

Client Alert

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The Malaysian Aviation Commission issues guidelines on merger control regime

The Malaysian Aviation Commission Act 2015 came into force on 1 March 2016 and introduced the first ever sectoral merger control regime in Malaysia which applies to the aviation service market.

Under the Malaysian Aviation Commission Act 2015 ("**Act**"), mergers that result, or may be expected to result, in a substantial lessening of competition ("**SLC**") in any aviation service market are prohibited.

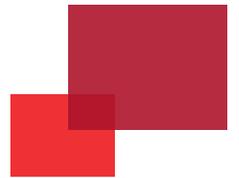
On 20 April 2018, the Malaysian Aviation Commission ("**MAVCOM**") issued: (i) the Guidelines on the Substantive Assessment of Mergers ("**Substantive Assessment Guidelines**"); and (ii) Guidelines on Notification and Application Procedure for an Anticipated Merger or a Merger ("**Procedural Guidelines**") (collectively "**Guidelines**"). The Guidelines provide long-awaited guidance on the substantive and procedural issues surrounding the voluntary merger control regime.

Substantive Assessment Guidelines

The merger control regime under the Act covers a wide spectrum of mergers, including horizontal, vertical and conglomerate mergers, as well as any long-term joint venture that is created to perform all the functions of an autonomous economic entity.

The Substantive Assessment Guidelines explains how MAVCOM will assess whether a merger may result in a SLC and sets out a number of factors which MAVCOM will consider in making such evaluation, some of which are highlighted below:

- (a) the definition of the relevant market to identify the aviation service market within which the competitive effects of the merger would be assessed;
- (b) market power of the merging parties;
- (c) the difference in the market concentration of the relevant aviation service market pre-merger and post-merger;
- (d) competitive effects which may arise of the merger. MAVCOM will consider the counterfactual scenario, i.e. the market condition and degree of competition in the market in the absence of the merger;



- (e) whether there is any entry of new competitors or expansion of operation of existing competitors that can pose competitive constraints on the merging parties; and
- (f) whether there is countervailing buyer power that can constrain or diminish the market power of the merging parties.

Importantly, MAVCOM recognises that competitive effects arising from vertical or conglomerate mergers are, in general, less likely to be anti-competitive, as compared to horizontal mergers.

Whilst a merger which results, or may be expected to result, in a SLC is an infringement of the prohibition under the Act, it may nevertheless be justified if there are significant economic efficiencies or social benefits arising directly from the merger that outweigh such SLC effect. MAVCOM sets out extensive examples of such economic efficiencies and social benefits in the Substantive Assessment Guidelines, such as economies of scale and scope, an increased network of aviation services and benefits of "one-stop shopping".

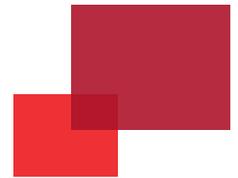
Ultimately, whether a justification would outweigh any SLC effect requires a balancing exercise to be carried out by MAVCOM, and no single justification can conclusively exclude a merger from infringement without such balancing exercise being undertaken first.

Procedural Guidelines

The Procedural Guidelines adds clarity to the procedures that notifying parties have to adhere to when making an application to MAVCOM. The key takeaway points are summarised below:

Do I have to make an application to MAVCOM before closing the transaction?

The merging parties should carry out a self-assessment to determine whether a merger will result in an SLC. The notification regime is voluntary and parties can close the transaction before making the application to MAVCOM or before approval from MAVCOM in respect of the application is received. However, if MAVCOM initiates an investigation into the merger transaction and finds the merger to have an SLC effect, it can order, among others, that the merger be dissolved or modified.



What are the filing thresholds?

The Procedural Guidelines states MAVCOM is more likely to investigate a merger if:

- (a) the combined turnover of the merger parties in Malaysia in the financial year preceding the merger is at least RM 50 million; or
- (b) the combined worldwide turnover of the merger parties in the financial year preceding the merger is at least RM 500 million.

When can I make an application to MAVCOM?

The earliest that a merger party may notify and make an application to MAVCOM with regard to an anticipated merger is when (i) the merger parties have a *bona fide* intention to proceed with the anticipated merger, (ii) details of the anticipated merger are available, and (iii) the anticipated merger will be or has been made public.

As for a completed merger, the notification and application to MAVCOM may be made at any time, and in any case, as soon as possible after the merger is completed.

What is the timeline for the application process?

The duration for the assessment of an application will be determined on a case-by-case basis, depending on the complexities of the issues and the timeliness and the completeness of the information provided by the merger parties.

Does MAVCOM provide for an undertaking procedure?

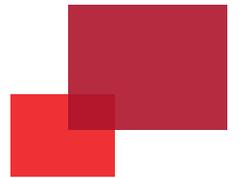
Yes, a merger party may, at any time, propose a written undertaking to MAVCOM to do or refrain from doing anything to address any actual or potential competition concern raised by MAVCOM in connection with the merger.

Alternatively, an undertaking may also be proposed by MAVCOM if it finds that the anti-competitive effects arising from a merger may be remedied by undertakings.

What are the consequences if MAVCOM decides there is an infringement?

In the event that MAVCOM decides that an anticipated merger or a merger infringes the prohibition under the Act, MAVCOM has the power to:

- (a) require the infringement to be ceased immediately;
- (b) specify appropriate steps to be taken by the infringing enterprise to bring the infringement to an end;
- (c) impose a financial penalty which shall not exceed 10% of the worldwide turnover of the enterprise over the period during which the infringement occurred; or



- (d) give any other direction as it deems appropriate, including but not limited to, (i) prohibiting an anticipated merger from being carried into effect, (ii) requiring a merger party to enter into agreements designed to prevent or lessen the anti-competitive effects arising from an anticipated merger or a merger, or (iii) requiring a merger party to dispose such businesses, assets, shares or rights in a manner that may be specified by MAVCOM.

Can I appeal against MAVCOM's decision?

Yes, any person aggrieved by any decision of MAVCOM may appeal to the High Court within three months from the date on which the decision was communicated to him/her.

Conclusion

Most countries have adopted a mandatory and *ex ante* approach to merger control; i.e. clearance must be obtained from the relevant competition authorities before the transaction can be completed. Only a handful of jurisdictions in the world have established a voluntary merger control regime – Australia, Singapore, New Zealand and the UK are examples. However, for young authorities, such as MAVCOM, a system of voluntary notification may be more suitable as analysing merger filings is a highly time and resource consuming process. A voluntary notification system will enable MAVCOM to focus on its other responsibilities under the Act, including investigating other potential anti-competitive agreements and abuses under the Act.

MAVCOM has taken a great step forward in producing these Guidelines, especially since the main competition legislation in Malaysia – the Malaysian Competition Act 2010 – has yet to include a general merger control regime. Merger control is an effective policy tool to safeguard against the creation or strengthening of concentrated market power. Implemented properly, the merger control regime will become a key weapon in preventing and addressing changes in concentrated market structures. MAVCOM will now need to apply the Guidelines coherently and in an objective manner to push the regime forward and build its credibility.

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