

Client Alert

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New Guidelines on Mergers and Acquisitions issued by the Malaysian Communications and Multimedia Commission

Introduction

The Malaysian Communications and Multimedia Commission ("**Commission**") has introduced guidelines which establish a voluntary regime for competition assessments of mergers and acquisitions ("**M&As**") in the communications market in Malaysia, pursuant to powers under the Malaysian Communications and Multimedia Act 1998 ("**CMA**").

Malaysia does not have a merger control regime of general application. Prior to this, the only competition regime regulating M&As is the one regulating the civil aviation industry and established under the Malaysian Aviation Commission Act 2015.

On 17 May 2019, the Commission issued the following 2 guidelines:

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

(collectively, "**Guidelines**").

In essence, the M&A Guidelines regulate the scope of transactions which fall within the guidelines, the process of application for assessments, the competition assessments of M&As, how the decisions are arrived at, enforcement measures and rights of appeal, among others.

The Conduct Authorisation Guidelines provide that the Commission may authorise anti-competitive conduct (including M&As) if the benefits from the conduct are in line with Malaysia's national interest.

Parties to an M&A may apply for assessments under the M&A Guidelines for a decision that the transaction will not result in a substantial lessening of competition. If unsuccessful, they have the option to apply for authorisation from the Commission under the Conduct Authorisation Guidelines. Parties also have the option to apply for assessments as well as authorisation of the M&A at the same time.


Statutory Basis: The CMA

The CMA established a regime for the regulation of competition between licensees in the communications market.

Section 133 of the CMA prohibits licensees from engaging in any *conduct* which has the purpose of substantially lessening competition ("**SLC**") in a communications market.

Section 139 gives the Commission the power to direct a licensee in a dominant position to cease conduct which has, or may have, the effect of SLC in a communications market.





Section 140 allows licensees to apply to the Commission for authorisation of *conduct* which has the purpose, or effect, of SLC in a communications market. The Commission may authorise the conduct if it finds that the benefits flowing from it are in the national interest.

M&A Guidelines

What M&A transactions are covered?

The M&A Guidelines clarify that M&As amount to "conduct" under the CMA and they cover a wide range of M&As, including mergers, business acquisition, share acquisitions and take-overs, as well as any long-term joint venture that is created to perform all the functions of an autonomous economic entity.

Who should apply?

Applications for assessment under the regime would be the responsibility of the acquiring party (for a proposed M&A) or the merged entity (for a completed M&A). The applicants can submit an application to the Commission for assessment of the potential anti-competitive effects of the M&A ("**Assessment Application**") prior to or after completion. The M&A Guidelines provide for a voluntary regime. Where parties believe that the Commission's view on the competitive effect on their transactions would be helpful in reducing the risk of engaging in anti-competitive conduct, the Commission recommends that they take advantage of the voluntary process of submitting their transaction for assessment, and consider including a condition precedent to the completion of the M&A that the approval or authorisation of the Commission is obtained.

The Commission encourages parties to a proposed M&A to make an Assessment Application if the M&A involves at least one licensee in a dominant position, and in the case of a horizontal M&A (i.e., between firms operating at the same functional level of the distribution chain), the M&A would result in the proposed merged or acquiring firm obtaining a dominant position. A post-M&A market share of 40% or more would be indicative of a dominant position.

In assessing the competitive effects of an M&A, the Commission may consult with suppliers, competitors and customers. This would be possible if the transaction has been announced and/or the parties have a bona fide intention to proceed. For some transactions where parties are only at the planning stages of an M&A and have concerns about maintaining confidentiality at that stage, the guidelines also allow for applications for a limited "confidential assessment" by the Commission.

Substantive assessment

When evaluating an Assessment Application, the Commission will seek to establish whether the M&A has the purpose of SLC in a communication market or may, in effect, result in a SLC in such a market. The M&A Guidelines sets out a number of factors that the Commission will consider in making such evaluation, including:

- the boundaries of the relevant communications market within which the competitive effects of the M&A would be assessed;
- whether the M&A involves a licensee in a dominant position, or whether the merged or acquiring entity may become one;
- anti-competitive effects which may arise from the M&A, taking into account *inter alia* market conditions (e.g., level of competition, degree of concentration); and

- the existence and degree of any efficiencies brought about by the M&A.

Procedures and timeframes of assessment

The M&A Guidelines details the procedures that applicants have to adhere to when making an Assessment Application. The assessment procedure is a 2 phase assessment process conveniently named "Phase 1" and "Phase 2".

The process is summarised below:

- i. The applicant applies for assessment by submitting a Form 1 to the Commission. The Commission will review the validity of the application and if valid and complete, will give notice to the applicant of the same within 5 business days from the date of receipt of the application. If the application is invalid, it will be rejected and a notice of rejection will be sent to the applicant within 10 business days from receipt of the application.
- ii. Before commencing assessment in Phase 1, the Commission will do a **preliminary review** to determine whether the transaction is covered by the guidelines, and whether the transaction meets the applicable threshold or if any other grounds justify the need to assess the transaction. If the Commission determines that the relevant thresholds have not been met and the transaction will not be assessed, the applicant will be notified within 10 business days from the date of receipt of the application.
- iii. The Commission will commence assessment after receiving a valid Form 1 ("**Phase 1 Assessment**"). It may hold consultations with the applicant or third parties. The indicative timeframe for Phase 1 Assessment is 30 business days from the date of notification by the Commission that the form was valid.
- iv. Following the Phase 1 Assessment, the Commission will issue either (a) a Notice of No Objection; or (b) (if the Commission is unable to determine the effect or purpose of the M&A on the basis of the information in Form 1) a notice informing that a Phase 2 assessment is necessary.
- v. The Commission will commence **Phase 2** within 10 business days of receipt of a valid Form 2. Phase 2 requires a more detailed and extensive assessment of the effect of the M&A and the Commission will require more comprehensive information in respect of the market in which the transaction takes place and the businesses of the M&A parties and the merged or acquired entity. The indicative timeframe for completion of a Phase 2 assessment is within 120 business days from the date of commencement by the Commission.
- vi. If the Commission is likely to reach an **unfavourable decision**, it will issue to the applicant a Statement of Issues (setting out the preliminary findings and specifying the grounds of the Commission's belief about the anti-competitive effects of the M&A) prior to making the final decision. The applicant will be given 30 days to provide a submission in response to the statement, and the Commission is required to consider it prior to making a final decision.
- vii. Upon **completion of its assessment** of an M&A under Phase 2 of the assessment, the Commission may either: (a) make a favourable decision, in which case it issues a Notice of No Objection with a specified validity period (generally 1 year); or (b) make an unfavourable decision, in which case the Commission will issue a Notice of Objection which may include its decision to apply any enforcement action or remedies available to it under the CMA. A favourable decision may be made by the Commission after completion of



Phase 1 or Phase 2, but an unfavourable decision can only be made after completing Phase 2.

- viii. Parties to the M&A who wish to **appeal the decision of the Commission may apply to the Appeal Tribunal for a review of the decision**. Parties may apply for a statement of reasons from the Commission which sets out the bases for its decision, and the latter must provide the statement within 30 days from the date of receipt of the request to allow for the applicant to undertake the appeal. The guidelines recognise that parties may apply to the court for a judicial review, but clarify that this can only be done after exhausting the rights of appeal provided under the CMA.

Conduct Authorisation Guidelines

The Commission issued the Conduct Authorisation Guidelines to provide guidance to prospective applicants (i.e., licensees under the Act) for authorisation of conduct (including M&A) that may have the purpose or effect of SLC in a communications market.

Who can apply?

In the context of M&As, the right to apply for authorisation of a transaction is limited to M&As where: (i) at least one of the M&A parties is a licensee; and (ii) the proposed M&A has not taken place.

An applicant can make an application for authorisation of the M&A during or after submitting its application for assessment of the M&As under the M&A Guidelines.

National interest justification

The CMA provides that the Commission has the powers to authorise, among others, an M&A if the Commission is satisfied that the M&A is in the national interest.

The Commission considers that the best guide as to what constitutes being in the national interest is provided by the national policy objectives set out in Section 3(2) of the CMA. These objectives include the considerations of establishing Malaysia as a major global centre and hub for communications and multimedia information and content services, and the long term benefit of end users in the communications and multimedia industry.

In order to authorise an M&A transaction, the Commission must be satisfied that the benefits arising from the M&A are substantial and in line with national policy objectives, and clearly outweigh the costs associated with the M&A. In this regard, the Commission will carry out a cost-benefit analysis based primarily on an analysis of the market in which the M&A is concerned and the economic impact of the M&A.

The Commission may request a licensee to submit an undertaking regarding the M&A in any related matter before granting authorisation of an M&A. A licensee can also provide an undertaking on its own accord to supplement its application for authorisation.

The indicative timeframe for the evaluation of an application is set out below:

- i. the *Preliminary Phase* in which the Commission will go about establishing the facts of the case: 30 days from receipt of a complete application;
- ii. the *Investigative Phase* in which the Commission inquire into a cost benefit analysis, look into the interests of consumers and licensees and determine if the conduct should be authorized: up to 120 days; and



- iii. the *Decision Making Phase* in which the Commission will decide on the course of action based on findings in the Investigative Phase, and it may approve the application, approve subject to an undertaking from the applicant, or reject the application: 30 days.

Conclusion

Following the introduction of the Guidelines, the voluntary assessment regime now allows parties to seek the views of the Commission as to the anti-competitive risks of their M&As prior to their completion, when previously they would have had to bear the risk of infringing the competition regulations under the Act without formal guidance. Moreover parties are also given the second avenue of seeking authorization of their M&As from the Commission (even if they are anti-competitive) where they can prove that they are in the national interests.

These Guidelines are welcome and timely as they provide additional competition guidance and certainty to licensees as they go about their M&A activities in the communications market in Malaysia. Industry players will clearly be guided further by the decisions made by the Commission as time goes by and the analysis, grounds and reasoning of the authority is made known incrementally with each application it receives under the Guidelines.

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