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Malaysia: Lack of cross-sector merger control sparks updates to current regime and new emphasis on digital economy

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GCR Global Competition Review

Malaysia: Lack of cross-sector merger control sparks updates to current regime and new emphasis on digital economy

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Summary

IN SUMMARY

This article provides an overview of developments in competition law from 2022 to 2024, including the status of proposed amendments to introduce a cross sectoral merger control regime in Malaysia, the application of merger control via sectoral laws, cartels and abuse of dominance enforcement actions in Malaysia.

DISCUSSION POINTS

- The sector-specific merger control regimes in Malaysia;
- The Malaysian Competition Commission's (MyCC) recent enforcement actions against domestic cartels;
- Exclusivity clauses by dominant enterprises under the antitrust spotlight; and
- MyCC's plans to conduct a market review on digital economy markets in Malaysia.

REFERENCED IN THIS ARTICLE

- The Competition Act 2010;
- The Communications and Multimedia Act 1998;
- The Malaysian Aviation Commission Act 2015;
- Grounds of decision by the Competition Appeal Tribunal on bid rigging;
- Finding of infringement against Leong Hup and four others; and
- Grounds of decision by the Competition Appeal Tribunal on Dagang Net.

INTRODUCTION

The MyCC is the cross-sectoral enforcement agency for competition law in Malaysia charged with enforcing the Competition Act 2010 (CA). The CA, which came into effect on 1 January 2012, applies to all commercial activities undertaken within Malaysia as well as outside of Malaysia (if it has an effect on competition in the Malaysian market), with the exception of certain commercial activities that have been carved out of the CA (eg, commercial activities regulated under the Communications and Multimedia Act 1998 (CMA), the Energy Commission Act 2001 and the Malaysian Aviation Commission Act 2015 (MACA). The main prohibitions under the CA presently relate to anticompetitive agreements (horizontal agreements, including cartels and vertical agreements)[1] and abuses of dominant position.-[2]

Status Of Amendments To Incorporate Merger Control In The CA

Unlike the aviation services industry and the communications and multimedia sector, there is presently no merger control regime contained in CA. During the tabling of the Competition Bill 2010 back in 20th April 2010, the then Minister of Domestic Trade and Consumer Affairs remarked that a merger control regime was not included in the CA at the point of its inception 'to strengthen the Government's intention to encourage the development of capital markets in Malaysia' and 'encourage[ing] merger and acquisition activities between businesses to strengthen the domestic economy and develop global corporations'.[3]

The policy basis to leave out a merger control regime in the CA appears to have changed. Recognising that 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, on 21 December 2021, MyCC obtained policy approval from the Cabinet to incorporate a merger control regime via amendments to the CA.[4]

On 25 April 2022, the MyCC issued a public consultation paper setting out its proposed amendments to the CA, which includes provisions to facilitate the introduction of a cross-sector merger control regime. While the original timelines for its introduction have passed, a recent statement by MyCC indicates that the merger control regime is targeted to be tabled for parliamentary debates in June 2024.[5] Some of the key features of the proposed merger control regime are summarised in the table below:[6]

Features	Description
Definition of a merger[[7]]	Two or more previously independent enterprises combine into one single enterprise The acquisition of direct or indirect control of the whole or part of an enterprise or enterprises The creation of a full - functioning joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity The acquisition of assets, which replaces the acquired enterprise in the business that it was in before the acquisition
Substantive test for prohibition[[8]]	Mergers or anticipated mergers (if consummated) which may result in a substantial lessening of competition (SLC) within any market for goods or services in Malaysia.
Requirement for notification[[9]]	Hybrid notification: Mandatory pre - merger notification – for anticipated mergers exceeding prescribed threshold Voluntary notification – for mergers or anticipated mergers that do not exceed the prescribed threshold
Threshold for mandatory notification[[10]]	MyCC has the power to prescribe the threshold (which will determine whether it is mandatory for an anticipated merger to be notified).[[11]]

Timeline for approval[[12]]	120 days, consisting: Phase 1 Review – 40 working days; and Phase 2 Review – 80 working days
Suspensory[[13]]	Prohibition on consummating an anticipated merger before receiving clearance from MyCC.
Power of MyCC to impose penalties[[14]]	Financial penalty of up to 10% of the value of the merger transaction on enterprises that has committed a merger violation. MyCC may also issue directions to reverse/unscramble the merger transaction.
Defence of economic efficiency[[15]]	Enterprises may relieve their liability on the basis that the economic efficiencies of the merger/anticipated merger outweigh any SLC effect caused.
Commitments[[16]]	Parties may voluntarily offer commitments to MyCC to remedy, mitigate or prevent the SLC effects caused by the merger/anticipated merger.

SECTOR-SPECIFIC MERGER CONTROL REGIMES IN MALAYSIA

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.

Celcom-Digi Merger Receives Clearance From MCMC

One of the first examples of merger control applied by the MCMC is the merger between Digi.Com Berhad (Digi) and Celcom Axiata Berhad (Celcom).

MCMC exerts jurisdiction over a merger that:

- has the purpose of SLC in a communications market (Section 133 CMA 1998); or
- amounts to conduct by a licensee who is in a dominant position in a communications market which has, or may have, an SLC effect in any communications market (Section 139 CMA 1998). MCMC will generally view a licensee with a market share of 40 per cent or more in any communications market as being in a dominant position.[17]

MCMC has issued Guidelines on Mergers and Acquisitions (M&A Guidelines)[18] and the Guidelines on Authorisation of Conduct (Authorisation Guidelines)[19] to provide clarity on its approach when assessing mergers and acquisitions and/or applications for authorisation of conduct in a communications market.

The M&A Guidelines set out a voluntary notification regime for merger control, with the following threshold: (1) at least one of the parties is a licensee in a dominant position or (2) the merger results or may result in a licensee obtaining a dominant position.[20] Parties can

also submit an application for MCMC to authorise a merger. In this regard, section 140 of the CMA permits the MCMC to authorise the conduct of a licensee that may be construed to have the purpose or effect of SLC in a communications market.[21] It can subject the authorisation to the provision of an undertaking from that licensee, if the MCMC is satisfied that such conduct is in the national interest.[22] An application for authorisation of conduct can be made before, during or after submitting an application to the MCMC for an assessment of a merger pursuant to the M&A Guidelines.[23]

The following is a description of the key features of the merger between Celcom and Digi (Celcom-Digi Merger) and its assessment:

- Both Digi and Celcom are network facilities providers, network service providers and applications service providers licensed by MCMC under the CMA.[24]
- On 21 June 2021, Axiata Group Berhad (ie, the holding company of Celcom) and Digi entered into a share purchase agreement to combine their respective telecommunications businesses in Malaysia.[25]
- MCMC commenced its Phase 1 assessment of the Celcom-Digi Merger on 23 September 2021. On 23 November 2021, MCMC commenced its Phase 2 assessment.[26]
- On 1 April 2022, MCMC issued a Statement of Issues to the merging parties requiring the parties to collectively address preliminary competition concerns across the communication markets as the merging parties are likely to occupy a dominant position, post-completion of the Celcom-Digi Merger in several markets (for instance, the national wholesale market for mobile broadband services, the national wholesale market for mobile voice and P2P messaging services etc).[27] MCMC also required the parties to respond to possible remedy recommendations provided.[28]
- The parties reverted with proposed remedies to alleviate MCMC's competition concerns and agreed to provide undertakings. Upon assessing the undertakings offered by Celcom and Digi, the MCMC remarked that it is satisfied that the undertaking offered significantly mitigates the competition concerns arising from the Celcom-Digi Merger.[29] On that basis, the MCMC determined that the Celcom-Digi Merger is in the national interest[30] and proceeded to grant authorisation for Celcom and Digi to proceed with the Celcom-Digi Merger.[31]

The Undertakings Offered By Celcom And Digi To Allay Competition Concerns

The undertakings given were both structural and behavioural and are aimed at addressing the competition concerns arising from spectrum assignment, arrangements with mobile virtual network operators (MVNOs), prepaid divestments, resellers and branding.[32] The key features of these undertakings are summarised as follows:

In respect of spectrum assignment, both parties had agreed to divest a total of 70MHz of spectrum to address the issue of spectrum concentration post-merger.[33] The spectrum must be returned to MCMC within three years, and the first divestment must occur within two years of closing.[34]

With respect to their arrangements with MVNOs, to ensure clear separation with its retail mobile business, both parties agreed to establish a separate business unit to manage the affairs of the MVNOs.[35] In addition, both parties must also ensure continuity of access to

wholesale services for MVNOs at terms that are no worse off than their current agreements.-[36]

Celcom had also agreed to divest its prepaid business (namely, Yoodo) via a sales auction, within 18 months from the date of closing of the Celcom-Digi merger.[37]

In respect of their arrangements with resellers, both parties had agreed to remove any exclusive arrangements with its exclusive distributors in six states across Malaysia, within 3 years from the closing of the Celcom-Digi merger.[38] Further, for a period of three years after closing, both parties had agreed not to enter into any new exclusivity agreements with other distributors within these states unless otherwise approved by the MCMC.[39]

Lastly, both parties had agreed to position their prepaid and postpaid brands as products under a single corporate brand, within two years from the closing of the Celcom-Digi merger.-[40]

Following the above, both parties officially announced the completion of the *Celcom-Digi* merger on 30 November 2022.[41]

MAVCOM Clears Merger Between SIA Engineering Company Limited (SIAEC) And Pos Aviation Engineering Services Sdn Bhd (PAES)

MAVCOM exerts jurisdiction over a merger that may result in SLC in any aviation service market (Section 54 of the MACA). Further, sections 55 and 56 of the MACA provide for a voluntary notification regime for anticipated merger and merger. In other words, parties to a merger have the option of notifying MAVCOM of its merger and apply for a decision as to whether the merger infringes section 54 of the MACA.

On 19 June 2023, MAVCOM released its decision to clear the merger between SIAEC (a major provider of aircraft maintenance, repair and overhaul services in Asia-Pacific) and PAES (a licensed ground handler in Malaysia which provides line maintenance services).[42] At post-completion of the merger, SIAEC will acquire 49 per cent of the issued and paid-up share capital in PAES.[43]

Significantly, MAVCOM concluded that the merger transaction between SIAEC and PAES, if completed, will not infringe the prohibition of mergers that result in SLC in any aviation services market in Malaysia (as envisaged in section 54 of the MACA)[44] , due to the following reasons:[45]

- PAES' market share is small as compared to that of its competitors.[46] There is also effective countervailing buyer power in the relevant markets, as airlines can choose to self-handle instead of engaging the line maintenance service providers;[47]
- since PAES has no market power, PAES similarly has no ability to foreclose its competitors in any of the relevant markets;[48]
- the merger transaction would not cause any coordinated effects.[49] The market environment renders coordination between competitors difficult, as competitors are unable to monitor each other's prices.[50] There is also a heterogeneity of services between competitors;[51] and
- it is unlikely that the merger transaction would create any barriers to enter the relevant markets, as existing market participants do not encounter many difficulties in expanding their services to other airports, and the capital investments required are not prohibitive.[52]

Highlights of MAVCOM's findings in its final decision on its approach to defining the market for purposes of assessing the effect of the proposed merger:

- Unnecessary to distinguish between aircraft types for the purposes of defining the aviation service market for line maintenance – first, MAVCOM identified that the merger would occur in the market for line maintenance services in Malaysia.[53] MAVCOM deemed it unnecessary to make any distinctions between aircraft types as service providers are generally capable of servicing similar types of aircraft, and there is little encumbrance on a service provider to expand its aircraft competency to service other types of aircraft;[54]
- The geographical market is localised at each airport across Malaysia – MAVCOM characterised line maintenance services as a form of service that can only be provided at a particular airport (ie, during its turnaround time while on the tarmac, before it leaves the airport).[55] MAVCOM also took note of the lack of demand-side substitutability between airports, citing that other considerations (for instance, connectivity and customer demand) may cast a greater influence on an airline's decision-making process;[56] and
- The market share of line maintenance service providers to be calculated based on flight frequencies – MAVCOM calculated market shares of each line maintenance service provider based on the flight frequencies of airlines (in the specific airports) that the respective service provider engages with.[57] In other words, the higher the airline's flight frequency in a specific airport, the higher the market share of the corresponding line maintenance service provider at a particular airport.

MYCC'S RECENT ENFORCEMENT ACTIONS AGAINST DOMESTIC CARTELS

The MyCC continues to focus on tackling domestic cartels. In June 2022, MyCC stated that the Commission is investigating 500 companies suspected of being involved in rigging the bidding process of contracts worth 2 billion ringgit across industries.[58] Therefore, cartels remain at the forefront of the MyCC's priorities, with the Commission encouraging enterprises to apply for leniency.[59] The following paragraphs discuss recent cases and developments on cartel enforcement activity in Malaysia.

The Malaysian Competition Appeal Tribunal Upholds MyCC's First Bid Rigging Decision Against IT Enterprises

On 19 September 2023, the Malaysian Competition Appeal Tribunal (CAT) delivered its judgment in respect of MyCC's infringement decision, which found eight enterprises had engaged in bid rigging for the quotation for a UPS equipment system (UPS project) advertised by a university.[60] Five of the eight enterprises had appealed MyCC's findings before the CAT. However, the appeal was dismissed as the CAT was satisfied that there was sufficient evidence to find an infringement of the deeming provision under section 4(2) of the CA.[61]

First Case

In its infringement decision, MyCC took the view that two enterprises had formed a bid rigging scheme under the guise of a subcontracting arrangement to increase their chances of being rewarded should one of the parties win the tender.[62] MyCC found that the two enterprises had submitted cover bids to the university as one of the enterprises had prepared and submitted the technical documents on its behalf and that of the other enterprise.[63]

Further, MyCC found that if either enterprise is awarded the project, it will choose the other as its subcontractor.[64] The UPS project was awarded to one of the enterprises.[65]

The parties had argued that their intentions were to genuinely collaborate as partners, as one of the enterprises lacked the required technical expertise to carry out a vital part of the UPS project.[66] However, MyCC stated that the parties could have submitted a single bid as it made no commercial sense for a subcontractor and its principal to compete in the same bidding process.[67] Further, MyCC inferred that one of the enterprises may have advised on costs while preparing the other enterprise's technical documents, allowing both enterprises to manipulate their bid.[68] In view of the totality of the evidence, MyCC found that the preparation and submission of the technical documents, as well as the subcontracting agreement between the parties, indicated a bid rigging agreement. This constituted an infringement under section 4(2) of the CA.[69]

The CAT affirmed MyCC's findings and held that the bids were not independent and anticompetitive.[70] Firstly, the parties had direct contact and exchanged information prior to the tender.[71] One of the enterprises preparing and submitting the technical documents on behalf of the other enterprise was relied on by the CAT to demonstrate that there were communications between the parties that went beyond a genuine subcontractor relationship.[72] Significantly, the CAT held that the consideration to contract out parts of the work should be taken after the award of the project.[73] The CAT also found that the separate tender submissions to the university without disclosure of their subcontracting relationship created a false impression of independent bids.[74]

The case highlights the care with which joint bids (ie, where two or more parties cooperate to submit a joint bid in a contract procurement procedure) should be prepared. If parties could each participate individually or if the joint bidding agreement contains more parties than necessary, the joint bid may restrict competition. Enterprises should make a realistic assessments on whether the company has the capacity to bid independently, and the company's capacity should be determined before it begins any talks with other companies about entering into a joint bidding agreement and make sure not to include more companies than are necessary to fulfil the contract. The case also highlights the importance of clarifying with the procurer whether the submission of a joint bid is permitted at the earliest possible opportunity.

Second Case

The MyCC found that a separate bid rigging arrangement was coordinated by four enterprises for the UPS project.[75] One of the enterprises (the lead enterprise) entered into bilateral agreements with each of the other enterprises for a name-sharing arrangement, which entailed sharing confidential company documents with each other, including letterheads, financial statements, regulatory certificates, and company stamps.[76] Thereafter, the lead enterprises prepared and submitted the quotation documents for all the enterprises in the cartel.[77] MyCC found that the lead enterprise had submitted three other tenders under the guise of three separate enterprises to give the impression that the lead enterprise had the best offer price.[78] Therefore, MyCC concluded that the lead enterprise had instigated the three other enterprises in the bid rigging arrangement by submitting cover bids to increase their chances of winning the tender.[79] Although all four enterprises in this cartel were unsuccessful in the tender, MyCC found that the big-rigging scheme constituted an infringement under section 4(2) of the CA.[80]

The CAT agreed with MyCC's finding that the three enterprises had given their implicit acquiescence to allow the lead enterprise to use their documents and information to submit cover bids for the UPS project. In other words, unilateral conduct can constitute an agreement if acquiesced tacitly.[81] The CAT also agreed with MyCC that there were communications between the parties wherein the parties supplied confidential company documents to the lead enterprise, which was then used to prepare and submit quotation documents for the other parties.[82] Ultimately, the CAT held that there was a common intention between the parties to rig the bid for the UPS project.[83]

Other Bid Rigging Investigations

MyCC has also recently issued a Proposed Decision against seven enterprises for their involvement in bid rigging for four tenders issued by the Ministry of Defence for the provision of goods and services worth 20.8 million ringgit.[84]

MyCC Imposes Record RM415 Million Penalty Against Five Enterprises For Fixing Chicken Feed Prices

On 11 December 2023, MyCC issued its finding of infringement against five enterprises for infringing section 4(2) of the CA by entering into an anti-competitive agreement to fix the quantum of poultry feed prices.[85] The investigation against the enterprises commenced following news reports and social media traction pertaining to raising poultry feed prices.[86] MyCC found that the enterprises had identical increments in the quantum of their poultry feed prices between January 2020 and March 2022.[87] Apart from evidence of parallel behaviour, MyCC states that it fortified its findings with evidence of direct and indirect communications between competitors, demonstrating a clear pattern of coordination.[88] The decision states that 'the concept of a 'concerted practice' has been developed to capture forms in coordination in which enterprises, without reaching an agreement or establishing a concrete plan of action, knowingly and based on mutual understanding, replace 'competition risks' with practical cooperation'. [89] This decision is currently subject to appeal before the CAT.[90]

EXCLUSIVITY CLAUSES BY DOMINANT ENTERPRISES UNDER THE ANTITRUST SPOTLIGHT

CAT Affirms MyCC's Infringement Decision Against Dagang Net For Abuse Of Dominance

On 18 December 2023, the CAT delivered its judgment in respect of MyCC's infringement decision, which found that Dagang Net Technologies Sdn Bhd (Dagang Net) had engaged in exclusive dealing through the imposition of exclusivity clauses on software providers involved in the provision of trade facilitation services in Malaysia.[91] This decision marks the first abuse of dominance case in Malaysia on exclusive dealings.

By way of background, Dagang Net was appointed by the Malaysian government to be the sole service operator of the National Single Window system (NSW), an electronic-based ecosystem that enables the electronic exchange of customs-related documents between the trading communities (consisting of manufacturers, importers, freight forwarders, etc – referred to as 'end users') and regulatory authorities.[92] As the sole service operator of the NSW, Dagang Net provides a variety of services which are essential to end users engaged in import and export trading activities.[93]

To use such services, the end users and regulators have to transmit information via the NSW and the Sistem Maklumat Kastam operated by the Royal Malaysian Customs Department

(RMC) (NSW-SMK System).[94] In relation to one of the essential services provided by Dagang Net, the end users must purchase a specific software from a software provider in the market.[95] However, it is noted that the use of this software must be connected to an electronic mailbox (e-mailbox).[96] Without the e-mailbox, the end users would not be able to use the software.[97] Dagang Net is the sole generator of the e-mailbox and has, since 2008, executed numerous agreements with the software providers for the provision of these e-mailboxes.[98] In this regard, the MyCC identified approximately eight software service providers in the market and found the entry of new software providers to be uncommon given established players that end-users are familiar with.[99]

In 2013, the Malaysian government envisioned the launching of the Ubiquitous Customs System (uCustoms).[100] Notably, a new service provider, Edaran Trade Networks Sdn Bhd (Edaran Trade) was appointed (in addition to Dagang Net) as the uCustoms service providers.[101]

Upon discovering the appointment of an additional service provider for the upcoming uCustoms system, it is alleged that Dagang Net attempted to invite the software providers to participate in a new partner programme for its existing NSW-SMK system, which contains an exclusivity clause that required the software provider not to engage with other service providers to be appointed by the RMC under the uCustoms Service Provider Programme, to provide similar services to the end users ('New Partnership Agreement').[102] Against this backdrop, MyCC commenced investigations into Dagang Net's conduct and discovered that the exclusivity clauses would cast adverse effects on the software providers, by preventing them from engaging with any other service providers and from providing similar services to the end user in the market for the provision of trade facilitation services.[103]

MYCC'S FINDINGS

The MyCC found that if all the software providers execute their respective agreements (containing the exclusivity clause) with Dagang Net during the tenure of the NSW-SMK system, then other service providers (such as Edaran Trade) would be prevented from competing with Dagang Net, as they would not have access to these software providers for purposes of the uCustoms system.[104] For the duration of the contractual period of the New Partnership Agreement, the software provider would have been bound to Dagang Net in the uCustoms operating environment, when implemented.[105] Consequently, the MyCC held that as the dominant incumbent in the market for trade facilitation services in Malaysia, Dagang Net has a special responsibility not to distort competition in the said market.[106] MyCC concluded that the imposition of the exclusivity clause is capable of having the effect of significantly preventing, restricting and distorting competition, therefore amounting to an abuse of dominant position under section 10 of the CA.[107]

CAT'S DECISION

Dagang Net had appealed against MyCC's findings on the basis that, among others, MyCC failed to explain how the exclusive clause has an anticompetitive effect on the relevant market.[108] In particular, Dagang Net argued that the uCustoms system has yet to commence operation, thus, the MyCC relied on a hypothetical scenario to assert that the exclusive clause is anticompetitive.[109] However, the CAT rejected the arguments and held that even though the uCustoms system is yet to be in full operation, the exclusivity clause has an anticompetitive effect in the upcoming uCustoms system.[110] In other words, by introducing and insisting on the exclusivity clause that applied to service providers providing

services to software providers in the NSW-SMK system, Dagang Net is creating barriers to entry into the market for its competitors such as Edaran Trade, by ensuring that the exclusivity clause would prevent software providers from providing services to any other service providers appointed by RMC for the uCustoms system.[111]

Crucially, the CAT held the following:

Taking the totality of evidence and environment surrounding the introduction of the Clause by the appellant, we are of the opinion that the introduction of the Clause and the announcement of UCustoms and the appointment of Edaran Trade as the other service provider is not a mere coincidence in the circumstances. In our opinion it is a deliberate and planned act by the appellant to ensure that all software service providers are tied up contractually with the appellant leaving them no option to join or use other service providers appointed for the uCustoms for the duration of their contracts with the appellant. This is the ultimate effect of the appellant's Exclusivity Clause – it kills competition.[112]

When read in the context of MyCC's findings that the software industry is 'niche and mature with established players',[113] such that it is uncommon for new software providers to enter the market,[114] as well as that end users are more inclined towards those utilising the services of software providers which they are familiar with,[115] the theory of foreclosure is arguably fortified. It stands to reason that the software providers would be incentivised to sign onto the clauses with Dagang Net as Dagang Net is the only gateway for these software providers to provide trade facilitation services to their end users.

It is also fair to say that the CAT was heavily influenced by the purpose of the clause and particularly the proximity of its introduction to the announcement by the government of the entry of a second player.[116] The case is also helpful in clarifying that a monopolist is a dominant entity for the purposes of the CA.[117]

It is fair to say that MyCC takes a dim view of exclusivity clauses by monopolists over downstream operators, arguably. This position is echoed in a press release concerning a payment provider for toll roads, where MyCC states as follows:[118]

MyCC has investigated a few monopolies before this, whereby one of them was found to have made an attempt to increase the cost of new entry by making an exclusivity agreement with its downstream players. As a result, the aspiration of the Government to inject the competition in that market could not be fulfilled. Similarly, we will adopt the same approach in monitoring the development to instil competition in the payment of highway toll market and public transportation, so that we can have viable alternative and strong competitor(s) that can compete effectively in the market for the benefit of the users.

MYCC'S INCREASED FOCUS ON DIGITAL ECONOMY MARKETS IN MALAYSIA

Following the increasing trend of competition authorities proactively pursuing antitrust investigations involving digital markets, MyCC is similarly placing emphasis on the dynamic and ever-evolving digital economy market in Malaysia, which includes the industry for online marketplace platforms.

August 2023 – MyCC and MCMC executed a Memorandum of Understanding to strengthen their collaborative efforts in addressing competition issues related to e-commerce platforms and the logistics industry

In a news release dated 3 August 2023, it was reported that MyCC and MCMC signed a Memorandum of Understanding (MOU), which signified the commitment of both regulators to work closely in addressing competition issues related to e-commerce platforms and delivery partners in the logistics industry.[119]

JANUARY 2024 – MYCC TO CONDUCT A MARKET REVIEW ON THE DIGITAL ECONOMY ECOSYSTEM UNDER THE CA

More recently, MyCC published its Tender Document for its upcoming market review on the digital economy ecosystem under the CA.[120] According to the said Tender Document, MyCC is seeking interested parties to submit their tender proposal for consultation services on or before 21 February 2024, at 12pm.[121]

A closer examination of the above activities shows that MyCC is geared towards ensuring that the major players in the industry for online marketplace platforms in Malaysia strive to remain competitive as they further develop themselves to cater to the needs of the consumers. While consumers may stand to gain significant benefits (in terms of higher quality of goods and services, as well as cheaper prices) as a result of the exponential growth of the online marketplace platforms, the concentration of market power within a small amount of online marketplace platform operators may arguably give rise to competition concerns, such as self-preferencing and limiting multihoming.

It remains to be seen how MyCC's activities above will develop, and whether these activities will cause any far-reaching impact on online marketplace platform operators in Malaysia.

Shanthi Kandiah was assisted by Tan Ken Seng, Caely Yo Yi Yun and Azyan Mohamed Ibrahim in preparing this contribution.

Endnotes

[1] Section 4 of the CA.

[2] Section 10 of the CA.

[3] Second and Third Readings of the Competition Bill 2010 as recorded in the Hansard dated 20 April 2010, accessed through https://www.parlimen.gov.my/files/hindex/pdf/DR-20042010.pdf, at page 143.

[4] MyCC, 'Consultation Paper on the Proposed Amendments to the CA 2010 (Act 712)' (Consultation Paper), accessed through https://www.mycc.gov.my/sites/default/files/Consultation%20Document%20for%20the%20Proposed%20Amendments%20of%20Act%20712%20%5B25.4.22%5D.pdf, at page 8.

[5] The Star, 'Merger control law on the horizon' accessed through https://www.thestar.com.my/news/nation/2024/01/04/merger-control-law-on-the-horizon. This projected timeline, however, is not final and may be subject to changes.

[6] MyCC, 'Salient Points of the Proposed Amendments to the Competition Act 2010 (Act 712)' (Salient Points) accessed through https://www.mycc.gov.my/sites/default/files/Salient%20Points%20of%20the%20Proposed%20Amendments%20of%20Act%20712%20%5B25.4.22%5D.pdf.

[7] Salient Points, at pages 11–12.

[8] Salient Points, at pages 10–11.
[9] Salient Points, at pages 13–15.
[10] Salient Points, at page 15.
[11] MyCC remarked (during the Public Consultation on 08.06.2022) that it will issue guidelines or regulations on the appropriate threshold after the proposed amendments are passed by Parliament.
[12] Consultation Paper, at page 23.
[13] Salient Points, at page 14.
[14] Salient Points, at page 39.
[15] Salient Points, at page 13.
[16] Salient Points, at page 36.
[17] MCMC, 'Public Inquiry Report: Assessment of Dominance in the Communications Market' accessed through https://www.mcmc.gov.my/skmmgovmy/media/General/pdf/PI-Report-Final-Revised.pdf.
[18] MCMC, 'Guidelines on Mergers and Acquisition' (M&A Guidelines) accessed through https://www.mcmc.gov.my/skmmgovmy/media/General/pdf/Guidelines-on-Merger-and-Acquisitions_1.pdf. The guidelines set out how the MCMC will apply, investigate and enforce the general prohibition in Section 133 CMA 1998 and decide whether to exercise its power under Section 139 CMA 1998 in respect of conduct by a dominant operator which it deems to be a merger or acquisition.
[19] MCMC, 'Guidelines on Authorisation of Conduct' accessed through https://www.mcmc.gov.my/skmmgovmy/media/General/pdf/Guidelines-on-Authorisation-of-Conduct_1.pdf.
[20] M&A Guidelines, at paragraph 3.17.
[21] M&A Guidelines, at paragraph 8.6.
[22] Ibid.
[23] M&A Guidelines, at paragraphs 1.32–1.39.
[24] MCMC, 'Undertaking to the Malaysian Communications and Multimedia Commission pursuant to section 140(3) of the Communications and Multimedia Act 1998' (Celcom-Digi Undertaking), accessed through https://www.mcmc.gov.my/skmmgovmy/media/General/registers/Undertaking-Public-Version.pdf, at paragraphs 2.4 and 2.5.
[25] Celcom-Digi Undertaking, at paragraph 2.1.
[26] Celcom-Digi Undertaking, at paragraph 3.1.
[27] Celcom-Digi Undertaking, at paragraphs 3.3–3.4.
[28] ibid.

[29] MCMC, 'Authorisation of Conduct for the Proposed Merger between Digi.Com Berhad and Celcom Axiata Berhad' ('Authorisation No. 1 of 2022'), accessed through https://www.mcmc.gov.my/skmmgovmy/media/General/registers/Commission-Decision-on-AOC.pdf, at paragraphs 7–8.
[30] Authorisation No. 1 of 2022, at paragraph 9.
[31] Authorisation No. 1 of 2022, at paragraph 10.
[32] Celcom-Digi Undertaking, at paragraph 3.4.
[33] Celcom-Digi Undertaking, at paragraph 3.7.
[34] Celcom-Digi Undertaking, at paragraphs 3.8 and 3.9.
[35] Celcom-Digi Undertaking, at paragraph 3.13.
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