

Merger Control 2020

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Published by

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First published 1996

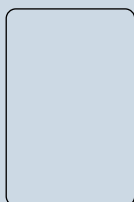
Twenty-fourth edition

ISBN 978-1-83862-149-0

Printed and distributed by

Encompass Print Solutions

Tel: 0844 2480 112



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Thomas Janssens

Freshfields Bruckhaus Deringer

Lexology Getting The Deal Through is delighted to publish the twenty-fourth edition of *Merger Control*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the consulting editor, Thomas Janssens of Freshfields Bruckhaus Deringer, for his and the firm's continued assistance with this volume.



London

July 2019

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This article was first published in August 2019

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Malaysia

Shanthi Kandiah

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

Malaysia's general competition legislation, namely 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 no merger control mandate.

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

MAVCOM has competition policy powers under the Malaysian Aviation Commission Act 2015 (MACA). This is presently the only statutory merger control regime in Malaysia.

MAVCOM has published the following guidelines on mergers:

- Guidelines on Substantive Assessment of Mergers (the SAM Guidelines);
- Guidelines on Notification and Application Procedure for an Anticipated Merger or a Merger (the NAP Guidelines); and
- Guidelines on Aviation Service Market Definition.

For the communications and multimedia sectors, the existing Guideline on Substantial Lessening of Competition (SLC Guideline) issued by the MCMC expressly states that the regulator considers that mergers involving telecommunications and multimedia licensees must be investigated as 'conduct which has the purpose of substantially lessening competition in a communications market' (under section 133 of the Communications and Multimedia Act 1998 (CMA)). On 17 May 2019, the MCMC issued the final versions of the following guidelines:

- Guideline on Mergers and Acquisitions (the M&A Guidelines); and
- Guideline on Authorisation of Conduct (the AC Guidelines).

Scope of legislation

2 | What kinds of mergers are caught?

The MACA encompasses both horizontal and non-horizontal mergers (vertical and conglomerate). A merger is deemed to occur if:

- two or more undertakings, previously independent of one another, merge;
- one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings;
- 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

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

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

Communications and multimedia sectors

The MCMC's SLC Guideline provides that the MCMC regards mergers to be 'conduct' falling within the scope of sections 133 and 139 of the CMA. The definition of mergers and acquisitions (M&A) under the M&A Guideline is similar to that set out in the MACA.

The competition regulation regime established by the CMA does not contain any express provisions for merger control and assessment. As such, there is no process nor is there a legal requirement that parties to a merger or acquisition should notify the MCMC in respect of such transactions. In spite of the lack of clear provisions, the MCMC has said that it will assess mergers affecting the communications and multimedia sector that are voluntarily submitted to it in the manner set out in the M&A Guidelines. The advantage that the procedures established through the M&A Guidelines is that they enable merging parties to:

- obtain the Commission's view in respect of the competitive effects of a M&A; and
- decide whether to apply to the Commission for authorisation of a M&A where it is consistent with national interest subject to various undertakings or in a restructured form to avoid breaching the provisions of the CMA.

It is likely that MCMC is attempting to replicate the informal clearance regime that operates in Australia. There is a natural incentive for merging parties to seek clearance of any anticipated or completed merger, to ensure that mergers are not subject to an unexpected review by the MCMC, thereby providing greater transaction certainty.

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.

3 | What types of joint ventures are caught?

Aviation services sector

The MACA treats full-function joint ventures as mergers. The SAM Guidelines explain that such a joint venture 'operates in an aviation service market and performs the functions normally carried out by enterprises in that market'. Factors to determine 'intention' include:

- commitment of resources by the parent enterprises – the period of the joint venture must be long enough to cause a lasting change in the structure of the enterprises concerned or provide for continuation beyond such specified period;
- joint ventures established for a short definite period and to carry out a specific project may be considered as not having an operation on a lasting basis; and
- joint control by the parties to the joint venture where such enterprises are capable of exercising decisive influence with regard to the activities of the joint venture.

Communications and multimedia sectors

The CMA does not define ‘joint venture’. However, the M&A Guideline describes an approach similar to that in the MACA.

4 | Is there a definition of ‘control’ and are minority and other interests less than control caught?

Aviation services sector

The SAM Guidelines explain that ‘control’ can exist via:

- ownership of the assets of the enterprise;
- the right to use all or part of the assets of the enterprise; or
- the rights or contracts that enable the exercise of decisive influence regarding the composition, voting or decisions of the enterprise.

Control can be acquired directly or indirectly. Examples of direct control are by becoming holder of the rights or contracts, whereas indirect control may occur through acquisition of the power to exercise rights. It can be determined by examining links between the acquirer and the enterprise having indirect control such as the source of funding and family relations between the acquiring person or enterprise.

Communications and multimedia sectors

‘Control’ is not defined or explained under the CMA. The M&A Guideline explains that control can be achieved through:

- amalgamating with another firm to form a merged entity;
- acquiring the assets of another firm and replacing that firm; or
- through acquiring direct or indirect control over another firm.

The test for control is whether a firm can exercise ‘decisive influence’ over the activities of another firm by reason of rights, contracts or other means. ‘Control’ can be obtained through:

- legal control (ie, having more than 50 per cent ownership of all voting rights); or
- de facto control (ie, circumstances that allow one firm to influence another’s activities to affect key strategic commercial behaviour).

Thresholds, triggers and approvals

5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Aviation services sector

For notification and assessment of a merger, parties should self-assess 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. MAVCOM is more likely to investigate a merger or anticipated merger where:

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

Communications and multimedia sectors

The MCMC has not prescribed any jurisdictional thresholds but has taken the position that a market share of more than 40 per cent is indicative of dominance.

The M&A Guideline provides guidance on thresholds for notification and assessment:

Type of merger	Notification threshold
Proposed horizontal merger	<ul style="list-style-type: none"> • At least one of the parties to the merger is a licensee in a dominant position; or • if the threshold above is not met, the merger would result in the proposed merged firm obtaining a dominant position. A post-merger market share of the proposed merged entity of 40 per cent or more would be indicative of this.
Completed horizontal merger	<ul style="list-style-type: none"> • The merged entity is a licensee in a dominant position.
Proposed non-horizontal merger	<ul style="list-style-type: none"> • At least one of the parties to the merger is a licensee in a dominant position.
Completed non-horizontal merger	<ul style="list-style-type: none"> • The merged or acquired entity is a licensee in a dominant position.

6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Aviation services sector

The MACA has a voluntary notification regime.

Communications and multimedia sectors

The regimes for both notification and assessment of a merger, as well as authorisation of conduct, are voluntary.

7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

There are no such special notification requirements for either sector.

Under the MACA, a local effects test is applied (ie, whether a merger transacted or executed outside Malaysia has an effect on competition in any aviation service market in Malaysia).

The CMA applies extraterritorially to licensees or providers of relevant facilities or services in a place within Malaysia.

8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

Aviation services sector

Applicants for an air service licence, air service permit or group handling licence must either be a Malaysian or a company incorporated in Malaysia under direct or indirect control of a Malaysian. It is understood that foreign shareholding is allowed subject to significant local shareholding.

Communications and multimedia sectors

Licences are only offered to Malaysian incorporated companies. In 2011, the Ministry of International Trade and Industry liberalised foreign shareholding thresholds to 70–100 per cent, depending on licence category. However, the MCMC, as the licensing authority, permits 30–49 per cent foreign shareholding for certain licence categories and higher shareholding requests will be entertained on a case-by-case basis. Import permits are required for importation of communications equipment.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

- 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Aviation services sector

Merger parties have the option of notifying both completed and anticipated mergers. For anticipated mergers, notification and application can be made to MAVCOM when:

- merger parties have a bona fide intention to proceed with the anticipated merger;
- details of the anticipated merger are available; and
- the anticipated merger has been, or may be, made public.

For completed mergers, notification can be made at any time, but merger parties are encouraged to do so as soon as possible after the merger is completed. There are no sanctions for failing to file, per se, but MAVCOM in its final decision can impose a financial penalty if it is satisfied the infringement was intentional or negligent.

Communications and multimedia sectors

For notification and assessment, parties should submit their transactions prior to completion. An application for authorisation of conduct can be made before, during or after submitting an application for assessment pursuant to the M&A Guidelines.

- 10 | Which parties are responsible for filing and are filing fees required?

Aviation services sector

A party to an anticipated merger or involved in a merger is responsible for filing. MAVCOM does not presently impose such fees but will do so via regulations in future.

Communications and multimedia sectors

Licensees can apply to the MCMC for authorisation of conduct and notification and assessment. Under the M&A Guideline, the MCMC will not accept multiple parallel applications for assessment of a merger. The M&A Guidelines provide that the acquiring party (for a proposed M&A) or the merged entity or entity that has acquired control (for completed mergers) are the appropriate parties.

- 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Aviation services sector

The regime is non-suspensory but parties proceed at their own commercial risk as MAVCOM has the power to unwind mergers and impose financial penalties for infringement. The duration for the assessment of an application will be determined on a case-by-case basis.

Communications and multimedia sectors

In theory, the notification and assessment regime under the M&A Guideline appears to be a non-suspensory regime. Parties can proceed with the M&A without automatic sanctions.

Similarly, where parties apply for authorisation, the regime is non-suspensory as licensees can apply before, during or after submission of an assessment application. There is no requirement to seek authorisation.

Pre-clearance closing

- 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Not applicable.

- 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

No.

- 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Where MAVCOM has commenced, but not completed, an investigation, it has the power to direct parties to suspend the effect of, or desist from acting in accordance with any agreement, desist from any conduct that is suspected to infringe a prohibition or to do, or refrain from doing, any act (but that shall not require the payment of money).

Public takeovers

- 15 | Are there any special merger control rules applicable to public takeover bids?

Takeovers and mergers in Malaysia are subject to the Malaysian Code on Takeovers and Mergers 2010.

Documentation

- 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Aviation services sector

The NAP Guidelines provide that a notification and application shall be made in the form and manner determined by MAVCOM, supported by the required documents and information. In the Notification and Application form for an anticipated merger or a merger published by MAVCOM, the information and supporting documents required by MAVCOM consist of, among others:

- details of the parties to the merger;
- information on the merger including description of the turnover of the merger parties, structure of the merger and change on the ownership structure of the merged entity;
- description of the relevant aviation service market, including the relevant service market, geographic market and temporal market where applicable;
- competitive effects of the merger including unilateral and coordinated effects of the merger, barriers to entry, and countervailing buyer power;
- economic efficiencies (if any) including description of significant economic efficiencies and nature of the economic efficiencies; and
- social benefits (if any) including description of significant social benefits and the nature of the social benefits.

MAVCOM may refuse to accept incomplete or incorrect applications.

Failing to disclose relevant information, evidence, documents or providing false or misleading information, evidence, documents to MAVCOM is an offence carrying a fine of up to 500,000 ringgit, imprisonment up to three years, or both.

Communications and multimedia sector

For authorisation of conduct, applicants will need to prepare Form 2 and the relevant supporting documents as stated in Annexure 3 of the AC Guidelines. The following information, among others, needs to be submitted:

- description of the proposed conduct and any documents detailing terms of such conduct;
- markets that the conduct is likely to affect;
- market characteristic;
- the time frame for which authorisation is sought;
- benefits of the conduct from the perspective of national interest;
- who is likely to benefit from the conduct;
- how are the benefits distributed; and
- how the conduct has been framed to minimise anticompetitive effect.

Failure to provide sufficient information may render the application to be invalid. If applicants knowingly give false or misleading information, they commit an offence that carries a fine of up to 20,000 ringgit, or imprisonment not exceeding six months, or both.

For notification and assessment, applicants will need to prepare Form 1 and Form 2 as well as the relevant supporting documents, full details of which can be found in Annexures 1 and 2 of the M&A Guideline.

Incomplete applications will be rejected by the MCMC. The MCMC may revoke a notice of no objection to a notification and assessment that was approved, if information provided by a licensee was materially incomplete, false or misleading. The CMA also provides that knowingly giving false information is an offence that carries a fine of up to 20,000 ringgit, or imprisonment not exceeding six months, or both.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

Aviation services sector

For notification and assessment, upon receiving a complete application, MAVCOM will first determine whether the merger or anticipated merger falls within the meaning of section 54 MACA. If it does, MAVCOM will publish a summary of the application for public consultation.

Next, MAVCOM will proceed with two phases of its assessment – Phase 1 involves evaluating the possible competitive effects through gathering of information. MAVCOM will then issue a proposed decision and publish it for public consultation. Following this, MAVCOM will make a final decision of non-infringement or proceed to Phase 2, which involves a more detailed and extensive examination of the effects of the merger or anticipated merger. A proposed decision will be published for public consultation and applicants can make written representations in response to a finding of infringement. MAVCOM will then consider public feedback and written representations before making its final decision. The duration for the assessment of an application will be determined on a case-by-case basis.

MAVCOM also has the power to investigate a merger or anticipated merger that raises competition concerns under the MACA. The process of such an investigation is not expressly spelled out.

Communications and multimedia sectors

The assessment for notification is proposed to be broken down into two phases under the M&A Guideline and is similar to MAVCOM's approach. The Guideline also indicates time frames for investigation – Phase 1 should be completed within 30 business days from receipt of a valid Form 1 application, Phase 2 should commence within 10 business days of a valid Form 2 application and is expected to complete within 120 business days. The time frame for an investigation for both Phase 1 and Phase 2 may be completed in less or more time than indicated if the

MCMC considers that it is warranted in the circumstances of the M&A being assessed.

If the MCMC reaches the view that it is likely to issue an unfavourable decision, it will issue an applicant with a statement of issues setting out its preliminary findings and the grounds on which it reaches its conclusions. The applicant will be given 30 days to respond. The MCMC will then object or not object to the merger and issue the relevant notices.

A similar process and time frames are envisaged for an authorisation application as provided in the AC Guidelines.

These timelines may be extended by the MCMC at its absolute discretion and may be reviewed by the MCMC, taking into account the practical considerations.

18 | What is the statutory timetable for clearance? Can it be speeded up?

See question 17.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

Aviation services sector

Mergers that have resulted or may be expected to result in a substantial lessening of competition in any aviation service market are prohibited.

The 'failing firm' defence is available. This will be considered in the counterfactual analysis where a merger party may claim that, without the merger, it would exit the relevant market and competition would be lost anyway.

Communications and multimedia sectors

Section 133 CMA prohibits 'any conduct which has the purpose of substantially lessening competition in a communications market'.

The failing firm defence is available where:

- the financial situation of the firm has deteriorated to such an extent that without the M&A, it and its assets would exit the market in the near future;
- there are no serious prospects for restructuring the business; and
- there are no less anticompetitive alternatives to the M&A.

20 | Is there a special substantive test for joint ventures?

See question 3.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

Aviation services sector

Generally, MAVCOM will look at whether a merger or anticipated merger is likely to lead to substantial lessening of competition by way of unilateral and coordinated effects. To determine unilateral effects, MAVCOM would consider:

- profitability of any price increase or reduction of supply;
- whether other competing enterprises would increase their capacities or expand their commercial operations in response to any price increase or reduction of supply;
- existence of any close substitutes of the service provided by the merger parties; and
- the possibility of new competitors entering the relevant aviation service market.

In assessing coordinated effects, MAVCOM will consider the structure and characteristics of a relevant aviation service market, any history of coordination in the said market, factors that would indicate the characteristics of a relevant aviation service market and how such factors would impact the coordinated effects of a merger.

Communications and multimedia sectors

As per the M&A Guidelines, when assessing whether a merger results in coordinated effects of horizontal mergers on competition, the MCMC will attempt to establish whether a merger materially increases the likelihood that firms in a market will successfully coordinate their behaviour or strengthen any existing coordination, and will take into account the following conditions:

- the ability of firms to align on the terms of coordination;
- incentives to maintain coordination; and
- weak competitive constraints.

In determining unilateral effects of horizontal mergers, the MCMC will consider:

- whether the products and services are close substitutes;
- whether rivals have an incentive and the ability to respond to a price increase;
- the significance the merger parties have to the competitive process; and
- the competitive constraint each of the merger parties exerted on each other prior to the merger.

For non-horizontal mergers, the MCMC also looks at coordinated effects and unilateral effects. For coordinated effects, the same factors for establishing coordinated effects in a horizontal merger will be relevant to non-horizontal mergers. For unilateral effects, the MCMC will take into account foreclosure, barriers to entry and access to commercially sensitive information.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

Aviation services sector

A party affected by an infringement decision by MAVCOM may within 14 days of 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. This exemption will be confined to matters of public or national security and defence.

Communications and multimedia sectors

Section 140(2) CMA states that the MCMC can authorise a conduct if it is satisfied that the authorisation is in the national interest. The MCMC will use the national policy objectives in section 3(2) as the basis to decide whether or not the conduct should be authorised.

A cost-benefit analysis is used to examine if a conduct promotes national policy objectives. This analysis is guided by four steps – market definition, market structure analysis, analysis of economic impact, and analysis of benefits from the perspective of national interest. The MCMC can exercise its discretion and vary these steps, if necessary.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

Aviation services market

A merger party may claim that there are significant economic efficiencies arising directly from the merger, including supply-side or

demand-side efficiencies. Examples of supply-side efficiencies that may be considered include cost reduction, removal of double marginalisation in vertical mergers, increase in investment, differentiation of aviation services, and increase in capacity and network of aviation services. Examples of demand-side efficiencies include increased network of aviation services available to buyers, price effects of complementary aviation services, and benefits of 'one-stop shopping'.

Communications and multimedia sectors

As part of the process of conducting a cost-benefit analysis (see question 22) in relation to authorisation of conduct, detrimental effects of a conduct will be analysed from the perspective of economic efficiency, namely production efficiency, allocative efficiency and dynamic efficiency – examples specified are economies of scale and scope and pooling of resources.

For the notification and assessment regime, efficiencies (including economic efficiencies) will be considered as part of the assessment of whether there is a substantial lessening of competition.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Aviation services sector

If an infringement is found in a merger or an anticipated merger, MAVCOM can take the following actions:

- order to cease infringement promptly;
- specify steps that should be taken by the infringing enterprise to bring the infringement to an end;
- impose financial penalties that shall not exceed 10 per cent of worldwide turnover of the infringing enterprise over the period that the infringement occurs; and
- provide any other direction as MAVCOM deems appropriate.

The NAP Guidelines provide examples of directions:

- prohibiting an anticipated merger from being carried into effect;
- ordering a merger to be dissolved or modified;
- requiring parties to enter into agreements designed to lessen or prevent the anticompetitive effects arising from a merger or an anticipated merger;
- requiring a merger party to dispose its businesses, assets, shares or rights in a specified manner; and
- providing a performance bond, guarantee or other form of security on such terms and conditions as may be determined by MAVCOM.

Additionally, MAVCOM may issue interim measures in the context of an investigation (but not for notification and assessment):

- suspending the effect or desisting from acting in accordance with any agreement suspected of infringing any prohibition;
- desisting from any conduct that is suspected of infringing any prohibition; and
- to do or refrain from doing any act, but that shall not require payment of money.

Communications and multimedia sectors

The CMA sets out administrative actions available to the Minister or the MCMC:

- the Minister can modify, vary, revoke, impose further special or additional conditions of an existing individual licence;
- the Minister, on MCMC's recommendation, can suspend or cancel an individual licence; and

- the MCMC can direct a licensee in a dominant position to cease conduct that substantially lessens competition and implement appropriate remedies.

No specific provision for remedies can be found in the CMA. The MCMC has the power to determine the appropriate remedy subject to ministerial direction and the object of the CMA.

In administering the section 133 CMA prohibition and failure to comply with MCMC's directions pursuant to section 139 CMA, the MCMC may enforce the following remedies:

- interim or interlocutory injunction against any prohibited conduct; and
- fine up to 500,000 ringgit or imprisonment up to five years or both upon conviction. Offenders would also be liable for a further fine of 1,000 ringgit per day or part of a day during which the offence is continued after conviction.

Under the M&A Guidelines, the MCMC is also empowered to include the following directions in its notice of objection, including requirements that the licensee:

- must not transfer or assign any licences or spectrum assignment granted pursuant to the CMA to another entity for a proposed merger; and
- must not further integrate with another merger party if a merger has completed and involves a licensee in a dominant position and has the effect of substantially lessening competition in a communication market. The MCMC may also prevent the merged entity from trading.

Remedies and conditions

25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Aviation services sector

A merger party may, voluntarily or upon invitation, propose an undertaking to do or refrain from doing anything, which MAVCOM has the right to accept or reject. If MAVCOM accepts, it must close the investigation without finding of infringement or imposition of a penalty. Undertakings can be both structural and behavioural.

Communications and multimedia sectors

In respect of authorisation, MCMC can require the licensee to submit an undertaking regarding its conduct in any matter relevant to the authorisation. Licensees can subsequently withdraw such undertaking and the authorisation that was granted based on the undertaking provided will be deemed to have never been given.

With respect to the notification regime, it is not clear if MCMC would be prepared to accept voluntary commitments offered by parties to a merger as part of the informal assessment process without having to go through a formal authorisation clearance pursuant to section 140 CMA.

26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

Aviation services sector

MAVCOM can impose remedies upon finding an infringement by taking into consideration:

- whether the remedial action can restore the competition that would be substantially lessened as a result of a merger or an anticipated merger;
- whether the remedial action would be effective to stop the infringement or to remedy, mitigate or prevent a substantially lessening

of competition effect arising from the merger or an anticipated merger; and

- the cost of monitoring the remedial action.

The NAP Guidelines spell out conditions applicable to the sale of business as a structural remedy:

- such business is required to be capable of being fully separated from the merger party;
- the approval of the purchaser may be required prior to the sale of the business; and
- to consider an enterprise that is willing to pay a commercially reasonable price for a business as an alternative purchaser even if the price is lower than the price that a merger party is willing to pay for the acquisition of that business.

In this regard, MAVCOM may specify that the sale must be completed within a certain period of time, failing which an independent trustee may be appointed, to monitor the operation of the business pending disposal or to handle the sale at the expense of such merger party.

MAVCOM may consider behavioural remedies in the following situations:

- divestment of business would be impractical or disproportionate to the nature of the competition concerns; and
- behavioural remedy is necessary to support structural divestment; for example, MAVCOM may direct a merger party to refrain from approaching buyers of the divested business for a specified period so as to allow the buyers of the divested business to be a viable and effective competitor.

Communications and multimedia sectors

The MCMC is given the power to request for an undertaking regarding a licensee's conduct in any matter relevant to the authorisation. Undertakings that the MCMC may require with an authorisation of conduct may include:

- proceeding with the merger in a substantially restructured form;
- a specific division to be sold off;
- the negative competitive effects of the merger to be addressed in some other form;
- expand or allow fair and reasonable access to vital infrastructure or services to customers or competitors;
- not acquire assets within a specific time period, if doing so would have the effect of strengthening the merged or acquired entity's market power; and
- in the case of a firm acquiring direct or indirect control of another, all dealings between the parties will continue on arm's length basis and measures will be put in place to ensure this remains the case

27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

None published.

Ancillary restrictions

28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The powers given to MAVCOM and the MCMC (in the M&A Guideline) appear to be wide enough to make decisions covering ancillary restrictions, but the circumstances in which decisions by MAVCOM and the MCMC would cover ancillary restrictions is unclear.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 | Are customers and competitors involved in the review process and what rights do complainants have?

Aviation services sector

Customers and competitors may be contacted for information gathering under the Phase 1 assessment and public consultation. It is unclear who would be the parties involved in an investigation where MAVCOM is not notified.

Any individual or enterprise may make a complaint to MAVCOM regarding any suspected infringement of Part VII MACA in the aviation services. Those who suffer loss or damage as a result of infringement have a right to civil action.

Communications and multimedia sectors

Under the M&A Guideline, the MCMC's assessment of competitive effects of a M&A involves public consultation with competitors, customers and even suppliers.

A person can lodge a complaint regarding any suspected infringement to the MCMC. However, the MCMC may decide whether to give a complainant the opportunity to appear before MCMC in relation to an investigation. As mentioned above, an interim or interlocutory injunction can be sought by anyone, against any prohibited conduct under the CMA.

Publicity and confidentiality

30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Aviation services sector

Commercial information is not automatically treated confidentially. Confidentiality is available to claims that MAVCOM determines to have merits prior to issuance of its proposed decision and a decision in a voluntary regime. There is no mention of confidentiality safeguards in relation to MAVCOM's public consultations. Hence, it is prudent for a merger party to specify that the information disclosed to MAVCOM is of a 'commercial and confidential' nature.

Communications and multimedia sector

The AC Guideline allows a licensee to provide confidential information in a separate annexure from the application form, clearly marked as 'confidential'. A public inquiry may form part of the investigation process under this route if the conduct in question is of significant interest to consumers or licensees. The MCMC may decide not to publish evidence or material presented to the inquiry or lodged with the MCMC that it considers to be confidential in nature.

Confidentiality is partially warranted in the M&A Guideline. An applicant has to redact commercially sensitive or confidential information to be used in the MCMC's consultations with third parties.

Under the M&A Guideline, the MCMC would conduct a limited confidential assessment of a M&A where its confidentiality needs to be preserved.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

None published.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

Aviation services sector

Persons affected by MAVCOM's decisions may apply to the Minister for a merger or anticipated merger to be exempt from the prohibition on the ground of public interest. MAVCOM's decision, act, omission, refusal, direction or order can also be challenged in the High Court.

Communications and multimedia sectors

An applicant's right to appeal against the MCMC's decision to the Appeal Tribunal exists under the CMA. The M&A Guideline explains that M&A parties may appeal for review of the MCMC's decision. Appeals are not available to third parties nor on the MCMC's determinations that a M&A party is in a dominant position.

A person affected by the Minister's or the MCMC's decision or other action may apply to the court for a judicial review upon exhausting all other remedies under the CMA.

Time frame

33 | What is the usual time frame for appeal or judicial review?

Aviation services sector

Applications for exemption must be made within 14 days of the date of MAVCOM's notice. Appeals to the High Court must be made within three months of the date on which the decision was communicated.

Communications and multimedia sector

There is no time frame prescribed by the CMA for appeal to the Appeal Tribunal at this juncture.

The time period for application for judicial review is three months from the date the grounds of application first arose or when the decision was first communicated to the applicant.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

None that have been made public.

Reform proposals

35 | Are there current proposals to change the legislation?

See question 36.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

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. Based on news reports, it is understood that the MyCC has begun the process of seeking legislative amendments to include new provisions on mergers and acquisitions into law. The MyCC aims to implement a merger control regime by the end of 2019.

Until this amendment to the law is made, the MyCC has clarified that it is not in a position to evaluate or prevent anticompetitive mergers

and acquisitions from taking place. It can only act if the merged entity starts abusing its dominant position.

The MCMC has finalised and issued the M&A Guideline and AC Guideline on 17 May 2019, shortly after the announcement of the proposed merger between Axiata Group Bhd (Axiata), owner of Celcom Axiata Bhd, and Norwegian Telenor Group (Telenor), owner of DiGi.com Bhd. It is unclear whether the parties have notified the merger for assessment or whether they are pursuing an application for authorisation.



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