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Merger Control 2022

Contributing Editor**Thomas Janssens**

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

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

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Peru, South Korea, Taiwan, Uzbekistan and Zambia.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

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

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



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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

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

Malaysia's general competition legislation, namely the Competition Act 2010, sets out prohibitions on anticompetitive agreements and abuses of dominance, but not merger control. Although mergers are not expressly excluded from the scope of the Competition Act 2010, there is acceptance that the competition regulator, the Malaysia Competition Commission, has no merger control mandate.

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

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

The MAVCOM has published the following guidelines on mergers:

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

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

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

Scope of legislation

2 | What kinds of mergers are caught?

Aviation services sector

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

- two or more enterprises, previously independent of one another, merge;
- one or more persons or other enterprises acquire direct or indirect control of the whole or part of one or more other enterprises;
- as the result of the acquisition by one enterprise (the first enterprise) of the assets (including goodwill), or a substantial part of assets, of another enterprise (the second enterprise) the first

enterprise is in a position to replace or substantially replace the second enterprise in the business or in the part concerned of the business in which the enterprise was engaged immediately before the acquisition; or

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

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

Communications and multimedia sectors

The MCMC Guideline on Substantial Lessening of Competition provides that the MCMC regards mergers to be 'conduct' falling within the scope of sections 133 and 139 of the CMA. The definition of M&A under the M&A Guidelines is similar to that set out in the MACA.

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

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

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

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

3 | What types of joint ventures are caught?

Aviation services sector

The MACA treats full-function joint ventures as mergers. A joint venture constitutes a merger where it is created to perform, on a lasting basis, all the functions of an autonomous economic entity. The Guidelines on Substantive Assessment of Mergers explain that a joint venture performs all the functions of an autonomous economic entity when it 'operates in

an aviation service market and performs the functions normally carried out by enterprises in that market'. Factors to determine whether a joint venture is intended to operate on a lasting basis include:

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

Communications and multimedia sectors

The CMA does not define 'joint venture'. However, the the M&A Guidelines describe an approach similar to that in the MACA.

Based on the M&A Guidelines, the MCMC will deem a joint venture to be an M&A when a joint venture is 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. The MCMC considers a 'lasting basis' to mean the joint venture is intended to, and can, operate for such a length of time that the joint venture involves a lasting change in the structure of the parent company, the structure of the market and competition in the market. Having said that, whether all the functions of an autonomous economic entity on a 'lasting basis' is contextual and will be determined by the MCMC based on circumstances of the M&A being assessed.

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

The MACA and the Guidelines on Substantive Assessment of Mergers explain that 'control' can exist via:

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

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

Communications and multimedia sectors

'Control' is not defined or explained under the CMA. The M&A Guidelines explain that control can be achieved through:

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

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

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

Thresholds, triggers and approvals

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

Aviation services sector

For notification and assessment of a merger, parties should self-assess whether a merger can give rise to a substantial lessening of competition within any market affecting Malaysia, and whether a merger notification should be made to the MAVCOM. The MAVCOM is more likely to investigate a merger or anticipated merger where:

- the combined turnover of the merger parties in Malaysia in the financial year preceding the transaction is at least 50 million ringgit; or
- the combined worldwide turnover of the merger parties in the financial year preceding the transaction of the merger parties is at least 500 million ringgit.

Communications and multimedia sectors

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

The Guidelines on Mergers and Acquisitions provide guidance on thresholds for notification and assessment:

Type of merger	Notification threshold
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 or acquired entity is a licensee in a dominant position.

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

Aviation services sector

The MACA has a voluntary notification regime.

Communications and multimedia sectors

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

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

There are no such special notification requirements for either sector.

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

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

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

Aviation services sector

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

Communications and multimedia sectors

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

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

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

Aviation services sector

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

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

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

Communications and multimedia sectors

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

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

Aviation services sector

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

Communications and multimedia sectors

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

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

Aviation services sector

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

Communications and multimedia sectors

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

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

Pre-clearance closing

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

There have been no reported cases in which a sanction was imposed for closing or integrating the activities of the merging businesses before clearance. However, the laws do not prevent the relevant regulators (ie, MAVCOM and the MCMC) from applying the following sanctions where applicable:

Aviation services sector

Where an application for an anticipated merger to be considered has been made to the MAVCOM and the anticipated merger is carried into effect before the MAVCOM makes a decision of whether there is an infringement, the MAVCOM may either treat the application as if it were an application for the resulting merger, or refuse to make any decision in respect of such anticipated merger and require any party involved to apply to the MAVCOM for the merger to be considered under the relevant provisions of the MACA as a merger instead.

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

Communications and multimedia sectors

The MCMC may direct a licensee in a dominant position in a communications market to cease a conduct in that communications market that has, or may have, the effect of substantially lessening competition in any communications market, including requirements that the licensee must not continue with or complete the M&A and must not transfer any licences or spectrum assignments granted pursuant to the CMA to another entity.

The MCMC may seek for an interim or interlocutory injunction in response to any failure by parties to an M&A to comply with the prohibition against conduct that substantially lessens competition in a communications market, or to prevent further integration between the parties to the M&A, or to prevent the merged or acquired entity from trading.

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

There have been no reported cases in which a sanction has been applied against any company, either local or foreign, for closing before clearance. However, the laws do not prevent the relevant regulators (ie,

MAVCOM and MCMC from challenging foreign-to-foreign mergers that substantially lessen competition in their respective markets in Malaysia, where applicable.

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

The regime in the aviation services as well as the communications and multimedia sectors are non-suspensory and parties can proceed with the M&A before clearance. Having said that, the relevant regulators have the powers to, among other things, direct a person to cease a conduct pursuant to the relevant legislation as well as to impose interim measures and financial penalties for infringement of any prohibited conduct. In this regard, it is not precluded that the parties try to agree with the relevant regulator on a hold-separate arrangement to permit closing before clearance although there has not been any reported precedent on this.

Public takeovers

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

All persons engaged in any takeover and mergers in Malaysia are subject to the Malaysian Code on Takeovers and Mergers 2016 and Rules on Takeovers, Mergers and Compulsory Acquisitions 2016, which are issued and administered by the Securities Commission Malaysia.

Documentation

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

Aviation services sector

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

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

The MAVCOM may refuse to accept incomplete or incorrect applications.

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

Communications and multimedia sector

For authorisation of conduct, applicants will need to provide MCMC with the information (Form 1) set out in Annexure 2 of the Guidelines on Authorisation of Conduct (the AC Guidelines) and prepare Form 2 as well as the relevant supporting documents as stated in Annexure 3 of the AC Guidelines. The following information, among others, needs to be submitted:

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

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

For notification and assessment, applicants will need to prepare Form 1 and Form 2 as well as the relevant supporting documents, full details of which can be found in Annexures 1 and 2 of the M&A Guidelines. The MCMC will use the information provided to it in Form 1 to undertake Phase 1 of the assessment process, and if the MCMC decides that Phase 2 of assessment is required, an applicant will be required to complete and submit Form 2 to the MCMC. Incomplete applications will be rejected by the MCMC. The MCMC may revoke a notice of no objection to a notification and assessment that was approved, if, among other things, the information provided by a licensee was materially incomplete, false or misleading. The CMA also provides that knowingly giving false information is an offence that carries a fine of up to 20,000 ringgit, or imprisonment not exceeding six months, or both.

Investigation phases and timetable

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

Aviation services sector

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

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

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

Communications and multimedia sectors

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

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

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

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

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

Aviation services sector

There is no specific statutory timetable for clearance. The duration for the assessment of an application will be determined on a case-by-case basis, depending on factors such as the complexity of the issues and the timeliness and the completeness of the information provided by the enterprises.

Communications and multimedia sectors

There is no specific statutory timetable for clearance. However, the M&A Guidelines stipulate the time frames for investigation – Phase 1 should be completed within 30 business days from receipt of a valid Form 1 application, Phase 2 should commence within 10 business days of a valid Form 2 application and is expected to complete within 120 business days. The time frame for an investigation for both Phase 1 and Phase 2 may be completed in less or more time than indicated if the MCMC considers that it is warranted in the circumstances of the M&A being assessed.

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

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

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

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

Aviation services sector

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

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

Communications and multimedia sectors

Section 133 of the Communications and Multimedia Act 1998 (CMA) prohibits 'any conduct which has the purpose of substantially lessening competition in a communications market'.

The failing firm defence is available where:

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

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

Aviation services sector

The Malaysian Aviation Commission Act 2015 (MACA) treats full-function joint ventures as mergers. A joint venture constitutes a merger where it is created to perform, on a lasting basis, all the functions of an autonomous economic entity. The Guidelines on Substantive Assessment of Mergers explain that a joint venture performs all the functions of an autonomous economic entity when it 'operates in an aviation service market and performs the functions normally carried out by enterprises in that market'. Factors to determine whether a joint venture is intended to operate on a lasting basis include:

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

Communications and multimedia sectors

The CMA does not define 'joint venture'. However, the Guidelines on Mergers and Acquisitions (the M&A Guidelines) describes an approach similar to that in the MACA. Based on the M&A Guidelines, the Malaysian Communications and Multimedia Commission (MCMC) will deem a joint venture to be an M&A when a joint venture is 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. The MCMC considers a 'lasting basis' to mean the joint venture is intended to, and can, operate for such a length of time that the joint venture involves a lasting change in the structure of the parent company, the structure of the market and competition in the market. Having said that whether all the functions of an autonomous economic entity on a 'lasting basis' is contextual and will be determined by the MCMC based on circumstances of the M&A being assessed.

Theories of harm

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

Aviation services sector

Generally, the Malaysian Aviation Commission (MAVCOM) will look at whether a merger or anticipated merger is likely to lead to substantial

lessening of competition by way of unilateral and coordinated effects. To determine unilateral effects, the MAVCOM would consider:

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

In assessing coordinated effects, the MAVCOM will consider the structure and characteristics of a relevant aviation service market, any history of coordination in the said market, factors that would indicate the characteristics of a relevant aviation service market such as the level of concentration in the market and the existence and degree of barriers to entry and how those factors would impact the coordinated effects of a merger.

Communications and multimedia sectors

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

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

In determining whether unilateral effects of horizontal mergers substantially lessen competition, the MCMC will consider:

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

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

Non-competition issues

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

Aviation services sector

A party affected by an infringement decision by the MAVCOM may within 14 days of the date notice of the decision is given, apply to the Minister (of Transport) for the anticipated merger or merger to be exempted from the prohibition on the ground of public interest considerations. This exemption will be confined to matters of public or national security and defence.

Communications and multimedia sectors

Section 140(2) of the CMA states that the MCMC can authorise a conduct if it is satisfied that the authorisation is in the national interest. The

MCMC will use the national policy objectives in section 3(2) of the CMA as the basis to decide whether or not the conduct should be authorised.

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

Economic efficiencies

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

Aviation services sector

A merger party may claim that there are significant economic efficiencies arising directly from the merger, including supply-side or demand-side efficiencies. Examples of supply-side efficiencies that may be considered include cost reduction, removal of double marginalisation in vertical mergers, increase in investment, differentiation of aviation services, and increase in capacity and network of aviation services. Examples of demand-side efficiencies include increased network of aviation services available to buyers, price effects of complementary aviation services, and benefits of 'one-stop shopping'.

Communications and multimedia sectors

As part of the process of conducting a cost-benefit analysis in relation to authorisation of conduct to examine if a conduct promotes national policy objectives, detrimental effects of a conduct will be analysed from the perspective of economic efficiency, namely production efficiency, allocative efficiency and dynamic efficiency – examples specified are economies of scale and scope and pooling of resources.

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

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

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

Aviation services sector

If an infringement is found in a merger or an anticipated merger, the Malaysian Aviation Commission (MAVCOM) can take the following actions:

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

The Guidelines on Notification and Application Procedure for an Anticipated Merger or a Merger provide examples of directions:

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

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

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

Communications and multimedia sectors

The Communications and Multimedia Act 1998 (CMA) sets out administrative actions available to the Minister (of Communications and Multimedia) or the Malaysian Communications and Multimedia Commission (MCMC):

- The Minister can modify, vary, revoke, impose further special or additional conditions of an existing individual licence.
- The Minister, on the MCMC's recommendation, can suspend or cancel an individual licence.
- The MCMC can direct a licensee in a dominant position to cease conduct that substantially lessens competition and implement appropriate remedies.

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

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

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

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

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

Remedies and conditions

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

Aviation services sector

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

Communications and multimedia sectors

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

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

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

Aviation services sector

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

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

The Guidelines on Notification and Application Procedure for an Anticipated Merger or a Merger spell out conditions applicable to the sale of business(es) as a structural remedy:

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

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

The MAVCOM may consider behavioural remedies in the following situations:

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

Communications and multimedia sectors

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

- proceeding with the merger in a substantially restructured form;
- a specific division to be sold off;
- the negative competitive effects of the merger to be addressed in some other form;
- expand or allow fair and reasonable access to vital infrastructure or services to customers or competitors;
- not acquire assets within a specific time period, if doing so would have the effect of strengthening the merged or acquired entity's market power; and

- in the case of a firm acquiring direct or indirect control of another, all dealings between the parties will continue on arm's length basis and measures will be put in place to ensure this remains the case.

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

None published.

Ancillary restrictions

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

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

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

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

Aviation services sector

Customers and competitors may be contacted for information gathering under the Phase 1 assessment. The Malaysian Aviation Commission (MAVCOM) will also consider any feedback received in the public consultation stage. It is unclear who would be the parties involved in an investigation where the MAVCOM is not notified.

Any individual or enterprise may make a complaint to the MAVCOM regarding any suspected infringement of Part VII of the Malaysian Aviation Commission Act 2015 in the aviation services. Those who suffer loss or damage as a result of infringement have a right to civil action.

Communications and multimedia sectors

Under the Guidelines on Mergers and Acquisitions (the M&A Guidelines), the Malaysian Communications and Multimedia Commission (MCMC) assessment of competitive effects of an M&A involves public consultation with competitors, customers and even suppliers.

A person can lodge a written complaint regarding any suspected infringement to the MCMC. However, the MCMC may decide whether to give a complainant the opportunity to appear before the MCMC in relation to an investigation. As mentioned above, an interim or interlocutory injunction can be sought by anyone, against any prohibited conduct under the Communications and Multimedia Act 1998.

Publicity and confidentiality

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

Aviation services sector

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

Communications and multimedia sector

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

As for the notification regime, confidentiality is partially warranted in the M&A Guidelines. An applicant has to redact commercially sensitive or confidential information to be used in the MCMC's consultations with third parties. However, as the assessment process involves a necessary amount of public and third-party consultation, the MCMC does not encourage parties to notify it in respect of a proposed merger unless it has been publicly announced (or is made known to the public generally) and the parties have a bona fide intention to proceed with the merger. Alternatively, where there is a level of confidentiality surrounding the M&A, parties are encouraged to consider an application for confidential assessment instead. However, the application process for confidential assessment is informal and any view taken by the MCMC following a confidential assessment is non-binding and qualified by the need for a full assessment of the M&A once it has been publicly announced.

Cross-border regulatory cooperation

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

None published.

JUDICIAL REVIEW

Available avenues

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

Aviation services sector

Persons affected by the Malaysian Aviation Commission (MAVCOM)'s decisions may apply to the Minister of Transport for a merger or anticipated merger to be exempt from the prohibition on the ground of public interest. Any person or body aggrieved by MAVCOM's decision, which includes any act, omission, refusal, direction or order, may also appeal to the High Court.

Communications and multimedia sectors

An applicant's right to appeal against the Malaysian Communications and Multimedia Commission's (MCMC) decision to the Appeal Tribunal exists under the Communications and Multimedia Act 1998 (CMA). The Guidelines on Mergers and Acquisitions explains that M&A parties may appeal against MCMC's decision. Appeals are not available to third parties nor on the MCMC's determinations that an M&A party is in a dominant position.

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

Time frame

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

Aviation services sector

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

Communications and multimedia sector

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

As a general rule according to the Rules of Court 2012, the time period for application for judicial review is three months from the date the grounds of application first arose or when the decision was first communicated to the applicant.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

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

None that have been made public.

Reform proposals

35 | Are there current proposals to change the legislation?

It has been reported that the the Malaysia Competition Commission has initiated the process of seeking legislative amendments to include new provisions on mergers and acquisitions into law and that a merger control regime is expected to be tabled to Parliament by the end of 2021.

UPDATE AND TRENDS

Key developments of the past year

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

It has been reported that the Malaysia Competition Commission (MyCC) has initiated the process of amending the Competition Act 2010 (CA) to include provisions on mergers and acquisitions. According to the Minister of Domestic Trade and Consumer Affairs, the amendments to the CA would mean that merger and acquisition transactions will require approval from the MyCC and companies that do so without approval may be ordered to demerge and may be fined. The MyCC aims to table the amendments to the CA to Parliament by the end of 2021. The MyCC has also indicated that the amendments to the CA will not be implemented on a retrospective basis, and that the MyCC is in the process of determining the thresholds for merger control. If this amendment to the law is made, Malaysia will be joining the ranks of its counterparts within East Asia in adopting a merger control regime as part of their competition law framework.

In April 2021, reports also surfaced of a proposed merger between two telecommunications companies, Celcom Axiata Bhd and Digi.com Bhd, with the merged company to be known as Celcom Digi Bhd. This merger would fall within the scope of the Communications and Multimedia Act 1998.

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Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice. The information in each table has been supplied by the authors of the chapter.

Malaysia		
Voluntary or mandatory system	Both regimes are voluntary.	
Notification trigger/ filing deadline	<p>Notification trigger</p> <p>Aviation services sector</p> <ul style="list-style-type: none"> • Combined turnover in Malaysia in the preceding financial year of at least 50 million ringgit; or • combined worldwide turnover in the preceding financial year of at least 500 million ringgit. <p>Communications and multimedia sectors</p> <p>Proposed horizontal M&A:</p> <ul style="list-style-type: none"> • At least one party is a licensee in a dominant position; or • M&A would result in the proposed merged or acquired firm obtaining a dominant position (post-M&A market share of 40 per cent or more). <p>Completed horizontal M&A: Merged or acquired entity is a licensee in a dominant position.</p> <p>Proposed non-horizontal M&A: At least one of the parties is a licensee in a dominant position.</p> <p>Completed non-horizontal M&A: Merged or acquired entity is a licensee in a dominant position</p>	
	<p>Filing deadline</p> <p>Aviation services sector</p> <p>Anticipated mergers:</p> <ul style="list-style-type: none"> • When merger parties have bona fide intention to proceed with anticipated merger; • details of the anticipated merger are available; and • anticipated merger has been made public or may be made public by MAVCOM. <p>Completed mergers: At any time.</p>	
	<p>Communications and multimedia sectors</p> <p>Notification and assessment: Parties are encouraged to submit transactions prior to completion. However, this is not mandatory. MCMC may even assess M&A that proceeded prior to the issuance of the M&A Guidelines.</p> <p>Authorisation of conduct: MCMC allows licensees to apply before, during or after submitting an assessment application pursuant to the M&A Guidelines; however, parties are encouraged to apply prior to engaging in any conduct that may be construed to have the purpose or effect of substantially lessening competition.</p>	
	<p>Aviation services sector: On a case-by-case basis.</p>	
	<p>Clearance deadlines (Stage 1/Stage 2)</p> <p>Communications and multimedia sectors: Phase I assessment: within 30 days of receipt of valid Form 1. Phase II assessment: will commence within 10 business days from the date of receipt of a valid Form 2. Indicative time frame for completion is 120 business days from the date of commencement.</p>	
	Substantive test for clearance	Both regimes use the 'substantial lessening of competition' test.

Malaysia

Aviation services sector

Up to 10 per cent of worldwide turnover of the enterprise over period of infringement.

Non-compliance of guidelines can lead to fines of up to 1 million ringgit or 5 per cent of annual turnover.

Penalties

Communications and multimedia sectors

Criminal penalties: fine of up to 500,000 ringgit, imprisonment up to five years, or both.

A person may further be liable to a further fine of 1,000 ringgit for every day or part of a day during which the offence is continued after conviction.

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