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JURISDICTIONAL OVERLAP BETWEEN THE MALAYSIAN COMPETITION COMMISSION AND THE SECURITIES COMMISSION IN MERGER REVIEW

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ABSTRACT

The introduction of merger control provisions through the proposed amendment to Malaysia's Competition Act 2010 (Act 712) represents a pivotal development in the country's competition law framework. Merger control is a fundamental component of competition regulation globally, ensuring that business consolidations do not create monopolistic structures that harm market competition and consumer welfare. Many jurisdictions, including those in Southeast Asia, have long implemented such measures, and Malaysia's adoption of merger review aligns it with international best practices. However, implementing this amendment raises critical concerns regarding jurisdictional overlaps between the Malaysian Competition Commission (MyCC) and the Securities Commission (SC). Both regulatory bodies have oversight

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responsibilities that may intersect, leading to potential enforcement inefficiencies, procedural delays, and disruptions to merger transactions. Without clear coordination mechanisms, businesses may face regulatory uncertainty, hindering investment and economic growth. This study examines the potential jurisdictional challenges and explores how effective inter-agency collaboration can be achieved. Employing a mixed-method approach that integrates doctrinal legal analysis with comparative insights from India and Singapore, this paper identifies three key issues: differences in legal definitions, information asymmetry, and conflicting timelines. Based on these findings, the study proposes institutional coordination mechanisms and the harmonisation of procedural timelines to enhance inter-agency collaboration. These recommendations aim to promote regulatory clarity, minimise enforcement conflicts, and foster a competitive yet business-friendly economic environment, ultimately strengthening Malaysia's competition law enforcement and economic governance.

Keywords: Competition, Securities, Jurisdictional Overlap, Coordination, Cooperation.

PERTINDIHAN BIDANG KUASA ANTARA SURUHANJAYA PERSAINGAN MALAYSIA DAN SURUHANJAYA SEKURITI DALAM SEMAKAN PENGGABUNGAN

ABSTRAK

Pengenalan peruntukan kawalan penggabungan melalui pindaan yang dicadangkan terhadap Akta Persaingan Malaysia 2010 (Akta 712) merupakan perkembangan penting dalam rangka kerja undang-undang persaingan di negara ini. Kawalan penggabungan adalah komponen asas dalam peraturan persaingan di peringkat global, yang bertujuan memastikan bahawa penyatuan perniagaan tidak mewujudkan struktur monopoli yang boleh menjejaskan persaingan pasaran dan kesejahteraan pengguna. Banyak bidang kuasa, termasuk di Asia Tenggara, telah lama melaksanakan langkah-langkah ini, dan penerimaan semakan penggabungan oleh Malaysia sejajar dengan amalan terbaik antarabangsa. Namun, pelaksanaan pindaan ini menimbulkan kebimbangan kritikal mengenai pertindihan bidang kuasa antara Suruhanjaya Persaingan Malaysia (MyCC) dan Suruhanjaya Sekuriti (SC). Kedua-dua badan berkuasa mempunyai tanggungjawab pemantauan yang mungkin bertindih, yang boleh mengakibatkan ketidakcekapan penguatkuasaan, kelewatan prosedur, dan gangguan terhadap transaksi penggabungan. Tanpa mekanisme penyelarasan yang jelas, perniagaan mungkin menghadapi ketidakpastian peraturan, yang boleh menjejaskan pelaburan serta pertumbuhan ekonomi. Kajian ini meneliti cabaran bidang kuasa yang berpotensi dan meneroka bagaimana kerjasama antara agensi dapat dilaksanakan dengan lebih berkesan. Dengan menggunakan pendekatan kaedah campuran yang menggabungkan analisis doktrinal undang-undang dengan perbandingan daripada India dan Singapura, kajian ini mengenal pasti tiga isu utama: perbezaan dalam definisi undang-undang, asimetri maklumat, dan percanggahan garis masa. Berdasarkan penemuan ini, kajian ini mencadangkan mekanisme penyelarasan institusi dan harmonisasi prosedur bagi meningkatkan kerjasama antara agensi. Cadangan ini bertujuan untuk memperjelaskan peraturan, mengurangkan konflik penguatkuasaan, serta mewujudkan persekitaran ekonomi yang kompetitif dan mesra perniagaan, sekali gus mengukuhkan penguatkuasaan undang-undang persaingan dan tadbir urus ekonomi di Malaysia

Kata Kunci: Persaingan, Sekuriti, Pertindihan Bidang Kuasa, Penyelarasan, Dan Kerjasama.

INTRODUCTION

The effort to introduce merger control into the Malaysian Competition Act 2010 was initiated by the Malaysian Competition Commission (MyCC) in 2022. This initiative was pursued through a proposal to amend the Act.[1] As part of this process, MyCC held a public consultation to gather feedback and opinions on the inclusion of merger control provisions.[2]

The motivation to incorporate merger control into the Act was driven by two key factors: internal and external. Internally, MyCC lacked the authority to intervene in merger transactions that could significantly lessen competition in the market. Additionally, the number of inquiries, complaints, and observations on mergers and

[1]Salient Points of the Proposed Amendments to the Competition Act 2010 (Act 712), Malaysian Competition Commission, 2022, 3, https://www.mycc.gov.my/sites/default/files/Salient Points of the Proposed Amendments of Act 712 %5B25.4.22%5D.pdf.

[2]Public Consultation, Malaysian Competition Commission, 2022, https://www.mycc.gov.my/public-consultation.

acquisitions rose sharply from 9 in 2020 to 45 in 2021.[3] This increase likely raised concerns within MyCC, prompting the need to address the regulatory gap.

Externally, the push to incorporate merger control into the Act is driven by Malaysia's commitment to international economic treaties, such as the ASEAN Economic Community (AEC), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and other agreements.[4] These treaties generally encourage member countries to adopt comprehensive competition laws, with merger control being a key mechanism for addressing anti-competitive practices. Moreover, most Southeast Asian countries, including Singapore, Brunei, Vietnam, and the Philippines, have already integrated merger control into their competition laws.[5] Malaysia remains one of only 20 out of 140 countries with a competition law framework that lacks a merger control regime.

In Malaysia, takeovers and merger transactions are subject to review by multiple regulatory bodies, reflecting the country's multi-agency approach to economic regulation. Currently, the assessment of potential anti-competitive effects in mergers falls under the jurisdiction of sector-specific regulators, such as the Malaysian Aviation Commission (MAVCOM) and the Malaysian Communications and Multimedia Commission (MCMC). MAVCOM is responsible for regulating mergers in the aviation sector under Section 54 of the Malaysian Aviation Commission Act 2015, ensuring that airline consolidations do not lead to market distortions such as monopolistic

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[3] Consultation Paper on the Proposed Amendment to the Competition Act 2010 (Act 712), Malaysian Competition Commission, 2022, 13, https://www.mycc.gov.my/sites/default/files/Consultation Document for the Proposed Amendments of Act 712 %5B25.4.22%5D.pdf.

[4] Consultation Paper on the Proposed Amendment to the Competition Act 2010 (Act 712), 15.

[5] Handbook of Competition Policy and Law in ASEAN for Business 2017 lists down the merger control regimes in the region of Southeast This was stated in one ASEAN report which lists down the merger control regimes in the region of Southeast Asia, which are Competition and Consumer Commission of Singapore, Philippine Competition Commission, Vietnam Competition Authority, Indonesia Commission for the Supervision of Business Competition, Competition Commission of Brunei Darussalam, Myanmar Competition Commission, Office of Trade Competition Commission of Thailand.

pricing or reduced consumer choice.[6] Similarly, MCMC oversees mergers in the communications and multimedia sectors under Section 133 of the Malaysian Communications and Multimedia Commission Act 1998, aiming to maintain fair competition among telecommunications and broadcasting companies while fostering technological innovation and consumer access to services.[7]

In contrast, the Securities Commission Malaysia (SC) primarily oversees the capital markets, which are defined under Section 2 of the Malaysian Capital Markets and Services Act 2007 to include securities and derivatives markets. A key responsibility of the SC is to ensure that the takeover and merger activities do not harm the interests of minority shareholders, particularly in the target companies. This aligns with General Principle 2 of the Malaysian Code on Take-overs and Mergers 2016. Furthermore, the SC is tasked with promoting transparency, preventing market manipulation, and maintaining investor confidence in Malaysia's financial markets, as mandated by Section 15 of the Securities Commission Act 1993.

With the MyCC emerging as the primary authority for enforcing merger control under the proposed Section 10A of the Competition Act 2010,[8] a more structured approach to competition enforcement is being established. However, as the MyCC expands its regulatory oversight, the risk of jurisdictional overlaps with existing sectoral and financial regulators, particularly the SC, increases. While previous studies have explored challenges related to overlapping jurisdictions between the competition regulators and sectoral-specific regulators,[9] this paper specifically examines the jurisdictional overlaps between the MyCC,

[6]MAVCOM Guidelines on Substantive Assessment of Mergers, Malaysian Aviation Commission (Kuala Lumpur, 2018), http://www.mavcom.my/wp-content/uploads/2018/04/Guidelines-on-Substantive-Assessment-of-Mergers.pdf.

[7]MCMC Guidelines on Mergers and Acquisitions, Malaysian Communications and Multimedia Commission (Kuala Lumpur, 2019), www.mcmc.gov.my.

[8]Salient Points of the Proposed Amendments to the Competition Act 2010 (Act 712), 10.

[9]Geeta Gouri, "Interface Between Competition Commission of India and Sectoral Regulators," in *A Commissioner's Primer to Economics of Competition Law in India*, ed. Geeta Gouri (Singapore: Palgrave Macmillan, 2023), 207.

as the competition regulator, and the SC, as the securities regulator. This focus is particularly significant given that securities regulators play a vital role in maintaining market integrity, protecting investors, and ensuring transparency, objectives that often align with or complement those of competition authorities.

This paper critically analyses the potential challenges arising from jurisdictional overlaps between the MyCC and the SC in merger reviews, employing doctrinal and comparative analyses. This study also aims to identify best practices for enhancing regulatory coordination by examining regulatory frameworks in other jurisdictions. Ultimately, the findings will contribute to the development of a structured framework for inter-agency cooperation, ensuring that Malaysia's merger control regime is both effective and efficient in promoting fair competition while safeguarding the interests of investors and shareholders.

LITERATURE REVIEW

Academic literature predominantly emphasises the jurisdictional overlap between generic competition authorities and sector-specific regulatory bodies. Beyond their core regulatory responsibilities, some sector-specific regulators are also empowered to enforce competition rules within their respective industries effectively.

Peterson et al. highlighted that over the past few decades, several heavily regulated markets, including telecommunications, energy, and transportation, have undergone partial liberalisation.[10] Despite deregulation, these markets often remained subject to both sector-specific regulations and general competition laws.[11] As a result, many countries experienced overlapping jurisdictions where competition

[10]Geoff Petersen, Morelle Bull, and Morelle Dermody, "Evolution and Revolution in Infrastructure Access Regimes: Australia's Sector-Specific Regulation and Its Challenges," in *Competition Law and Economics in Australia, Volume I: The Competition Law System: Context, Law, and Economics*, ed. Julie Clarke et al., 1st ed. (London: Routledge, 2025), 28.

[11]Petersen, Bull, and Dermody, "Evolution and Revolution in Infrastructure Access Regimes: Australia's Sector-Specific Regulation and Its Challenges," 29.

policy intersected with sectoral regulation.[12] In Malaysia, the MyCC serves as the primary authority overseeing competition matters.[13] In contrast, enforcement of competition laws in specific sectors is delegated to agencies such as the MAVCOM and the MCMC.[14]

Dabbah highlights that the interplay between sectoral regulators and competition authorities varies widely across jurisdictions.[15] Barros provided examples of coordination practices in several countries. In Denmark, sector-specific authorities may be required to seek the opinion of the competition authority. In France and Germany, regulatory bodies are required to share information with each other, although in Germany, the sectoral regulator has the discretion to take the lead in initiating action.[16] In Italy and Sweden, the competition authority is given priority and may consult the sectoral regulator when necessary.[17] Conversely, in the Netherlands and the United Kingdom, decision-making involves explicit coordination, requiring both regulatory bodies to act concurrently.[18] In the United States, jurisdiction is shared between the Department of Justice and the Federal Communications Commission (FCC) for the telecommunications and media sectors, as well as with the Federal Energy Regulatory Commission (FERC) in the energy sector.[19]

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[12]Maher M. Dabbah, "The Relationship between Competition Authorities and Sector Regulators," *The Cambridge Law Journal* 70, no. 1 (2011): 113.

[13]Nasarudin Abdul Rahman, Mohd Aidil Tupari, and Haniff Ahamat, "Merger Control Regime in Malaysia : Past, Present and Way Forward," *International Islamic University Malaysia Law Journal* 32, no. 2 (2024):124.

[14]Abdul Rahman, Tupari, and Ahamat, "Merger Control Regime in Malaysia : Past, Present and Way Forward,"121.

[15]Dabbah, "The Relationship between Competition Authorities and Sector Regulators," 114.

[16]Pedro P. Barros and Steffen H. Hoernig, "Sectoral Regulators and the Competition Authority," *Review of Industrial Organization* 52, no. 3 (2018): 452, https://doi.org/10.2307/48722390.

[17]Barros and Hoernig, "Sectoral Regulators and the Competition Authority," 452.

[18]Barros and Hoernig, "Sectoral Regulators and the Competition Authority," 452.

[19]Barros and Hoernig, "Sectoral Regulators and the Competition Authority," 452.

The complexity of coordination stems from the differing objectives and ultimate goals of competition law and sectoral regulation. Sectoral regulation pursues broader objectives that extend beyond the scope of competition law. While competition authorities focus solely on anti-competitive conduct, sector-specific regulators oversee their respective markets, which includes but is not limited to addressing anti-competitive concerns.[20] Furthermore, competition authorities primarily rely on ex-post measures, with the exception of merger control, whereas sectoral regulation generally adopts an ex-ante approach.[21] In other words, the former intervenes after anti-competitive harm has occurred, while the latter acts to prevent such harm before it arises.

The differences between these two regulatory approaches arise from their distinct methods of addressing issues. Competition law primarily depends on market mechanisms, resorting to legal measures only in response to market failures.[22] In contrast, sectoral regulation relies on regulatory bodies and anticipates more frequent and often significant interventions, viewing such actions as essential to consistently achieving the desired regulatory outcomes.[23]

Overlaps often arise in the relationship between competition authorities and sectoral regulatory bodies, particularly in areas such as market definition and the assessment of market power. Under competition law, these steps are essential for identifying potential anticompetitive concerns. In sectoral regulation, they play a pivotal role in resolving various issues, such as determining interconnection obligations for operators in industries like telecommunications.[24]

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[20]Cansu D. Burkhalter, *Legal and Regulatory Framework of European Energy Markets: Competition Law and Sector-Specific Regulations* (Berlin, Germany: Tectum Publication, 2020), 89.

[21]Antonio Manganelli and Antonio Nicita, *The Governance of Telecom Markets: Economics, Law and Institutions in Europe* (London, United Kingdom: Palgrave Macmillan, 2020), 57.

[22]Parcu Pier, Monti Giorgio, and Botta Marco, *The Interaction of Competition Law and Sector Regulation: Emerging Trends at the National and EU Level* (United Kingdom: Edward Elgar Publishing, 2022), 13.

[23]Pier, Giorgio, and Marco, *The Interaction of Competition Law and Sector Regulation: Emerging Trends at the National and EU Level,* 14.

[24]Manganelli and Nicita, *The Governance of Telecom Markets: Economics, Law and Institutions in Europe*, 59.

In terms of pricing, the methodologies used in sectoral regulation to establish interconnection or access fees significantly influence competitive dynamics in downstream markets, particularly affecting price competition.[25] When it comes to remedies, both behavioural and structural measures are utilised by competition enforcement and sectoral regulation, although competition authorities often favour structural remedies.[26] Behavioural remedies are rules that control how a company acts, like stopping unfair practices or requiring access to services. Structural remedies change the setup of a company, such as selling part of the business to reduce market power.[27] Moreover, the objectives of sectoral regulation, such as technical, economic, and access regulation, align with those of competition law, particularly in prioritising consumer protection and welfare.[28]

A key issue with the concurrent approach is the potential for jurisdictional overlap between sector regulators and the competition authority. Industry participants occasionally raise concerns about inadequate collaboration between the relevant sectoral regulator and the competition authority. For instance, the British Airports Authority (BAA) voiced concerns about the involvement of both the Office of Fair Trading (OFT) and the Civil Aviation Authority (CAA) in the investigation of UK airports, alleging insufficient communication between the two agencies.[29]

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[25]Nico Roehrich and Mark Armstrong, "Interconnect Outcomes: To Impose or Negotiate - The Experiences of Singapore, Hong Kong, South Korea and Australia," Emerald Insight, 2002, https://doi.org/10.1108/14636690210426622.

[26]Benjamin Lörtscher and Frank Maier-rigaud, "On the Consistency of the European Commission's Remedies Practice," in *Remedies in EU Competition Law: Substance, Process and Policy*, ed. Damien Gerard and Assimakis Komninos (Netherlands: Wolters Kluwer, 2020), 55.

[27]Lörtscher and Maier-rigaud, "On the Consistency of the European Commission's Remedies Practice," 53.

[28]Manganelli and Nicita, *The Governance of Telecom Markets: Economics, Law and Institutions in Europe*, 57.

[29]Jackie Holland and Aurora Luoma, "Decision-Making Powers and Institutional Design in Competition Cases: The Application of Competition Rules by Sectoral Regulators in the United Kingdom," Competition Policy International, 2014, https://www.pymnts.com/cpi-posts/decision-making-powers-and-institutional-design-in-competition-

Coordination and cooperation between competition authorities and sectoral regulators face three principal limitations and challenges.[30] First, it must be acknowledged that not all sectoral regulators are statutorily mandated to actively promote competition. Second, potential legal restrictions on the sharing of confidential information between competition authorities and sectoral regulators require careful consideration. Third, sectoral regulators frequently demonstrate a strong adherence to the strict application of their statutory mandates.

Building on the observations above, existing scholarly works have largely highlighted the challenges arising from overlapping jurisdictions between competition regulatory bodies and sector-specific regulators. In the Malaysian context, this issue involves the MyCC and sector-specific regulators such as MAVCOM and MCMC. Given the recognised difficulties in coordination and cooperation between competition regulators and sector-specific regulators, similar challenges are likely to arise between MyCC, the competition regulator, and SC, the securities regulator. Therefore, this paper aims to address this research gap by evaluating the potential challenges of coordination in overlapping jurisdictions during merger reviews conducted by MyCC and SC.

POTENTIAL CHALLENGES IN JURISDICTIONAL OVERLAP BETWEEN MYCC AND SC

Effective coordination and cooperation among regulators with overlapping jurisdictions in merger assessment is essential to facilitate the smooth completion of cross-border takeovers and mergers in Malaysia. A lack of coordination and cooperation among regulatory bodies could delay the merger process, creating unfavourable conditions for foreign acquirers.

Prior to examining the potential challenges in jurisdictional overlap, it is important to clarify where such overlaps arise between the Malaysian Competition Commission (MyCC) and the Securities Commission (SC). In Malaysia, the SC has jurisdiction over mergers

cases-the-application-of-competition-rules-by-sectoral-regulators-in-the-united-kingdom/.

[30] Gouri, "Interface Between Competition Commission of India and Sectoral Regulators," 210.

involving unlisted public companies with more than 50 shareholders and net assets of at least RM15 million, as well as listed business trusts and listed real estate investment trusts (REITs), in accordance with Rule 1.09 of the Malaysian Rules on Take-overs, Mergers and Compulsory Acquisitions. In contrast, the MyCC, as the national competition regulator, has broad authority to enforce competition rules across all enterprises, irrespective of their public or private status, as outlined in the proposed Section 10B of the Malaysian Competition Act 2010.[31] Consequently, coordination between the MyCC and SC primarily applies to cases involving unlisted public companies that meet the SC's thresholds, listed business trusts, and listed REITs.

The potential challenges arising from jurisdictional overlap between the MyCC and SC include differences in legal definitions, information asymmetry, and timeline conflicts, as illustrated in Figure 1 below.

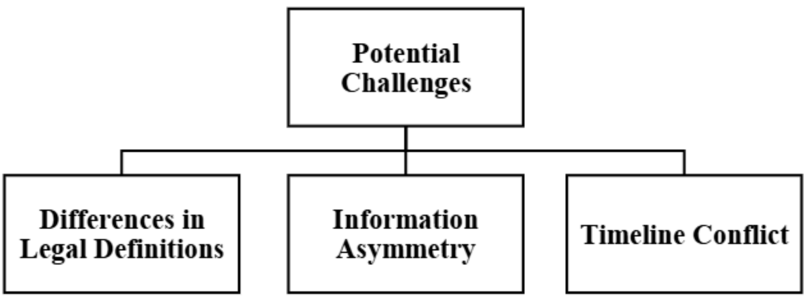

Figure 1: Potential Challenges of Overlapping Jurisdiction Between MyCC and SC

Differences in Legal Definitions

A significant challenge in certain jurisdictions stems from the use of identical terminology across various takeover and merger regulations, even though these terms often carry distinct meanings within different regulatory frameworks. For example, the term "control" is defined differently in Singapore's regulatory instruments. Under Rule 11 of the Singapore Code on Take-overs and Mergers, "control" is referred to as "effective control," defined as the holding, or aggregate holdings, of

[31] Salient Points of the Proposed Amendments to the Competition Act 2010 (Act 712), 11.

shares carrying 30% or more of a company's voting rights, irrespective of whether this shareholding confers de facto control. In contrast, Section 54 (3) of the Singapore Competition Act 2004 defines "control" as the ability to exert decisive influence over an enterprise's activities, whether through ownership of assets, rights, or by influencing the enterprise's composition, voting, or decision-making processes.

Similarly, in Malaysia, "control" is subject to varying definitions. Section 216 of the Malaysian Capital Market and Services Act 2007 defines it as the acquisition or holding of, or entitlement to exercise or control, voting shares or voting rights exceeding 33% (or another percentage prescribed in the Code) in a company, regardless of how this is achieved. However, under the Proposed Amendment to the Competition Act 2010, "control", as defined in the proposed Section 10B, refers to the ability to exercise decisive influence over another enterprise through rights, contracts, or any other means, whether individually or in combination.[32]

Based on the definitions above, determining control in the context of merger control assessment requires a more detailed evaluation compared to its determination in the context of takeovers and mergers. In merger control, the concept of control is subjective, relying on the extent of decision-making power the acquirer can exercise. Conversely, under takeover and merger rules, control is defined objectively, based on the percentage of voting rights held by the acquirer. These differences in definitions and concepts arise from the distinct objectives of the respective rules. The primary aim of merger control is to prevent mergers that may negatively impact market competition, whereas takeover and merger rules are designed to ensure shareholders can benefit from premium payments when exiting the company.

Determining control in the context of merger regulation requires a more detailed and flexible assessment than in takeovers and mergers. This difference exists because each set of rules serves a different purpose. In merger regulation, control is assessed based on how much influence an acquiring company can have over the target company's

[32] Salient Points of the Proposed Amendments to the Competition Act 2010 (Act 712), 12.

decisions.[33] This influence can come from various factors, such as the ability to appoint board members, shape business strategy, or influence financial decisions, even if the acquirer does not hold a majority of the voting shares. The reason for this flexible approach is that competition authorities need to examine whether a merger could harm competition in the market, even if control is achieved indirectly.

On the other hand, takeover and merger rules define control more clearly and objectively, usually based on a specific percentage of voting rights. For example, if a company acquires a certain percentage, often 33 percent or more, it is automatically considered to have control.[34] This clear-cut approach ensures transparency and legal certainty, as companies and shareholders know exactly when certain legal obligations, such as making a mandatory offer to minority shareholders, apply.

The reason for these different approaches is that merger control focuses on protecting competition in the market, preventing deals that could reduce consumer choice or lead to unfair pricing.[35] Meanwhile, takeover and merger rules are designed to protect shareholders, particularly minority shareholders, by ensuring they receive fair treatment and compensation when a company changes hands.[36] These differences highlight why control must be assessed differently depending on whether the focus is on competition or shareholder rights.

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[33]Ioannis Kokkoris, *Public Interest Considerations in US Merger Control: An Assessment of National Security and Sectoral Regulators* (United Kingdom: Oxford University Press, 2024), 13.

[34]Umakanth Varottil, "Comparative Takeover Regulation and the Concept of 'Control,'" *Singapore Journal of Legal Studies*, 2015, 208.

[35]Nasarudin Abdul Rahman and Haniff Ahamat, *Competition Law in Malaysia* (Selangor, Malaysia: Sweet & Maxwell Asia, 2016), 17.

[36]Mushera Ambaras Khan, Suzana Norlihan Alias, and Hnadi Muhtah, "The Future of Mandatory Takeover Offer: A Case Study on Malaysia," in *Proceedings of the Second International Conference on the Future of ASEAN (ICoFA) 2017*, ed. Ahmad Nizan Mat Noor, Zeti Zuryani Mohd Zakuan, and Suryani Muhamand Nor, vol. 1 (Singapore: Springer Link, 2019), 490.

However, differences in legal definitions can pose challenges to the regulators, as demonstrated by the Indian case of the Jet-Etihad acquisition.[37] On April 24, 2013, Etihad Airways, an airline based in the United Arab Emirates, entered into an investment agreement with Jet Airways, a publicly listed Indian company, to acquire 24% of its equity shares. The Jet-Etihad transaction required review by both the Securities and Exchange Board of India (SEBI) and the Competition Commission of India (CCI).[38]

The Ministry of Finance of India sought the opinions and views of SEBI regarding the Jet-Etihad transaction. In response, SEBI concluded that, on the surface, the acquisition did not appear to result in a change of control and, therefore, did not trigger an open offer requirement under the Indian Takeover Code.[39] However, SEBI reserved the right to reassess the transaction if other regulators, particularly the CCI, determined that Etihad had gained control of Jet under the provisions of the Indian Competition Act 2002.

The CCI exercised its authority to review the Jet-Etihad acquisition after the merging parties submitted a notification. The CCI concluded that Etihad had indeed acquired control over Jet. During the review, the issue of control was pivotal in determining whether the parties could be exempted from being reviewed. The CCI ultimately determined that Etihad had gained control of Jet, making the acquisition subject to its review. Nevertheless, the CCI approved the transaction, concluding that it did not have an anti-competitive impact on the market.[40]

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[37]Rajat Sethi, Simran Dhir, and Dhruv Agarwal, "Defining Control: A Study of The Jet-Etihad Case," *National Law School of India Review* 27, no. 2 (2015): 196.

[38]Madhavi Singh, "The Competition for India's Antitrust Jurisdiction: Competition Commission Versus Sectoral Regulators," *Journal of Antitrust Enforcement* 11, no. 1 (2023): 193.

[39]SEBI's Order: In the Matter of Acquisition of Shares of Jet Airways, Securities and Exchange Board of India, 2014, https://www.sebi.gov.in/sebi_data/attachdocs/1399545948533.pdf.

[40]CCI's Order on the Acqusition of Shares of Jet Airways by Etihad, Competition Commission of India, 2014, http://164.100.58.95/sites/default/files/C-2013-12-144 Majority.pdf.

Consequently, SEBI initiated a review of the Jet-Etihad acquisition to assess whether the requirement to make an open offer under the Code of Takeovers had been triggered. SEBI ultimately concluded that Etihad had not acquired "control" over Jet.[41]

If the definitions of control in both competition and securities regulation had exhibited minimal variation, the SEBI would have been more inclined to initiate the review process promptly, rather than waiting for other regulatory bodies to first determine control. The absence of a clear and consistent definition has contributed to unnecessary delays in the review process, potentially undermining investor confidence.[42] Moreover, inconsistencies in defining key regulatory terms may lead investors to question the overall coherence, transparency, and predictability of the local legal framework.[43] When regulatory definitions vary significantly across different legal domains, it can create ambiguity regarding compliance obligations, enforcement mechanisms, and the extent of regulatory oversight

Information Asymmetry

Asymmetrical information may lead to inefficiencies for regulators in carrying out their roles, particularly in merger reviews. This issue often arises in two specific situations, which are incomplete notification to regulators and selective information submission.

Incomplete Notification to Regulators

The parties to the merger may notify only one regulatory body, such as the takeover and merger authority, while neglecting to inform another crucial regulator, like the competition authority. This lack of communication can severely impair the regulatory process, as regulators may not have access to all the information necessary to conduct timely or comprehensive reviews.

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[41]SEBI's Order: In the Matter of Acquisition of Shares of Jet Airways

[42]Shweta Nimwal, Ekta Nimwal, and Korra Anand Nayak, "CCI vs SEBI: An Analysis of Overlapping Regimes in India," *Indian Journal of Law and Legal Research* 5, no. 1 (2023): 1.

[43]Nimwal, Nimwal, and Nayak, Shweta Nimwal, Ekta Nimwal, and Korra Anand Nayak, "CCI vs SEBI: An Analysis of Overlapping Regimes in India," 1.

Without early and adequate intervention, the competition authority may find itself in a position where it is unable to prevent the merger or impose the necessary remedial measures, potentially resulting in irreversible harm to market competition. This issue was notably evident in the decision in the decision by the Competition and Consumer Commission of Singapore (CCCS) regarding Uber's acquisition of Grab's shares in Southeast Asia.[44] In this case, the merging parties did not notify the CCCS for merger review. Consequently, the Commission initiated a *motu proprio* review only after the merger had already been finalised, leaving little room for effective intervention. The CCCS ultimately determined that the merger infringed the prohibition on mergers that could have anti-competitive effects. However, the CCCS was limited to imposing a directive and a financial penalty, as it was no longer feasible to unwind the merger.[45] If the merger had been notified at an earlier stage, the CCCS could have prevented it from being consummated.

Furthermore, delays in the merger review process can result in the loss of critical evidence that may be necessary for an effective investigation. A pertinent example of this can be found in the case of the U.S. Federal Trade Commission's (FTC) review of the merger between Genzyme and Novazyme.[46] The FTC had decided to close its investigation on the merger of Genzyme and Novazyme. The FTC's decision not to challenge this merger was based on evidence of the merger's lack of anticompetitive effects and synergisation of the companies realised two years after the merger. If the merger had been examined before consummation, the FTC would have recommended

[44]Notice of Infringement Decision: Sale of Uber's Southeast Asian Business to Grab in Consideration of a 27.5% Stake in Grab (No. 500/001/18) Competition and Consumer Commission of Singapore (Singapore, 2018), https://www.cccs.gov.sg/-/media/custom/ccs/files/public-register-and-consultation/public-consultation-items/grab-uber-id-24-sep-2018/20180924-infringement-decisiongrab-uber-merger--publiccleanfinal.pdf?la=en&hash=A773B37C629F7CFFDB453D9C45ADC237B51779A7.

[45]Notice of Infringement Decision: Sale of Uber's Southeast Asian Business to Grab in Consideration of a 27.5% Stake in Grab (No. 500/001/18),326.

[46]Genzyme Corporations's Acquisition of Novazyme Pharmaceuticals Inc. (File No. 021-0026), Federal Trade Commission, accessed November 28,2023,https://www.ftc.gov/system/files/documents/public_statements/418511/harbourgenzymestmt.pdf.

against it due to its anti-competitive effect.[47] This case highlights the critical importance of conducting merger reviews in a timely manner, ensuring that key evidence is preserved before substantial changes in market dynamics occur.

Selective Information Submission

In another scenario, the merging parties choose to notify both regulatory bodies but provide comprehensive and detailed information exclusively to one authority, while submitting incomplete or insufficient details to the other.[48] This disparity in the quality and depth of information provided may hinder the latter authority's ability to conduct a thorough and effective merger review. Without all the necessary information, the authority’s ability to evaluate the merger fully is limited, which could lead to poor regulatory outcomes.

Timeline Conflict

Compliance with regulatory assessments requires all parties to strictly observe deadlines set by regulatory bodies. Adhering to these timelines facilitates a smooth transaction process and minimises disruptions that could hinder its completion. Likewise, regulators must meet their own evaluation deadlines to prevent uncertainty among investors.[49]

The Malaysian Rules on Take-overs, Mergers, and Compulsory Acquisitions establish a comprehensive framework governing corporate takeover processes. Appendix 1 of the regulation provides a detailed breakdown of the takeover timeline, including key phases and associated deadlines, offering essential guidance for both offeror and target companies navigating the complexities of the process. Figure 2 illustrates the takeover offer timeline as outlined in Appendix 1, while

[47]Andreea Cosnita-Langlais and Jean-Philippe Tropeano, “Ex Post or Ex Ante? On the Optimal Timing of Merger Control,” *HAL Open Science*, no. 22 (2013): 2.

[48]Mohd Radhuan Arif Zakaria, “Regulating Cross-Border Take-Overs and Mergers in Malaysia Post ASEAN Economic Community” (International Islamic University Malaysia, 2024), 250, https://studentrepo.iium.edu.my/entities/publication/b1cd4f20-7e66-4a5e-8f44-9ca1cd1e0a19.

[49]Nimwal, Nimwal, and Nayak, “CCI vs SEBI: An Analysis of Overlapping Regimes in India,” 3.

Table 1 explains each stage in more detail, along with the relevant rules.

Figure 2: Take-over Offer Timeline from Appendix 1 of the Rules on Take-overs, Mergers, and Compulsory Acquisitions

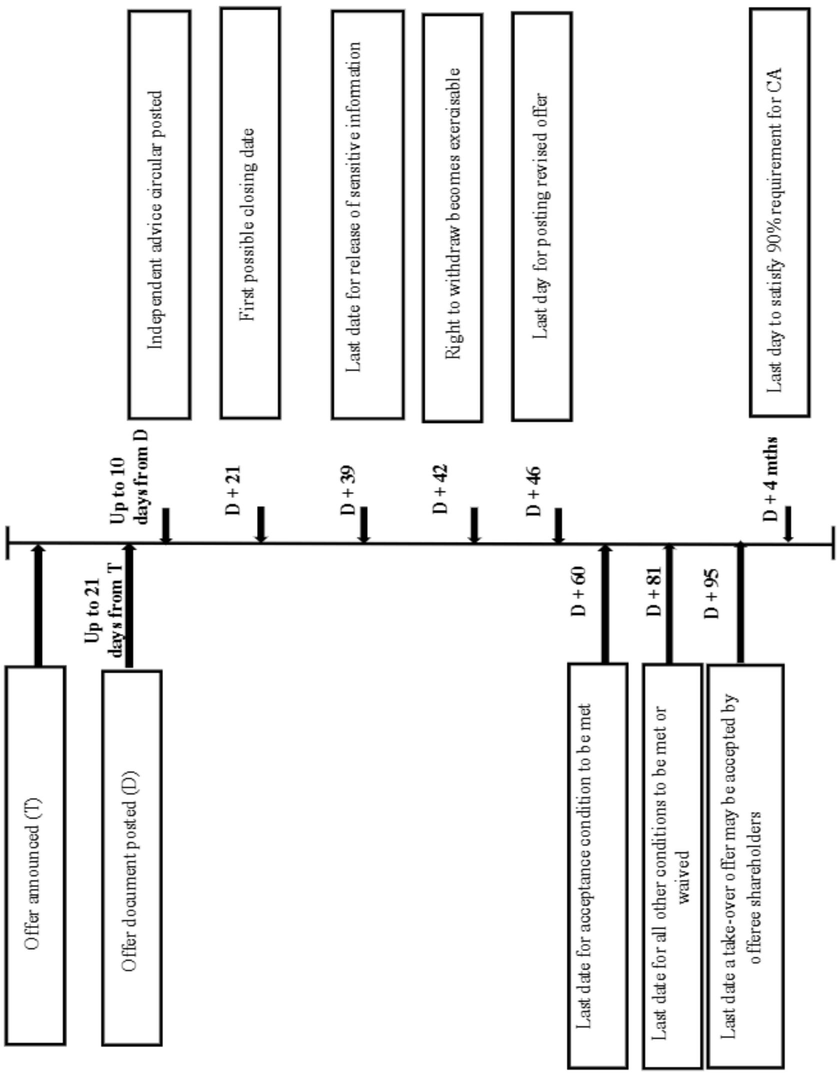


Table 1: Description and Applicable Rules for Each Phase of the Take-over Offer (Figure 2)

Days	**Description**
T	The offeror publicly announces its intention to make a take-over offer. The notice also must be sent to the board of the target company, the Securities Commission (SC) and Bursa Malaysia (if either offeror or target is listed in stock exchange)
D (T+21)	The offer document must be sent to the target company's board and its shareholders within a period of 21 days from the announcement date.
D + 10	The appointed independent adviser is required to provide an independent advisory circular to both the offeree board and the offeree shareholders.
D + 21	The earliest day a take-over offer can be closed for acceptance, The offeror must maintain the availability of a take-over offer for acceptance for a minimum duration of 21 days from the initial posting date of the offer document.
D + 39	After the 39th day from posting the offer document, the target's board of directors should avoid releasing important information about trading results, profit or dividend predictions, and asset valuations.
D + 42	Shareholders who have accepted the offer can withdraw their acceptance starting 21 days after the initial closing date of the offer if the offer has not become unconditional as to acceptances by that time.
D + 46	The offeror must send a written notification of the revised take-over offer to all offeree shareholders, including those who have already accepted the initial take-over offer, by the 46th day from the posting date of the offer document
D + 60	A take-over offer will expire on the 60th day after the offer document was sent to shareholders if the condition has not been met by 5:00 PM on that day.
D + 81	All conditions must be met no later than 21 days after the 60th day following the dispatch of the offer document to the target company's shareholders

D + 95	The target company's shareholders have the option to accept the take-over offer from the day the offer document is sent until the closing of the take-over offer. However, this period must not exceed 95 days from the offer document's dispatch
D + 4 months	The final day for the offeror to make compulsory acquisition, if the offeror has obtained acceptances for at least nine-tenths of the nominal value of the offer shares.

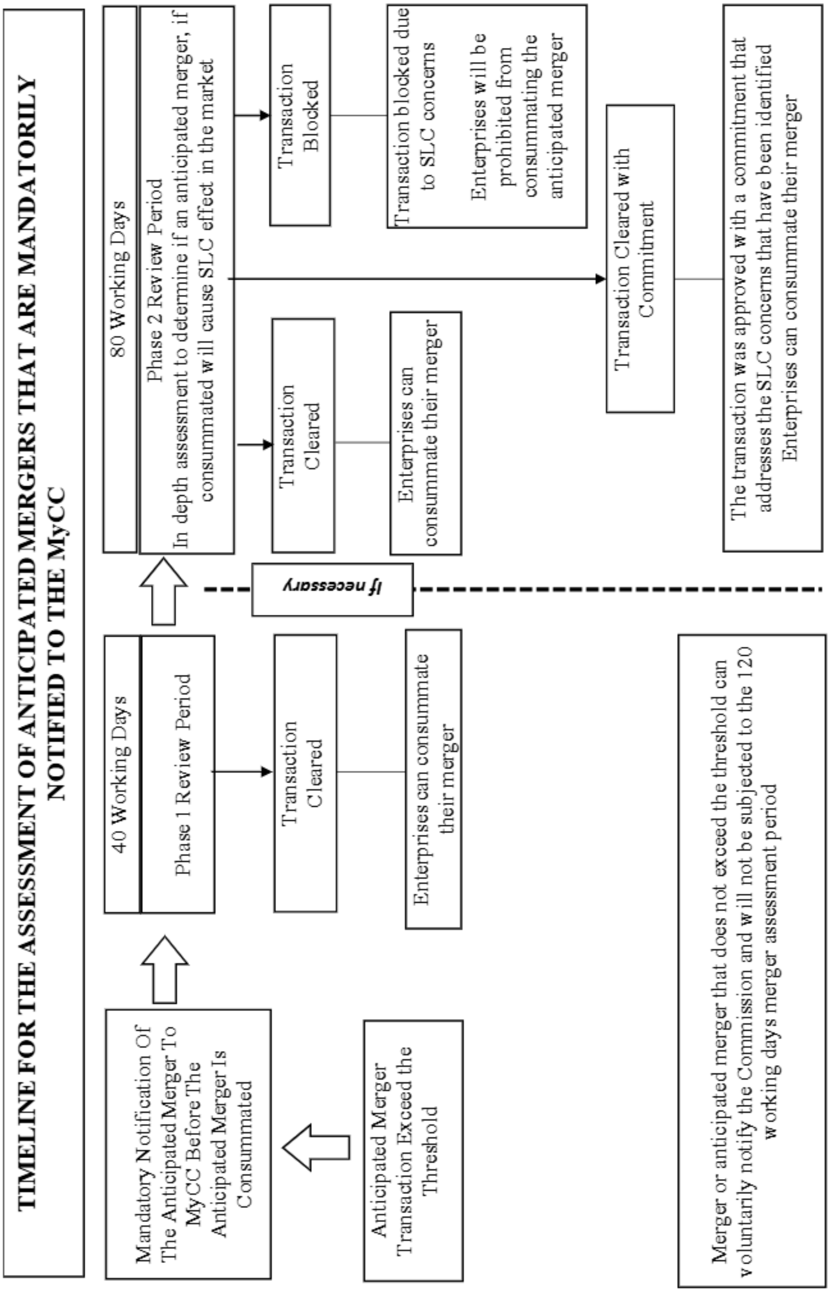
Meanwhile, MyCC is mandated to complete merger assessments within 120 days to evaluate potential anti-competitive effects.[50] Its review process consists of two phases: Phase 1 is a preliminary review lasting 40 working days, which begins upon submission of a complete application, and mergers without significant competition concerns are approved at this stage.[51] If concerns remain, Phase 2 follows with an extended 80-working-day review involving a detailed analysis of the merger's implications.[52] Figure 3 visually summarises this process.

[50]Salient Points of the Proposed Amendments to the Competition Act 2010 (Act 712), 14.

[51]Consultation Paper on the Proposed Amendment to the Competition Act 2010 (Act 712), 23.

[52]Consultation Paper on the Proposed Amendment to the Competition Act 2010 (Act 712), 23.

Figure 3: MyCC Merger Assessment Timeline



However, challenges may arise when delays in one regulatory body's review process hinder the parties' ability to meet the timelines set by another regulatory authority. This situation often occurs when a regulatory body extends its assessment period due to various factors, such as the need to collect additional evidence, conduct further market analysis, or address unforeseen complexities in the case.[53] Such delays are particularly prevalent in the context of competition regulation, where the competition authority is required to conduct a comprehensive assessment. For instance, the competition regulator must evaluate counterfactual scenarios to determine the likely state of the market in the absence of the merger, analyse potential barriers to entry that could affect market competition, and assess the extent of countervailing buyer power that might mitigate anticompetitive effects. These factors contribute to the complexity and time-intensive nature of the competition regulator's review process.

Consequently, delays in the competition regulator's assessment may prevent the parties from complying with the timelines set by the securities regulator. As a result, the merging parties may face risks such as penalties for non-compliance, increased transaction costs, or even the abandonment of the merger.

WAY FORWARD FOR MYCC AND SC

Differences in legal definitions, information asymmetry, and timeline conflicts may present significant challenges for both merging entities and regulatory bodies, complicating the process of expediting takeover and merger transactions. These issues can raise red flags, leading to unnecessary delays in such transactions.[54] Such delays may, in turn, create negative perceptions among investors about Malaysia's appeal as a destination for cross-border takeover and merger activities.

Harmonising differences in legal definitions remains impractical due to the varying enforcement objectives of regulatory bodies. Competition regulators review mergers to assess whether they have an anti-competitive effect on the market. Under the proposed Section 10B

[53] Zakaria, "Regulating Cross-Border Take-Overs and Mergers in Malaysia Post ASEAN Economic Community," 253.

[54] Sethi, Dhir, and Agarwal, "Defining Control: A Study of The Jet-Etihad Case," 196.

of the Malaysian Competition Act 2010, "control" refers to having a decisive influence over another enterprise. This broad definition allows regulators to scrutinise arrangements that may not involve outright ownership but still facilitate coordinated anti-competitive behaviour. In contrast, securities regulators review mergers to ensure that the interests of minority shareholders in the target company are protected. "Control" under Section 216 of the Capital Market and Services Act 2007 refers to holding a 33% stake in the target company. This level of ownership may pose risks to minority shareholders, including squeeze-outs, unfair related-party transactions, and the dilution of minority voting power.

However, to address the challenges of information asymmetry and timeline conflict, this paper proposes that regulatory bodies establish institutional mechanisms for inter-agency cooperation and harmonise procedural timelines. This approach is illustrated in Figure 4 below.

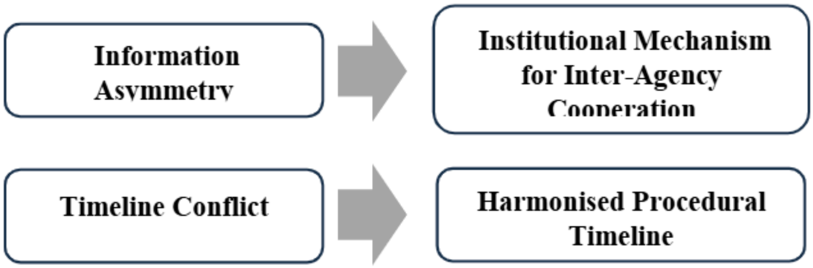


Figure 4: Proposed Solutions to Challenges of Overlapping Jurisdiction

Institutional Mechanism for Inter-Agency Cooperation

It is essential to establish best practices for coordination and cooperation between the MyCC and SC to reduce information asymmetry and avoid unnecessary delays in merger completion. It is worth noting that Malaysia established a Special Committee on Competition for this purpose. This committee comprises various regulators, including the MyCC, SC, Malaysian Communications and Multimedia Commission (MCMC), the Energy Commission (EC), the National Water Services Commission (SPAN), the Central Bank of Malaysia (BNM), the Intellectual Property Corporation of Malaysia

(MyIPO), the Companies Commission of Malaysia (SSM), and the Malaysian Aviation Commission (MAVCOM).[55]

This Special Committee functions as a collaborative platform where key regulators from various sectors across the country come together to discuss and address competition-related issues. It plays a crucial role in monitoring market developments, identifying challenges, and formulating strategies to enhance fair competition. Furthermore, the committee seeks to establish greater alignment and consistency among competition-related provisions within sector-specific legislation. By fostering regulatory harmonisation, the committee aims to create a more predictable and efficient legal framework that benefits businesses, consumers, and the overall market ecosystem.[56]

While Malaysia has already established such a committee, examining the structure and collaborative practices between Singapore's Competition and Consumer Commission (CCCS) and the Monetary Authority of Singapore (MAS) could offer valuable insight.

One of the key cooperation platforms established is the Community of Practice for Competition and Economic Regulations (COPCOMER).[57] Since its inception in 2013, COPCOMER has served as an inter-agency forum where the CCCS, sector-specific competition regulators, and various government entities come together to share insights, best practices, and experiences related to competition and regulatory matters. This platform is designed to promote the development of effective regulatory and competition policies, drawing on both local expertise and international standards. MAS is one of the government agencies that actively supports and participates in COPCOMER's collaborative initiatives.

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[55]News Release: First Special Commitee Meeting on Competition on Post Pandemic, Malaysian Competition Commission, accessed February 22, 2024,https://www.mycc.gov.my/sites/default/files/pdf/newsroom/NEWS Release - First Special Committee Meeting On Competition Post Pandemic.pdf.

[56]News Release: First Special Commitee Meeting on Competition on Post Pandemic

[57]Zakaria, "Regulating Cross-Border Take-Overs and Mergers in Malaysia Post ASEAN Economic Community," 292.

The CCCS takes the lead in organising regular activities under COPCOMER, which include:

i. Annual Regulators' Luncheons or Teas: These events bring together senior representatives to discuss current and emerging competition and regulatory challenges facing Singapore.

ii. Half-day Seminars: Focused sessions aimed at sharing insights and experiences on contemporary competition and regulatory issues in Singapore.

iii. Periodic Newsletters: Distributed to raise awareness of key global developments in competition and regulatory matters.

iv. Specialised Training Sessions: Tailored programs designed to equip participants with the technical knowledge and skills needed for policy analysis and assessments in competition and regulatory areas.[58]

Cross-training opportunities provide another valuable platform for collaboration. In 2017, the Competition and Consumer Commission of Singapore (CCCS) assigned a senior staff member to undertake an extended placement at the Monetary Authority of Singapore (MAS), offering them direct exposure to financial sector issues. These initiatives foster a deeper mutual understanding and appreciation of competition and regulatory perspectives between the staff of both agencies.[59] The strong collaboration between CCCS and MAS is also reflected at the highest levels of CCCS's organisational structure. Since its establishment in 2006, the CCCS board, consisting of the Chairman and Commission Members, has consistently included a representative from MAS.[60]

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[58]"Working Party No. 2 on Competition and Regulation: Co-Operation between Competition Agencies and Regulators in the Financial Sector - Note by Singapore," Organisation for Economic Co-operation and Development (OECD), 2017, https://one.oecd.org/document/DAF/COMP/WP2/WD(2017)25/en/pdf.

[59]Zakaria, "Regulating Cross-Border Take-Overs and Mergers in Malaysia Post ASEAN Economic Community," 294.

[60]Working Party No. 2 on Competition and Regulation: Co-Operation between Competition Agencies and Regulators in the Financial Sector - Note by Singapore.

Given that sector regulators like MAS possess a deeper understanding of their respective industries and associated policies, it is crucial for CCCS to collaborate closely with them to assess the competitive impacts of mergers effectively.[61] In cases where mergers fall within MAS's purview, CCCS must consider MAS's policy priorities to provide informed advice that supports MAS's overarching objectives while addressing potential competition concerns. To this end, CCCS and MAS engage with one another early in the merger assessment process and maintain open communication channels to facilitate the exchange of perspectives between the agencies.[62]

Harmonisation of Procedural Timelines

As discussed above, one of the key challenges in overlapping jurisdictions between merger regulators is the conflict of timelines for deal completion. This raises important questions, such as: What happens to the SC's review timeline if there is a delay in the MyCC's review process? Could a delay by MyCC potentially stall SC's review? To address this issue, it is crucial to establish a clear and coordinated timeline outlining the interaction between MyCC and SC. This timeline should be incorporated into the SC's Rules on Takeovers, Mergers, and Compulsory Acquisitions to provide investors with greater clarity and ensure that takeover transactions proceed without unnecessary delays.

A comparable framework could be observed in Appendix 3 of the Singapore Code of Takeovers and Mergers, which details the procedures for mergers, including the interaction between MAS and CCCS in merger assessments.[63] Under this framework, the offeror is given the option to either include or exclude a pre-condition in a takeover offer. The pre-condition refers to CCCS clearance, which

[61] Zakaria, "Regulating Cross-Border Take-Overs and Mergers in Malaysia Post ASEAN Economic Community," 295.

[62] Working Party No. 2 on Competition and Regulation: Co-Operation between Competition Agencies and Regulators in the Financial Sector - Note by Singapore.

[63] The Singapore Code on Take-Overs and Mergers,Monetary Authority of Singapore, 2019, https://www.mas.gov.sg/-/media/mas/resource/sic/the_singapore_code_on_take_overs_and_merger_24-january-2019.pdf.

determines whether the offer may proceed. This flexibility aligns with CCCS's voluntary notification system.

If the offeror opts to include the pre-condition, the takeover offer will only commence after CCCS clearance is obtained. This approach ensures that the timelines of MAS and CCCS do not overlap, thereby avoiding potential delays in the review process. If the offeror does not incorporate the pre-condition into the mandatory takeover offer, the process must be halted if CCCS proceeds to a Phase 2 Review or issues an order prohibiting the offeror from acquiring voting rights in the target company.[64] At this point, the mandatory takeover offer lapses. However, the obligation to make a mandatory offer under the Singapore Code of Take-overs and Mergers remains in effect. Should CCCS issue a favourable decision, the mandatory offer must be reinstated as soon as practicable, on the same terms and at a price no less than the original offer.

Conversely, if CCCS issues an unfavourable decision following the Phase 2 Review, the mandatory takeover obligation lapses. In such cases, CCCS will issue an order requiring the offeror or acquirer to reduce their voting rights in the target company to less than 30%, or to a level below the 1% acquisition limit within six months prior to incurring the mandatory offer obligation.[65] Similarly, a voluntary takeover offer will lapse if CCCS delivers an unfavourable decision at the conclusion of the Phase 2 Review.[66]

In the event of a delay in the Phase 1 review, the Council may consider extending the offer timeline by designating the day following CCCS's announcement of the Phase 1 review decision as the new "Day 39," with corresponding adjustments to the Final Day Rule.[67] Figure 5 below summarises the interplay between CCCS and MAS in merger procedure.

[64]The Singapore Code on Take-Overs and Mergers, 197.
[65]The Singapore Code on Take-Overs and Mergers, 197.
[66]The Singapore Code on Take-Overs and Mergers, 197.
[67]The Singapore Code on Take-Overs and Mergers, 197.

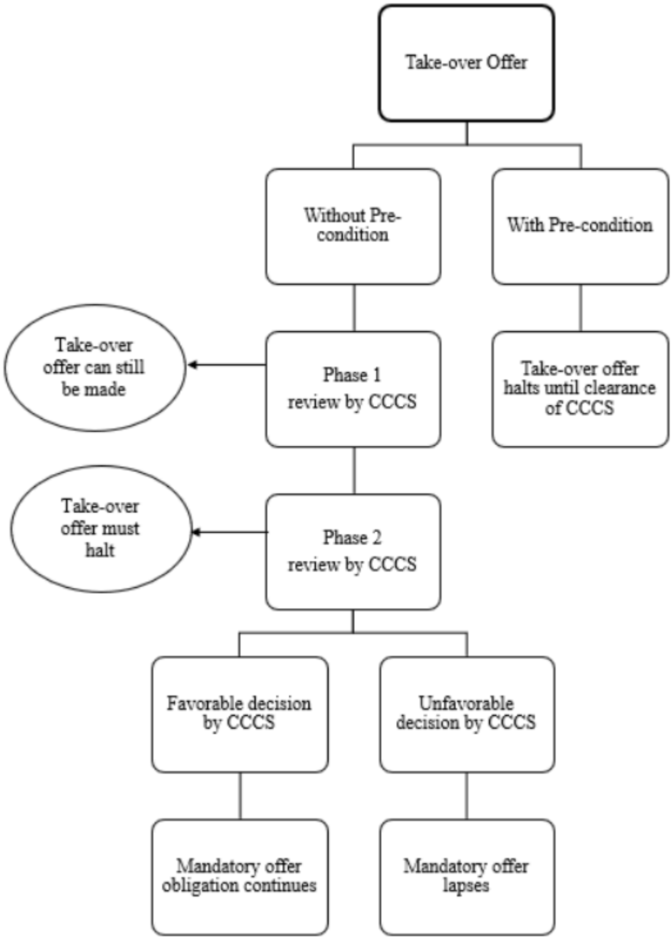

Figure 5: The Interplay between MAS and CCCS in Merger Procedure

Regulatory authorities must ensure they have the capacity to complete their assessments within the timeframes outlined in the relevant regulations. However, if one regulatory body faces challenges in meeting these deadlines, it is its responsibility to promptly notify the other regulatory body about the delay. For example, if the competition regulatory body needs additional time to obtain relevant information from the merging parties, it should inform the takeover regulatory authority. This would allow the takeover authority to adjust the compliance deadline for the merging parties accordingly.

CONCLUSION

The introduction of merger control provisions through the proposed amendment to Malaysia's Competition Act 2010 represents a significant advancement in the nation's efforts to promote equitable market competition. This reform aligns Malaysia's regulatory framework with international standards, curbing the risk of undue market dominance by large corporations. However, this progress introduces a potential challenge: overlapping oversight responsibilities between the MyCC and SC, which may result in regulatory ambiguity, procedural inefficiencies, and duplication of efforts if not systematically addressed.

This study adopts a dual-method approach, combining doctrinal analysis of Malaysia's legislative framework with comparative insights from other jurisdictions. Drawing on these comparative examples, the study proposes two key reforms to strengthen coordination between the MyCC and SC: (1) institutional mechanisms for inter-agency cooperation, and (2) harmonisation of procedural timelines.

These recommendations aim to streamline merger review processes, enhancing efficiency and predictability without diluting safeguards against anti-competitive practices. By minimising delays, Malaysia can foster investor confidence, ensuring mergers are neither obstructed by regulatory inefficiencies nor permitted to create harmful monopolies. Achieving this balance is essential to cultivating a regulatory environment that concurrently promotes fair competition and sustainable economic growth.

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