



26 May 2022

Via Online Submission: [amendment@mycc.gov.my](mailto:amendment@mycc.gov.my)  
United Public Consultation Portal

Dear Sir/Madam:

**Re: Proposed Amendments to the Competition Act 2010 (Act 712)**

The Merger Working Group of the Antitrust Section of the International Bar Association (“**IBA**”) hereby encloses its comments in response to the Malaysia Competition Commission’s request for comments and feedback on the proposed amendments to the Competition Act 2010 (Act 712).

The IBA Antitrust Section would be grateful for your kind consideration of the enclosed submission. The co-chairs of the Merger Working Group and the officers of the Antitrust Section of IBA would be delighted to discuss the enclosed submission in more detail, should that be of interest.

Yours faithfully,

A handwritten signature in blue ink, appearing to read "Daniel G Swanson".

Daniel G Swanson  
Co-Chair  
Antitrust Section  
International Bar Association

A handwritten signature in blue ink, appearing to read "Thomas Janssens".

Thomas Janssens  
Co-Chair  
Antitrust Section  
International Bar Association



**INTERNATIONAL BAR ASSOCIATION ANTITRUST SECTION – MERGERS WORKING GROUP:  
SUBMISSION TO THE MALAYSIA COMPETITION COMMISSION REGARDING THE PROPOSED  
AMENDMENTS TO THE COMPETITION ACT 2010 (ACT 712)**

**1. INTRODUCTION**

- 1.1 The Mergers Working Group of the Antitrust Section of the International Bar Association (“**IBA**”) (the “**Working Group**”) provides these submissions in response to selected proposed amendments to the Competition Act 2010 (Act 712) (the “**Act**”), as announced by the Malaysia Competition Commission (“**MyCC**”) on 25 April 2022 and described within the documents entitled:
- 1.1.1 Consultation Paper on the Proposed Amendments to the Competition Act 2010 (Act 712), 25 April 2022 (the “**Consultation Paper**”); and
- 1.1.2 the Salient Points of the Proposed Amendments to the Competition Act 2010 (Act 712), 25 April 2022 (the “**Salient Points Document**”).
- 1.2 These submissions are focussed specifically on the portions of the Consultation Paper and Salient Points Document related to the proposed introduction of a merger control regime into the Act.
- 1.3 The Working Group is grateful for the opportunity to provide these submissions to the MyCC for its consideration, and at the outset expresses its willingness to be consulted (or to otherwise contribute constructively where possible and as appropriate), in terms of the development of the structure of the regime, and/or the related implementing regulations and guidelines in due course.

**2. ABOUT THE IBA**

- 2.1 The IBA is the world's leading international organisation of legal practitioners, bar associations and law societies. The IBA takes a keen interest in the development of international law reform and helps shape the future of the legal profession throughout the world. The IBA has a membership of more than 80,000 individual lawyers from over 170 countries, including Malaysia, and it has considerable expertise in providing assistance to the global legal community<sup>1</sup>. The IBA Antitrust Section, which is broadly representative of the global antitrust community, regularly makes submissions on developments related to the implementation and refinement of competition laws worldwide.
- 2.2 The IBA's Antitrust Section includes antitrust / competition law practitioners with a wide range of jurisdictional backgrounds and professional experience. Such varied experience places it in a unique position to provide a comparative analysis for the development of competition laws, including through submissions developed by its working groups on various aspects of competition law and policy. The Working Group's contributions draw on the vast experience of the Section's members in merger control law and practice around the world<sup>2</sup>.

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<sup>1</sup> Further information about the IBA is available at <http://ibanet.org>.

<sup>2</sup> Further information about the Antitrust Section and its Working Groups is available at: <https://www.ibanet.org/LPD/AntitrustSection/Antitrust/Default.aspx>.



### 3. BEST PRACTICES PRINCIPLES

- 3.1 As a general principle, the Working Group encourages convergence toward best practices by all jurisdictions in terms of the development and operation of merger control regimes, and for this convergence to be rooted deeply in the principles of transparency, consistency, predictability, certainty and procedural fairness.
- 3.2 The International Competition Network (“**ICN**”) (of which the MyCC is a member) has issued Recommended Practices for Merger Notification (the “**ICN Recommended Practice Document**”)<sup>3</sup>. The Working Group considers the ICN Recommended Practices Document to be an important indicator of best practices for jurisdictions considering the implementation of a new merger regime. Specific portions of the ICN Recommended Practice Document are referred to in these submissions where relevant, and the Working Group also recommends it as a useful general resource.

### 4. SPECIFIC OBSERVATIONS ON THE CONSULTATION PAPER AND SALIENT POINTS DOCUMENT

- 4.1 The Working Group sets out below its comments and observations on the Consultation Paper and the Salient Points Document, noting that the proposed approach to the introduction of the merger regime in Malaysia has been described in general rather than specific terms (and that specific proposed wording revisions to the Act relating to the implementation of the merger regime, as far as the Working Group is aware, have not yet been publicly disclosed).
- 4.2 The Working Group is cognisant that several of the concepts below will be further developed and elaborated upon by MyCC in due course and that the contemplated future consultative processes (related to notification procedures, anticipated practice standards and merger-related guidelines) will provide another opportunity to comment more fully and substantively.

#### Definition of merger

- 4.3 The Working Group respectfully submits that, in line with the ICN Recommended Practices Document<sup>4</sup>, the types of transactions that are included within the scope of merger laws should be clearly defined in the interests of legal certainty, and be of a nature where durable combinations of previously independent entities or assets result and are likely to materially change market structures.
- 4.4 As set out in the Salient Points Document, the Working Group notes that various merger scenarios have been set out in detail and (with specific reference to point (d) of row 6 of the Salient Points Document<sup>5</sup>) these scenarios include the creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity.

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<sup>3</sup> Available at:  
[https://www.internationalcompetitionnetwork.org/wpcontent/uploads/2018/09/MWG\\_NPRecPractices2018.pdf](https://www.internationalcompetitionnetwork.org/wpcontent/uploads/2018/09/MWG_NPRecPractices2018.pdf).

<sup>4</sup> Section I(A) at page 1 of the ICN Recommended Practices Document.

<sup>5</sup> Page 12 of the Salient Points Document.



- 4.5 In this regard, the Working Group respectfully submits that further clarity regarding the circumstances where joint ventures will be considered to constitute mergers would be welcomed from the perspective of legal certainty. While the wording of the Salient Points Document suggests that the regime will be limited to the creation of full function joint ventures, other definitional aspects of qualifying joint ventures are somewhat unclear at this juncture. For instance, and amongst other factors, it is unclear as to whether joint ventures would need to be subject to joint control.
- 4.6 This need for clarity is reflected in the ICN Recommended Practice Document, which recognizes that there should be clear and predictable criteria to distinguish those transactions that are subject to merger review from those that are not<sup>6</sup>.

#### **Substantial lessening of competition standard**

- 4.7 The standard of a “substantial lessening of competition”, is a commonly accepted and adopted standard in the assessment of mergers. The Working Group is encouraged by the adoption of such a standard, and suggests that further elaboration on how this standard will be applied in a Malaysian context can usefully be provided within practice standards and merger-related guidelines developed by the MyCC.
- 4.8 For present purposes, and for the avoidance of doubt, the Working Group assumes from a holistic reading of the Salient Points Document and the Consultation Paper that point (a) within row 5 of the Consultation Paper<sup>7</sup> ought to read “...*that may result in a substantial lessening of competition (SLC) in any market for goods or services **in Malaysia***”. The Working Group respectfully submits that the wording “in Malaysia” should be specifically reflected in the amendments to the Act, for reasons set out further below in paragraphs 4.9 to 4.11. This limitation to Malaysia is consistent with section 3(2) of the Act which states: “*in relation to the application of this Act outside Malaysia, this Act applies to any commercial activity transacted outside Malaysia which has an effect on competition in any market in Malaysia.*”

#### **Jurisdictional nexus**

- 4.9 Further to paragraph 4.8 above, the Working Group respectfully underscores the importance of a local nexus requirement being included in the Act, in order to ensure that there is a significant and direct economic connection of a merger transaction to Malaysia (whether by turnover, assets, or otherwise) before it would fall under the jurisdiction of the MyCC. Such a requirement provides legal certainty for businesses, and reduces unnecessary regulatory costs and burden related to transactions both for businesses and the MyCC (and avoids the potential diversion of MyCC scarce resources to matters that will not be of particular consequence to Malaysia).
- 4.10 The ICN Recommended Practice Document establishes several foundational principles regarding jurisdictional nexus<sup>8</sup>, including that:

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<sup>6</sup> Section I(B) at page 2 of the ICN Recommended Practices Document.

<sup>7</sup> Page 10 of the Consultation Paper.

<sup>8</sup> Sections II(A)-(C) at pages 3-5 of the ICN Recommended Practices Document.



- 4.10.1 jurisdiction should be asserted only over transactions that have a material nexus to the reviewing jurisdiction;
  - 4.10.2 determination of a transaction's nexus to the reviewing jurisdiction should be based on activities within that jurisdiction, as measured by reference to the activities of at least two parties to the transaction in the local territory and/or by reference to the activities of the acquired business in the jurisdiction; and
  - 4.10.3 with reference to merger notification thresholds, that these should incorporate appropriate standards ensuring a material nexus to the reviewing jurisdiction.
- 4.11 At this juncture, and while it is understood that the substantive prohibition within the Act will focus on whether a particular transaction substantially lessens competition within a market for goods or services in Malaysia, it is not clear as to whether the mandatory notification thresholds will reflect specific market share threshold levels within Malaysia, or will reflect specific levels of turnover derived in Malaysia by the parties to the transaction (or otherwise). As a matter of principle, the Working Group stresses the importance of a clear and coherent nexus being required as a basis for jurisdiction over any given transaction. Ultimately, if a local nexus is found too readily (or in too broad a fashion), this could lead to a transaction being subject to unnecessary and unfounded regulatory scrutiny. Moreover, it may lead to a chilling effect and compliance burdens on international transactions, and also have the potential to divert MyCC's scarce resources from matters which have potentially much greater impact on markets in Malaysia.

#### **Thresholds for notification**

- 4.12 The Working Group appreciates that the mandatory threshold requirements will be subject to future and separate consultation processes.
- 4.13 The Working Group welcomes the use of notification thresholds that will provide clear, understandable and administrable "bright-line" criteria for assessments related to the necessity of filing. While it is understood that the contemplated amendments to the Act at this juncture are limited to providing for thresholds which will be subsequently specified through Gazette Notice, the Working Group makes the preliminary comments that, in line with the ICN Recommended Practice Document<sup>9</sup>, thresholds for mandatory notification should be:
  - 4.13.1 clear and understandable (with a view to simple and straightforward application);
  - 4.13.2 based on objectively quantifiable criteria (i.e., related to turnover or sales related information or discrete asset values, and not dependant on substantive or fact-dependant judgements regarding relevant markets and market shares, etc.);
  - 4.13.3 based on information that is readily accessible to the parties to the proposed transaction; and
  - 4.13.4 in the case of the formation of a joint venture, designed in such a way as to ensure that

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<sup>9</sup> Sections II(D)-(F) at pages 5-7 of the ICN Recommended Practices Document.



only those transactions are captured where the activities of the joint venture will have an effect on competition in Malaysia.

- 4.14 In addition, the Working Group recommends that thresholds should be set at a sufficiently high level so that only significant effects on markets in Malaysia are caught. This will reduce the burdens on companies engaged in merger activity in Malaysia (both investors, and Malaysian Targets seeking to raise capital) as well as on the MyCC in being responsible for assessing every notified transaction, allowing the MyCC to focus its limited resources on those cases most capable of producing significant effects on markets in Malaysia.

### **Review timelines**

#### ***Indicative 120 working day review period, and associated deal suspension***

- 4.15 The Salient Points Document indicates at row 10<sup>10</sup> that the MyCC will have a period of 120 working days to complete its assessment of notifications (from the date that the MyCC accepts the notification). While review timelines do vary across jurisdictions, the Working Group would respectfully reiterate the general principle that suspensive jurisdictions need to have timely review periods, given that parties are prohibited from proceeding with their transactions during the review<sup>11</sup>.
- 4.16 The Working Group observes that the currently stipulated amendments involve a 120 working day review timeline (and thereby associated transaction suspension), with an indicative 40 working day period for "Phase 1" reviews.
- 4.17 Turning first to the indicated 40 working day period for Phase 1 reviews, the Working Group considers that this timeline is lengthy having regard to some other ASEAN jurisdictions (notably Singapore, Vietnam and the Philippines, which adopt a 30 working day period for preliminary / Phase 1 assessments). The 30 working day timeline is also common internationally, with China, Korea and Japan (among others) all adopting this timeline for initial assessments. As such, the Working Group respectfully recommends that the Phase 1 timeline be shortened from 40 working days to 30 working days.
- 4.18 In terms of the overall review timeline of 120 working days, the Working Group also considers this to be relatively lengthy having regard to the equivalent review periods applying in some other ASEAN jurisdictions (for instance the Philippines<sup>12</sup>, which is understood to have an overall review period extending to 90 days). While Singapore uses an indicative working time period of 30 working days for Phase 1 reviews, and up to an additional 120 working days for Phase 2 reviews, Singapore's regime is non-suspensory in nature.
- 4.19 Notwithstanding the above, the Working Group considers that the potential for relatively lengthy review periods and deal suspensions underscore the importance of clear practice guidelines

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<sup>10</sup> Page 14 of the Salient Points Document.

<sup>11</sup> This principle is reflected in Section IV(A) at page 11 of the ICN Recommended Practices Document.

<sup>12</sup> As per Section 7.1. of the Philippine Competition Commission Rules on Merger Procedure, which provides that "*The PCC shall have a period of sixty (60) days within which to conduct the Phase 2 review*".



designed to facilitate the clearance of the majority of notified transactions within the shorter Phase 1 (40 working day) review period specified on page 23 of the Consultation Paper, and for lengthier Phase 2 review periods to only apply in rare circumstances involving substantively complex matters. The long potential review periods also underscore the importance of clock stoppages being more limited, as further elaborated upon below in paragraphs 4.24 to 4.28.

#### ***Inapplicability of specified review period to voluntarily notified mergers***

- 4.20 The Working Group notes that the Consultation Paper indicates that transactions which do not meet the mandatory notification thresholds, but are nonetheless voluntarily notified, are not subject to the 120 working day review timeline that is applicable to notifications made pursuant to the mandatory thresholds.
- 4.21 It is unclear to the Working Group why voluntarily notified mergers will not be subject to the same review period as mergers notified pursuant to mandatory requirements. One of the primary benefits of voluntarily notifying a transaction to the MyCC would be to obtain legal and transaction certainty, and the lack of a specific review timeline to voluntarily notified mergers may have the counterproductive effect of increasing uncertainties for merging parties. While it is understood that the obligation to not consummate an anticipated merger would not apply to those transactions falling outside the scope of the mandatory notification requirements, transaction timing certainty is also important to parties in circumstances where material substantive competition questions potentially arise in relation to a non-notifiable transaction.
- 4.22 It is acknowledged in the ICN Recommended Practices Document that reasonable review periods should take into account, among other things, the complexity of the transaction and the competition issues raised, and the timeliness of the merging parties' responses to information requests. However, the Working Group respectfully submits that the mandatory versus voluntary nature of the notification ought not to bear on the timeline adopted by the MyCC to assess the notification. It is also recognized in the ICN Recommended Practices Document that *"to facilitate multijurisdictional coordination, non-suspensive jurisdictions should consider conforming their initial review period to suspensive regimes"*<sup>13</sup>, and by application of the same logic this would suggest that the timelines for the review of mandatory and non-mandatory notifications should not diverge within the same jurisdictional regime.
- 4.23 Accordingly, it is respectfully submitted that no distinction between mergers notified voluntarily and those notified due to mandatory requirements is necessary or appropriate with regard to the application of review periods for such transactions.

#### ***Suspension of review periods***

- 4.24 It is specified within row 33 of the Salient Points Document<sup>14</sup> that: *"the 120 working days specified in section 10F shall be suspended from the date when the Commission makes a request for additional information or document until the date the information or document requested is received by the Commission"*.

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<sup>13</sup> Section IV(A) at page 11 of the ICN Recommended Practices Document.

<sup>14</sup> Page 23 of the Salient Points Document.





- 4.25 While the ability to request further information from the Parties is fundamental to the MyCC's ability to effectively review a notified merger, the Working Group notes that 'stop the clock' measures, particularly when used extensively and without prior warning, can be seriously disruptive to the parties' legitimate interests in ensuring predictability and certainty related to the timing of their proposed transaction.
- 4.26 Experience from other jurisdictions indicates that 'stop the clock' mechanisms work best where they are deployed only in exceptional circumstances, such as where the reviewing authority is not able to complete its review without certain information from the merging parties that it has requested and not received within a reasonable period of time.
- 4.27 The Working Group respectfully proposes that the MyCC follow an approach which is closer to that of the European Commission ("EC") under the EUMR, where the statutory waiting period under the EUMR is not automatically suspended whenever the EC issues a request for information. Rather, the EC is given the authority to 'stop the clock' only when the parties have been asked to provide relevant information and have failed to respond fully or completely within the timeframe specified. This approach would strike a more appropriate balance between the MyCC's need to obtain relevant information in a timely manner, and the parties' interest in having predictability related to the timeline of their proposed merger.
- 4.28 In this regard, the Working Group respectfully submit that the suspensions of the 120 Working Day review period be limited to circumstances where:
- 4.28.1 the information request in question has been made to the parties to the merger notification (as opposed to being made to third parties). Indeed, the ICN Recommended Practices Document observes that "... periods should not be tolled based upon the issuance or pendency of third-party information requests, given that third parties may have no incentive to facilitate timely review and may even be hostile to the transaction"<sup>15</sup>;
  - 4.28.2 the parties to the notification have been given a reasonable period to respond with complete information to the information request, but have not responded fully or completely within that allowed time period; and / or
  - 4.28.3 circumstances where the parties themselves request, subject to reasons acceptable to the MyCC, that the applicable review period be suspended.

### **Commitments**

- 4.29 The Working Group observes that (on a plain reading of slide 23 of the Consultation Paper) the potential for mergers to be cleared subject to the acceptance of commitments does not appear to be contemplated within a "Phase 1 Review" process. However, the Salient Points Document appears to contemplate the acceptance of commitments as not being limited to, nor conditional on, the MyCC undertaking a Phase 2 Review.

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<sup>15</sup> Section VI(D) at page 20 of the ICN Recommended Practices Document.





- 4.30 For the avoidance of doubt, the Working Group is of the view that the potential for commitments to be submitted and accepted in the context of the assessment of a merger notification ought not to be limited to (or conditional on) the commencement of a Phase 2 review. While it may not be a frequent occurrence, it is possible that there will be situations where merging parties are prepared to provide commitments during a Phase 1 Review that the MyCC may determine are acceptable.

### **Gun jumping**

- 4.31 It is specified on pages 21 and 22 of the Consultation Paper that gun-jumping rules will apply, whereby the MyCC will have the ability to investigate failures to make notifications, or the consummation of mergers prior to requisite clearance being obtained from the MyCC in respect of such gun-jumping. It is also specified that the MyCC will have powers to impose penalties in relation to such conduct.
- 4.32 The Working Group would highlight that the existence of such powers underscores the need for:
- 4.32.1 the mandatory notification thresholds to be clear, understandable, based on objectively quantifiable criteria, and based on information that is readily accessible to the parties to the proposed transaction (as discussed above in paragraph 4.13); and
  - 4.32.2 clear guidance to be provided by the MyCC in respect of what specific actions may constitute gun-jumping activities. In particular, the Working Group encourages the MyCC to make it clear that preparatory steps taken by the merger parties in contemplation of their transaction will not constitute gun-jumping.
- 4.33 Moreover, the Working Group recommends that the MyCC ought to have the power to grant derogations from suspensory period obligations and allow parties to fully or partially implement a combination in advance of final MyCC approval in appropriate cases of urgency.
- 4.34 The Working Group recognizes that the issues raised in paragraph 4.32 above may be explored in further detail during the future consultation process related to the applicable thresholds, anticipated practice standards and merger-related guidelines, and the Working Group would welcome the opportunity to comment more fully and constructively in the context of that process.

### **Financial penalties**

- 4.35 The Salient Points Document at row 52<sup>16</sup> states that section 43G of the Act will provide that: *“upon the issuance of a prohibition decision, the Commission will also be empowered ... [to] impose a financial penalty not exceed[ing] ten per cent of the worldwide turnover of an enterprise over the period during which the infringement occurred and give any other direction as it deems appropriate”*. However, the Salient Points Document at row 57<sup>17</sup> states that *“Section 43L of Act 712 provides for the power of the Commission to impose a financial penalty of up to ten per cent of the value of the merger transaction or anticipated merger transaction on enterprises that has*

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<sup>16</sup> Page 35 of the Salient Points Document.

<sup>17</sup> Page 39 of the Salient Points Document.



*committed a merger violation”.*

- 4.36 It is the respectful view of the Working Group that financial penalties are not appropriate at all in circumstances where a regime imposes mandatory notification requirements that are suspensive in nature (i.e., where mergers may be prohibited without actually being consummated) and are not appropriate in relation to voluntarily notified mergers. Financial penalties should be reserved for violations of merger notification rules or gun-jumping. This principle is in line with the approach in Europe<sup>18</sup> and most other merger control regimes.
- 4.37 Notwithstanding the fundamental point above, it is unclear to the Working Group as to whether applicable penalties in the context of the proposed merger regime will be tied to the value of the transaction in question, or to the worldwide turnover of the parties held to have committed an infringement. In the respectful view of the Working Group, the maximum financial penalties should be tied to the local turnovers of the parties to the transaction.

#### **Exclusions**

- 4.38 Page 43 of the Consultation Paper states that certain types of merger transactions are excluded from the application of the merger control regime, including mergers between enterprises that are licensed or approved or registered, as the case may be, by the Finance Minister or the Securities Commission ("SC") as the case may be under the Capital Market and Services Act 2007 ("CMSA"). It is unclear whether the exclusion applies to transactions which are approved under the CMSA as well, therefore raising uncertainty as to whether the proposed merger control regime applies to the takeover bids of public companies in Malaysia (which is heavily regulated by the Securities Commission through the Rules on Take-Overs, Mergers and Compulsory Acquisitions), and the various exemptions that the SC may grant in respect to any particular take-over offer.

#### **Other observations**

- 4.39 The Consultation Paper and the Salient Points Document are both silent on the use of pre-merger discussions or consultation processes, in the intended structure of merger review to be undertaken by the MyCC. As observed in the ICN Recommended Practices Document<sup>19</sup>, the Working Group believes that as a matter of best practice competition agencies should provide for the possibility of pre-notification guidance to parties on the notifiability of a transaction and the content of the intended notification. However, this should not become a requirement or an expectation of the agency, which can lead to the de facto lengthening of normal review duration beyond the established timelines.

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<sup>18</sup> European Union Council Regulation (EC) No 139/2004 (the EU Merger Regulation), Article 14(2), allows the European Commission to impose fines not exceeding 10% of the aggregate turnover of the undertaking concerned only where, either intentionally or negligently, they (a) fail to notify a concentration prior to implementation; (b) implement a concentration in breach of Article 7 (Suspension of concentrations); (c) implement a concentration declared incompatible with the common market or do not comply with any measure ordered by decision pursuant to Article 8(4) or (5); or (d) fail to comply with a condition or an obligation imposed by a decision pursuant to Article 6(1)(b), 7(3), or 8(2).

<sup>19</sup> Section V(E) at page 17 of the ICN Recommended Practices Document.



## **5. OFFER OF FUTURE CONSULTATION OR ASSISTANCE**

- 5.1 The members of the Working Group and officers of the Antitrust Section would be delighted to provide further input to the Malaysia Competition Commission, should that be of interest at the appropriate juncture.
- 5.2 In particular, the Working Group would welcome the opportunity to comment further in the context of future consultations related to the applicable thresholds, notification fees, notification procedures, anticipated practice standards and merger-related guidelines as Malaysia moves forward with its merger regime.