

THE INTRODUCTION OF MERGER CONTROL REGIME AND THE IMPACT ON BUSINESSES

The Merger Control Regime - The Missing Pillar?

Recently, the Malaysia Competition Commission ("**MyCC**") released a Consultation Paper on the Proposed Amendments to the Competition Act 2010 ("**Act 712**") inviting the public to share their feedbacks by 27 May 2022.[1]

Among the main focus of the proposed amendments includes the insertion of merger control regime provisions into the Act 712. In ASEAN, Malaysia is the only country that does not have a merger control regime yet.

Generally, competition law has 3 main pillars; i) prohibition against anti-competitive agreements; ii) prohibition against an abuse of dominant position; iii) prohibition against anti-competitive mergers. Currently, the Act 712 only regulates anti-competitive agreements and abuse of dominant position without the powers to regulate mergers - which is viewed as the lacuna and the missing pillar in the competition law in Malaysia.

Despite the contribution of mergers to a functioning economy, unregulated mergers may reduce the number of competitors in a market, strengthen the position of one firm or increase barriers to entry to new entrants. In the long run, mergers may create anti-competitive effects that are detrimental to the consumers.[2]

Cartels are often viewed as the supreme evils in competition law. Some enterprises would utilise mergers to avoid being termed cartels. In essence, MyCC views the merger control regime as a preventive measure that would go hand in hand with the current enforcement measures that regulate post-merger conducts[3].

The Proposed Merger Control Regime Framework[4]

Under the proposed amendments, the merger control regime would be implemented as

follows:

a) Prohibitions

Any Merger or anticipated merger that may result in a **substantial lessening of competition** (“SLC”) within any market for goods or services.

b) Jurisdiction

Any merger or anticipated mergers transacted **within and outside of Malaysia** that has an **effect on competition in any market in Malaysia**.

c) Notification Regime – Hybrid Notification

- **Mandatory:** a pre-notification is mandatory for any anticipated merger that exceeds the threshold (which will be prescribed by an order published in the Gazette after the amendments to Act 712 have been passed).
- **Voluntary:** any anticipated merger or merger that does not exceed the notification threshold can be voluntarily notified to the MyCC before or after it has been consummated.

d) Review Period

- **Mandatory Notification:** MyCC will review the anticipated merger within 120 working days from the receipt of the notification; or
- **Voluntary Notification:** the merger or anticipated merger is not subjected to the 120 working days period.

e) Obligation Not to Consummate an Anticipated Merger

Any anticipated merger which is subject to the mandatory notification shall not be consummated until a decision is made by MyCC.

f) Decision by MyCC

- **Clearance decision** – MyCC will issue a clearance decision if MyCC determines that a merger or anticipated merger:
 - will not lead to SLC in the market; or
 - will result to SLC in the market, but the merger or anticipated merger was cleared following the commitment to address the SLC.
- **Prohibition decision** – MyCC will issue a prohibition decision if MyCC determines that a merger or anticipated merger will lead to SLC.

The Impact on Businesses

If the proposed amendments on the merger control regime is approved by the Parliament, businesses would have to consider, among others, the possibility of the proposed merger to be approved by MyCC, the review period, and the potential commitments in addressing the SLC that are likely to be imposed by MyCC.

For businesses, the new merger control regime may be seen as a regulatory hurdle in relation to deal making. The new regime may add uncertainties to the timeline and the structure of the proposed deals. Nevertheless, the proposed amendment is anticipated to make the Malaysia's competition law in line with international practices.[5] The practice standard and the review process undertaken by MyCC will be the ultimatum in determining the impacts of the merger control regime on the businesses.

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1. <https://www.thestar.com.my/business/business-news/2022/04/26/mycc-invites-public-to-provide-input-on-proposed-amendments-to-competition-law> and <https://www.mycc.gov.my/sites/default/files/Consultation%20Document%20for%20the%20Proposed%20Amendments%20of%20Act%20712%20%5B25.4.22%5D.pdf>
 2. Consultation Paper on The Proposed Amendments to The Competition Act 2010 (Act 712) by MyCC
 3. <https://www.theedgemarkets.com/article/fine-balancing-act-mycc>
 4. Consultation Paper on The Proposed Amendments to The Competition Act 2010 (Act 712) by MyCC
 5. <https://www.theedgemarkets.com/article/mycc-launches-online-public-consultation-amendment-competition-act-2010>

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