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When Should A Business Challenge Its Regulator?: Judicial Review, Competition Law And The Changing Regulatory Landscape

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An adverse regulatory decision can have consequences extending far beyond the immediate penalty or direction imposed. For businesses operating in heavily regulated sectors, such a decision may affect licences, ongoing projects, commercial arrangements and, in some cases, the viability of the business model itself.

Yet challenging the regulator is rarely a straightforward legal decision. It requires businesses to weigh legal merits against timing, cost, reputation and the longer-term relationship with the regulator.

The MAS–AirAsia Case: A Regulatory Decision That Travelled Through The Courts

The litigation arose from a collaboration agreement between Malaysia Airlines (MAS) and AirAsia which MyCC found to have infringed the Competition Act 2010. MAS and AirAsia appealed to the Competition Appeal Tribunal (CAT), which set aside MyCC's decision. MyCC subsequently commenced judicial review proceedings against the CAT decision.

The High Court ruled in MyCC's favour, but that decision was subsequently reversed by the Court of Appeal. Importantly, the Court of Appeal held that MyCC did not have locus standi to commence judicial review proceedings against the CAT's decision. Having exercised its quasi-judicial function, MyCC was not a person adversely affected by the CAT's decision for the purposes of judicial review. The Court of Appeal also addressed substantive competition-law issues arising from the arrangement.

MyCC subsequently sought leave to appeal to the Federal Court, but leave was refused. The Court of Appeal's decision therefore remained undisturbed.

An Adverse Decision Is Not Enough

One of the most important distinctions for businesses is between an adverse decision and an unlawful decision. A company may strongly disagree with a regulator's conclusion. It may consider the regulator factually mistaken or believe that another conclusion would have been commercially or technically preferable. That does not necessarily make the decision susceptible to judicial review.

Judicial review is generally concerned with the legality of the decision-making process rather than providing an appeal on the merits. The court is ordinarily concerned with matters such as whether the regulator acted within the powers conferred upon it, applied the correct legal principles, observed procedural fairness, considered relevant matters and avoided irrelevant considerations.

Traditional judicial review principles also permit intervention where a decision reaches the high threshold of irrationality or unreasonableness recognised by public law. For companies considering a challenge, the first question should therefore not simply be: “Was the regulator wrong?”

The more important question is: “Was the decision reached lawfully?”

Four Questions Businesses Should Ask

1. Did The Regulator Have The Power To Act?

The starting point is the statutory framework. Regulators are creatures of statute. Their jurisdiction, powers and procedures ultimately derive from legislation.

A company should therefore examine whether the regulator had jurisdiction to make the particular decision, whether the relevant statutory preconditions were satisfied and whether the regulator acted within the scope of the powers Parliament conferred upon it.

Questions of jurisdiction and standing can be decisive.

The MAS–AirAsia litigation itself demonstrates how such issues can determine the outcome of proceedings independently of the underlying commercial dispute.

2. Was The Correct Process Followed?

Even where a regulator has substantive authority to act, the process by which the decision was reached matters.

Regulatory legislation frequently prescribes procedures governing investigations, representations, hearings and decision-making.

Businesses should therefore consider whether they were given an adequate opportunity to respond, whether the prescribed procedures were followed and whether the ultimate decision was reached in accordance with procedural fairness.

A substantively defensible regulatory decision may nevertheless become vulnerable where the process leading to it is legally defective.

3. Can The Regulator Explain Its Reasoning?

Courts exercising judicial review do not ordinarily substitute their own preferred regulatory outcome for that of the specialist decision-maker. The quality of the regulator's reasoning nevertheless remains important.

A reviewing court may examine whether the decision demonstrates a rational connection between the evidence, the applicable legal framework and the conclusion reached.

This makes the reasons given by the regulator and the material upon which those reasons are based particularly important when assessing whether a challenge is viable.

4. What Does The Record Show?

The documentary record can ultimately determine the strength of a judicial review application. Companies should preserve correspondence, submissions, representations, minutes, regulatory notices, supporting evidence and other materials forming part of their engagement with the regulator.

The question is not merely what the company now says happened. It is what the contemporaneous record demonstrates was placed before the decision-maker and how the regulator responded to it. This is why regulatory strategy should begin well before litigation is contemplated.

Do Not Lose Sight Of The Clock

A particularly practical difficulty arises when businesses attempt to resolve a dispute informally with a regulator. There are often good reasons to do so. Companies operating in regulated industries may have longstanding relationships with regulators and may depend upon them for licences, approvals and future dealings. Correspondence, representations and requests for reconsideration can therefore be commercially sensible.

But engagement with the regulator should not cause the company to overlook the applicable judicial review timeline.

Once a regulatory decision has been made, legal advisers should immediately consider whether time has begun to run for a potential judicial review application.

A business should not assume that continuing discussions, appeals to the regulator or requests for reconsideration automatically suspend the relevant procedural deadline.

Where an extension of time becomes necessary, the applicant will generally need to explain the delay. It is therefore preferable to identify and preserve the company's legal position from the outset rather than rely upon obtaining an extension later.

Internal Appeal Or Judicial Review?

Another important question arises where legislation creates a specialist appeal mechanism.

As a general proposition, where Parliament has provided a statutory avenue of appeal or review, a party will ordinarily be expected to pursue the available domestic remedy before turning to judicial review.

There are exceptions, including circumstances involving questions of illegality or jurisdiction, but businesses should be cautious about treating judicial review as an alternative appellate process.

This distinction is particularly significant in competition law because Malaysia's competition framework is undergoing substantial reform.

The Competition (Amendment) Bill 2026, passed by the Dewan Rakyat on 6 July 2026 and subsequently by the Dewan Negara on 27 July 2026, forms part of a significant overhaul of Malaysia's competition regime. Among the changes is an express mechanism enabling an appeal to the High Court from certain decisions of the Competition Appeal Tribunal. The reform is particularly significant against the background of the MAS–AirAsia litigation, where the ability of MyCC itself to challenge a CAT decision by judicial review became a central issue.

For businesses, an express statutory appellate route potentially provides a more clearly defined mechanism for challenging CAT decisions than attempting to fit the dispute within the narrower parameters of judicial review.

The precise application of the amended provisions should, however, be considered against the final legislation and its commencement and transitional provisions.

Judicial Review Is Also A Business Decision

Whether to commence judicial review cannot be determined by legal merits alone. For in-house legal teams, the decision must ultimately be aligned with the organisation's commercial objectives.

Before commencing proceedings, boards and management should consider:

- **Commercial impact:**
  Does the regulatory decision materially affect a licence, transaction, project or business model?

- **Legal strength:**
  Is there an identifiable public-law error, rather than merely disagreement with the outcome?

- **Alternative remedies:**
  Is there an internal or statutory appeal mechanism which should first be pursued?

- **Timing:**
  Has the company protected its position within the applicable judicial review deadline?

- **Regulatory relationship:**
  What effect could litigation have on the company's longer-term engagement with the regulator?

- **Reputation:**
  What are the consequences of publicly challenging the regulator?

- **Cost and duration:**
  Is management prepared for proceedings that may involve leave applications, substantive judicial review proceedings and subsequent appeals?

- **Business continuity:**
  What will the company do while the litigation remains unresolved?

This requires close coordination between management, in-house counsel and external advisers. External counsel may assess whether a regulatory decision is legally vulnerable. In-house counsel has the additional task of determining whether pursuing that challenge advances the company's broader objectives.

Prepare For Judicial Review Before You Need It

Perhaps the most important lesson is that regulatory litigation strategy should not begin after an adverse decision has already been issued.Businesses operating in regulated sectors should build the possibility of future scrutiny into their regulatory engagement from the outset.

Submissions to regulators should be carefully prepared. Relevant evidence should be placed on record. Important meetings and representations should be documented. Internal teams should understand the statutory framework governing the regulator's powers and procedures.

Where an adverse decision appears possible, legal advisers should also identify potential appeal and judicial review routes early and take note of the applicable deadlines. The objective is not to litigate every regulatory disagreement. It is to ensure that, if litigation becomes necessary, the company has not inadvertently weakened its own position before proceedings begin.

The Takeaway

The MAS–AirAsia litigation provides a useful reminder that regulatory disputes operate at the intersection of public law, commercial strategy and regulatory relationships.

Judicial review remains an important safeguard against unlawful administrative action, but it is not an appeal against every regulatory decision with which a business disagrees.

For boards and general counsel, the critical exercise is therefore to identify early what the company is seeking to protect, determine whether the alleged defect is genuinely susceptible to judicial review, preserve the evidential record and procedural timelines, and consider whether litigation is consistent with the company's wider commercial and regulatory strategy.

The 2026 amendments to Malaysia's competition framework add another dimension. As statutory appeal mechanisms develop, businesses and regulators alike will need to reconsider when judicial review is appropriate and when the dispute properly belongs within the appellate structure created by Parliament.

For businesses facing significant regulatory decisions, the lesson is straightforward: engage early, preserve the record, protect the timeline and choose the route that fits both the law and the commercial objective.

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