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A dark grey silhouette map of the Asia-Pacific region, including India, Southeast Asia, China, and Australia, set against a black background. The map is centered behind the title text.

ASIA-PACIFIC
ANTITRUST REVIEW 2020

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Preface

Global Competition Review is a leading source of news and insight on national and cross-border competition law and practice, with a readership that includes top international lawyers, corporate counsel, academics, economists and government agencies. GCR delivers daily news, surveys and features for its subscribers, enabling them to stay apprised of the most important developments in competition law worldwide.

GCR's coverage of Asia continues to expand, with a senior reporter now stationed in Hong Kong and more plans for growth following Law Business Research's merger with Globe Business Media Group.

Complementing our news coverage, *Asia-Pacific Antitrust Review 2020* provides an in-depth and exclusive look at the region. Preeminent practitioners have written about antitrust issues in nine jurisdictions, as well as one regional overview for merger control. The edition includes updates to 16 chapters and adds three new ones: two chapters on merger control in India and Vietnam, and another on leniency in India. The authors are unquestionably among the experts in their field within these jurisdictions and the region.

The volume includes contributions from the chairs of the Australian Competition and Consumer Commission and Korea's Fair Trade Commission, as well as the chief executives of Hong Kong's Competition Commission and Singapore's Competition and Consumer Commission. Other experts look at a range of subjects, including abuse of dominance and vertical agreements in China and e-commerce in Japan.

This annual review expands each year, especially as the Asia-Pacific region gains even more importance in the global antitrust landscape. It has some of the world's most developed enforcers – in Australia, Korea and Japan, for example – but it also has some of the world's newest competition regimes, including in Malaysia and Hong Kong.

If you have a suggestion for a topic to cover or would like to find out how to contribute, please contact insight@globalcompetitionreview.com. GCR thanks all of the contributors for their time and effort.

Global Competition Review
London
March 2020

Malaysia: Overview

Shanthi Kandiah

SK Chambers

The year 2019 saw a series of enforcement actions taken by the Malaysia Competition Commission (MyCC). Key highlights include the MyCC's first ever bid-rigging case in public procurement and the investigation launched on Grab Inc, GrabCar Sdn Bhd and MyTeksi Sdn Bhd (collectively, Grab) for alleged abuse of dominance.

On 9 January 2020, the MyCC announced that it has also issued a proposed decision against seven warehouse operators for the fixing of rates on long-length handling and heavy-lift handling services. The MyCC emphasised that price-fixing cartels are the supreme evil of competition law and must be stopped in order to protect the consumers.¹ This recent announcement emphasises the continued priority placed by the MyCC on combating cartel conduct.

Anti-monopoly policy?

The regime change in government following the 2018 general elections appears to have paved the way for a review of competition law and policy in Malaysia. There are some positive signs that anti-monopoly competition policy will gain traction in the years to come, as evidenced by the government's action in the following industries:

- telecommunications – the implementation of the Mandatory Standard on Access Pricing, which requires that infrastructure providers give access to their networks at regulated prices, has reduced broadband prices by 49 per cent on average since the end of 2018;² and
- sugar – as at 6 December 2019, the Ministry of Domestic Trade and Consumer Affairs (MDTCA) granted 11 sugar import permits for Sarawak food and beverage manufacturers,³ and thus broke the monopolistic control over the sale of sugar in Malaysia's domestic market by two sugar refiners for many years.

1 www.mccc.gov.my/sites/default/files/pdf/newsroom/MyCC%20FINES%207%20COMPANIES%20FOR%20PRICE%20FIXING.pdf.

2 www.malaysiakini.com/news/472565.

3 www.theborneopost.com/2019/12/06/dr-yii-11-sarawak-companies-receive-aps-to-import-sugar/.

The deputy minister of the MDTCA, Chong Chieng Jen, stated that the next target in liberalising the sugar import industry is Sabah, signalling the government's continued efforts to break up monopolies in a bid to spur competition in business and reduce the cost of living. It is, however, uncertain when this initiative would expand to Peninsular Malaysia.

Additionally, the government identified a number of companies as potentially having a monopolistic position in the market: Padiberas Nasional Bhd (Bernas), Pusat Pemeriksaan Kenderaan Berkomputer (Puspakom), Pharmaniaga Bhd and MyEG Services Bhd (MyEG). The minister of the MDTCA, Datuk Seri Saifuddin Nasution Ismail, is quoted as saying that the government believes the increase in the cost of living was partly contributed by resources being controlled by a small group of individuals and big conglomerates. This serves as part of the government's initiative to liberalise the industry and promote competition and technological innovation in business and services.⁴

Merger control

Perhaps the most significant impediment to a robust anti-monopoly policy is the absence of merger control provisions in Malaysia's Competition Act 2010 (CA 2010). The CA 2010 presently only sets out prohibitions on anticompetitive agreements (horizontal agreements including cartels and vertical agreements) and abuses of dominant position. The absence of merger control powers deprives the MyCC and the government of a more direct influence over changes in market structures that may be adverse to competition.

The MyCC, which enforces the CA 2010, has begun the process of seeking legislative amendments to include new provisions on merger controls into law. It will be important to ensure that the MyCC is appropriately funded and resourced to take this mandate on.

There are sector-specific laws and guidelines that regulate the antitrust aspects of mergers; namely, aviation services and the 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 through prohibitions on anticompetitive agreements and conduct, as well as abuse of dominance.

Key developments at the Malaysia Competition Commission

Scope

The CA 2010, which came into effect on 1 January 2012, applies to all commercial activities undertaken within and outside of Malaysia that have an effect on competition in the Malaysian market, with the exception of commercial activity regulated under:

- the Communications and Multimedia Act 1998 (CMA 1998);
- the Energy Commission Act 2001 (ECA 2001);

⁴ www.thestar.com.my/business/business-news/2019/04/04/monopoly-watch.

- the Petroleum Development Act 1974 and the Petroleum Regulations 1974 (insofar as the commercial activities regulated under these pieces of legislation are directly connected with upstream operations comprising the activities of exploring, exploiting, winning and obtaining petroleum, whether onshore or offshore Malaysia); and
- the Malaysian Aviation Commission Act 2015 (MACA 2015).

Highlights

New guidelines

The long-awaited MyCC Guidelines on Intellectual Property Rights and Competition Law came into force on 6 April 2019. The MyCC would generally consider intellectual property licensing to be pro-competitive; however, any dealings involving intellectual property rights (IPR) may fall within the restrictions imposed by the CA 2010. For example, the MyCC may be concerned if an intellectual property owning enterprise enters into an anticompetitive agreement or any dominance created by the IPR is abused by the intellectual property owning enterprise. To illustrate, an agreement between IPR holders may have an adverse impact on downstream competition. Higher prices and excess profits, which do not form part of the proper reward from the innovation, may result from the anticompetitive agreement. Another example is where an IPR holder imposes conditions on a licensee, such as limiting the amount of product that the licensee can produce. The IPR holder is limiting competition in a downstream market in order to increase the price of the licensed product.

Enforcement actions

In terms of enforcement actions, the MyCC has imposed cease-and-desist orders and other corrective orders, as well as financial penalties by issuing proposed and final decisions. The MyCC's latest enforcement actions are discussed in detail below.

Market review

A market review was conducted on the food sector with a focus on five selected food items: beef, Indian mackerel, infant formula, mustard leaf and round cabbage. In August 2019, the MyCC published its findings and proposed recommendations to further improve the competition process within the five sub-sectors in tandem with the government's efforts and initiatives to reduce cost of living.

Ex officio investigations

In December 2018, the MyCC revealed that it is working closely with the MDTCA to identify any anticompetitive elements that may occur in the domestic market for chicken eggs, given recent price hikes in the price of eggs. At the time of writing, the MyCC has yet to issue any statement regarding further developments in this investigation.

Cartels

Cartel enforcement is positioned as a key priority for the MyCC. Section 4(2) of the CA 2010 – which deems price-fixing, market-sharing and bid-rigging, among others, as object infringements – continues to be heavily relied upon by the MyCC in its enforcement actions.

Updates from key cases pursued by the MyCC are discussed below.

Price-fixing cartels must be stopped in order to protect consumers

Proposed decision against seven warehouse operators

In the MyCC's most recently reported case, the MyCC issued a proposed decision against seven warehouse operators: Regional Synergy (M) Sdn Bhd, WCS Warehousing Sdn Bhd, Pioneerpac Sdn Bhd, Interocean Warehousing Service Sdn Bhd, Intrexim Sdn Bhd, SAL Agencies Sdn Bhd and Prima Warehousing Sdn Bhd for fixing rates for two services (ie, long-length handling and heavy lifting). The MyCC emphasised its stance on price-fixing stating that the price-fixing cartel is the 'supreme evil of competition law which must be stopped in order to protect the consumers'.

As part of the MyCC's new policy starting 2020, the amount of the proposed fine was undisclosed to the media pending a final decision being made.

Bid-rigging potentially a main area of focus for the MyCC

Proposed decision against eight enterprises

In March 2019, the MyCC issued a proposed decision against eight enterprises: Tuah Packet Sdn Bhd, Caliber Interconnects Sdn Bhd, Aliran Digital Sdn Bhd, Viamed Sdn Bhd, Novatis Resources Sdn Bhd, Silver Tech Synergy Sdn Bhd, Basenet Technology Sdn Bhd and Venture Nucleus (M) Sdn Bhd for their involvement in bid-rigging related to an information technology procurement valued at 1.92 million ringgit, submitted to ASWARA (the Academy of Cultural Arts and Heritage). ASWARA is a statutory body fully supported by the government under the Ministry of Tourism, Arts and Culture. The MyCC initiated an investigation into the eight enterprises found colluding with each other by sharing each other's Request for Quotations (RFQs) and tender proposal information, manipulating prices and preparing documents for one another, and further, the winner of the RFQs and tender also shared their profits with the losing bidders. The financial penalty proposed to be imposed on all eight enterprises collectively amounted to approximately 1.94 million ringgit.

As of 14 January 2020, the MyCC announced that it has opened up 11 bid-rigging cases for investigation.

The legal threshold for the MyCC to discharge in making out an infringement under the deeming provision for cartel infringements is being tested through the Courts

Judicial review of Competition Appeal Tribunal's Malaysian Airlines System Berhad (MAS)/Air Asia Berhad (AirAsia) decision

The MyCC scored a big win in December 2018 when the High Court of Kuala Lumpur reinstated the MyCC's decision to impose a fine of 10 million ringgit each against MAS and AirAsia for infringing the prohibition on anticompetitive agreements, overturning the decision of the Competition Appeal Tribunal (CAT).

The MyCC's case for market-sharing was built largely around the collaboration agreement between MAS and AirAsia. The CAT held that a plain reading of the terms of the collaboration agreement did not warrant a finding of restriction by object within the meaning of Section 4(2)(b) of the CA 2010. It further faulted the MyCC for not giving any reason or analysis for its decision that the purported object of the collaboration agreement was one of market-sharing.

In reinstating the MyCC's decision to impose a fine of 10 million ringgit each against MAS and AirAsia, the High Court held that the decision by the CAT in allowing the appeal by MAS and AirAsia to set aside the fine imposed by the MyCC was tainted with error of law and unreasonableness. The judge also held that the CAT had failed to consider that the collaboration agreement entered into between the two air carriers over sharing markets in the air transport services sector had an anticompetitive object. In April 2019, it was reported that the Court of Appeal fixed 13 December 2019 to hear the appeals filed by MAS and AirAsia against the High Court's ruling that upheld the 10 million ringgit fine on each of the two airlines.

For now, it appears that the interpretation preferred by the MyCC – that cartels cause harm by definition – prevails.

The unprecedented public disagreement between a sectoral regulator and the MyCC raises issues of jurisdiction

Proposed decision against PIAM and 22 of its members

In an ongoing case, the MyCC issued a proposed decision to the General Insurance Association of Malaysia (PIAM) and 22 of its members, being insurance companies, carrying a fine of 213.45 million ringgit, for allegedly being parties to an anticompetitive agreement between themselves. The decision received strong opposition from the Central Bank of Malaysia (BNM).

Based on BNM's press release, it is understood that BNM had issued a directive to general insurance companies in 2011 to address disputes between workshops and insurance companies over insurance payments for motor repairs. In compliance with the directive, PIAM and 22 of its members entered into an agreement with the Federation of Automobile Workshop Owners' Association of Malaysia to fix the parts trade discount for six vehicle makes and the labour hourly rate. The directive issued by BNM in 2011 was in response to disputes between repairers and insurers over the payment of claims for motor repairs causing protracted delays and inconvenience to consumers. The press statement by BNM also highlighted the fact that the arrangement was necessary to reflect the reasonable cost of repairs in an environment where motor insurance premiums are regulated by a tariff.

The MyCC has the most overlap with regulators governing key sectors (except those clearly exempted) that usually have the mandate to create, promote and protect competition in their industries. Sectoral regulators intervene where the possibility of market failure is high or where there are natural monopolies. The idea is to regulate firms in these industries in such a way that even when a competitive market cannot be ensured, the outcome in terms of prices and output will be nearly the same as if the market had been competitive.

It was reported in August 2019 that the MyCC is likely to reach a decision on the proposed 213.45 million ringgit fine on PIAM and 22 of its members sometime in 2020.

Abuse of dominance

Section 10 of the CA 2010 prohibits enterprises from engaging in conduct that amounts to abuse of dominance in a relevant market. Further developments in relation to notable cases enforced by the MyCC recently are discussed below.

Proposed decision on Grab

In October 2019, the MyCC issued a proposed financial penalty of 86.7 million ringgit against Grab and provisionally found that Grab had abused its dominant position by imposing a number of restrictive clauses on its drivers that prevented the drivers from promoting and providing advertising services for Grab's competitors in the e-hailing and transit media advertising markets. Grab submitted its written representation in response to the MyCC's proposed decision on 30 December 2019. It has been reported that the final review will be concluded by the MyCC within 2020.⁵

Judicial review by the High Court on MyEG

The first abuse of dominance case enforced by the MyCC concerns MyEG, an electronic government service that enables employers to renew insurances for foreign and domestic workers. MyEG, via its subsidiary, also engaged in the sale and purchase of insurance as an insurance agent. For renewals to be approved, employees must upload mandatory insurance policies through MyEG's electronic government service. However, renewals of insurance policies purchased from other insurers were not approved as fast as renewal policies purchased from MyEG. The MyCC found that, as a dominant concessionaire, MyEG is obliged to grant equal access of its facilities and promote competition in the downstream market. On appeal, the CAT upheld the MyCC's decision in finding an infringement under Section 10(2)(d)(iii) of the CA 2010 for abuse of dominance and increased the financial penalty imposed by the MyCC to 6.2 million ringgit.

MyEG then filed for judicial review of CAT's decision at the High Court, which dismissed MyEG's application and upheld the decision of the MyCC on the basis that the conduct by MyEG of using its dominance in the upstream market to induce end users to use its services in the downstream market has put other agents and insurance companies at a competitive disadvantage. MyEG, in its position as the dominant concession holder in the upstream market, has failed to ensure that there is a platform equally available to all, so that there is no abuse in the downstream market. The High Court further considered that MyEG holds the monopoly in the provision of PLKS renewal services and had established MyEG Commerce Sdn Bhd to act as an agent for RHB Insurances (and other insurance companies) to provide for the purchase of the mandatory insurances. Due to its dominance in the upstream market, MyEG has a special responsibility to ensure that its conduct did not have exclusionary effect in the downstream market. As of 5 March 2019, it was reported that MyEG paid 6.4 million ringgit out of the total penalty amounting to 9.64 million ringgit (which included a daily penalty of 7,500 ringgit imposed on MyEG until MyEG adheres to the directions imposed by the MyCC to provide an efficient gateway for all of its competitors in the downstream market).

5 www.theedgemarkets.com/article/decision-grabs-fine-abusive-practices-be-concluded-year-says-mycc.

Proposed decision on Dagang Net Technologies (Dagang Net)

In July 2018, Dagang Net was provisionally found to have infringed Section 10(2) of the CA 2010 for allegedly abusing its position as a monopoly provider of trade facilitation services under the National Single Window by refusing to supply electronic mailboxes to end users of the customs operating system. Dagang Net was also provisionally found to have imposed an exclusivity clause on its business partners that would have had the effect of distorting competition in the provision of trade facilitation services under the National Single Window, thereby creating a barrier to entry. The MyCC imposed a proposed financial penalty of 17.4 million ringgit, as well as a directive on Dagang Net to cease and desist its infringing conduct and any future conduct that may disrupt competition. The directors and senior management of Dagang Net and its related companies were required to undergo a competition law compliance programme within three months of the issuance of the proposed decision. To date, there have been no developments reported in relation to this case.

Undertakings accepted by the MyCC

Section 43 of the CA 2010 empowers the MyCC to accept undertakings from enterprises. The MyCC previously conducted an investigation into the Sabah Tourist Guides Association (STGA) and its members who were suspected of fixing the fee rates of tourist guide services. On 30 August 2019, the executive council of the STGA, on behalf of the members of STGA, signed an undertaking to withdraw and repeal all prior decisions or proposals made in relation to the agreed or revised rates for tourist guide services including but not limited to the Minimum Tourist Guides Professional Fees (effective 1.3.2009), among others things. No financial penalties were imposed on the STGA or its members as a result of the undertaking. The acceptance of the undertaking by the STGA reinforces the position that the MyCC would be willing to accept undertakings even in price-fixing cases. In the past, the MyCC has accepted undertakings by sand operators, container depot operators and heavy construction equipment owners investigated for price-fixing issues.

Judicial review in respect of the MyCC's notice to require provision of information and documents

In 2019, two separate applications for judicial reviews were made by enterprises in respect of the notices issued by MyCC to require the provision of information and documents from these enterprises. The MyCC investigated these enterprises for price-fixing. In holding that the applications did not carry any merit, the High Court stated that the MyCC's investigations had not been completed and that the applicant was not entitled to obstruct the MyCC's investigations with frivolous excuses. It appears, from these decisions, that for an enterprise to resist a request by the MyCC to provide information and documents for the purpose of investigations, there must be a stronger reason for doing so.

Outlook for 2020

Past years have seen large-scale mergers and acquisitions take place, including the acquisition of Uber's Southeast Asian operations by Grab Inc (and its subsidiaries and related entities), and the merger between YTL Cement Bhd and Lafarge Malaysia Berhad. Coupled with the fact that one of

the most significant absences in Malaysia's competition law framework is the lack of power under the CA 2010 to address anticompetitive mergers, it is little surprise that the MyCC has begun the process of seeking legislative amendments to include new provisions on merger control, and the law is expected to be amended to include merger control provisions by 2020.

The minister of the MDTCA has also expressed two other key areas that the MyCC will be looking into in 2020: bid-rigging and the continued monitoring for issues relating to the digital economy. We believe that the MyCC will continue to place special emphasis on preventing abuse of economic power by large conglomerates and guaranteeing fair competition opportunities for small to medium enterprises.

Key developments in the Malaysian Aviation Commission Act 2015

Part VII of the MACA 2015 governs anticompetitive practices in the aviation service market in Malaysia. It largely mirrors the CA 2010 in its competition provisions by prohibiting anti-competitive agreements and abuse of dominance in the aviation service market. However, one major difference between the CA 2010 and the MACA 2015 is that the MACA 2015 sets out provisions on merger control.

MAVCOM, as sector regulator, has a wide range of ex ante regulatory tools to achieve its outcomes for the sector. MAVCOM has wider responsibility for the regulation of economic and commercial matters within the civil aviation industry. Other responsibilities include the issuance of air services licences (fixed schedule journeys) and air service permits for non-scheduled services. MAVCOM also issues aerodrome operator licences for airport operators and ground-handling licences to those who wish to carry out ground-handling services in Malaysia.

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.

In December 2019, press reports mentioned plans to merge MAVCOM with the Civil Aviation Authority of Malaysia (CAAM). It remains to be seen whether the role of MAVCOM as the sector regulator will be taken up by the CAAM or whether it will revert to the MyCC.

Highlights

Pursuant to the Malaysian Aviation Commission (Amendment) Act 2018, MAVCOM has been empowered to impose high administrative penalties of up to 1 million ringgit on individuals and up to 5 per cent of a corporate body's worldwide annual turnover from the preceding final year.

In 2018, MAVCOM published the following guidelines:

- Guidelines on Aviation Service Market Definition;
- Guidelines on Anti-Competitive Agreements;
- Guidelines on Abuse of Dominant Position;
- Guidelines on Substantive Assessment of Mergers;
- Guidelines on Notification and Application Procedure for an Anticipated Merger or a Merger;
- Guidelines on Determination of Financial Penalties; and
- Guidelines on Leniency Regime.

There are no infringement actions taken pursuant to the competition provisions in the MACA 2015, nor have there been merger applications made based on publicly available information.

As with the CA 2010, enterprises in the aviation service sector can make an individual or block exemption application to MAVCOM. To date, only one application for individual exemption has been approved and gazetted (ie, individual exemption by All Nippon Airways Co Ltd and United Airlines Ltd, which will expire on 10 May 2022). There are three applications for individual exemptions by various airline operators that are currently under consideration or pending official approval by MAVCOM. These are applications made by:

- Singapore Airlines Limited and Deutsche Lufthansa AG in relation to a joint venture agreement for parties to cooperate in schedule coordination and capacity management, pricing and inventory management, sales, marketing and revenue sharing;
- Malaysia Airlines Berhad and Japan Airlines Co Ltd in relation to a metal neutral partnership for scheduled air passenger services between Malaysia and Japan. The parties will cooperate in scheduling, capacity management, sales and marketing, performance monitoring and revenue planning. Based on a press release in December 2019, it is understood that Malaysia Airlines Berhad and Japan Airlines Co Ltd are set to launch a joint business structure in 2020 following MAVCOM's decision to grant an individual exemption and Japan's Ministry of Land, Infrastructure, Transport and Tourism to grant an antitrust immunity; and
- Malaysia Airlines Berhad and Singapore Airlines Limited in relation to a metal neutral joint business partnership for air passenger services between Malaysia and Singapore operated by Malaysia Airlines Berhad and its sister company, FlyFirefly Sdn Bhd, as well as Singapore Airlines Limited and its subsidiaries, SilkAir Pte Ltd and Scoot Tigerair Pte Ltd.

Merger control under the MACA 2015

Section 54 of the MACA 2015 strictly prohibits mergers that have resulted or may be expected to result in a substantial lessening of competition in any aviation service market.

Parties to a merger can voluntarily make an application to MAVCOM notifying of an anticipated merger pursuant to Sections 55 and 56 of the MACA 2015. MAVCOM may also initiate an investigation under Section 83 of the MACA 2015 if there is reason to suspect that an anticipated merger would infringe Section 54 of the MACA 2015.

The guidelines published by MAVCOM state that notification of an anticipated merger is unlikely to result in an imposition of a financial penalty. However, MAVCOM may impose a financial penalty if it is satisfied that the infringement was committed intentionally or negligently. Pursuant to Section 59(2) of the MACA 2015, a person affected by MAVCOM's decision can apply to the minister for the anticipated merger to be exempted from prohibition on the ground of any public interest consideration. Public interest considerations are said to be confined only to matters of public or national security and defence.

As recent as 24 January 2020, it was reported that Malaysia Airlines Bhd, the national airline of Malaysia, may potentially be sold to its biggest competitor, AirAsia Group Berhad. It remains to be seen whether the clearance will be sought by the parties and whether the authorities will clear the merger.

Applicability to joint ventures

The MACA 2015 treats full-function joint ventures as mergers. The Guidelines on Substantive Assessment of Mergers explains 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 2015 is, for example, whether the joint venture is intended to operate on a lasting basis. The treatment of full-function joint ventures as mergers in the aviation services sector is also an important development for the aviation sector in the wake of increasing collaborations between airlines via alliances and code sharing, and involving varying degrees of integration of operations. Merger laws introduce another vehicle through which airlines may structure collaborations.

Key developments in the Communications and Multimedia Act 1998

The MCMC oversees the regulatory framework for the converging industries of telecommunications, broadcasting and information and communications technology industries as set out in the CMA 1998. The CMA 1998, which came into effect in April 1999, has four key areas of regulatory oversight: economic regulation, technical regulation, social regulation and consumer protection. Importantly, it has exclusive jurisdiction to apply competition law to its licensees.

These regulations were designed to develop the communications and multimedia industry for the ultimate benefit of consumers.

Technical regulation is generally ex ante (ongoing)

This involves setting standards and allocating publicly controlled resources. Allocation of spectrum can be considered a technical issue (ie, determining the most technically efficient use of the spectrum and allocating it to the most technically efficient user). However, this may result in a substantial lessening of competition if the best technical use of the spectrum is for a single operator to get it all. Competition policy has not featured strongly in decisions surrounding spectrum allocation to date.

Economic regulation

Access to bottleneck facilities and services are key to promoting competition in the telecommunications market. Examples of such bottlenecks are last-mile copper and fibre networks. As the sector regulator it has ex ante powers such as intervention before the fact (eg, price control and access conditions). The MCMC has primarily used ex ante means to resolve structural issues and promote competition.

The MCMC also possesses ex post competition law enforcement powers through Sections 133, 139 and 140 of the CMA 1998, though it has not used these powers much since 1998. In essence, these set out the three main prohibitions that relate to anticompetitive conduct:

- Section 133 of the CMA 1998 expressly forbids conduct that has the purpose of substantially lessening competition;
- Section 139 of the CMA 1998 gives the MCMC the power to direct a licensee in a dominant position to cease conduct that has the effect of substantially lessening competition; and

- Section 140(1) of the CMA 1998 states that a licensee may apply to the MCMC for authorisation prior to engaging in any conduct that may be construed to have the purpose or effect of substantially lessening competition.

As regards merger control, MCMC issued the Guidelines on Mergers and Acquisitions and the Guidelines on Authorisation of Conduct on 17 May 2019. Under the Guidelines on Mergers and Acquisitions, notification of any mergers and acquisitions to MCMC is done on a voluntary basis.

Highlights

Earlier in 2019, Axiata Group Berhad and Telenor Group (which is a substantial shareholder of Digi.Com Berhad) were reportedly looking at merging their operations in the ASEAN region to create a global champion that has a pro forma revenue of over 50 billion ringgit. The Guidelines on Mergers and Acquisitions and the Guidelines on Authorisation of Conduct were issued by the MCMC at the height of these merger talks. However, the merger was eventually called off by the parties due to the 'complexities' involved in the proposed transaction, but parties did not rule out the possibility of a future transaction.

On 19 September 2019, the government launched the five-year National Fiberisation and Connectivity Plan (NFCP) to further enhance digital connectivity in the country and ensure essential infrastructure is in place to offer a robust, pervasive, affordable and high quality digital connectivity to every Malaysian.⁶ The NFCP implementation will focus on initiatives based on policies and projects, including formulating policies such as removing barriers that hinder fast and cost-effective infrastructure deployment at state level, ensuring optimised use of spectrum for better quality and wider coverage of mobile broadband, improving the competitive landscape of the industry and promoting infrastructure sharing.

Outlook for 2020

Functional or structural regulation

Countries such as Australia, United Kingdom, Singapore and New Zealand have adopted more onerous approaches, such as functional or structural separation of entities holding their high-speed broadband networks to promote competition that will ultimately benefit consumers. So far, the MCMC has not focused on functional or structural separation. However, the MCMC has said that it is tracking developments in other jurisdictions to leverage on their experience in managing these networks.

⁶ www.mcmc.gov.my/en/media/press-releases/nfcp-spurs-economic-competitiveness-enhanced-stand.

Rationalisation of the regulatory framework

Over-the-top (OTT) services increasingly operate in the telecommunications and broadcasting sectors. They fall outside the regulatory scope of the MCMC as they are not required to be licensed by the MCMC, though they perform activities that compete with those of licensed entities. This is an area that requires greater integration and close cooperation between competition and sector regulator. There is a need to harmonise the provisions of the CMA 1998 with the CA 2010.

Energy Commission Act 2001

The Energy Commission (EC) was established under the ECA 2001 as a regulating body in the energy services sector. Section 14(1)(d) of the ECA 2001 empowers the EC to implement and enforce energy supply laws such as the Gas Supply Act 1993 (GSA 1993) and the Electricity Supply Act 1990 (ESA 1990). In 2016, the GSA 1993 was significantly amended to include extensive provisions on anticompetitive practices that largely mirror the CA 2010. The EC further published the Guidelines on Competition for the Malaysian Gas Market in relation to Market Definition, Anti-Competitive Agreements, and Abuse of Dominant Position in 2017.

Shanthy Kandiah was assisted by Thong Xin Lin and Nimraat Kaur in preparing this article.



Shanthy Kandiah
SK Chambers

Shanthy Kandiah is the head of SK Chambers, legal and regulatory advisers specialising in competition law, telecoms regulation, data protection and cybersecurity. Her competition law practice covers antitrust litigation, cartels and sectoral competition regimes, including merger control. She regularly advises 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. More recently, SK Chambers acted as coordinating counsel in the largest enforcement action to date by the Malaysia Competition Commission, involving fines exceeding 200 million ringgit.

On mergers, recent assignments include serving as local counsel on a multi-jurisdictional merger transaction led by a magic circle firm. She also successfully advised on antitrust approval for acquisitions in the communications and multimedia sector.

Shanthy has a masters in law from King's College London. She also holds a postgraduate diploma in competition economics from King's College.



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9B Jalan Setiapuspa
Bukit Damansara
50490 Kuala Lumpur
Tel: +60 3 2011 6800
Fax: +60 3 2011 6801

Shanthi Kandiah
sk@skchambers.co

www.skchambers.co



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