

## Proposed Amendments to Competition Act 2010: Introduction of Merger Control Regime

### In brief

On 25 April 2022, the Malaysia Competition Commission ("**MyCC**") launched an online public consultation on proposed amendments to the Malaysian Competition Act 2010 ("the **Act** "). Key amendments include (i) introduction of a merger control regime; and (ii) amendments to increase MyCC's investigation and enforcement powers and enhance its procedures. This is the **first part of a two-part** client alert on proposed amendments to the Act, and answers the most frequently asked questions about the merger control regime which is being proposed by MyCC ("**Proposed Regime**").

### Your Most Frequently Ask Questions about the Proposed Regime

#### 1. What types of transactions are covered 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 under the Proposed Regime.

"Merger" includes the following scenarios:

- (i) combination / amalgamation of two or more previously independent enterprises into one;
- (ii) acquisition of direct or indirect control of enterprises. "Control" is deemed to be acquired if there is a possibility of exercising decisive influence on the enterprise by reason of rights, contracts and / or any other means;
- (iii) acquisition of assets such that the acquiror replaces or substantially replaces the asset vendor in the business (or part of the business); or
- (iv) creation of a joint venture to perform functions of an independent enterprise on a lasting basis.

#### 2. Are there any exclusions?

The following merger transactions are excluded from the application of the Proposed Regime:

- (i) mergers between enterprises which are licensed, approved or registered by Bank Negara Malaysia, Securities Commission, Labuan Financial Services Authority or Suruhanjaya Perkhidmatan Air under the following statutes:
  - (a) Financial Services Act 2013, Islamic Financial Services Act 2013, or Money Services Business Act 2011;
  - (b) Capital Market and Services Act 2007 or Securities Industries (Central Depository) Act 1991;
  - (c) Development Financial Institution Act 2002;
  - (d) Labuan Financial Services and Securities Act 2010 or Labuan Islamic Financial Services and Securities Act 2010; or
  - (e) Water Services and Industry Act 2006;



- (ii) mergers involving any commercial or economic activities regulated by the following statutes:
  - (a) Communications and Multimedia Act 1998;
  - (b) Postal Services Act 2012;
  - (c) Malaysian Aviation Commission Act 2015;
  - (d) Petroleum Development Act 1974 (for upstream activities);
  - (e) Energy Commission Act 2001; or
  - (f) Gas Supply Act 1993;
- (iii) mergers engaged (to the extent to which it is engaged) in order to comply with a legislative requirement; and
- (iv) mergers carried out by an enterprise entrusted by the Federal or State government with the operation of services of general economic interest or having revenue-producing monopoly, whose performance of the task assigned may be obstructed by the Proposed Regime.

### 3. Is notification mandatory or voluntary?

The proposed notification regime is a hybrid of mandatory and voluntary notifications:

- (a) notification is **mandatory** if the anticipated merger exceeds the prescribed thresholds; and
- (b) enterprises can also **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 result in a substantial lessening of competition.

### 4. What is the notification threshold?

The notification threshold is still unknown. MyCC expects to launch another public consultation for the notification thresholds in early 2023.

### 5. What is MyCC's timeline to review a merger notification?

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 (i.e. Phase 1 Review). 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 merger or anticipated merger;
- (ii) clear the merger or anticipated merger unconditionally; or
- (iii) clear the merger or anticipated merger based on commitments successfully offered by the enterprise.

If 120 working days have passed without any decision from MyCC (note however the instances which allow this timeline to be stopped or frozen in Question 6 below), the anticipated merger will **automatically be deemed approved**, and parties may proceed to complete the merger.

For **voluntary notifications**, the 120 working days review period above does not apply, which means that MyCC is not bound to any timeline when reviewing voluntary notifications.



## 6. Are there any circumstances whereby the timeline above can be extended or frozen?

There are 4 scenarios under which the time counted toward the 120 working day review period for mandatory notifications may be suspended (thus allowing more time to the MyCC in the review process):

- (i) when MyCC requests for further information from the enterprise, the 120 days will be suspended until the day the information is received by MyCC. More importantly, 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);
- (ii) when the enterprise files a written representation in response to a provisional infringement decision by the MyCC and seeks an extension of time;
- (iii) when an oral representation is made in response to a provisional infringement decision by the MyCC; and
- (iv) when the enterprise makes a commitment offer, the 120 days will be suspended for up to 60 days.

## 7. If the thresholds are met, is it really necessary to make a filing?

Once the thresholds are met, **a legal obligation to notify MyCC is triggered**. Failing to notify the MyCC of a transaction that meets the prescribed threshold would constitute a merger violation, in which case the merger transaction will be rendered void and may result in a financial penalty of up to 10% of the value of the merger transaction.

## 8. Do merging parties have to delay completion of the transaction until MyCC issues its decision?

If the prescribed thresholds are met and the transaction is notifiable, parties must delay completion of the transaction until either:

- (i) MyCC has issued a clearance decision; or
- (ii) the 120 working days period for the merger review has expired (note however the instances which allow this timeline to be stopped or frozen in Question 6 above).

Failure to do so will render the completed merger void and may result in a financial penalty of up to 10% of the value of the merger transaction. This also means that upon making a mandatory filing, parties are subject to standstill obligations and prohibited from prematurely completing the merger transaction (i.e. gun-jumping) before receiving MyCC's clearance of the merger transaction.

If a voluntary filing was 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. In such case, the 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. The MyCC may also give any other direction it deems appropriate.

When a filing is made, whether mandatorily or voluntarily, MyCC has the powers to impose interim measures and issue directions to merging parties if it is a matter of urgency for the purpose of preventing serious and irreparable damage or economic harm or to protect the public interest.

## 9. Can MyCC review the transaction even if notification thresholds are not met?

Yes. If MyCC has reasons to suspect that any merger has or may be expected to result in substantial lessening of competition, it has the power to investigate the merger, regardless of whether it exceeds the prescribed threshold and whether the transaction has been completed or not. 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.



Pending completion of its investigation, MyCC has the powers to impose interim measures and issue directions to merging parties if it is a matter of urgency for the purpose of preventing serious and irreparable damage or economic harm or to protect the public interest.

#### 10. Can merging parties offer commitments to address MyCC's concerns?

If MyCC has concerns that the merger transaction or anticipated merger transaction may substantially lessen competition, parties can offer commitments at any time before MyCC issues its decision to remedy or mitigate such concerns. If MyCC accepts the commitments, MyCC will make a finding that the merger transaction does not substantially lessen competition in its decision. However, if MyCC has reasonable grounds to suspect that any information on the basis of which the MyCC has accepted a commitment is incomplete, false or misleading, or that parties fail to implement or comply with one or more of the terms of commitment, the MyCC has the right to revoke its clearance decision.

#### 11. Can MyCC's decision be subject to appeal?

Yes. Merging parties can appeal against MyCC's decision to the Competition Appeal Tribunal ("CAT") which has exclusive jurisdiction to review merger-related decisions issued by MyCC. Further, merging parties may also appeal against decisions made by the CAT at the High Court, on a point of law or the amount of a financial penalty. The High Court subsequently has the power to confirm, modify or reverse the decision of the CAT, or make such other order as deemed fit.

#### 12. When will the Proposed Regime come into force?

Subject to Parliament passing the proposed amendments (which MyCC expects to take place in October 2022), a one year transition period will apply, and the MyCC expects to begin enforcing the Proposed Regime **by October 2023**. As such, M&A transactions which are expected to complete before October 2023 should be excluded from the Proposed Regime. We expect to see heightened M&A activity in the market between now and October 2023 as parties may wish to take full advantage of the grace period before the Proposed Regime takes effect.

## Contact Us



**Andre Gan**  
Partner  
Kuala Lumpur  
[andre.gan](mailto:andre.gan@wongpartners.com)  
[@wongpartners.com](https://www.wongpartners.com)



**Lydia Kong**  
Partner  
Kuala Lumpur  
[lydia.kong](mailto:lydia.kong@wongpartners.com)  
[@wongpartners.com](https://www.wongpartners.com)

