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Merger Control Regime: The Malaysian Perspective

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The Malaysia Competition Commission (MyCC) has recently issued the Consultation Paper on the Proposed Amendments to the Competition Act 2010 (Consultation Paper). This paper was accompanied by a supplementary document titled Salient Points of the Proposed Amendments to the Competition Act 2010. These consultation papers seek feedback from the public and stakeholders on the proposed amendments to the Competition Act (CA 2010) in relation to establishing a merger control regime in Malaysia.

These amendments will grant MyCC the authority to regulate merger and acquisition activities except in instances where the transactions may fall under the authority of other agencies such as the Energy Commission, Malaysian Communications and Multimedia Commission, Bank Negara Malaysia and Malaysian Aviation Commission.

This alert examines MyCC's proposed amendments to the CA 2010 that would establish the legal framework for the proposed merger control regime.

Background

Competition legislations are enacted to promote economic growth by enabling and bolstering fair competitive process amongst businesses and companies, ultimately protecting consumers' interests. Malaysian competition law does this by prohibiting two types of activities: (i) anti-competitive conduct and (ii) abuse of dominant position.

However, one shortfall in the CA 2010 is that it lacks a merger control mechanism to govern and regulate mergers and acquisitions in Malaysia. In the long term, unregulated mergers or anticipated mergers may have anti-competitive impacts which will be detrimental to consumers and market growth. Thus, MyCC's proposed merger control regime framework aims to fill in the gaps in Malaysia's competition law landscape.

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The Proposed Merger Control Regime Framework

As outlined in the Consultation Paper, the proposed merger control regime sought to be implemented by the MyCC is as follows:

1. Prohibited Mergers

The proposed a merger control regime will prohibit mergers or anticipated mergers that may result in a Substantial Lessening of Competition (SLC) in any market for goods or services in Malaysia. A similar SLC test has been adopted in the Malaysian Aviation Commission Act 2015, which is currently the only legislation in Malaysia that specifically incorporates a merger control regime.

2. Jurisdiction

The jurisdiction of the proposed merger control regime is to cover any merger or anticipated mergers transacted within and outside of Malaysia that have an effect on competition in any markets in Malaysia.

3. Notification To The MyCC

A hybrid notification regime is proposed which will depend on the threshold of the merger or anticipated merger. With the proposed insertion of Section 10F of the CA 2010, it would be mandatory for companies to notify the MyCC of any merger or anticipated merger that, if consummated, exceeds the prescribed threshold. The threshold will be prescribed by a gazette order after the proposed amendments to CA 2010 have been passed. This is known as the mandatory notification.

Any merger or anticipated merger that does not exceed the prescribed notification threshold, can be voluntarily notified, before or after it has been consummated, to the MyCC under the proposed Sections 10H and 10I of the CA 2010 respectively. This is known as the voluntary notification.

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4. Review Period

Once the MyCC has been notified, the MyCC will review the merger or anticipated merger within 120 working days from the receipt of the Mandatory Notification, to complete an in-depth assessment and arrive at a decision on whether to provide clearance or to prohibit the merger or anticipated merger. However, for voluntary notification, the merger or anticipated merger is not subjected to the 120 working days review period.

5. Requirement Not To Consummate The Anticipated Merger

Any merger or anticipated merger subjected to the mandatory notification shall not be consummated until a clearance decision is given by MyCC. It is prohibited under the proposed Section 10G of the CA 2010 to implement all or any part of the merger before the MyCC's clearance. Breaching this requirement will render the merger or anticipated merger void and failing to notify MyCC, will result in a merger violation which attracts a financial penalty of up to 10% of the value of the merger transaction or anticipated merger transaction.

6. Decision By MyCC

Under the proposed amendments to the CA 2010, the MyCC will be given the power to review and make decisions on anticipated mergers or mergers notified to the MyCC under the proposed Sections 10F, 10H or 10I of the CA 2010.

The types of decisions which the MyCC may issue in relation to an anticipated merger or merger are as follows:

- **Clearance Decision**

If MyCC determines that the merger or anticipated merger, if consummated:

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- (a) does not result in SLC in the market.
- (b) would result to an SLC in the market, but the merger or anticipated merger was cleared following the acceptance of commitment that addresses the SLC concerns identified by the MyCC.

The MyCC will issue a clearance decision under the proposed Section 43F of the CA 2010 and companies can proceed with their merger. A validity period for the clearance decision for an anticipated merger or merger may be specified by the MyCC, if it deems fit. In this case, the anticipated merger must materialise within the specified validity period (or any extension thereof granted by the MyCC).

- **Prohibition Decision**

MyCC will issue a prohibition decision if it determines that the anticipated merger or merger will result in an SLC under the proposed Section 43G of the CA 2010.

Upon the issuance of a prohibition decision, the MyCC may require any infringement to be ceased immediately and specify steps to be taken by the company to end the infringement. The MyCC may also impose a financial penalty not exceeding 10% of the worldwide turnover of a company over the period during which the infringement occurred and give any other direction as the MyCC deems appropriate.

Conclusion

The proposed amendments expected to make Malaysia's competition law more comprehensive and consistent with international standards, as well as allowing the MyCC to carry out its duty more effectively in promoting and preserving the market's competitive process. If the proposed amendments to the CA 2010 are approved and passed by Parliament, which is expected to come into force by October 2023¹, businesses considering merger and acquisition

¹ <https://www.theedgemarkets.com/article/my-say-merger-control-horizon>

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transactions must consider, among other things, the possibility of the proposed merger being approved by MyCC, the review period of such undertaking, and the potential commitments measures imposed by MyCC in addressing the SLC.

Authored by our pupil, Cuthbert Ephraim Chan Pak Hang from the firm's Corporate & Real Estate Transactions practice.

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