
Competition Law

Public Consultation on Proposed Amendments to Competition Act 2010 - Introduction of Merger Controls in Malaysia

Introduction

On 25 April 2022, the Malaysia Competition Commission ("**MyCC**") issued for public consultation salient points of its proposed amendments to the Competition Act 2010 ("**Competition Act**"). The proposed amendments aim not only to strengthen MyCC's investigative and enforcement powers, but also to establish an economy-wide merger control regime in Malaysia.

Currently, mergers and acquisitions ("**M&As**") are regulated only in the aviation and telecommunications sectors by their respective regulators, the Malaysian Aviation Commission (MAVCOM) and the Malaysian Communications and Multimedia Commission (MCMC), respectively. Businesses and their advisers (including lawyers and investment bankers) will need to ensure that their M&A transactions are afforded proper competition scrutiny, and comply with the Competition Act once the proposed amendments are in force. It is highly possible that the remainder of 2022 and H1 2023 will see a rush by parties contemplating or in the midst of negotiating large M&A transactions, to complete the same to avoid MyCC's purview over their transactions as the proposed introduction of merger controls is expected to take place in Q4 of 2023.

Highlights of Proposed Amendments

New merger control regime

MyCC has proposed a hybrid regime as opposed to a voluntary regime. Essentially, mergers or anticipated mergers (if consummated) which may result in a substantial lessening of competition ("**SLC**") within any market for goods or services are prohibited. This new regime:

- (a) makes it mandatory to notify MyCC of anticipated mergers which exceed the threshold prescribed by MyCC ("**Applicable Threshold**"); and

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- (b) allows mergers or anticipated mergers which do not exceed the Applicable Threshold to be voluntarily notified to MyCC, whether before or after the mergers or anticipated mergers have been consummated.

The Applicable Threshold is not yet announced and will be prescribed by an order published in the Gazette after the (final) amendments to the Competition Act have been passed by Parliament.

The proposed merger control regime would also be suspensory in nature. This means any anticipated mergers which are notified to MyCC cannot be implemented before MyCC's clearance i.e. parties to the anticipated mergers are subject to standstill obligations. Merging parties would therefore be prohibited from implementing all or any part of their merger transaction or co-ordinating their competitive behaviour before MyCC's clearance of their merger transaction.

Failure to notify mergers or anticipated mergers which result in SLC or gun-jumping would result in a merger violation. Similar to the existing Competition Act, where infringement of the anti-competitive agreement prohibition or abuse of dominance prohibition attracts a potential 10% financial penalty, a merger violation also attracts a financial penalty of up to 10%, save that instead of 10% being calculated on the revenue of the infringing party during the infringing period, the merger violation infringement's penalty is calculated on the value of the merger transaction or anticipated merger transaction.

A key concern for merging parties is the timing within which MyCC will need to clear the merger. Under the proposed amendments, MyCC is subject to an obligation to issue its decision on any anticipated merger that was notified to it within 120 working days from the date when MyCC accepts the notification as complete. This timeframe is only applicable to anticipated mergers which exceed the Applicable Threshold. The 120 working days comprises 40 working days for a Phase 1 review period and 80 working days for a Phase 2 review period. There is an automatic "deemed approved" provision if MyCC has not issued its decision upon the expiry of the said 120 working days. MyCC may, however, stop the clock in computing the 120 working day-period in the following circumstances:

- (a) when MyCC requests further information from the relevant enterprises;
- (b) when the enterprise seeks an extension of time to file for their written representation;
- (c) when the enterprise wants to make an oral representation; or
- (d) when the enterprise submits a commitment offer.

If a proposed M&A transaction is likely to substantially lessen competition in the market, merger parties have the possibility of making a commitment offer to MyCC to remedy, mitigate, or prevent the SLC caused by the merger or anticipated merger. This commitment offer may be offered by the merging parties and may be accepted by MyCC any time before it makes a decision on the merger or anticipated merger, or before the completion of an investigation by MyCC (if the merger was not notified to MyCC). If the commitment offer is accepted by MyCC, it will issue a decision and make a finding that the Competition Act has not been infringed.

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Of importance to note for merger parties is a provision which stipulates that if any additional information or document required by MyCC is not provided by the merger parties within the period specified in MyCC's notice (or any extended time granted by MyCC), the notification shall be deemed to have been withdrawn (albeit with a right to submit a fresh notification to MyCC). Further, not only are merging parties subject to MyCC's purview but also their competitors, suppliers or customers, as MyCC has the power to compel any person or government entity to provide information or documents relating to any market which is the subject of the notification. Failure to adhere to MyCC's request for information order is an offence.

Merging parties displeased with MyCC's decisions may only appeal to the Competition Appeal Tribunal ("CAT"). This is because a proposed amendment to the Competition Act includes a provision for the exclusive jurisdiction of the CAT to review merger-related decisions issued by MyCC.

The proposed merger control regime would not apply to the following:

- (a) mergers involving commercial or economic activities regulated under the Communications and Multimedia Act 1998, Postal Services Act 2012, Malaysian Aviation Commission Act 2015, Energy Commission Act 2001, Gas Supply Act 1993, Petroleum Development Act 1974 (upstream activities only); and
- (b) mergers between enterprises licensed or approved by, or registered with, Bank Negara Malaysia (BNM), Securities Commission Malaysia (SC), Labuan Financial Services Authority (LFSA) and Suruhanjaya Perkhidmatan Air Negara (SPAN).

Key amendments to definition of "enterprise" and "SEU" not limited to "parent and subsidiary"

The existing definition of "enterprise" in the Competition Act is proposed to be amended (among others) so that it is not limited to "entity" carrying on commercial activities but broadened to "persons" carrying on commercial activities. MyCC stated that the amendment will then make clear that the legal status of a person is not relevant in determining whether the person is subjected to the prohibitions under the Competition Act, which is more similar to the approach adopted in the European Union (EU).

Additionally, the reference to the circumstances which render a parent and subsidiary company to be regarded as a single enterprise is proposed to be deleted from the definition of "enterprise". MyCC highlighted that this removal of the reference to the single economic unit ("**SEU**") doctrine does not prevent MyCC from raising the same and MyCC will still be able to apply the SEU doctrine on a case-by-case basis depending on the facts and circumstances of the case. We interpret this as MyCC no longer being limited to a parent and subsidiary circumstance for establishing a SEU. This has been shown in MyCC's previous decisions where MyCC would apply EU caselaw, including applying the

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"control test" to establish SEU: see MyCC's Infringement Decision against Malaysian Airline Sdn Bhd, AirAsia Berhad and AirAsia x Sdn Bhd (No. MyCC.0001.2012).

Key amendments in relation to settlement procedure and new whistle blowing provisions

MyCC is also proposing to introduce a settlement procedure which would allow for enterprises that have infringed the anti-competitive agreement prohibition or the abuse of dominance prohibition in the Competition Act to enter into a settlement with MyCC by admitting liability for its said infringement and enjoying a reduction in their financial penalty of up to **20%**. Such reduction will be in addition to any other reduction in the financial penalty that the enterprise would have been entitled to under the leniency regime.

In relation to the existing leniency regime, MyCC has also proposed amendments to give MyCC the power to grant differing percentages of reduction of financial penalty to enterprises depending on (among others) the order in which they sought leniency from MyCC. While the existing leniency powers apply only to "hardcore cartels", through the proposed amendments, MyCC's leniency powers will be extended to all anti-competitive agreement infringements (which include vertical agreement infringements).

MyCC has also proposed to empower MyCC to pay a reward to whistleblowers who provide information or assistance to an investigation carried out by MyCC. Businesses should take note that disgruntled employees may seize this financial incentive to provide information to MyCC.

Conclusion and Details of the Public Consultation

The proposed amendments to the Competition Act highlighted above represent only a fraction of the extensive amendments proposed by MyCC. As the Competition Act applies to all businesses in Malaysia, the proposed amendments should be reviewed by all enterprises and if the amendments adversely impact the enterprise, it would be advisable for the enterprise to raise the same to MyCC. MyCC's invitation to attend the public consultation is available on MyCC's website, www.mycc.gov.my.

The public consultation for industry players and the public will be held in-person on 8 June 2022. Any opinions, views, input and feedback may be submitted by email to MyCC's Amendment Team at amendment@mycc.gov.my or through the UPC portal by 27 May 2022. Any written submissions that are made after 27 May 2022 will not be accepted and entertained by MyCC.

If you have any comments in respect of MyCC's proposed amendments which you would like presented to MyCC or have any comments on the above, please reach out to Yon See Ting (see.ting.yon@christopherleeong.com), Jane Guan (jane.guan@christopherleeong.com) or Samuel Ong (samuel.ong@christopherleeong.com).

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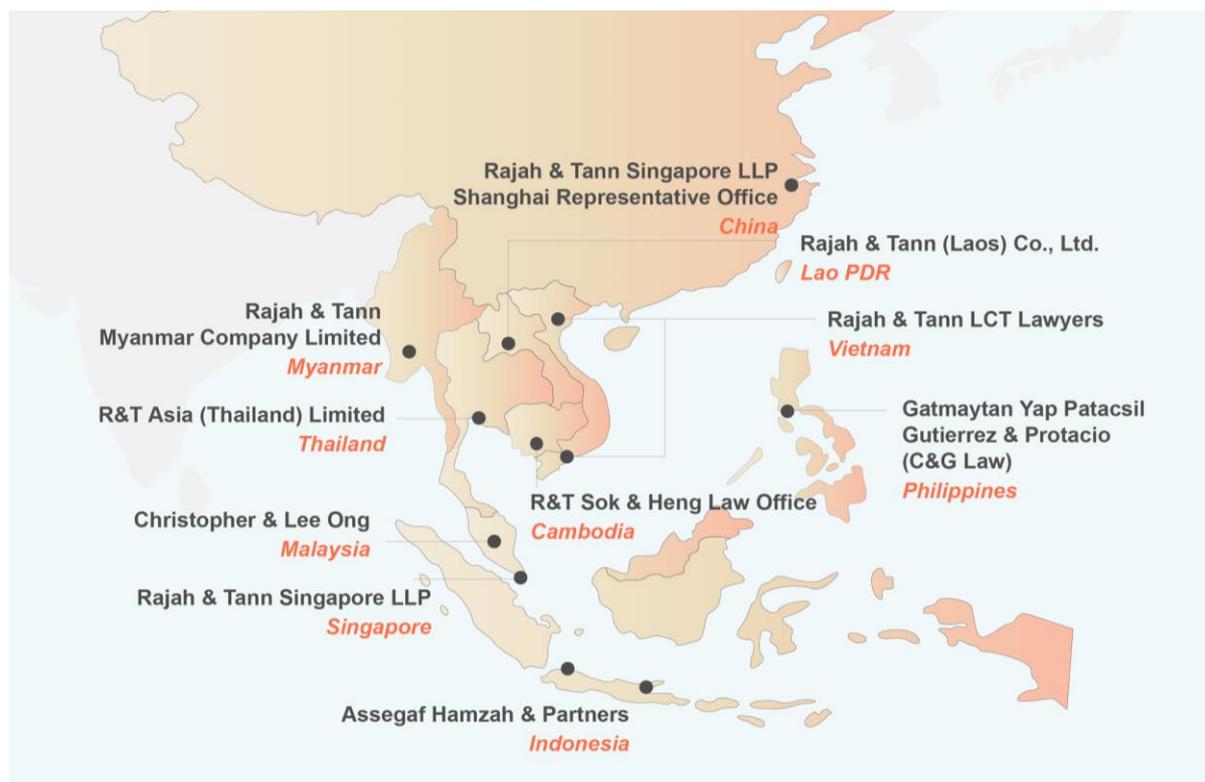
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