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To Merge or Not to Merge?

Globally, the COVID-19 pandemic has accelerated the trend towards the digitalisation of businesses, with more companies looking to acquire new technologies and tech-enabled businesses. Closer to home, Malaysia is also experiencing a positive take-up of merger and acquisition (**M&A**) activities in the telecommunications space, with the upcoming merger of Celcom Axiata Bhd and Digi.Com Bhd slated to be one of the largest of its kind within the Southeast Asian telecoms industry (**Telco Merger**). This article contemplates mergers in the communications market by considering the regulation of such transactions through the existing merger control regime.

The case for and against mergers

Among the most widely cited reasons as to why companies merge is the argument that mergers can bring about economies of scale and scope. By merging, a combined entity is able to produce products at the most marginal cost but at the same time, operate at optimum scale. Apart from that, a merged entity is arguably able to bring about other efficiencies such as increased financial flexibility, accessibility to a wider range of research and development resources and, to some extent, bring about desirable management efficiencies.

However, perhaps one of the more controversial reasons (and one that is less popularly admitted to) as to why companies merge is that it can facilitate increase in market power by eliminating competition — especially where the merged entities are close rivals within the markets that they operate in.

From a purely competition perspective, it is perhaps for the above reason that merger control is important to ensure mergers that are harmful to competition are carefully managed and prevented altogether. The ensuing effect of a harmful merger is that, not only does it reduce the competitive landscape for goods and services (thus limited prospect for innovation), but it will also have follow-on effects which do not protect consumer welfare, leading to inflated prices for lower-quality goods.

Merger regime under Malaysian competition laws

The main objective of the Competition Act 2010 (**CA 2010**) is to promote economic development by promoting and protecting the process of competition in Malaysia, which is enforced through the prohibition against anti-competitive agreements and abuse of dominant position. Unlike in other jurisdictions, the CA 2010 does not afford the Malaysia Competition Commission (**MyCC**) (the authority responsible for enforcing the CA 2010) the ability to control a particular M&A or the power to unwind the same in the event of any anti-competitive finding.

During its formative years, the CA 2010 included substantive provisions such as control over M&A activities. Nevertheless, when the policy direction was eventually tabled in its final stages, this feature was eventually removed to be in line with the government's goal at the time to encourage the development of the capital markets and the government's policy of encouraging M&A among enterprises to strengthen the domestic economy and to develop corporate competition globally.[1] Following which, the activities of dominant players resulting from any M&A exercise would instead be controlled under the prohibition against abuse of dominant position if it results in any market dominance.

In view of such absence, it was announced in early 2021[2] that MyCC is set to introduce amendments to the CA 2010 to include the much-anticipated merger control regime to break up abusive monopolies or undue concentrations of market power. MyCC has also indicated that the proposed merger control regime in Malaysia will likely require mandatory pre-notification, which means that companies would be at risk of monetary penalties should they wish to consummate an M&A transaction without prior approval.

Sectoral merger control regimes in Malaysia

While the CA 2010 awaits the formal introduction of a merger control regime, there are other sector-specific laws and guidelines which regulate the anti-competitive aspects of mergers in the aviation services sector and the communications sector; pursuant to the Malaysian Aviation Commission Act 2015 and the Communications and Multimedia Act 1998 (**CMA**), respectively. Such sectoral laws are specifically excluded from the CA 2010 by virtue of the First Schedule of the CA 2010 and come under the purview of the Malaysian Aviation Commission (MAVCOM) and the Malaysian Communications and Multimedia Commission (**MCMC**), instead.

It is to be noted that s 3(3) of the CA 2010 read together with the First Schedule places emphasis on activity rather than entities. Therefore, activities not covered under the specific sectoral laws and regulations would remain bound to the CA 2010, unless such activity is expressly exempted under the statute.

In this regard, any merger which involves companies licensed under the CMA could fall within the purview of the MCMC.

Communications sector regime

The CMA does not contain an express merger control provision. Instead, the competition principles under the CMA regulate the conduct

1 Nasarudin Abdul Rahman and Haniff Ahamat, *Competition Law in Malaysia* (Wolters Kluwer) at paras 32–35
2 'MyCC initiates process to amend Competition Act 2010' *theSun daily* (1 April 2021) https://www.thesundaily.my/business/mycc-initiates-process-to-amend-competition-act-2010-DJ7478243

of “licensees”[3] within the communications market.[4] According to s 133 of the CMA, licensees are prohibited from engaging in conduct which has the purpose of substantially lessening competition in the communications market. Further, s 139(1) of the CMA gives the MCMC the power to direct a licensee in a dominant position to cease conduct which may also have the effect of substantially lessening competition in any communications market.

Merger activities are encapsulated in the term “conduct” which is further elaborated in the Guidelines on M&A (**M&A Guidelines**) published by the MCMC. The regime that is implemented is one that is voluntary, in which licensees are not legally obligated to notify the MCMC of a proposed merger.

Generally, the MCMC will look into mergers where the merger results in a licensee obtaining a dominant position in a market or where one of the parties to the merger or acquisition is already in a dominant position. Although there is no legal obligation for merger control and assessment, there are procedures established under the M&A Guidelines which can enable merger parties to obtain the MCMC’s view in respect of the competitive effects of an M&A.

The assessment of such applications is conducted through a two-phase assessment process. During Phase 1 of this process, the MCMC will assess the purpose or effect of an M&A based on the information obtained by the MCMC. Upon completion of its Phase 1 assessment, the MCMC will then issue a notice of “no objection” to the applicant or inform the applicant that the application will proceed to Phase 2, which will require a more comprehensive assessment in respect of the market that the M&A is set to take place in and the business the M&A parties and the merged entity will be engaged in.

Due to the voluntary nature of the M&A regime within the communications sector, parties have the option of notifying the MCMC and obtaining clearance if they are of the view that the merger raises anti-competitive concerns; and that the merger control regime herein does not have a suspensory effect which would allow a merger to proceed at its own risk.

It is also worth noting that certain activities of licensees which are not regulated under the CMA may still be caught under the general competition prohibitions set out in the CA 2010 and would be subject to the authority of the MyCC instead of the MCMC. Examples of such conduct include activities that do not come under the ambit of the licence regime under the CMA (e.g. over-the-top (OTT) services such

[3] Licensees for the purpose of the CMA include network facilities providers, network service providers, applications service providers and content applications service providers.

[4] The CMA defines “communications market” as an economic market for a network service, or an applications service, or for goods or services used in conjunction with a network service or an applications service, or for access to facilities used in conjunction with either a network service or an applications service.

as Netflix are exempted from the licensing regime under the CMA), or are not carried out within the communications market as defined under the CMA.

Outlook for Malaysia

The proposed Telco Merger will greatly benefit from the existing parameters which have been drawn up by the MCMC to offer some certainty in navigating a merger approval. However, for other technology and media-based proprietors, the availability of similar offerings may be limited if the scope of their M&A activities falls outside the application of the CMA.

The introduction of the general merger framework under the CA 2010 is a welcome change as it would address regulatory gaps which have enabled unconstrained growth of certain Malaysian tech-enabled companies; especially those which have enjoyed indirect exemptions due to not being a licensee regulated under the CMA, and the absence of a merger control tool. Such regulatory gaps will bring about severe consequences to the process of competition if unfettered concentrations of market powers are not swiftly dismantled by the tools required by regulators. After all, there must be a way to level the playing field; otherwise, the welfare of consumers and sectoral innovation will be harmed.

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