Competition Act amendments a potential game changer

The Malaysia Competition Commission (MyCC) launched an online public consultation on proposed amendments to the Malaysian Competition Act 2010 in April, which included the introduction of a merger control regime. This is a highly anticipated antitrust development in Malaysia, given that there are already more than 130 merger control regimes globally and the MyCC has been working on the proposed regime for a few years now.

A hybrid notification model

Under the proposed regime, any merger or anticipated merger transacted within and outside of Malaysia which may result in a substantial lessening of competition within any market for goods or services in Malaysia will be prohibited. "Merger" is defined broadly and includes: (i) combination/amalgamation of two or more previously independent enterprises into one; (ii) acquisition of direct or indirect control of enterprises. "Control" is defined as the possibility of exercising decisive influence over an enterprise, which can emanate from the acquisition of shares, contractual rights or any other means; (iii) acquisition of assets such that the acquiror replaces or substantially replaces the asset vendor in the business; or (iv) creation of a full-function joint venture to perform functions of an independent enterprise on a lasting basis.

The proposed regime is a hybrid of mandatory and voluntary notifications. Notification is mandatory and suspensory if the anticipated merger exceeds the prescribed thresholds. Once the prescribed thresholds are exceeded, the legal obligation to notify MyCC is triggered, and parties would be subject to standstill obligations and cannot consummate the transaction prematurely (also known as gun-jumping) until approval is obtained from the MyCC. Non-filing or gun-jumping would constitute a merger violation, in which case the merger transaction will be rendered void and MyCC has the powers to impose a financial penalty of up to 10% of the transaction value.

Even if the prescribed thresholds are not met, the MyCC has residual powers under the proposed regime to investigate any merger or anticipated merger if it has reasons to suspect that the transaction has resulted or may be expected to result in a substantially lessening of competition within any market. Such powers are also common in other merger control regimes in the world, including the European Union. MyCC can also initiate an investigation upon receiving a complaint from a person or under the direction of the Ministry of Domestic Trade And Consumer Affairs. As such, there will also be an avenue for parties to voluntarily notify MyCC of anticipated mergers or mergers when the prescribed thresholds have not been exceeded.

Voluntary notifications may be useful where parties require assurance from MyCC that the transaction will not be investigated or prohibited by the MyCC. If a voluntary filing is made, parties have the flexibility to complete the merger transaction without waiting for MyCC's approval, but will have to bear the risk of MyCC potentially issuing a prohibition decision that the merger results in substantial lessening of competition after completion, whereby MyCC has extensive powers to require the infringement to be ceased immediately, specify steps that must be taken to bring the infringement to an end and impose a financial penalty of not more than 10% of the worldwide turnover of the enterprise over the period during which the infringement occurred and give any other direction as it deems appropriate.

Currently, the notification threshold is still unknown. MyCC expects to launch another public consultation for the notification thresholds in early 2023. It would be imperative for MyCC to set the thresholds at a sufficiently high level so that only significant effects on markets in Malaysia are caught, as thresholds which are too low may result in a chilling effect on the M&A activities in Malaysia.

Certain merger transactions will be excluded from the application of the proposed regime, including (but not limited to) mergers between enterprises which are licensed, approved or registered by the central bank of Malaysia, Securities Commission Malaysia, Labuan Financial Services Authority or Suruhanjaya Perkhidmatan Air under the applicable legislations. The scope of this exclusion will be applied narrowly. For instance, a merger transaction between a financial institution licensed by the Central Bank of Malaysia on one hand and a non-regulated entity on the other hand would fall outside of the exclusion and remain under the purview of MyCC. Amendments to the Rules on Take-Overs, Mergers and Compulsory Acquisitions as issued by the Securities Commission are also expected to ensure that the tight timelines which apply to takeovers of public companies are aligned with the review timeline under the proposed regime.

Impact on feasibility and timeline of transactions

The proposed regime will have a significant impact on the feasibility and timeline of transactions. If a mandatory filing is triggered, parties will need to take into account the time required to prepare the filing and the time required by MyCC to review it. This is especially the case where merger control filings are triggered not just in Malaysia but also in other countries. Given that each regulator will have their own review timelines, it would be key for parties to ensure that the review periods of all the triggered jurisdictions are aligned with the wider deal timetable. Under the proposed regime, for mandatory notifications, if the merger is non-problematic and MyCC finds no substantial lessening of competition effect, MyCC may clear the merger in the first 40 working days (Phase 1 Review). However, if MyCC needs to conduct a more in-depth investigation, it will proceed to Phase 2 Review for the next 80 working days, at the end of which, MyCC may issue a decision to either: (i) block the anticipated merger; (ii) clear the anticipated merger unconditionally; or (iii) clear the anticipated merger based on commitments successfully offered by the merging parties. To accord greater deal certainty to the deal parties, if 120 working days pass without any decision from MyCC, the anticipated merger will automatically be deemed approved, and parties may proceed to complete the merger.

The 120-working-day review period for mandatory notifications may be stopped or frozen in a number of scenarios, including when MyCC requests further information from the enterprise, in which case the review period will be suspended until the day the information is received by MyCC. If the parties fail to provide the information within the period specified by MyCC, the merger notification shall be deemed to have been withdrawn (with a right to submit a fresh notification to MyCC). This automatic "stop the clock" measure whenever MyCC requests for further information from the parties may result in great uncertainty for transaction timelines and impact deal certainty. In exercising its powers to request for information, MyCC will have to balance its need to obtain information in a timely manner and importance of predictability of the deal timeline to the transaction parties. For instance, MyCC should avoid making multiple requests for information during the review period and, hence, stopping the clock more than once. The review period will also be suspended when an enterprise files a written representation or makes an oral representation in response to a provisional infringement decision by the MyCC or makes a commitment offer to address MyCC's concerns.

The 120-working-day review period above does not apply to voluntary notifications, which means that MyCC is not bound to any timeline when reviewing voluntary notifications. Among the primary benefits of voluntarily notifying a transaction to the MyCC would be to obtain legal and transaction certainty, but the absence of a specific review timeline would result in the counter-effect of creating time-related deal uncertainties, even if parties can proceed to close a merger which falls short of the prescribed thresholds. As such, it is hoped that there will be a reasonable review period that applies to voluntary notifications, which is not too divergent from the 120-working-day review period for mandatory notifications, when MyCC finalises the merger control regulations.

The merger control regime is expected to come into force by October 2023, subject to parliament passing the proposed amendments to the Competition Act (which MyCC expects to take place in October 2022). As such, M&A transactions which are expected to complete before October 2023 should be excluded from the proposed regime. Transactions signed prior to October 2023 but expected to only complete after October 2023 will be subject to the merger control regime and, as such, appropriate provisions will need to be inserted in transaction documents to ensure that an analysis is conducted to determine whether a mandatory or voluntary notification to MyCC is required and to set out how responsibilities and risks are allocated between the parties. E

Andre Gan and Lydia Kong are partners in the Corporate, Commercial and Securities practice of Wong & Partners, a member firm of Baker McKenzie International

Long-term structural problems facing the economy not addressed

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very real. Federal government revenue as a percentage of GDP has declined from over 21% in 2012 to about 18% last year, with the tax-to-GDP ratio being around 12% in 2021 compared with 16.1% in 2012.

Of course, there is a greater demand on fiscal resources but the government has been lackadaisical in consolidating government expenditure, especially while also avoiding the pain of enhancing revenues. The state of government finances is a major point of vulnerability that can push an external shock into a national crisis.

On the private side of the economy, one can look at investments as an indicator of both confidence and the creation of new economic capacity. Investments as a share of GDP have been falling since the 1998 crisis — from a peak of over 40% in 1995 to just under 20% last year. This is happening while the current account surplus too is declining, which suggests that the surpluses the economy has been generating have not been reinvested. It has largely been sloshing in the capital market with the government being the dominant borrower there. This is a textbook crowding-out situation but there are also other reasons why private investments have been declining. Quite a few of those reasons are being amplified instead of being addressed by the current government.

Since the onset of the Covid pandemic, the government has not presented a coherent policy framework to address the longer-term structural problems facing the economy. The successive governments have been preoccupied with short-term problems — managing the pandemic in the face of severe fiscal constraints and doing it almost on an ad hoc basis; from securing the budget to fund vaccination and putting in place safety net programmes to managing the effects of food inflation.

The change in government almost a year ago did not change the policy posture much as the present government is essentially the same as the last one, a distracted one that is seemingly more preoccupied with its own political longevity than tackling the more substantive problems of the economy, including some potentially damaging time bombs mentioned earlier. Either the government is impervious to these challenges or it is just incompetent. It has instead focused on identity-based issues that are meant to address the political constituency instead of addressing the pressing problems faced by that same constituency.

I do not foresee any change to this political situation and I therefore do not foresee any positive changes to the way the economy is managed. From a purely economic point of view, there should be a general election as soon as possible to obtain clearer boundaries among political parties and the alliances between them. Fractious though the results may be, the business of diffusing these time bombs can get started. Time is not an ally for the economy. As long as political boundaries are firm, the equilibrium will be more stable than what it is today. E

Dr Nungsari A Radhi is an economist