Organisation for Economic Co-operation and Development

DAF/COMP/GF/WD(2019)28

Unclassified **English - Or. English**

2 December 2019

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Global Forum on Competition

MERGER CONTROL IN DYNAMIC MARKETS – Contribution from Malaysia

- Session III -

6 December 2019

This contribution is submitted by Malaysia under Session III of the Global Forum on Competition to be held on 5-6 December 2019.

More documentation related to this discussion can be found at: oe.mcdym.

Please contact Ms. Lynn Robertson [E-mail: Lynn.Robertson@oecd.org], if you have any questions regarding this document.

JT03455647

Merger Control in Dynamic Markets

- Contribution from Malaysia –

1. Introduction

1. Malaysia Competition Commission (MyCC) appreciates the opportunity to submit these contributions to the OECD Global Forum on Competition specifically on merger control. Nonetheless, MyCC is in the midst of amending the competition law to include merger control regime.

2. The Competition Act 2010[1] (hereinafter referred to as the "Act") had come into effect on 1.1.2012 and it applies to all commercial activities undertaken within Malaysia and those outside of Malaysia that have an effect on competition in Malaysian market, save for commercial activity regulated under the exceptions of the Act.

3. Unlike other jurisdictions, Malaysia does not have merger control in its competition law. The Act was implemented in 2012 without the benefit of merger control. The reason for this non-inclusion is, the Malaysian Government then, intended to encourage mergers and acquisitions to further strengthen the domestic economy and fuel competition for entities to enter the global market, especially amongst the financial institutions.

4. Nevertheless, there are sector-specific laws and guidelines that regulate the anti-competitive aspect of mergers in the aviation services sector and the communications and multimedia sectors, enforced by the Malaysian Aviation Commission, and the Malaysian Communications and Multimedia Commission, respectively.

5. The Malaysian Aviation Commission has competition powers under the Malaysian Aviation Commission Act 2015. This is presently the only statutory merger control regime in Malaysia.

6. For the communications and multimedia sectors, the existing "Guideline on Substantial Lessening of Competition"[2] issued by the Malaysian Communications and Multimedia Commission expressly states that the regulator will closely monitor mergers or acquisitions involving its licensees.

7. In this contribution paper we will outline the relevant descriptions concerning amendment of the Act with brief reasons of the amendment, the mandatory merger notifications and the forming of an interim unit for the upcoming merger control's enforcement.

[1] Act 712 of 2010 enacted on 1st January, 2012 as amended from time to time.

[2] See Guideline on Substantial Lessening of Competition: https://www.mcmc.gov.my/skmmgovmy/media/General/pdf/Guideline-on-Substantially-Lessening-Competition-110714.pdf

2. Amendment

8. Regarding the amendment to the Competition Act 2010, the MyCC has initiated the process of seeking legislative amendments to include new provisions on mergers and acquisitions into the Act. The MyCC aims to complete this process by the middle of 2020.

9. A task force has been formed for this purpose. The MyCC collated feedbacks from various governmental agencies such as Central Bank of Malaysia, Securities Commission and Malaysian Productivity Corporations. Currently, we are in the midst of conducting the cost–benefit analysis to design the merger thresholds.

2.1. Reasons for having merger control

10. The goal of a merger control regime is not to subject all transactions to merger control.

11. The goal is to review mergers where the marginal benefits of enforcement are likely to exceed the marginal costs of enforcement *e.g.* horizontal mergers in concentrated industries.

12. The absence of merger control would only essentially mean that the Commission is handicapped from pursuing *ex-ante* anti-competitive conducts and only able to monitor and take *ex-post* actions against conduct of the merged company.

13. It is apparent in the case of *Grab/Uber*[3] merger, no *ex-ante* action could be taken by the MyCC despite numerous public outcries on the said matter. This is contrary to national competition authorities of neighbouring countries such as Singapore and Philippines.

14. Another recent example in Malaysia includes the *YTL/Lafarge*[4] merger. YTL Cement acquired its competitor, LafargeHolcim mid of this year. Post-acquisition, YTL announced 41% hike in cement prices.

2.2 Mandatory merger notifications

15. In relation to the type of merger notification, after much thought and deliberation, we are inclining towards a mandatory notification regime. Notification is mandatory as soon as jurisdictional thresholds are met. Nevertheless, notification is voluntary where it falls below the thresholds.

16. The MyCC acknowledges that the biggest challenge to voluntary notification regime is to create sufficient incentives to induce notification since if the penalties for not notifying are not severe enough, the superiority of voluntary regime disappears. Hence, we are of the view that the optimal solution is a mandatory notification regime.

[3] See MyCC's proposed decision to fine Grab RM 86 million for abusive practice: https://www.mycc.gov.my/sites/default/files/pdf/newsroom/Proposed%20Decision%20against%20GRAB%20%28Eng%29.pdf

[4] See MyCC's media release on keeping close eye on cement industry: https://www.mycc.gov.my/sites/default/files/pdf/newsroom/English%20Version%20-%20Cement%20Issue.pdf

2.2. Interim Unit

17. In line with this effort, The MyCC is currently in the midst of forming an interim unit to prepare our officers before the coming into force of the merger control regime. There will be a sufficient grace period before the merger control regime takes effect. This will allow sufficient time for the MyCC and market participants to prepare for implementation of the merger control regime.

3. Conclusions

18. The MyCC trusts that the upcoming amendments to the Competition Act 2010, especially with the incorporation of merger control regime, would place Malaysia on similar footing with many other jurisdictions under OECD and would further enhance the effectiveness of competition enforcement in Malaysia.

19. MyCC looks forward to future discussion and collaboration with other jurisdictions on this particular subject.