THE Merger Control Review

Tenth Edition

Editor
Ilene Knable Gotts

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THE MERGER CONTROL REVIEW

TENTH EDITION

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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, most recently in South America, have added 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.

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 before, 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 32 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 is now the major exception in this regard since China consolidated its three antitrust agencies into one agency this year. 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 opportunity to review transactions

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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 its 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, 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 before completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made before 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. Chile's antitrust enforcer recommended a fine of US$3.8 million against two meat-packing companies, even though the parties had carved the Chilean business out of the closing.

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

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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 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.

The United States and the European Commission both have a long history of focusing on interim conduct of the transaction parties, which is commonly referred to as 'gun-jumping', even fining companies who are found to be in violation. For example, the European Commission (EC) imposed the largest gun-jumping fine ever of €124.5 million against Altice. Other jurisdictions have more recently been aggressive. 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 before approval appears to be considered an element of gun-jumping. The Korea Fair Trade Commission (KFTC) has imposed fines on over 50 transactions in the past two years that it deemed were not reported, were reported late, or were properly reported but implemented before the end of the waiting period. Also, for the first time, France imposed a fine of €20 million on the notifying party for failure to implement commitments fully within the time frame imposed by the authority.

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 KFTC, but when it faced difficulties and delays in Korea, the parties restructured the acquisition to render the transaction non-reportable 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 addition, the European Commission has fined companies on the basis that the information provided at the outset was misleading (for instance, the EC fined Facebook €110 million for providing incorrect or misleading information during the *Facebook/WhatsApp* acquisition).

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

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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 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 antitrust 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 US, 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 is very evident. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction following the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the FTC and the Canadian Competition Bureau

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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. This past year, for instance, many jurisdictions coordinated on the *Linde/Praxair* and the *Bayer/Monsanto* transactions. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

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, 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 United Kingdom 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

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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 anti-dumping 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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Part II

Jurisdictions

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Chapter 23

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.

In May 2019, YTL Cement Bhd (YTL) acquired a controlling stake in Lafarge Malaysia Bhd (Lafarge). This would make YTL a dominant cement producer in Malaysia with around 60 per cent market share in terms of production capacity for cement and ready-mixed concrete. MyCC clarified that it is not in a position to stop such mergers and acquisitions from taking place. MyCC will only act if the merged entity starts abusing its dominant position.

There are, however, sector-specific laws and guidelines that regulate the antitrust aspects of mergers. The sectors are aviation services, and communications 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 include 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) 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 of the MACA prohibits mergers that have resulted, or may be expected to result, in a substantial lessening of competition in any aviation service market.

1 Shanthi Kandiah is the founding partner at SK Chambers. She was assisted by Henin Tong, Denishia Rajendran and Nimraat Kaur (associates at SK Chambers) in writing this chapter.

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

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MAVCOM has also published the following guidelines on mergers:

a the Guidelines on Substantive Assessment of Mergers (SAM Guidelines), 20 April 2018;
b the Guidelines on Notification and Application Procedure for an Anticipated Merger or a Merger (NAP Guidelines), 20 April 2018; and
c the Guidelines on Aviation Service Market Definition, 19 January 2018.

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
d any other service determined by MAVCOM to be necessary or expedient for the carriage of passengers, mail or cargo referred to in point (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 (fixed schedule journeys), air service permits for non-scheduled services, aerodrome operator licences and ground handling licences.[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 and other aircraft operators.

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

a 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 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 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.

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

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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 of the assets (including goodwill), or a substantial part of assets, of another 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.

Section 48 of the MACA 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 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'.

A key factor in determining whether a joint venture falls within the scope of the MACA is, for example, whether the joint venture is intended to operate on a lasting basis. Factors to determine 'intention' include:

a commitment of resources by the parent enterprises for the carrying out of the joint venture's functions as an autonomous economic entity;

b where an agreement forming the joint venture provides for a specific period, the period must be long enough to cause a lasting change in the structure of the enterprises concerned or provide for continuation of the joint venture beyond such specified period. However, provisions on the possibilities of dissolution of the joint venture by themselves do not prevent the joint venture from being considered as operating on a lasting basis;

c 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

d a joint venture under Section 54(2)(d) MACA would be jointly controlled by the enterprises that are parties to such joint venture where such enterprises are capable of exercising decisive influence with regard to the activities of the joint venture.

The treatment of full-function joint ventures as mergers is also an important development for the aviation sector in the wake of increasing collaborations 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 MACA 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 aviation services market in Malaysia.

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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.

ii Communications and multimedia sector

The communications and multimedia sector in Malaysia is regulated by the MCMC under the Communications and Multimedia Act 1998 (CMA). The CMA has been expressly carved out of the application of the CA.[4]

The MCMC oversees the regulatory framework for the converging industries of telecommunications, broadcasting and information and communications technology 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 the sector regulator, it has *ex ante* powers and *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). The MCMC has 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. These three main prohibitions that relate to anticompetitive conduct are:

a Section 133 expressly forbids conduct that 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 MCMC, before 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 Guideline on Substantial Lessening of Competition (SLC Guideline), 24 September 2014;

b Guideline on Dominant Position (DP Guideline), 24 September 2014; and

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

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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On 17 May 2019, the MCMC issued the final versions of the following guidelines:

a Guideline on Mergers and Acquisitions (M&A Guidelines); and

b Guideline on Authorisation of Conduct (AC Guidelines).

The M&A and AC Guidelines introduce two routes that a licensee may take in relation to clearance of a merger:

a notification to obtain MCMC's views in respect of the competitive effects of a merger or acquisition (where the applicant receives a no-objection or objection letter as the case may be); and

b authorisation of a merger where the merger will promote national interest.

On 6 May 2019, Axiata Group Bhd (Axiata), owner of Celcom Axiata Bhd, and Norwegian Telenor Group (Telenor), owner of DiGi.com Bhd, announced the proposed merger of their business operations in Asia. If the proposed merger materialises, it will create Malaysia's largest cellular operator. It is unclear whether the parties have notified the merger for assessment or whether they are pursuing an application for authorisation.

Definition of a merger

Paragraph 4.40 of the 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.

A merger or acquisition may raise competition concerns only if it lessens competition by reducing or weakening the competitive constraints in a market or reducing the incentives for competitive rivalry. Accordingly, MCMC has 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

The CMA does not define 'joint venture'. However, the M&A Guidelines explain that MCMC regards 'mergers and acquisitions' to constitute 'conduct which has the purpose of substantially lessening competition in a communications market'. The guidelines further state that MCMC will deem a merger to have taken place when, inter alia, 'a joint venture created to perform, on a lasting basis, all the functions of an autonomous economic entity and involves changes in the shareholding structure of the firm' occurs.

Foreign-to-foreign mergers

The CMA and its subsidiary legislation apply to any person beyond the geographical limits of Malaysia and its territorial waters if such person:

a is a licensee under the CMA; or

b provides relevant facilities or services under the CMA in a place within Malaysia.[5]

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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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. The Draft M&A Guidelines do, however, provide guidance on thresholds for notification and assessment:

Type of merger	Threshold for notification
Proposed horizontal merger	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	The merged entity is a licensee in a dominant position.
Proposed non-horizontal merger	At least one of the parties to the merger is a licensee in a dominant position.
Completed non-horizontal merger	The merged entity is a licensee in a dominant position.

The MCMC may also initiate investigations into a merger where there is allegation of anticompetitive conduct.

II YEAR IN REVIEW

i Aviation services sector

Apart from guidelines issued by MAVCOM (detailed in Section I.i), MAVCOM has also issued the Notification and Application Form for an anticipated merger or a merger. The information and supporting documents required by MAVCOM consist of, among others:

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

The gazetting of the Malaysian Aviation Commission (Amendment) Act 2018 on 10 January 2018 introduced the imposition of financial penalties for non-compliance with guidelines expedient or necessary for the better carrying out of the provisions on competition.

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This amendment is significant because it allows MCMC to impose high administrative penalties of up to 1 million ringgit (on individuals) and up to 5 per cent of a body corporate's annual turnover from the preceding final year (on body corporates).

ii Communications and multimedia sector

As mentioned, on 17 May 2019, the MCMC has issued the final versions of the M&A and AC Guidelines.

Axiata and Telenor's proposed merger will be scrutinised by the MCMC. The deal has prompted concerns of a monopoly in Malaysia's telecommunication sector. If allowed, the merged entity will have 267 million customers in nine countries. The MCMC has announced that it is currently evaluating the deal and will only approve after a thorough review, although no definitive timeline has been set for the review.

III THE MERGER CONTROL REGIME

i Aviation services sector

Voluntary regime

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

A decision by MAVCOM is in the form of a finding of infringement under Section 59(1) of the MACA or non-infringement under Section 58 of the MACA. 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.

The NAP Guidelines provide instances of directions that can be imposed by MAVCOM:

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

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.

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

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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 MACA 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 MACA or to take actions required in order to comply with MACA.

Interim measures

Section 57 of the MACA sets out MAVCOM's power to issue interim measures. This power only arises upon commencement of an investigation that has not been completed (i.e., 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 sets 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 and desist from acting in accordance with any agreement;
b desist from any conduct which is suspected to infringe a prohibition; or
c 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).

For anticipated mergers, notification and application can be made to MAVCOM when:

a merger parties have a bona fide intention to proceed with the anticipated merger;
b details of the anticipated merger are available; and
c the anticipated merger has been or may be made public by any party, or may be made public by MAVCOM through the publication of an application summary.

For completed mergers, notification and application can be made at any time, but merger parties are encouraged to do so as soon as possible after the merger is completed.

Time frame for assessment

The duration for the assessment of an application, based on the NAP Guidelines, will depend on complexity of issues, and timeliness and completeness of information provided by the enterprises.

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Pre-notification discussion

The NAP Guidelines state that the CMA does not provide for a merger party to consult or seek guidance from MAVCOM on whether an anticipated merger or a merger would infringe Section 54 of MACA or should be notified to MAVCOM and applied for a decision.[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, MAVCOM has the power to decide structural and behavioural remedies. Structural remedies may include sale of business or assets to introduce structural modifications to the market. Behavioural remedies would subject merger party to specific operating rules.

Appeals

A party affected by an infringement decision by MAVCOM 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 to the High Court also exist 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, the 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). The 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 email 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, the 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) of the CMA provides that a licensee may apply to the MCMC for authorisation of the conduct where a merger will promote national interest. It is essentially a voluntary regime. Given the MCMC's regulatory leverage, licensees tend to err on the side of caution and consult the MCMC, particularly since the MCMC has expressed an interest in monitoring mergers in the sector.

Section 143 of the CMA provides for criminal penalties for contravention of any prohibition of Chapter 2 Part VI, which includes a fine of up to 500,000 ringgit or imprisonment for up to five years, or both. A person may further be liable to a fine of 1,000 ringgit for every day or part of a day during which the offence continues after conviction.

Further administrative actions available to the MCMC under the CMA 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 – the 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]

There are no express provisions in the CMA on notification and assessment of mergers and acquisitions. The M&A Guidelines, however, provide for a voluntary regime for notification and assessment, separate from an authorisation under Section 140 of the CMA.

Interim measures

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

Timing for notification

Section 140(1) of the CMA provides that a licensee may apply to the MCMC, before engaging in conduct that 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 the 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.

For notification and assessment under the M&A Guidelines, parties should submit their transactions before completion. It is recommended under the same guidelines that merger parties include as a condition precedent to the completion of their merger transactional documents requiring the approval of the MCMC in circumstances that would indicate that

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 CMA, national policy and any directions issued by the Minister.

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the merger has the potential to raise anticompetitive concerns. In recognition of the fact that mergers may have proceeded before the introduction of the voluntary assessment process via the guidelines, the MCMC will also assess these types of completed mergers.

Time frame for review

The M&A Guidelines provide for a two-phase review process with an indicative timeline of 30 days and 120 days for each phase respectively.

Suspensory regime

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

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

Undertakings

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

The M&A Guidelines allow an undertaking under the notification route as long as it involves a licensee and an anticipated merger that has yet to take place.

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 MCMC.

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

IV OTHER STRATEGIC CONSIDERATIONS

What remains unclear is the application of the merger regimes to mergers between parties that are not licensees under the MACA and the CMA.

The MACA appears to apply to any merger that results or is expected to result in a substantial lessening of competition in any aviation service market. Its scope appears to be broader than just licensees. This is substantiated by the fact that MAVCOM has the power to determine any other service that is necessary or expedient to, for example, the carriage of passengers as an aviation service, whether or not the service is provided by a licensee.

With respect to the communications industry, the M&A Guidelines of the MCMC in defining a merger (Paragraph 3.10) does not reference the licensee. However, as the MCMC's powers are limited by the scope of Sections 133 and 139 of the CMA (which relate to the conduct of a licensee), the definition of a merger for the purposes of the M&A Guidelines may be similarly limited.

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V OUTLOOK AND 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. Based on news reports, MyCC has begun the process of seeking legislative amendments to introduce new provisions on mergers and acquisitions into law. MyCC aims to implement a merger control regime by the end of 2019. It will be important to ensure that the agency is appropriately funded and resourced to take this mandate on.

The aviation services and communications and multimedia sectors are exceptions in this regard. MAVCOM has introduced the SAM Guidelines and NAP Guidelines, and intends to introduce further guidelines in future, while the MCMC has issued the M&A and AC Guidelines, thus providing clarity on the MCMC's approach in regulating the mergers and acquisitions in these sectors. The merger control provisions in the MACA provide a useful template that could be broadened to other sectors 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 specialising in competition law, telco regulatory, data protection and cybersecurity. Her competition law practice covers antitrust litigation, cartels, sectoral competition regimes, 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. Recently, she acted as coordinating counsel in the largest enforcement action to date by the Malaysian Competition Commission involving fines exceeding 200 million ringgit. On mergers, recent assignments include serving as local counsel on a multi-jurisdiction merger transaction led by a magic circle firm. She has also successfully advised on antitrust approval for acquisitions in the communications and multimedia sector. 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, London.

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