholds.pdf

[62] ICN, "Setting Notification Threshold", 4

guidelines, with MyCC empowered to amend the threshold from time to time.[63]

Based on various sources,[64] it is expected that the proposed merger control regime in Malaysia will utilise a 'turnover'- based threshold[65] in combination with an 'asset'- based threshold before triggering the notification. Turnover and asset-based thresholds are widely adopted as they provide 'objective criteria' and more clarity regarding whether a transaction should undergo review.[66] Many countries, such as the US and the EU, have also embraced these criteria due to their simplicity in determining turnover/assets, which can be easily obtained during the ordinary course of business.[67] It remains unclear whether the Malaysian merger control regime will combine both local and worldwide turnover to establish a local nexus, as seen in the aviation sector. However, local turnover alone may be sufficient to capture transactions that impact the local market.[68] The downside of objective criteria, such as turnover/asset-based criteria, is that they focus more on whether a transaction should be reviewed based on the economic size of the parties[69] but do not provide a clear prediction of whether a transaction will lead to an SLC in terms of the market position of the parties.

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[63] Section 10J, Competition Bill (Malaysia).

[64] See for example, Malaysian Bar, "Updates on Merger Control and the Coming Sea Change," (PowerPoint presentation, Virtual Conference on Corporate and Commercial Law, October 20, 2022)

[65] Amount derived from the sales of product and provision of services, see Organisation for Economic Co-operation and Development (OECD), "Local Nexus and Jurisdictional Thresholds in Merger Control" (Working Party No.3 on Cooperation and Enforcement, June. 14-15 2016) 10 https://www.oecd-ilibrary.org/docserver/39e70c71-en.pdf?expires=1722527183&id=id&accname=guest&checksum=34CE1FB83898486559E2D18646DA8B1E

[66] Damiano Canapa*, "*TURNOVER THRESHOLD (MERGER), Global Dictionary of Competition Law*,"* Concurrences, Art. N° 12368 , accessed July 31, 2024, *https://www.concurrences.com/en/dictionary/turnover-threshold-merger*

[67] OECD, "Local Nexus," 10, 13

[68] ICN, "Setting Notification Threshold", 8, OECD, " Local Nexus," 10.

[69] OECD, "Local Nexus," 6 & 10.

Some jurisdictions rely on market shares as the trigger for merger notification. Market share thresholds may better predict whether a particular transaction will lead to an SLC effect than turnover/asset-based thresholds.[70] The market shares criteria are also well-suited for establishing a local nexus because the parties need to define the relevant market in which the merger parties operate, involving both product and geographical markets. However, relying on market shares is a complex process, particularly the requirement to define the relevant market, which often exposes the parties and competition authority to errors. This complexity creates legal uncertainty and delays in merger notification. Furthermore, the merger parties need to conduct their own assessment regardless of whether the transaction requires notification.[71] The market share criteria may create a burden and increase costs for market players. Market definition is always subject to different interpretations and conclusions, particularly when cases go to higher authorities, such as appeal tribunals and courts.[72] Another objective criterion is relying on the value or size of the transaction. Like turnover, the value of the transaction is not a suitable criterion to predict the potential effect of a transaction on competition. Furthermore, the value of the transaction can be easily manipulated by the merger parties to ensure that a transaction does not meet the notification threshold. Still, in particular regarding startups in digital markets, the transaction value gives a more realistic view of the significance of a merger on the relevant market than the turnover. In digital markets, young companies often generate very low or even zero turnover but already have a significant importance for competition.[73]

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[70] OECD, "Local Nexus," 14.

[71] Ibid.

[72] For example, the Tribunal disagreed with the MyCC's definition of the relevant market in the case of PIAM, see "Competition Appeal Tribunal's decision on PIAM" https://www.mycc.gov.my/sites/default/files/pdf/decision/PIAM%20%26%2023%20Ors%20v%20Competition%20Commision%20%28Grounds%20of%20Decision%29.pdf; the Court of Appeal also rejected MyCC's definition in the case of MAS/Airasia, CIVIL APPEAL NO . : W-01(A)-31-01/2019

[73] See, for instance, the merger Facebook/WhatsApp where Facebook paid approximately 19 billions USD, EC, decision of 3.10.2014, case COMP/M.7217 – Facebook/WhatsApp; see also Steven Berry, Martin, Gaynor & Fiona Scott Morton, "Do Increasing Markups Matter? Lessons

Substantive assessment – substantial lessening of competition

There is no uniform legal standard employed by competition authorities worldwide when assessing whether a merger transaction is anti-competitive and in contravention of merger prohibitions. Generally, most competition law jurisdictions employ two common legal tests: (1) the market dominance test and (2) the SLC test. Many countries also use a combination of these two tests in their substantive assessment of mergers,[74] for instance the SIEC[75] test of European competition law. Under the SIEC test, market dominance is a leading, but not the only factor that leads to an SIEC.[76] However, for easy comparison and discussion, this paper will focus on the two tests that are at the centre of the discussion on the implementation of merger control in Malaysia, namely, the market dominance and the SLC test.

The SLC test focuses on the rate of change related to the intensity of competition in the market, while the market dominance test focuses on whether a merger transaction creates or enhances market power, or facilitates its exercise. The notion of market power is typically determined based on an entity's ability to profitably maintain prices above competitive levels for a significant period. In Malaysia, sector regulators have issued guidelines containing legal standards or tests for merger assessments. MAVCOM relies on the SLC test, while MCMC employs a mix of the SLC and market dominance tests. When applying the SLC test, MCMC assesses whether licensees hold a dominant position pre-merger. Different SLC standards (purpose or

from Empirical Industrial Organization," *Journal of Economic Perspectives* 33, No 3 (2019) : 44, 61.

[74] Organisation for Economic Co-operation and Development (OECD), "The Standard for Merger Review, DAF/COMP(2009)21," accessed July 31, 2024 https://www.oecd-ilibrary.org/docserver/4d67d71a-en.pdf?expires=1721880210&id=id&accname=guest&checksum=F38746EFE8C743D1558C6D1AE2E8899F

[75] Significant impediment on effective competition.

[76] The SIEC captures transaction transactions that do not necessarily create or strengthen dominant position but still cause an impediment to competition (e,g, through the ability to increase price without coordination or without holding the largest market shares, Hanna Stakheyeva, "Test SIEC, Global Dictionary of Competition Law," Concurrences, Art. N° 89155, accessed July 31, 20204, *https://www.concurrences.com/en/dictionary/siec-test-mergers*

effect) are applied based on the licensees' market position pre-merger. In assessing the purpose, MCMC considers the nature of the conduct, the circumstances surrounding the conduct (including decision-making leading up to the conduct), its commercial context, and the actual and likely effects of the conduct. When assessing the effect of the conduct, MCMC evaluates both the results and the likely results of the conduct.[77]

The proposed merger control regime employs the SLC test, with the main provision prohibiting any anticipated merger or completed merger that results or has resulted in an SLC.[78] Previously, there was an argument that dominance should not be a major concern in competition law enforcement, and the SLC test is better aligned with the government's industrial policy to encourage local enterprises to emerge as international players and national champions. Dominance is also associated with technical innovation, such as natural monopolies, and the need for the optimal allocation of scarce resources. In addition, the SLC test is considered a more flexible economic tool in terms of analysis by economists. However, it is claimed that the market dominance test would be preferred in merger assessments, based on the fact that a reduction in the intensity of competition without creating a dominant position would not give rise to competitive concerns.[79] The market dominance test posits that when the market power of an entity reaches a certain threshold (dominance threshold) as a result of a merger, effective competition in the market diminishes, as other players are unable to impose significant constraints on the dominant merged entity. The market dominance test considers the outcomes of the merger and any potential economic efficiencies, such as price reduction, resulting from the merger may be short-lived, as the lack of

[77] Malaysia Communications and Multimedia Commission, "Guidelines on Mergers and Acquisitions," May 17, 2019, para 2.13, 2.15.

[78] Section 10A, Competition Bill (Malaysia)

[79] Organisation for Economic Co-operation and Development (OECD), "Substantive Criteria used for Merger Assessment (DAFFE/COMP(2003)5 24," accessed July 31, 2024, <https://www.oecd-ilibrary.org/docserver/85acdf79-en.pdf?expires=1721880824&id=id&accname=guest&checksum=E0D3F0D5477E917BF0B1E7CDBA094622>

effective competition and constraints diminishes the incentive to maintain these efficiency gains over time.[80]

The market dominance test does not consider the detrimental effect of a merger on competition and welfare alone as sufficient grounds to block the merger. Additionally, a merger can produce unilateral effects that harm competition and consumers, even if the market power of the new entity falls short of reaching a dominant position.[81] For this reason, some jurisdictions opt for the SLC test, which prohibits mergers with adverse effects on competition, even those allowing firms to unilaterally increase prices without necessarily creating or strengthening market dominance. This implies that the SLC test could block more anti-competitive mergers compared to the market dominance test. While the SLC test addresses mergers with coordinated effects, it remains uncertain whether the market dominance test would prevent the same unless a competition law jurisdiction also applies to collective dominance, beyond single-firm dominance. Notably, collective dominance is a complex area, and in the EU, for instance, a structural link must exist among all oligopolist firms in the market. The CA 2010, through section 10, also incorporates the principle of collective dominance. However, there is no clear precedent or guidance on how the concept of collective dominance should be interpreted and applied. Even if a particular jurisdiction incorporates collective dominance in its competition law regime, the line between collective dominance (under unilateral effect) and coordinated effect often blurs, leading to miscategorisation (as observed in cases of collective dominance and concerted practice). Additionally, in the event that the market dominance test is preferred, clear guidance is needed on how the test interacts with or affects other provisions, particularly the abuse of the dominant position provision in the competition law.

[80] OECD, "Substantive Criteria," 2009, 25
[81] OECD, "Substantive Criteria," 2009, 8

Exemption and exclusion

The SLC test under the proposed merger control regime allows an anti-competitive merger to be balanced against economic efficiency, providing an opportunity for the merger parties to be relieved from liability under competition law. Since it is difficult to quantify efficiencies prospectively, and the merger parties have better access to information relating to the merger,[82] the burden of proof is shifted to the enterprises to demonstrate that the economic efficiencies resulting from the merger or anticipated merger outweigh any adverse effects from the substantial lessening of competition caused by the merger or anticipated merger.[83] This is in line with the existing provision of section 5 CA 2010 which requires parties to an agreement to prove that the otherwise anti-competitive agreement brings about technological and efficiency benefits. Efficiency benefits include cost-saving, quality improvement, rationalisation and economic of scale, etc. This aligns with the existing provision of section 5, which requires parties to an agreement to prove that an otherwise anti-competitive agreement brings about technological and efficiency benefits. Efficiency benefits encompass cost-saving, quality improvement, rationalisation, and economies of scale, among other factors.[84] However, the exemption regime under the proposed merger control will solely focus on economic efficiency, excluding any non-efficiency defenses. This is in stark contrast to section 5 of the CA 2010, which includes social benefits as one of the grounds for relief from liability. Furthermore, the exemption under the proposed merger control does not incorporate the four cumulative requirements stipulated under section 5 of the CA 2010.[85]

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[82] OECD, "Competition Policy and Efficiency Claims in Horizontal Agreements," *Policy Roundtables*,1995, 5, https://www.oecd-ilibrary.org/docserver/b08fdf87-en.pdf?expires=1722660821&id=id&accname=guest&checksum=A6B8DF5B8FD9DCC1B5E7EDFE7238D8E4

[83] Section 10D, Competition Bill (Malaysia)

[84] Ioannis Kokkoris, "Assessment of Efficiencies in Horizontal Mergers: the OFT is setting the example," *European Competition Law Review* (2009)

[85] For relief of liability under section 5 of the CA 2010, parties to an anti-competitive agreement need meet four requirements cumulatively, namely, benefits, indispensability, proportionality, and no substantial elimination of competition.

Other regulators, such as MAVCOM, allow the Commission to take into account restricted social benefits, such as the improvement of connectivity, and other public policy objectives, including environmental concerns, safety, health, and employment.[86] In addition, the merger parties can also apply to the Minister to seek an exemption for the merger on the grounds of public policy.[87] In administering competition law provisions and authorising any anti-competitive behaviour, including mergers, the CMA 1998 allows the MCMC to consider broader objectives in the name of 'national interest.' The notion of 'national interest' must be read in line with the National Policy Objectives.[88] These objectives encompass specific goals in the administration of economic regulation and competition practices, which are not limited to protecting competition and consumers but also include other aims such as promoting investment and innovation, ensuring any-to-any connectivity, and providing protection for smaller operators.[89]

Another important aspect closely associated with the efficiency defense is the welfare standard that will be employed by the MyCC in its merger assessment. Some jurisdictions adopt a consumer welfare approach, which considers the effect of the merger on consumers, focusing on the price effect of the merger.[90] In the consumer welfare standard, a merger is only permissible if it is predicted that consumers are better off after the merger compared to pre-merger.[91] However, most economists view that competition policy should not solely focus on protecting consumers but also consider the total surplus standard,

[86] Malaysia Aviation Commission, "Guidelines on Substantive Assessment", para 12.9 (a) & (b)

[87] Section 59 (2), Malaysia Aviation Commission Act 2015 (Malaysia)

[88] Section 3 (2), Communications and Multimedia Act 1998 (Malaysia)

[89] Malaysia Communication and Multimedia Commission, "Guidelines on Authorization of Conduct," 2019, para 4.3, 4.4 https://www.mcmc.gov.my/skmmgovmy/media/General/pdf/Guidelines-on-Authorisation-of-Conduct_1.pdf

[90] Lars-Hendrik Röller, Johan Stennek and Frank Verboven, "Efficiency gains from mergers," (Wissenschaftszentrum Berlin für Sozialforschung (WZB) Discussion Paper, No. FS IV 00-09, 2000), accessed July 31, 2024, https://www.econstor.eu/bitstream/10419/51032/1/322768578.pdf

[91] Keneth Heyer, "Welfare Standards and Merger Analysis: Why not the Best?" (Economic Analysis Group, Discussion Paper EAG-06-8, March 2006) 2

focusing on both the interests of consumers and producers.[92] Under the total surplus standard, a merger is only permissible if it is predicted that the effect of the merger on the total welfare of society as a whole is positive.[93] The total surplus standard gives weight not only to those who are consuming the product (end consumers) but also to those who are producing.[94]

Based on the objective of the CA 2010, one may argue that the CA 2010 pursues a consumer welfare standard.[95] However, the existing relief of liability under section 5 does not require the enterprises to prove that the benefits arising from an anti-competitive agreement are passed on to the consumers.[96] This position will not remain the same as the proposed amendments to the CA 2010 seek to introduce the pass-on requirement in the existing section 5. For now, the welfare standard issue has remained unsettled. One should distinguish between two aspects: proof of infringement on the one hand (the burden is on the authority) and relief of liability/defense on the other hand (the burden is on the parties). Consumer welfare has never been a legal standard in proving competition law infringement (anti-competitive agreement & abuse of dominant position) in Malaysia. This is because the main objective of the CA 2010 is to protect the process of competition for the sake of efficiency, and consumers will be naturally protected from the preservation of the competitive process.[97] Consumer harms as a result of anti-competitive conduct are difficult to quantify, and requiring the competition authority to prove harm to consumers in each and every case may undermine the effectiveness of competition law enforcement. Besides, competition law is not seen as a branch of consumer protection law.

As far as the relief of liability is concerned, the proposed amendments to section 5 require the enterprises to prove that the

[92] Röller, Lars-HendrikStennek et al., "Efficiency gains from mergers," 30.
[93] Keneth Heyer, "Welfare Standards and Merger Analysis," 2.
[94] Keneth Heyer, "Welfare Standards and Merger Analysis," 2.
[95] See Pre-amble of the CA 2010
[96] The pass on requirement is essential in consumer welfare standard, see Ioannis Kokkoris, "Assessment of Efficiencies in Horizontal Mergers: the OFT is setting the example," *European Competition Law Review* (2009) 3.
[97] See for example the case of Dagang Net Technologies Sdn Bhd, MyCC Case No. 700-2/2/003/2015, para 212.

agreement allows consumers a fair share of the resulting benefits.[98] One may argue that this is in line with consumer welfare standards. Again, section 5 is a balancing regime that requires the parties to satisfy all four requirements, including the benefits that can be realised from the agreement itself to the benefit of producers. The efficiency defence under the proposed merger control regime remains open (with no equivalent to section 5), which appears to be consistent with a total welfare approach. The potential gains to producers will be given weight even if they are not passed on to consumers.[99] A merger that leads to large cost reduction may be permissible even though it does not decrease the price. The total welfare standard seems to be more in line with the current government policy to encourage mergers and acquisitions, and to promote national champions and international competitiveness through the synergisation and rationalisation of business.

SOME CHALLENGES AND WAY FORWARD

In the absence of provisions related to mergers in the CA 2010, the merger control regime in Malaysia remains fragmented, with different regulations adopting various approaches. While a few merger notifications can be observed in specific sectors such as aviation and telecommunications, no prohibitive orders have been issued so far. The question of whether there will be more mergers notified or blocked remains to be seen, particularly since specific sectors involve a very niche market. Currently, the incumbent operator controls most of the communications markets, with the exception of the mobile phone

[98] Section 5 (1), Competition Bill (Malaysia), based on Malaysia Competition Commission (MyCC), "Salient Points of the Proposed Amendments to the Competition Act 2010 (Act 712), 25 April 2022)" <https://www.mycc.gov.my/sites/default/files/Salient%20Points%20of%20the%20Proposed%20Amendments%20of%20Act%20712%20%5B25.4.22%5D.pdf>

[99] See Organisation for Economic Co-operation and Development (OECD), "The Consumer Welfare Standard - Advantages and Disadvantages Compared to Alternative Standards," *OECD Competition Policy Roundtable Background Note,* 2023, 14, *www.oecd.org/daf/competition/consumer-welfare-standard-advantages-and-disadvantages-to-alternative- standards-2023.pdf.*

market. National carriers including MAS tend to favour collaboration such as alliances and code-sharing agreements with other international carriers, over mergers. [100] However, potential mergers may arise among local airlines and providers of aviation services, such as ground handling, in the future. It is worth noting that mergers between airlines outside Malaysia may have minimal impact on the Malaysian market, particularly with regard to overlapping routes.

This paper argues that the merger control regime under the CMA 1998 is more intricate than that under the MACA 2015. This complexity arises from the absence of explicit merger control provisions in the CMA 1998, forcing the MCMC to rely on two general provisions for the review: section 133: any conduct which has the purpose of substantially lessening competition in a communications market' as well as section 139: the MCMC has the power to 'direct a licensee in a dominant position in a communications market to cease a conduct in that communications market which has, or may have, the effect of substantially lessening competition in any communications market'. The legal standard to prove the SLC, as contained in the merger guidelines, must align with these two sections. These sections are far more complex than those under the MACA 2015, especially concerning the requirement to establish dominance and to draw a line between purpose and effect. In addition to this, competition law in the CMA 1998 pursues a broader objective in the name of 'national interest' and may result in complex trade-offs between various objectives particularly when it involves the political economy and national agenda of the country. The proposed merger control under the CA 2010 mirrors the MACA 2015 merger control regime, which, in turn, largely borrows from Singaporean competition law on merger control. However, the MACA 2015 only applies to licensees, and it is unclear under whose jurisdiction a transaction between a licensee and a non-licensee falls—MAVCOM or the MyCC.

[100] See Nasarudin Abdul Rahman & Haniff Ahamat, *Competition Law in Malaysia* (Sweet & Maxwell, 2nd Ed, 2021) 548-554. See also "Malaysia Airlines to grow partnerships, increase codeshare traffic following cutover to Amadeus PSS", CAPA, Centre for Aviation, accessed July 31, 2024 https://centreforaviation.com/analysis/reports/malaysia-airlines-to-grow-partnerships-increase-codeshare-traffic-following-cutover-to-amadeus-pss-349825

A hybrid pre-mandatory notification regime is time- and resource-consuming since the MyCC may receive an influx of merger notifications. This approach requires a large pool of expertise and financial capabilities. On the positive side, mandatory notification enables the MyCC to generate income from the merger notification fees. This in turn can be used to fund its regulatory and enforcement activities. The hybrid regime requires the MyCC to complete assessments within a stipulated time frame. Given that the MyCC is a small agency, this may impact the MyCC's enforcement in other areas such as cartel and abuse of dominant position provisions. In addition, the merger parties must also comply with the merger time frame outlined in other regulations, such as the 2010 Take-Overs Code. Delays in the merger review process may impede the smooth progression of the merger and increase compliance costs for the parties involved. To minimise delays, the merger control regime will offer an opportunity for pre-notification consultation. This allows for the discussion and presentation of the proposed merger in advance before the final submission. Furthermore, it is recommended that the notification thresholds for a merger be set sufficiently high to minimise the number of merger notifications. Additionally, the merger control regime should consider adopting a simplified or expedited review process in terms of review timelines or limited information sought from the merger parties. This would apply to transactions that are unlikely to raise competition concerns or have a negligible effect on the local market, even if the transaction exceeds the stipulated threshold.

The merger notification threshold should be set based on qualitative criteria with the flexibility to adjust the threshold to suit the economic situation of the country. The use of objective criteria such as 'turnover' or the value of assets reduces the burden of the parties to a merger and the MyCC from the requirement to define the relevant market and determine any dominant position. However, turnover and the value of assets may not adequately capture certain transactions, especially where turnover is unavailable or challenging to quantify. The MyCC may consider incorporating additional criteria, such as the value of the transaction, which is crucial to capturing transactions in the digital market economy where services may be provided for free. The proposed merger control regime empowers the MyCC to review or investigate non-notifiable mergers those that do not exceed the stipulated threshold. To address the issue of legal uncertainty, the

merger control regime may consider implementing a simplified process, such as investigating non-notifiable mergers within a short period after the merger has been consummated. [101]

The adoption of the SLC test aligns with international best practices and is better suited to the country's agenda of encouraging more mergers and acquisitions as a means of fostering growth. However, the challenging aspect lies in the SLC test's reliance on a prospective assessment (considering unilateral and coordinated effects), exposing the competition authority to potential errors and litigation. This may necessitate increased involvement of economic experts and financial resources in merger assessments. The evaluation of price effects (both coordinated and unilateral) within the SLC test under the proposed merger regime could potentially advocate for a consumer welfare standard in other provisions, such as abuse of dominant position. To address potential disputes in the future regarding the welfare standard that the MyCC should adopt in its enforcement, consideration must be given to the aim pursued by the CA 2010, which is to promote economic development through the protection of the process of competition. Competition law provides incentives for firms to compete by preventing them from engaging in anti-competitive behaviour, including through mergers and acquisitions, with the goal of benefiting both producers and consumers (total welfare). Regardless of whether the merger assessment relies on the future price effect of the transaction, the main objective of the law is to ensure the overall welfare of the societies.

[101] International Competition Network (ICN), "Setting Notification Thresholds for Merger Review"

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