The Merger Control Review

Eighth Edition

Editor
Ilene Knable Gotts

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THE MERGER CONTROL REVIEW

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PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions, particularly in Asia, have added – or propose adding – pre-merger notification regimes. In our endeavour to keep our readers well informed, we have expanded the jurisdictions covered by this book to include the newer regimes as well. Also, the book now includes chapters devoted to such 'hot' M&A sectors as pharmaceuticals, and high technology and media in key jurisdictions to provide a more in-depth discussion of recent developments. Finally, the book includes a chapter on the economic analysis applied to merger review.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. For instance, in 2009, China blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger, even though less than 10 per cent of each of the undertakings was attributable to Germany. It is, therefore, imperative that counsel for such a transaction develops a comprehensive plan prior to, or immediately upon, execution of an agreement concerning where and when to file notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 37 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. Given the number of recent significant M&A transactions involving media, pharma and high-technology companies, we have included chapters that focus on the enforcement trends in these important sectors. In addition, as merger review increasingly includes economic analysis in most, if not all, jurisdictions, we have added a chapter that discusses the various economic tools used to analyse transactions. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States and China may end up being the exceptions in this regard. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany has recently amended its law to ensure that it has the

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opportunity to review transactions in which the parties' turnover do not reach the threshold, but the value of the transaction is significant (e.g., social media, new economy, internet transactions). Please note that the actual monetary threshold levels can vary in specific jurisdictions over time. There are some jurisdictions that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be an impact on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. In Serbia, there similarly is no 'local' effects required. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a 'self-assessment' of whether the transaction will meet certain levels, and, if so, should notify the agency to avoid potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and their participation in the company. Many of the remedies imposed in South Africa this year have been in connection with these considerations. Although a number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, the competition law provides that the government can prohibit a merger if it determines that such merger could have a potential impact on national security.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made prior to closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing, even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriache group. In Ukraine and Romania, the competition authorities have focused their efforts on discovering consummated transactions that had not been notified, and imposing fines on the parties.

Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia provides for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, Indonesia, and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., Austria, Canada, China, Greece, Portugal, Ukraine and the United States). In Macedonia, the failure to file can result in

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a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover. In Belgium, the competition authority fined a party for late submission of information.

In addition, other jurisdictions have joined the EC and the United States in focusing on interim conduct of the transaction parties. Brazil, for instance, issued its first 'gun-jumping' fine in 2014 and recently issued guidelines on gun-jumping violations. Since then, Brazil has continued to be very active in investigating and imposing fines for gun-jumping activities. In addition, the sharing of competitively sensitive information prior to approval appears to be considered an element of gun jumping. In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority. In Canada – like the United States – however, the Canadian Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea the parties restructured the acquisition to render the transaction nonreportable in Korea and consummated the transaction. The KFTC, however, continued its investigation as a post-consummation merger investigation and eventually obtained a consent order.

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based upon the size of the transaction; some jurisdictions, however, determine the fee after filing or provide different fees based on the complexity of the transaction. For instance, Cyprus is now considering charging a higher fee for acquisitions that are subjected to a full Phase II investigation.

Most jurisdictions more closely resemble the EC model than the United States model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the Japan Federal Trade Commission (JFTC) announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and processes with the EC model. Some jurisdictions even within the EC remain that differ procedurally from the EC model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan), there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees must be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal: the Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EC and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EC and the United States), third parties (e.g., competitors) are

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required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was recently fined by the authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The United States is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period of one year for challenging a notified transaction (see the recent *CSC/Complete* transaction). Norway is a bit unusual, where the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation. In 'voluntary' jurisdictions, such as Australia and Singapore, the competition agency can investigate and challenge unnotified transactions.

It is becoming the norm in large cross-border transactions raising competition concerns for the United States, Canadian, Mexican and EC authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The KFTC has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's CADE, which in turn has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia, and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation Forum, which shares a database. In transactions not requiring filings in multiple European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the European Commission in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including most recently Peru and India. China has 'consulted' with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of such multi-jurisdictional cooperation was very evident this year. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction due to the combined objections of several jurisdictions, including the United States, Europe, and Korea. In *Office Depot/Staples*, the FTC and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. In fact, it is becoming the norm for coordination among the jurisdictions in multinational transactions that raise competition issues.

Although some jurisdictions have recently raised the size threshold at which filings are mandated, others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an 'acquisition of control'. Many of these jurisdictions, however,

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will include, as a reportable situation, the creation of 'joint control', 'negative (e.g., veto) control' rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey), or a change from 'joint control' to 'sole control' (e.g., the EC and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which only a 10 per cent or less interest is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use, as the benchmark, the impact that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The UK also focuses on whether the minority shareholder has 'material influence' (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a stand-alone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also a subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an 'acquisition' subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multi-jurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the United States and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the International Merger Remedies chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. Moreover, the need to coordinate is particularly acute to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that 'structural' remedies are preferable to 'behavioural' conditions, a number of jurisdictions in the past few years have imposed a variety of such behavioural remedies (e.g., China, the EC, France, the Netherlands, Norway, South Africa, Ukraine and the United States). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing antidumping suits (e.g., Mexico). Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers* transaction, China's MOFCOM remedy in *Glencore/Xstrata*, and France's decision in the *Numericable/SFR* transaction). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

Ilene Knable Gotts
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Chapter 28

MALAYSIA

Shanthi Kandiah[1]

I INTRODUCTION

Malaysia has not introduced a cross-sectoral merger control law. The Competition Act 2010 (CA) sets out prohibitions on anticompetitive agreements and abuses of dominance, but not merger control. While mergers are not expressly excluded from the scope of the CA, there is acceptance that the competition regulator, the Malaysian Competition Commission (MyCC), has only review and enforcement powers in respect of behavioural conduct but no merger control mandate.

There are, however, sector-specific laws and guidelines that regulate the antitrust aspects of mergers. The sectors are aviation services, and communication and multimedia sectors, enforced by the Malaysian Aviation Commission (MAVCOM), and the Malaysian Communications and Multimedia Commission (MCMC) respectively.

These sectoral regulators also enforce competition rules for their sector, which includes prohibitions on anticompetitive agreements or conduct as well as abuses of dominance. The merger jurisdiction in each of these sectors will be discussed in turn in each section of this chapter.

i Aviation services sector

The Malaysian Aviation Commission Act 2015 (MACA), which came into force on 1 March 2016, gives MAVCOM full and sole authority for competition issues in the aviation services sector.[2] The provisions on competition and in particular merger control, are set out in Part VII Division 1 of the MACA. Section 54 prohibits mergers that have resulted, or may be expected to result, in a substantial lessening of competition in any aviation service market.

The term 'aviation service' is defined in Section 2 of the MACA as any of the following services:

- *a* *the carriage of passengers, mail or cargo for hire or reward by air or by the use of any aircraft between two or more places, of which at least one place is in Malaysia;*
- *b* *the provision in Malaysia of any of the ground handling services as specified in the Second Schedule;*
- *c* *the operation of an aerodrome in Malaysia for the take-off and landing of any aircraft engaged in the carriage of passengers, mail or cargo for hire or reward; or*

1 Shanthi Kandiah is the founding partner at SK Chambers.

2 The MACA has been expressly carved out of the application of the general competition legislation (i.e. the CA).

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d any other service determined by MAVCOM to be necessary or expedient for the carriage of passengers, mail or cargo referred to in paragraph (a), whether or not such service is provided by a licensee, permit holder or otherwise.

As sector regulator, MAVCOM has wider responsibility for the regulation of economic and commercial matters within the civil aviation industry.

Its responsibilities include the issuance of air services licences (ASL) for journeys with a fixed schedule, such as for timetabled commercial flights and air service permits (ASP) for non-scheduled services, such as for chartered flights. MAVCOM also issues out aerodrome operator licences (AOL) for airport operators and ground handling licences (GHL) to those who wish to carry out ground handling services in Malaysia.[3]

Its responsibilities also cover the administration and allocation of air traffic rights to airlines based on the available capacity of each route and the approval of schedule filing. It monitors slot allocation for airlines or other aircraft operators.

It is worth noting that MAVCOM (as sector regulator) has a wider range of *ex ante* regulatory tools to achieve its outcomes for the sector. It is also likely that competition enforcement will take into account the broader range of regulatory objectives for the sector. For example, the goals of the MACA include:

a to encourage effective competition within the civil aviation industry by promoting an economic environment that allows Malaysian carriers to maintain their ability to compete effectively in the civil aviation market in a sustainably profitable, efficient and fair manner;

b to maximise the economic value of any financial support granted by the federal government to the civil aviation industry and to seek and promote ways to reduce any such financial support over time; and

c to promote an environment for consumers in relation to the civil aviation industry to have access in a transparent manner to choices of products and services of high quality and at fair prices.

The MACA therefore gives MAVCOM an important margin of discretion in prioritising these regulatory objectives as well as the means to achieve them.

Definition of a merger

Pursuant to Section 54(2) of the MACA, a merger is deemed to occur if:

a two or more undertakings, previously independent of one another, merge;

b one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings;

c as the result of the acquisition by one undertaking (the first undertaking) of the assets (including goodwill), or a substantial part of assets, of another undertaking (the second undertaking) is to place the first undertaking in a position to replace or substantially replace the second undertaking in the business or, as appropriate in the part concerned of the business in which the undertaking was engaged immediately before the acquisition; or

d a joint venture is created to perform, on a lasting basis, all the functions of an autonomous entity.

3 See www.mavcom.my/en/industry.

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Section 48 read together with the Third Schedule lists excluded commercial activities, agreements and mergers.

Applicability to joint ventures

The MACA treats full-function joint ventures as mergers. The criteria for what constitutes a full-function joint venture is not set out in the law. Given the similarity in the provisions in the MACA and the Singaporean Competition Act, and until MAVCOM issues its guidelines on the matter, practitioners tend to refererence the position in Singapore for guidance on how the provisions might be interpreted in Malaysia.

Having said that, important distinctions remain between the Singapore Competition Act provisions and the MACA. It is understood that in Singapore, mergers are expressly excluded from the application of the prohibition on anticompetitive agreements and abuse of dominance. It is noteworthy that the MACA does not provide for the same exclusion and it is also not clear whether this is intentional. This suggests that joint ventures could be subject to both merger review as well as the prohibition against anticompetitive agreements, which would complicate the review process significantly. For one, the substantive test applied is different (substantial lessening of competition) than for joint ventures (prevention, restriction or distortion of competition).

This in turn would deter some pro-competitive joint ventures. It is hoped that MAVCOM will provide clarity on this point.

The treatment of full function joint ventures as mergers in the aviation services sector is also an important development for the aviation sector in the wake of increasing collaboration between airlines via alliances and code sharing, and involving varying degrees of integration of operations. Merger regulations introduce another vehicle through which airlines may structure collaborations.

Foreign-to-foreign mergers

The prohibition under Section 54 of the Act may apply even where the merger takes place outside Malaysia or where the merger is located outside Malaysia, so long as the merger could have an effect on any market affecting Malaysia.

Jurisdictional thresholds

As of now, MAVCOM has laid down several *de minimis* thresholds on mergers. It is unlikely to investigate unless:

a the combined turnover of the merger parties in Malaysia in the financial year preceding the transaction is at least 50 million ringgit; or

b the combined worldwide turnover of the merger parties in the financial year preceding the transaction of the merger parties is at least 500 million ringgit.

Parties are expected to conduct a self-assessment to establish whether a merger can give rise to a substantial lessening of competition within any market affecting Malaysia and whether a merger notification should be made to MAVCOM.

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ii Communications and multimedia sector

The Communications and Multimedia sector in Malaysia is regulated by the Malaysian Communication and Multimedia Commission (MCMC) under the CMA. The CMA has been expressly carved out of the application of the general competition legislation (i.e., CA).[4]

The MCMC oversees the regulatory framework for the converging industries of telecommunications, broadcasting and ICT industries. It is also the body through which the government implements and promotes its national policy objectives for the communications and multimedia sector. The MCMC licenses players in this sector and its jurisdiction as competition regulator extends over licensees. The MCMC clearly contemplates that the objective of promoting competition must be consistent with national policy objectives. As sector regulator, it has *ex ante* powers – intervention before the fact, e.g., price control and access conditions. It has also *ex post* enforcement powers. As with MAVCOM, the MCMC has a margin of discretion to prioritise these national objectives as well as the means to achieve them.

The CMA's merger control provisions are more oblique (when compared to the MACA). It was clarified more recently by MCMC during Public Inquiry Process which led to the Public Inquiry Report – Assessment of Dominance in Communications Market (dated 24 September 2014) and revisions to both the Guideline on Substantial Lessening of Competition (the SLC Guideline) as well as the Guideline on Dominant Position (the DP Guideline) where MCMC expressed its intention to monitor mergers and acquisitions that have the potential to substantially lessen competition more closely using the existing regulatory framework in the CMA – namely sections 133, 139 and 140. In essence these set out the three (3) main prohibitions on that relate to anticompetitive conduct:

a Section 133 expressly forbids conduct which has the purpose of substantially lessening competition;

b Section 139 gives the MCMC power to direct a licensee in a dominant position to cease conduct that has the effect of substantially lessening competition; and

c Section 140(1): a licensee may apply to the Commission, prior to engaging in any conduct that may be construed to have the purpose or effect of substantially lessening competition in a communications market, for authorisation of the conduct.

The MCMC has published the following to clarify its approach in administering the prohibitions under this Chapter:

a the SLC Guideline, 24 September 2014;

b the DP Guideline, 24 September 2014; and

c the Market Definition Analysis – Definition of Communications Market in Malaysia 24 September 2014.

On mergers, paragraph 4.40 of MCMC's SLC Guideline states that the MCMC regards mergers to be 'conduct' falling within the scope of Sections 133 and 139 of the CMA. The MCMC has also said that it is presently developing guidelines (both substantive and procedural) for the merger review regime.

4 Section 3 of the CA provides that the Act 'shall not apply to any commercial activity regulated under the legislation specified in the First Schedule'. The First Schedule specifies the CMA.

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There was some disagreement expressed by licensees with the MCMC's treatment of mergers and acquisitions as a type of conduct that is subject to sections 133 and 139 of the CMA on the basis, *inter alia*, that mergers and acquisitions can generate certain benefits and therefore should not be regarded as prohibited conduct.

The MCMC, however, took the view that it does not consider the potential positive benefits of a merger or acquisition to be a valid reason to exclude mergers and acquisitions from the application of Sections 133 and 139. Any positive benefit of a merger or acquisition will be considered when assessing an authorisation application under Section 140.

In response to calls for further clarity on how merger parties may approach the MCMC regarding a proposed merger and for the MCMC to develop a procedural framework for the assessment of mergers and acquisitions, the MCMC has said that it intends to issue a separate guideline on mergers and acquisitions and will consider all of the comments from respondents in the development of those guidelines.

MCMC's merger guidelines have not been issued as yet. It is understood that there are amendments pending to the CMA that will *inter alia* will seek to rationalise the competition provisions in the CMA with that of the CA and MACA. This would be a positive development for competition law in Malaysia as streamlining the competition principles will go some way towards promoting consistency and coherence in the application of competition laws in Malaysia, despite the existence of multiple authorities with jurisdiction to implement competition principles in their respective sectors.

Definition of a merger

MCMC regards mergers and acquisitions to be 'conduct' and therefore subject to sections 133 and 139 of the CMA. The SLC Guidelines provide that mergers or acquisitions can take the following forms:

a a horizontal merger or acquisition, which involves the merger of two firms, or the acquisition by one firm of another, at the same functional level of the supply chain;

b a vertical merger or acquisition, which involves firms at different functional levels of the market; and

c a conglomerate merger or acquisition, which is a merger or acquisition that is neither a horizontal or vertical merger.

Not all mergers or acquisitions will raise competition concerns. However, a merger or acquisition may raise competition concerns if it lessens competition by reducing or weakening the competitive constraints in a market or reducing the incentives for competitive rivalry.

Accordingly, MCMC have said that they will closely monitor mergers or acquisitions where:

a the merger or acquisition results in a licensee obtaining a dominant position in a market; or

b where one of the parties to the merger or acquisition is already in a dominant position.

Applicability to joint ventures

It is hoped that there will be more clarity on the treatment of joint ventures as mergers when the merger guidelines are issued.

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Foreign-to-foreign mergers

The CMA provides for extraterritorial jurisdiction. The CMA and its subsidiary legislation applies to any person beyond the geographical limits of Malaysia and its territorial waters if such person:

a is a licensee under this Act; or

c provides relevant facilities or services under this Act in a place within Malaysia.[5]

It should be noted that the competition provisions under the CMA apply only to licensees. The four (major) individual licence categories under the CMA require licensees to be companies incorporated in Malaysia as a standard licence condition.

Jurisdictional thresholds

There have been no jurisdictional thresholds prescribed by MCMC. The MCMC has said that a high market share (as an indicator of dominance) would be a market share of more than 40 per cent. This is useful to the extent that MCMC has highlighted that it intends to monitor mergers involving dominant entities or that create dominant entities.

II YEAR IN REVIEW

i Aviation services sector

MAVCOM is currently developing guidelines to clarify and illustrate the application of Part VII (Competition) of the MACA. The guidelines are targeted to be issued and published latest by the end of 2017. Until then, it is understood that MAVCOM will review notifications on a case-by-case basis. It has provided contact details on its website for merger notifications, which conveys that the provisions in the law are fully operational.

ii Communications and multimedia sector

It is understood that the MCMC is already reviewing applications for mergers and acquisitions in the sector. It not clear whether clearance comes in the form of a no-objection letter or authorisation. Where the MCMC authorises conduct, it is required to maintain a register of current authorisations of a conduct. This register is not available on its website which suggests that there have been no authorisations given in respect of mergers and acquisitions, though this does not exclude the possibility of no-objection letters being issued.

III THE MERGER CONTROL REGIME

i Aviation services sector

Voluntary regime

MACA provides for a voluntary merger control regime, so parties can implement the transaction before clearance. Alternatively, parties may apply for a decision from MAVCOM on whether a merger infringes the Section 54 prohibition.

5 The CMA further provides that 'a place' means a point of any nature or description whether on land, in the atmosphere, in outer space, underground, underwater, at sea or anywhere else.

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A decision by Commission is in the form of a finding of infringement under Section 59(1) or non-infringement under Section 58. Actions that MAVCOM can take where an infringement is found include the following:

a orders to cease infringement immediately;

b specify steps that are required to be taken by an infringing enterprise that are appropriate to bring an infringement to an end, for example, unwinding orders;

c financial penalties that shall not exceed 10 per cent of the worldwide turnover over the period during which an infringement occurred; or

d any other direction that MAVCOM deems appropriate.

Parties should therefore consider timing of implementation measures that are difficult or costly to unwind, if they choose to proceed with a merger that has yet to receive clearance from MAVCOM.

The Commission is required to prepare and publish reasons for each decision it makes.

Regime where parties do not apply

MAVCOM may launch an investigation at any point – pre or post-closing of a transaction – whether or not the parties have made an application for clearance. An authorised officer has the power to conduct investigations on suspicion of infringement, attempts to commit infringement or conspiracy to commit infringement. In addition to MAVCOM's power to make a finding of infringement or non-infringement pursuant to Sections 58 and 59 of the Act when its investigation powers have been invoked, an authorised officer can issue a compliance order if satisfied of an infringement or likely infringement. The compliance order can require a person to refrain from conduct in contravention of the Act or to take actions required in order to comply with the Act.

Interim measures

Section 57 sets out MAVCOM's power to issue interim measures. This power only arises upon commencement of an investigation but which has not been completed. In other words, it is only available in context of an investigation. No specific provision to issue interim measures in connection with an application for clearance exists (in contrast Singapore's Competition Act provisions that set out two different interim measure provisions – one in the context of an application for clearance and the other in the context of an investigation).

Interim measures are directions to:

a suspend the effect of or desist from acting in accordance with any agreement;

b desist from any conduct which is suspected to infringe a prohibition; and

c to do or refrain from doing any act (but which shall not require the payment of money).

Timing for notification

Parties can apply any time before or during the merger (anticipated merger) or after (resulting merger).

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Time frame for review

There are no statutory time frames for review prescribed under the law. We anticipate that these matters will be dealt in the guidelines. Until then we expect the process to involve preliminary discussions with MAVCOM on the process, time frames and criteria on a case-by-case basis.

Pre-notification discussion

We anticipate that these matters will be dealt in the guidelines. MAVCOM asks parties to e-mail them with questions on notification.[6]

Non-suspensory regime

The regime is a non-suspensory regime. Parties may give effect to or proceed with mergers at their own commercial risk. MAVCOM has the power to unwind mergers that have been given effect to and even to impose financial penalties if it decides that the merger infringes the prohibition in Section 54 of the MACA.

Undertakings and remedies

MAVCOM may accept undertakings from an enterprise to do or refrain from doing anything that the MAVCOM considers to be appropriate. Where MAVCOM accepts an undertaking MAVCOM may close an investigation without a finding of infringement. These undertakings are enforceable if they form part of a decision of MAVCOM.

In terms of remedies, the powers given to MAVCOM appear broad enough to cover structural and behavioural remedies.

Appeals

A party affected by an infringement decision by the Commission may within 14 days from the date notice of the decision is given, apply to the Minister for an exemption from the prohibition on the ground of public interest considerations.

Rights of appeal also exist to the High Court pursuant to Section 88(1) of the MACA, within three months beginning on the date on which the decision was communicated to the 'person or body aggrieved by the decision'.

ii Communications and multimedia sector

In assessing whether a merger or acquisition has the purpose or effect of substantially lessening competition in a relevant market, MCMC will consider the following factors.

The degree of concentration in the market with or without the merger or acquisition taking place

A merger or acquisition that leads to a significant increase in market concentration is more likely to substantially lessen competition (although concentration is not in itself determinative). MCMC will consider the extent to which competitors remaining in the market post-merger will constrain the level of competition in the market.

6 For information on the notification of an anticipated merger or a merger, MAVCOM asks parties to e-mail them at competition@mavcom.my.

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The extent of barriers to entry into the market

The MCMC's perspective on barriers to entry is discussed in the DP Guideline. Where a merger or acquisition brings about an increase in market concentration, low barriers to entry may nevertheless result in the merger or acquisition having no substantial effect on competition in the market, as new entrants can constrain the behaviour of the merged firm.

The effect of the merger or acquisition on the relevant firm's ability to raise prices

A lowering of competitive constraints on the relevant firm after the merger or acquisition, conveyed through its ability to raise prices above the competitive level, may indicate that the merger or acquisition has the effect of substantially lessening competition in the market.

The level of dynamic competition in the market

A merger or acquisition that leads to an increase in market concentration may not necessarily have an anticompetitive effect in a dynamic market, where future competition may be fuelled by growth and innovation.

The degree of countervailing buyer power

Countervailing buyer power may function as a competitive constraint on a licence post-merger, even where the merger or acquisition brings about greater concentration in the market.

The existence and degree of any efficiencies brought about by the merger or acquisition

In its analysis, MCMC will consider the potential beneficial effects that a merger or acquisition may have on competition. For example, mergers and acquisitions may provide efficiencies through economies of scale and the pooling of research and development. In particular, the efficiencies resulting from the merger of two smaller players in the market may actually increase competition, by providing a more powerful constraint on larger or dominant players in the market.

The MCMC may require a range of quantitative and qualitative information from parties to a merger or acquisition when assessing whether a merger or acquisition is likely to raise competition concerns. Some examples of information that the MCMC may require include:

a recent sales figures (by volume and by value) of each competitor in the market, so as to allow the MCMC to calculate market shares;

b information relating to the size of investment required for a potential competitor to enter the market;

c economic data relating to price elasticity in the market, so as to determine the effect of a possible price increase on demand and therefore to assess the ability of the merged firm to raise prices above the competitive level;

d data relating to current pricing and profit margins of the parties, and projected prices and profit margins after the merger or acquisition;

e data relating to the market's size, growth prospects; and

f level of innovation, to assess the level of dynamic competition in the market.

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Voluntary regime

Section 140(1) provides that a licensee may apply to MCMC, for authorisation of the conduct. It is essentially a voluntary regime. Given MCMC's regulatory leverage, licensees tend to err on the side of caution and consult MCMC, particularly since MCMC has expressed an interest in monitoring mergers in the sector.

Section 143 CMA provides for criminal penalties for contravention of any prohibition of Chapter 2 Part VI, which includes a fine not exceeding 500,000 ringgit or imprisonment for a term not exceeding five years or to both. A person may further be liable to a further fine of 1,000 ringgit for every day or part of a day during which the offence is continued after conviction.

Further administrative actions available to the MCMC include the following:

a Section 37 – right of the Minister, on the MCMC's recommendation, to suspend or cancel a licence where the licensee fails to comply with a provision of the CMA.

b Section 33 – minister may modify, vary, revoke or impose further special or additional conditions to an existing licence.

c Section 139 – the MCMC may issue a direction to licensees to cease conduct that substantially lessens competition and implement appropriate remedies.[7]

Interim measures

MCMC or any person may seek an interim or interlocutory injunction against any prohibited conduct through the courts.

Timing for notification

Section 140(1) provides that a licensee may apply to the MCMC, prior to engaging into any conduct which may be construed to have the purpose or effect of substantially lessening competition in a communications market.

In the case of public listed companies, the application for approval should ideally be submitted after announcement of a transaction to minimise the risk of leakage of price-sensitive information and disenfranchisement of minority shareholders. As completion of a transaction can be made subject to regulatory approval, it is likely that this would still qualify as prior approval.

Time frame for review

There have been no time frames prescribed by the Commission at this juncture.

Suspensory regime

Where parties apply for authorisation, the regime can be described as a suspensory as the application for authorisation is for prior approval of the conduct. There is, however, no requirement to seek authorisation.

7 The CMA does not offer insights on what these remedies might be. The MCMC has the power to determine what the appropriate remedy might be subject to the objects of the Act, national policy and any directions issued by the Minister.

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Undertakings

Prior to authorising any conduct, the MCMC may require the licensee to submit an undertaking regarding the conduct in any matter relevant to the authorisation.

Appeals

Section 120 of the CMA provides for rights of appeal to the Appeal Tribunal by a person who is aggrieved or whose interest is adversely affected by a decision or direction (but not a determination) of the Commission.

Section 121 of the CMA preserves the right to judicially review the decisions of the Commission provided that all remedies under the CMA are first exhausted.

IV OUTLOOK & CONCLUSIONS

Malaysia remains a notable exception to the general trend within jurisdictions in East Asia to adopt a merger control regime as part of their competition law framework. The aviation and communications, and multimedia sectors are exceptions in this regard. MAVCOM and MCMC have expressly indicated that merger guidelines will be issued. This will provide much needed clarity on their approach in regulating the mergers and acquisitions in these sectors. The rumoured amendments to the CMA are also being closely watched to see if they introduce a merger regime similar to that of the MACA. The merger control provisions in the MACA provide a useful template that could be broadened to other sectors (such as the communications and multimedia sector) and the broader economy via amendments to the CA, if and when cross-sectoral merger control provisions are introduced.

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Appendix 1

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Shanthi Kandiah is the head of SK Chambers, legal and regulatory advisers specializing in competition law, telco regulatory, data protection and cybersecurity. Her competition law practice covers cartels, sectoral competition laws, including merger control. She regularly advises many corporations in sectors such as media and telecommunications, aviation, FMCG, construction, pharmaceuticals and other service industries covering issues ranging from competitor collaborations, cartels, pricing and rebate policies, and compliance. Noteworthy recent assignments include defending clients in a cartel allegation (involving highest proposed fines to date in Malaysia), advising on a full-function joint venture in the aviation services sector and successfully securing a no objection letter for an acquisition in the communications and multimedia industry. Shanthi has a master's in law from King's College London. She holds a postgraduate-diploma in competition economics also from King's College.

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