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Investing In... 2022

Malaysia: Law & Practice

To' Puan Janet Looi, Selvamalar Alagaratnam, Jillian Chia Yan Ping and Shi Wen
Skrine

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MALAYSIA

Law and Practice

Contributed by:
To' Puan Janet Looi, Selvamalar Alagaratnam, Jillian Chia Yan Ping and Shi Wen
Skrine see p.21

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1. LEGAL SYSTEM AND REGULATORY FRAMEWORK

1.1 Legal System

Malaysia has a common law legal system, based on English common law. The concept of constitutional supremacy is provided in the Federal Constitution of Malaysia, which is a written document and the supreme law of the land. Malaysia is a federation of 13 states and is a constitutional monarchy.

The federal government adopts the principle of separation of powers enshrined in Article 127 of the Federal Constitution, and is divided into three branches: the executive, the legislature and the judiciary.

Malaysia's judicial system includes the superior courts (consisting of the Federal Court, the Court of Appeal, the High Court of Malaya and the High Court of Sabah & Sarawak) and the subordinate courts (including Session Courts and Magistrate Courts). There is also a Special Court that has the jurisdiction to try civil or criminal actions instituted by or against the *Yang diPertuan Agong* or a ruler of a state. Furthermore, there is a parallel system of sharia courts which have jurisdiction in relation to matters of sharia.

In general, persons who carry on business in Malaysia are subject to two categories of laws: written law and unwritten law. Written law includes the Federal Constitution, Acts of the Federal Parliament, federal subsidiary legislation, the 13 state constitutions, Enactments and Ordinances of the State Assemblies and state subsidiary legislation. Case law consists of decisions of the courts of Malaysia, made on the basis of "stare decisis"; ie, the principle that a lower court is bound by precedents set by judicial decisions of a higher court on cases with similar facts and issues.

1.2 Regulatory Framework for Foreign Direct Investment (FDI)

Malaysia is very receptive to foreign direct investment (FDI) and is an FDI-friendly country. The rules and requirements applicable to FDIs are primarily sector-specific under the various different Ministries and governmental bodies, and there is presently no centralised federal or state body that reviews FDIs coming into Malaysia or its individual states. As an example, certain sectors have minimum local equity requirements, such as:

- financial services;
- insurance and Islamic insurance (*takaful*);
- upstream and downstream petroleum activities;
- communications and multimedia services;
- wholesale and retail trade (in relation to hypermarkets and food and restaurant businesses);
- education;
- transportation services, freight forwarding and shipping;
- energy supply;
- professional services such as architecture and engineering; and
- security and employment agencies.

In these sectors, equity ownership limits may be imposed as a condition to obtain licences. The exact requirements differ from industry to industry, and there are also a number of other sector-specific rules issued by sectoral regulators that may impact how a decision to invest is structured. For example, there may be requirements to reserve minimal equity participation levels for Malaysian Malays and indigenous persons (*Bumiputera*).

2. ECONOMIC/POLITICAL/BUSINESS CLIMATE

2.1 Outlook and FDI Developments

A number of stimulus packages were announced by the federal government of Malaysia to incentivise foreign investment activities in view of the COVID-19 pandemic.

The Prime Minister of Malaysia on 5 June 2020 announced a series of 40 short-term economic recovery measures (collectively called Pelan Jana Semula Ekonomi Negara, or PENJANA) with a total of RM35 billion (approximately USD8.2 billion) in value. Some of these initiatives are either aimed at FDI or will have an impact on FDI in Malaysia.

Initiative No 25 of Penjana, Spur the Set Up of New Businesses

This initiative aims at encouraging the establishment of new businesses and M&A transactions through income tax rebates and stamp duty exemptions.

Initiative No 26 of PENJANA, Dana PENJANA Nasional

An MYR1.2 billion investment fund was established on 1 July 2020 to support the digitalisation of Malaysian businesses by channelling funding from international investors into the local venture capital space. As of the end of May 2021, MYR840 million had been successfully raised. Half of the fund was sourced domestically and the other half from international investors, around 55% of the total amount raised (MYR433 million) was from foreign investors from Hong Kong, Singapore and South Korea. The fund will match institutional private capital investment with selected venture capital and early-stage tech fund managers.

Initiative No 34 of PENJANA, Malaysia as an Attractive Horizon for Businesses

This initiative dedicates MYR50 million and includes (among other things) advantageous tax rates and allowances, and ran from 1 July 2020 and has been extended until 31 December 2022. This is intended to attract foreign companies to relocate their businesses into Malaysia, by compensating for the risks of relocation with the provision of tax incentives. The scope of the tax incentives will also be extended to selected companies in the services sector pursuant to Malaysia's Budget 2021.

3. MERGERS AND ACQUISITIONS

3.1 Transaction Structures

In Malaysia, corporate transactions are commonly structured either as a share deal (acquisition of shares of a target company) or a business or asset deal (acquisition of a business as a going concern or specific assets of the target).

Key Legislation

The Companies Act 2016 ("CA 2016") governs both private and public companies and has relevant provisions which need to be complied with for transactions, such as shareholders' approvals for substantial disposals or substantial acquisitions.

The Capital Markets and Services Act 2007 ("CMSA") and the Malaysian Code on Take-Overs and Mergers 2016 ("Code") (issued by the Securities Commission of Malaysia ("SC") and enacted pursuant to the CMSA) primarily governs merger and acquisition transactions involving public companies in Malaysia.

Other key laws and requirements which may be applicable are as follows:

- the Bursa Malaysia Securities Berhad Listing Requirements 2010 ("Bursa Listing Requirements");
- the Financial Services Act 2013;
- the Offshore Companies Act 1990 (for companies incorporated in Labuan);
- the Contracts Act 1950; and
- the Competition Act 2010.

Key Regulators

Public takeovers and mergers in Malaysia are heavily regulated and are overseen by regulatory bodies such as *Bursa Malaysia Berhad*, the Central Bank of Malaysia (*Bank Negara Malaysia*), the SC, the Companies Commission of Malaysia and, for companies incorporated in Labuan, the Labuan Financial Services Authority. Several other industry-related regulators not named here may also be relevant as the regulator varies and depends on the nature of the merger and acquisition undertaken and the licences that the company in question are regulated by.

Key Considerations

The key considerations for a foreign investor for acquisitions in Malaysia are to have a tax-efficient structure that also enables the investor to meet any local or foreign equity requirements, and which also allow for effective exit mechanisms, particularly where a joint venture is required by legal equity restrictions or is commercially advantageous. Typical structures in Malaysia will include a separate locally incorporated investment vehicle, most commonly a private company limited by shares. However, depending on whether the entity being acquired is a public listed company or a private limited company, the legal framework, transaction structure and process will vary.

In general, one of the main advantages of embarking on a merger and acquisition transaction by way of a share purchase in a company is that stamp duty on share transfers is much lower than stamp duty for transfer of assets. Stamp duty for the transfer of assets is chargeable as stamp duty on a conveyance under Item 32 of the First Schedule of the Stamp Act 1949 at a current rate of 1% for the first MYR100,000, 2% for an amount from MYR100,001–500,000, 3% from an amount from MYR500,001 to MYR1 million and 4% for everything above MYR1 million. Furthermore, in a share sale, employment remains the same as the legal entity that is doing the employing remains the same, whereas on a transfer of assets, employment is deemed terminated and as such, there is a need for careful consideration of employment law issues relating to timing and terms of offers of employment, notice periods for termination and the like.

Another consideration that foreign investors take into account is that it is usually quite difficult to transfer existing permits and licences to another entity, whereas generally speaking, a transfer of shares in a company will generally allow the foreign investor the benefit of existing licences and permits, subject to compliance with conditions for approvals or notifications of change in ownership, transfer of shares and the foreign equity limits.

Competition/Antitrust Issues

The primary competition legislation in Malaysia, the Competition Act 2010 ("CA 2010"), does not provide for a generic merger control regime that is applicable to all mergers and acquisitions that take place in the country. However, certain sectors are subject to competition merger control provisions, such as communications and multimedia and aviation as these have been expressly carved out of the CA 2010. These carve-outs are discussed in further detail below in **6. Antitrust/Competition**.

3.2 Regulation of Domestic M&A Transactions

As mentioned in **3.1 Transaction Structures**, the primary competition legislation in Malaysia, the CA 2010 does not provide for a generic merger control regime that is applicable to all mergers and acquisitions that take place in the country. However, the communications and multimedia and aviation sectors are subject to pre-merger approvals. These carve-outs are discussed in further detail in **6. Antitrust/Competition**.

In the event that a public company issues securities for purposes of settlement of purchase consideration, approval of the SC under the CMSA is required if the issue falls within the definition of "proposals" under the CMSA. This is pursuant to Section 212(4) of the CMSA which provides that a person who proposes to make available, offer for subscription or purchase, or issue an invitation to subscribe for or purchase, outside Malaysia, securities of a public company or listed corporation, or to list such securities on a securities exchange outside Malaysia shall seek the approval of the SC.

In addition, under the Code issued by the SC, a general offer is required to be made by an acquirer of control in a listed public company. Pursuant to the CMSA, control is defined as the acquisition or holding of, or entitlement to exercise or control the exercise of, voting shares or voting rights of more than 33%, or such other amount as may be prescribed in the Code in a company, howsoever effected.

Pursuant to the Bursa Listing Requirements, where the "percentage ratios" of a transaction involving a listed company is at 10% or more, an announcement of the transaction is required after the terms of the transaction have been agreed. Should the percentage ratios reach 25% or more, prior shareholders' approval at a general meeting is required to be obtained before the transaction may be carried out by the company, in addition to the requirement of an announcement. Should the percentage ratios for a related-party transaction reach 5% or more, an announcement is required to be made immediately after the terms of the transaction have been agreed.

Section 223(1) of the CA 2016 states that approval must be granted by members in a general meeting for disposal of a substantial portion of a company's undertaking or property or acquisition by the director's company undertaking or property of a substantial value by way of resolution. "Substantial value" is also defined in the CA 2016 as follows:

- the value exceeds 25% of total assets of the company;
- the value exceeds 25% of the net profit after deducting all charges except taxation and excluding extraordinary items; or
- the value exceeds 25% of the issued share capital of the company, whichever is the highest.

For companies whose shares are quoted on *Bursa Malaysia*, "substantial value" or "substantial portion" shall mean the same value prescribed in the Bursa Listing Requirements where approval of the shareholders at a general meeting is required.

Transactions that do not obtain the approval as required under Section 223 shall be void unless they are in favour of any person dealing with the company for valuable consideration and without actual notice of the contravention.

4. CORPORATE GOVERNANCE AND DISCLOSURE/REPORTING

4.1 Corporate Governance Framework

Corporate governance in Malaysia comprises of laws, guidelines and requirements issued by the relevant authorities. The main sources in relation to corporate governance in Malaysia are as follows:

- the CA 2016;
- the CMSA;
- the FSA and IFSA;
- the Main Market Listing Requirements by *Bursa Malaysia Securities Berhad* ("MMLR");
- the Malaysian Code of Corporate Governance ("MCCG");
- the Guidelines on Conduct of Directors of Listed Corporations and their Subsidiaries ("Guidelines"); and
- the Corporate Governance Policy Document issued by the Central Bank of Malaysia.

The CA2016 governs companies in Malaysia. Foreign investors who wish to set up their business in Malaysia can choose from a variety of business structures such as:

- limited liability partnerships;
- private limited companies;
- public limited companies;
- representative offices; and
- branch offices.

However, in Malaysia, the most prevalent type of legal entity and the one most similar to Limited Liability Company is a private limited company ("Sdn. Bhd."). A Sdn. Bhd. is a private company incorporated under the CA 2016 and regulated by the Companies Commission of Malaysia ("CCM").

4.2 Relationship between Companies and Minority Investors

Under the CA 2016, minority investors are entitled to apply to the court to wind up a company on just and equitable grounds in the event there is evidence of minority oppression by the majority shareholders on the following grounds:

- that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the shareholders including those shareholders themselves or in disregard of their interests as shareholders of the company; or
- that an act of the company has been or is threatened to be committed, or that a resolution of the shareholders has been passed, or is proposed, that unfairly discriminates against or is otherwise prejudicial to one or more of the shareholders, including those shareholders themselves.

Minority investors may also negotiate for their rights and protections under the shareholders' agreement and for such clauses to be entrenched in the company's constitution.

4.3 Disclosure and Reporting Obligations

Beneficial Ownership

The CCM issued the Guideline for The Reporting Framework for Beneficial Ownership of Legal Persons 27 February 2020 (revised on 17 December 2020) ("Beneficial Ownership Guidelines"), requiring companies incorporated, and foreign companies registered, under the CA 2016 to report on the identity of their "beneficial owners".

Paragraph 6 of the Beneficial Ownership Guidelines, read together with the FAQs issued by the CCM, defines "beneficial owners" as natural persons or individuals who ultimately own or control

a legal entity or arrangement. This needs to be read together with Section 2 of the CA 2016, which defines a "beneficial owner" as "the ultimate owner of the shares and does not include a nominee of any description". Paragraph 26 of the Beneficial Ownership Guidelines provides that for the purposes of the beneficial ownership reporting framework, "the ultimate owner of shares" would cover both the perspective of ownership and effective control in the case of private limited companies. Furthermore, Paragraph 27 clarifies that an "ultimate owner of shares" would need to fulfil the following requirements:

- has interest, directly or indirectly, in not less than 20% of the shares of the company;
- holds, directly or indirectly, not less than 20% of the voting shares of the company;
- has the right to exercise ultimate effective control whether formal or informal over the company, or the directors or the management of the company;
- has the right or power to directly or indirectly appoint or remove a director(s) who hold(s) a majority of the voting rights at the meeting of directors; or
- is a member of the company and, under an agreement with another member of the company, controls alone a majority of the voting rights in the company.

Substantial Shareholders

Additionally, Section 137 of the Companies Act 2016 imposes an obligation on individuals and corporations that have an interest in 5% or more of the voting shares of a Malaysian incorporated public company (whether listed or unlisted) to disclose that interest to the relevant public company and to the CCM. Notice is also required to be given if the substantial shareholder undergoes a change in the interest of their voting shares and if they cease to be the substantial shareholder of the company.

5. CAPITAL MARKETS

5.1 Capital Markets

There are two types of funding generally deployed in Malaysia; ie, equity financing and debt financing. The primary sources of funding for businesses would depend on the overall goal and also the qualifications of the company.

Equity Financing

Types of equity financing include subscription of the ordinary and/or preference shares, venture capital investing, crowdfunding and initial public offerings. The conditions for receiving equity funding may be less stringent when compared to raising debt funding. Investors would, however, expect to have a veto right or a say on matters such as an increase in share capital, dividends or other profit distributions, entry into new businesses, incurring of major capital expenditure, obtaining of external financing and provision of security and/or guarantees and the like. The business owner may therefore have to sacrifice control over some portion of the business.

Debt Financing

Types of debt financing include the issuance of debt instruments such as bonds, sukuks (Islamic bonds), medium term notes (MTNs), term loans, overdrafts, cash lines, trade lines and hire purchase. Funds are obtained from institutions, high net worth individuals or others who subscribe to the debt instruments or from licensed financial institutions. The business owner would maintain control of the business but would need to ensure that the company operates within the confines of the numerous covenants in the financing documents such as debt-equity ratios.

5.2 Securities Regulation

The SC is the main statutory authority with responsibility for regulating, promoting and developing the Malaysian capital markets.

Bursa Malaysia Securities Berhad is the approved stock exchange in Malaysia and regulates listed companies and stakeholders.

In Malaysia, dealing in securities is subject to the licensing requirements and prohibitions set out in the CMSA. Pursuant to the CMSA, the SC has issued guidelines to provide a legal and regulatory framework to the Malaysian capital markets, including guidelines in relation to the offering of wholesale funds, structured products, corporate bonds, asset-backed securities and Islamic securities. Persons dealing in securities, amongst other things, will require a licence from the SC under the CMSA.

5.3 Investment Funds

There are no specific exemptions for FDI into Malaysia which is structured as investment funds. The same criteria for whether the foreign investors meet the sector-specific criteria and local or foreign equity limits will apply on an effective equity basis for FDIs structured as investment funds.

The Government of Malaysia has announced in the Budget 2021 the following measures to encourage investments:

- MYR1 billion special incentive package for high value-added technology investments in Malaysia;
- MYR500 million High Technology Fund provided by *Bank Negara Malaysia* ("BNM") for hi-tech and innovative companies;
- enjoyment of a tax rate of 0–10% for ten years for manufacturers of pharmaceutical products if they invest in Malaysia;
- a concessionary tax rate of 10% for five years for the establishment of a global trading centre;
- tax incentive conditions for a principal hub and incentives to be relaxed and extended until the end of 2022; and
- an income tax exemption on 50% of the investment amount for investors who invest in Equity Crowdfunding, subject to certain criteria.

The above are in addition to incentives offered from 1 July 2020 for foreign companies (including those held by foreign funds) to relocate their businesses to Malaysia under the PENJANA scheme, including:

- a 0% tax rate for ten years for new investment in manufacturing sectors with capital investment between MYR300–500 million;
- a 0% tax rate for 15 years for new investment in manufacturing sectors with capital investment above MYR500 million.

A condition for the above tax incentives is that the company must commence its operation in Malaysia within one year from the date of approval and the capital investment must be made within three years.

There is also a 100% investment tax allowance for five years for an existing company in Malaysia relocating overseas facilities into Malaysia with a capital investment above MYR300 million.

6. ANTITRUST/COMPETITION

6.1 Applicable Regulator and Process Overview

The primary competition legislation in Malaysia is the CA 2010. At the time of writing (January 2022), the CA 2010 does not provide for a generic merger control regime that is applicable to all mergers and acquisitions that take place in the country. However, certain sectors are expressly carved out of the CA 2010, these include activities in the communications and multimedia sector, energy sector, upstream oil and gas, and avi-

ation services. The activities in these industries are regulated by sector-specific laws which are enforced by separate regulators.

The merger control regimes in some of these sectors are briefly discussed below.

Communications and Multimedia Sector

This sector is regulated by the Malaysian Communications and Multimedia Commission ("MCMC") under the Communications and Multimedia Act 1998 ("CMA").

The CMA contains an entire chapter on economic regulation of the communications market, which is specifically defined as "an economic market for a network service, or an applications service, or for goods or services used in conjunction with a network service or an applications service, or for access to facilities used in conjunction with either a network service or an applications service".

The competition provisions in the CMA are concerned with any conduct which has the purpose, or effect, of substantially lessening competition in a communications market and this may be applied towards regulating mergers within the said market:

- Section 133 CMA prohibits licensees (meaning a person who either holds an individual licence or carries out activities subject to a class licence under the CMA) from engaging in such conduct;
- Section 139 CMA requires licensees in a dominant position in a communications market to cease such conduct; and
- Section 140 CMA provides that a licensee may apply to the MCMC prior to engaging in such conduct.

To clarify its approach in administering the prohibitions and enforcing the provisions under the CMA, the MCMC has published the following Guidelines:

- Guidelines on Substantial Lessening of Competition ("MCMC Guidelines on SLC");
- Guidelines on Dominant Position ("MCMC Guidelines on DP");
- Market Definition Analysis ("MCMC MD Analysis"):
- Guideline on Mergers and Acquisitions (M&A Guidelines); and
- Guideline on Authorisation of Conduct ("AC Guidelines").

The notification of a merger to the MCMC is a voluntary regime. The M&A and AC Guidelines introduce two routes that a licensee may take in relation to clearance of a merger:

- notification to obtain the MCMC's views in respect of the competitive effects of a merger or acquisition (where the applicant receives a no-objection or objection letter); and
- authorisation of a merger that will promote national interest.

The framework includes guidance on self-assessments for parties to undertake when considering whether to make a submission for an assessment of the merger, for instance:

- whether the M&A has been publicly announced;
- whether there is a bona fide intention to proceed; and
- there is significant cross-shareholding between the parties to a M&A.

Aviation Sector

The Malaysian Aviation Commission Act 2015 ("MACA") which is enforced by the Malaysian Aviation Commission ("MAVCOM") is presently the only statutory merger control regime in Malaysia. Apart from also dealing with anti-

competitive agreements (Section 49) and abuse of dominant position (Section 53), Section 54 of the MACA states that any mergers which "have resulted, or may be expected to result, in a substantial lessening of competition in any aviation service market" is prohibited. Notwithstanding whether any of the below services are provided by a licensee, permit holder or otherwise, an aviation service market in the context of the MACA means:

- the carriage of passengers, mail or cargo for hire or reward by air or by the use of any aircraft between two or more places, of which at least one place is in Malaysia;
- the provision in Malaysia of any of the ground handling services specified in the Second Schedule to the MACA;
- the operation of an aerodrome in Malaysia for the take-off and landing of any aircraft engaged in the carriage of passengers, mail or cargo for hire or reward; or
- any other service determined by MAVCOM to be necessary or expedient for the carriage of passengers, mail or cargo referred to in the first of these bullet points.

MAVCOM published the following guidelines relating to its merger control regime:

- Guidelines on Substantive Assessment of Mergers ("SAM Guidelines");
- Guidelines on Notification and Application Procedure for an Anticipated Merger or a Merger ("N&A Guidelines"); and
- Guidelines on Aviation Service Market Definition.

The requirement under the N&A Guidelines specify that the merging parties should make an application to MAVCOM in the following circumstances.

- In the case of a completed merger, as soon as possible.
- In the case of an anticipated merger, once:
  - (a) the merger parties have a bona fide intention to proceed with the anticipated merger;
  - (b) details of the anticipated merger are available; and
  - (c) the anticipated merger has been made public by any party or may be made public by the Commission through the publication of a summary of the application.

6.2 Criteria for Review

Communications and Multimedia Sector

As mentioned in **6.1 Applicable Regulator and Process Overview**, the merger notification under the CMA is voluntary and parties to the merger are required to undertake a self-assessment. In doing so, parties are required to assess whether the merger is likely to have the purpose or effect of a substantial lessening of competition in the market, the MCMC considers several factors to be important, including:

- the degree of concentration in the market before and after the merger;
- the extent of barriers to entry into the market; and
- the level of dynamic competition in the market.

Aviation Sector

Under the MACA, once it has been established that a merger has occurred within the meaning of Section 54, the SAM Guidelines state that a "substantial lessening of competition" (SLC) test should be applied. According to the SAM Guidelines, a SLC may occur where a merger has a significant effect on rivalry between enterprises over time, reducing the competitive pressure on enterprises in any aviation service market to improve their services offered to buyers in terms of quality, efficiency or innovation. The

SLC test set out in the SAM Guidelines involves four steps:

- defining the relevant aviation service market (MAVCOM's Guidelines on Aviation Service Market Definition provide further guidance in this regard);
- developing a theory of harm to identify possible harm and effects on competition within the relevant market;
- developing a counterfactual scenario, assessing the degree of competition in the relevant market if the merger had not/were not to occur based on the prevailing conditions of competition (including the possibility of new market entrants, or the exit of failing market participants); and
- assessing the competition in the relevant market and comparing it to the counterfactual identified above.

The SLC Guidelines expand further on the core principles set out in the MACA, facilitating self-assessment by market enterprises. If an enterprise, upon carrying out the SLC test, determines that its merger or proposed merger has resulted in, or is likely to result in, an SLC, then it may make a voluntary notification or application to MAVCOM requesting a decision from MAVCOM as to whether the merger infringes (or will infringe) the provisions of the MACA. The N&A Guidelines set out how this may be done.

6.3 Remedies and Commitments

Communications and Multimedia Sector

Before authorising any conduct, the MCMC may require the licensee to submit an undertaking regarding the conduct in any matter relevant to the authorisation. The M&A Guidelines allow an undertaking under the notification route as long as it involves a licensee and an anticipated merger that has yet to take place.

Aviation Services Sector

The N&A Guidelines also state that an applicant(s) is encouraged to give an undertaking to mitigate or remedy any adverse effects which the merger may have on competition in the market, once any such competition concerns are identified. This undertaking may be given at any time from the point of making the initial notification and application to MAVCOM, up until the completion of the Phase II assessment and issuance of a proposed decision by MAVCOM. MAVCOM also has the discretion to invite the merger parties to give an undertaking if it is of the view that the anti-competitive effects identified in the course of its assessment may be remedied or mitigated by such undertaking.

The undertaking must be in a document available for public inspection in a manner determined by MAVCOM.

6.4 Enforcement

Multimedia and Communications Sector

The CMA and the M&A Guidelines empowers the MCMC to utilise certain enforcement options and remedies to block a merger prior to implementation. If the parties to an M&A proceed without obtaining the MCMC's view, the MCMC can issue a Notice of Objection which may include the following.

- Where the proposed M&A involves a licensee in a dominant position – a direction that the licensee:
  - (a) must not continue with or complete the M&A; and
  - (b) must not transfer any licences or spectrum assignments granted pursuant to the CMA (if permitted pursuant to the terms and conditions applicable to the assignment) to another entity (furthermore, the MCMC may seek an injunction under Section 142 of the CMA for failure by parties to comply with direction issued by the

MCMC, in a Notice of Objection).

- Where the proposed M&A does not involve a licensee in a dominant position or likely to result in a dominant position – a statement that MCMC will seek an interim or interlocutory injunction against the parties if the M&A is continued or completed.

If the merger is implemented without seeking the MCMC's approval under Section 140 of the CMA, the MCMC may initiate an investigation on its own accord if it is of the view that the merger would result or has resulted in a substantial lessening of competition in the market. If the MCMC is satisfied that any licensee has conducted itself in a way so as to cause substantial lessening of competition, it is empowered under the CMA to seek interim or interlocutory injunctions, and/or impose a financial penalty of up to MYR500,000 plus a further MYR1,000 for every day the offence continues after conviction. The offender may additionally be liable to imprisonment for a term up to five years, on top of the fine.

The parties to an M&A who are aggrieved or whose interest is adversely affected by a decision or direction of MCMC may appeal to the Appeal Tribunal under Section 120 of the CMA. It is noted that parties may only appeal against decisions or directions of the MCMC, but not a determination made under Section 10 of the CMA. Parties may also seek judicial review under Section 121 of the CMA, after exhausting all other remedies.

Aviation Sector

It should be noted that even if the enterprise does not notify MAVCOM of its merger, MAVCOM is authorised under Section 83 of MACA to investigate the merger if it has reason to suspect that the said merger has or will lead to a substantial lessening of competition in the relevant market.

Where such an investigation has commenced but is not yet completed, MAVCOM may, under Section 57 of MACA impose interim measures by issuing of a direction if it has reasonable grounds to believe that any prohibition under Part VII (including the merger provisions) has been infringed or is likely to be infringed and considers it necessary to act as a matter of urgency for the purposes of:

- preventing serious and irreparable damage, economic or otherwise, to a particular person or category of persons; or
- protecting the public interest.

The directions by MAVCOM may include requiring or causing any person (Section 57(3), MACA):

- to suspend the effect of, and desist from acting in accordance with, any agreement;
- to desist from any conduct which is suspected of infringing any prohibition under Part VII; or
- to refrain from doing any act, but which shall not require the payment of money.

Prior to issuing a direction, MAVCOM will serve a notice of its proposed direction and give the parties an opportunity to make written representations within seven days from the date of the notice (Sections 57(4) and (5), MACA). Any direction given will cease to have effect once MAVCOM completes its investigation under Section 83; or 12 months from the date the direction was given, whichever is earlier (Section 57(7), MACA).

The parties to an M&A who are aggrieved by any decision of MAVCOM to the merger, under may appeal to the High Court of Malaysia against MAVCOM's decision under Section 88 of the MACA at any time within the period of three months from the date on which the decision was communication to them. The term "decision" includes direction.

7. FOREIGN INVESTMENT/NATIONAL SECURITY

7.1 Applicable Regulator and Process Overview

Malaysia does not presently have a foreign investment/national security review regime for FDI. FDI is primarily regulated by the relevant Ministries or governmental bodies which have supervisory jurisdiction over the specific sector. There was previously a Foreign Investment Committee (FIC) (a part of the Prime Minister's Department of the Federal Government) which had the role of approving foreign investments other than those under specific regulators, and acquisitions were subject to the Foreign Investment Committee Guidelines' requirements. The Federal Government repealed the FIC Guidelines in 2009.

However, where the company requires certain sector-specific licences, permits or approvals, the relevant regulator having jurisdiction over the sector may impose certain foreign equity restrictions and other conditions.

7.2 Criteria for Review

As the FIC Guidelines have been repealed, the criteria, considerations and requirements for approving FDI will be based on the guidelines and requirements of the relevant regulator having supervisory jurisdiction over that sector. Please see **1.2 Regulatory Framework for Foreign Direct Investment (FDI)** and **8. Other Review/Approvals** for further details.

7.3 Remedies and Commitments

As the FIC Guidelines have been repealed, the criteria, considerations and requirements for approving FDI will be based on the guidelines and requirements of the relevant regulator having supervisory jurisdiction over that sector. Please see **1.2 Regulatory Framework for Foreign Direct Investment (FDI)** and **8. Other Review/Approvals** for further details.

7.4 Enforcement

Almost all of the sector-based approvals for FDIs are based on general guidelines and policies adopted from time to time by the relevant regulator. For example, the Guidelines on Foreign Participation in Distributive Trade in Malaysia ("Distributive Guidelines") issued by the Ministry of Domestic Trade and Consumer Affairs ("MDTCA") provide that all "foreign business operators" engaged in distributive trade services in Malaysia are required to obtain approval from the MDTCA prior to commencing operations ("MDTCA Approval"). The requirement to obtain MDTCA Approval under the Distributive Guidelines has been extended to foreign corporations who carry on business activities which are classified by the MDTCA as Unregulated Services.

Malaysia is a signatory to the Common Effective Preferential Tariff ("CEPT"). The CEPT Scheme is a co-operative arrangement among ASEAN Member States that would reduce intra-regional tariffs and remove non-tariff barriers over a 15-year period commencing 1 January 1993. All manufactured products, including capital goods and processed agricultural products, and those falling outside the definition of agricultural products are covered by the CEPT Scheme.

It is to be noted that Malaysia acceded to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) 1965 on 22 October 1965 and the Convention came into force on 14 October 1966 through the Convention on the Settlement of Investment Disputes Act 1966. ICSID provides for settlement of disputes by conciliation, arbitration or fact-finding. The ICSID process is designed to take account of the special characteristics of international investment disputes and the parties involved, main-

taining a careful balance between the interests of investors and host states.

8. OTHER REVIEW/APPROVALS

8.1 Other Regimes

Foreign Exchange Regulation

BNM has a liberal foreign exchange policy, which is part of its broad prudential toolkits to maintain monetary and financial stability.

The foreign exchange control rules are governed under notices issued by BNM pursuant to the FSA. These notices set out the prudential measures governing the monetary and financial rules applicable to both "Residents" and "Non-Residents". BNM has also announced further liberalisations of foreign exchange policy which will provide greater flexibility for export-oriented industries to better support the economic recovery.

However, the rules on external borrowings in foreign currency by residents including issuance of redeemable preference shares to foreign investors remain unchanged. For the purpose of foreign exchange policy rules, a foreign-owned company incorporated in Malaysia is deemed as a resident. As a resident company, the foreign-owned company is free to borrow any amount in foreign currency (FC) from:

- non-resident entities within the same group excluding a non-resident financial institution or a non-resident special purpose vehicle (SPV) which is set up solely to obtain FC borrowing from any person outside the resident borrower's group;
- resident entities within the same group;
- other residents through the issuance of FC debt securities (eg, bonds or sukuk);
- resident and non-resident direct shareholders; and
- licensed onshore banks.

Real Property

Under the Guideline on the Acquisition of Properties issued by the Economic Planning Unit of the Prime Minister's Department ("EPU Guideline") which is effective from 30 June 2009 and was subsequently amended on 1 March 2014, there are two situations that would require the EPU's approval for the acquisition of property.

Firstly, the EPU's prior approval is required when there is a direct acquisition of property valued at MYR20 million and above which results in the dilution in the ownership of property held by *Bumiputera* interests and/or a government agency. Secondly, when there is an indirect acquisition of property by other than *Bumiputera* interests through acquisition of shares, resulting in a change of control of the company owned by *Bumiputera* interest and/or government agency, having property more than 50% of its total assets, and the said property is valued more than MYR20 million.

In the two decisions above, a company needs to satisfy the equity and paid-up capital conditions as listed in the EPU Guideline in order to acquire a property. For direct acquisition of property, the equity and paid-up capital conditions imposed by the EPU must be complied with before the transfer of the property's ownership, whereas for indirect acquisition of property, the equity and paid-up capital conditions must be complied with within one (1) year after the issuance of written approval.

In Malaysia, land matters are state prerogative and hence, state authorities have powers to decide the minimum purchase price for different types of property which may be acquired by foreigners. There is a different threshold for

different states and for different type of property. In addition to meeting the threshold, the foreign interest is required to obtain prior consent of the relevant state authority to acquire a property and some states impose a levy in granting their consent; eg, Penang and Johor.

Trade

Trading companies which are majority owned by foreign interests require approval under the Distributive Trade Guidelines ("MDTCA Guidelines") issued by the Ministry of Domestic Trade, Co-Operatives and Consumerism ("MDTCA").

The MDTCA Guidelines are applicable to wholesale and retail activities as well as to all other distributive formats, such as agents, distributors or franchise systems with foreign equity. There are minimum capital requirements stated in the MDTCA Guidelines, depending on the company and the business of the company in question, the MDTCA Guidelines provide for a wide range of possible measures to foster *Bumiputera* participation such as the employment of *Bumiputera* managerial staff or the utilisation of certain Malaysian services such as ports.

For example, the MDTCA Guidelines provides that all hypermarket businesses with foreign equity must be incorporated locally under the CA 2016. The capital investment in terms of company's shareholder funds is MYR50 million at the minimum, which includes paid-up capital. The hypermarket operators must provide at least 30% *Bumiputera* or Malay ownership in the company's equity structure.

However, upon approval of the applications made by the operators, a grace period of three years for compliance may be granted by the Distributive Trade Committee of MDTCA. It is also worth noting that hypermarket operators are not allowed to open additional branches unless it has fulfilled the requirement of 30% *Bumiputera* or Malay ownership in the company's equity structure. In addition, all various other distribution-format businesses with foreign equity must also be incorporated locally under CA 2016.

9. TAX

9.1 Taxation of Business Activities

Companies, limited liabilities partnerships ("LLP") and business trusts are subject to a 24% income tax rate.

From year of assessment 2020 onwards, tax resident companies and LLPs with a paid-up capital/capital contribution of MYR2.5 million and below (and are not controlled by or do no not directly or indirectly control another company with a paid-up capital of more than MYR2.5 million and having a gross business income of less than MYR50 million) (hereinafter referred to as "SMEs") are subject to 17% for the first MYR600,000 of chargeable income. Any subsequent chargeable income will be taxed at 24%.

For the year of assessment 2022, *Cukai Makmur* will be imposed on a one-off basis: the first MYR100 million chargeable income of a company (excluding SMEs) is subject to a 24% income tax rate. Any subsequent chargeable income is subject to a 33% income tax rate.

Foreign companies carrying on business in Malaysia through a permanent establishment/a branch, are subject to the same 24% income tax rate for income derived from Malaysia and are not eligible for any tax incentives/benefits.

Effective from 1 January 2022, income arising from sources outside Malaysia and received in Malaysia by a Malaysian tax resident is subject to a 3% tax rate on gross income. The Malaysian government has indicated that the 3% tax rate will be revised to 24% in the second half of 2022.

9.2 Withholding Taxes on Dividends, Interest, Etc

Effective from 2008, Malaysia has implemented the single-tier system. Under the single-tier system, tax on a company's chargeable income is the final tax and dividends received in the hands of the shareholders are tax exempted. There is no withholding tax on Malaysian dividends.

In respect of interest payment made by a payor who is Malaysian tax resident to a payee who is a non-resident in Malaysia, the payer is required to withhold an amount according to the prescribed rate of 15% (which may vary between the rate of 5% to 10% depending on the double taxation agreement, if any) and remit the same to the Inland Revenue Board of Malaysia ("IRB") within the stipulated period.

9.3 Tax Mitigation Strategies

A common tax planning strategy is having group structures where a holding company is incorporated with subsidiary companies created for specific activities/businesses. Such a structure will allow the holding company to receive dividends from the subsidiaries. Dividends so received are not subject to tax under the Malaysian single-tier system. The holding company then repatriates these profits (being the dividends received) to its foreign parent company. No withholding tax is payable as the profits are dividends which are tax free.

Effective from 2006, tax resident companies which are within the same group of companies can surrender not more than 70% of adjusted loss to a related company to set off the defined aggregate income of another related company, provided that all prescribed conditions are satisfied.

Inter-company loans/advances are subject to transfer pricing (interest rate must be charged at arm's length) and earning stripping rules (interest expenses which exceed MYR500,000 in a basis period is restricted to an amount equal to 20% of the amount of tax-earnings before interest, taxes, depreciation, and amortisation for the basis period for a year of assessment).

9.4 Tax on Sale or Other Dispositions of FDI

Malaysia does not impose tax on capital gains, save for the gains on disposal of real property and shares in a real property company ("RPC") which are chargeable to tax under the Real Property Gains Tax Act 1976 at a rate (for a company) of between 30% for a disposal within the first three years of acquisition and 10% for disposals in the sixth or subsequent years. In other words, capital gains derived by a foreign investor from the sale or other disposition of FDI by way of shares are not subject to tax unless the shares disposed are in an RPC.

To attract FDI, the Malaysian government has introduced various tax incentives in selected industry sectors, including manufacturing, biotechnology, healthcare, communications, utilities, transportation and green technology, hi-tech and multimedia, electricity, and electronic and Islamic financing.

Tax incentives and tax exemptions come in various forms, for example, income tax exemptions, withholding tax exemptions, extra allowances on capital expenditure incurred, and preferential tax rate for promoted sectors, promoted areas, regional multimedia and development corridors located across the country.

9.5 Anti-evasion Regimes

Whilst there are no specific anti-avoidance rules on FDI, FDI transactions between related companies are subject to transfer pricing ("TP") provisions where related parties shall apply the arm's length price for the acquisition or supply of property or services.

There are five prescribed methods in which an arm's length price can be determined:

- the comparable uncontrolled price method;
- the resale price method;
- the cost-plus method;
- the transactional profit split method; and
- the transactional net margin method.

A taxpayer will have to apply the most appropriate method in determining an arm's length transfer price based on the facts and circumstances of each particular transaction.

Furthermore, the taxpayer is required to prepare contemporaneous TP documentation to justify that the pricing is at arm's length. The contemporaneous TP documentation must include records and documents that provide a description of, among other things:

- the nature of the business or industry and market conditions;
- the controlled transaction;
- the strategies, assumptions and information regarding factors that influenced the setting of any pricing policies;
- the selection and application of the transfer pricing method; and
- the documents that provide the foundation for, or otherwise support or were referred to in developing, the transfer pricing analysis.

There is no requirement for the taxpayer to submit the contemporaneous TP documentation to the IRB along with the income tax return. The contemporaneous TP documentation is required to be submitted within 30 days if the taxpayer is selected by the IRB for TP audit.

Should the IRB opine that the transaction was not transacted at arm's length pursuant to a tax audit, the IRB has the power to substitute the price in respect of the transaction to reflect an arm's length price for that transaction.

10. EMPLOYMENT AND LABOUR

10.1 Employment and Labour Framework

Labour and employment matters are governed by both statutes and case law. There are several statutes that govern minimum terms of employment, minimum wage, social security and superannuation, safety and health, trade union membership, trace union recognition, collective bargaining, trade disputes, sexual harassment and unjust dismissal. The applicability of the statutes and remedies available often depends on the nature of work/type of worker and salaries of the worker. Case law has contributed significantly to the labour and employment jurisprudence.

Collective bargaining is common in most industries but less common in small enterprises.

A foreign investor should be made aware of all employment and labour laws, with the main ones being:

- the Employment Act 1955 (currently being amended);
- the Minimum Wages Order;
- the Minimum Retirement Age Act 2012;
- the Industrial Relations Act 1967;
- the Trade Unions Act 1959;
- the Occupational Safety and Health Act 1994;
- the Employees' Provident Fund Act 1991;
- the Employees' Social Security Act 1969; and
- the Employment Insurance System Act 2017.

Each of the above statutes have regulations issued under them.

10.2 Employee Compensation

The common framework for compensation includes financial and non-financial components such as salary (cash), annual bonuses, incentives (where the nature of the employment is productivity-linked) and, in some large corporations, employee share option schemes. Retirement and social security are statutory benefits payable by both the employer and employee at the rates determined by the relevant statutes.

Generally, employee compensation is not affected by an acquisition, change of control or other investment transaction unless a termination of employment occurs (which may occur by operation of law, depending on the nature of the transaction), in which event the employee may become entitled to termination benefits which is calculated based on the years in service.

10.3 Employment Protection

Employee rights in the event of an acquisition, change-of-control or other investment transaction would depend on the nature of transaction and the category of employees. Where the transaction is a sale of business as a going concern (as opposed to a share sale or sale of assets), the employee's employment with the seller will terminate on the change in ownership occurring and the employee will ordinarily become entitled to termination benefits unless the acquirer, within seven days of the change in ownership, offers continued employment (with recognition for years of service) on terms and conditions that are no less favourable. The quantum of termination benefits is dependent on the salary of the employee, years of service, contractual terms and category of employment. There are also certain other legal formalities to be fulfilled when a sale of business occurs such as issuance of termination of employment notice and filing with the Labour Department. If there is a collective agreement in place, the terms of the agreement should also be complied with.

11. INTELLECTUAL PROPERTY AND DATA PROTECTION

11.1 Intellectual Property Considerations for Approval of FDI

There is no government screening of intellectual property specifically for FDI in Malaysia.

11.2 Intellectual Property Protections

Malaysia has strong intellectual property laws. Malaysia is a signatory to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Paris Convention and the Berne Convention. The Intellectual Property Corporation of Malaysia (MYIPO) administers and enforces the following intellectual property legislation: the Trademarks Act 2019, the Patents Act 1983, the Copyright Act 1987, the Industrial Designs Act 1996, the Layout Designs of Integrated Circuits Act 2000 and the Geographical Indications Act 2000. Common law protection is also available for unregistered rights such as passing off and trade secrets/confidential information. The MYIPO does not differentiate specific sectors in administering and enforcing intellectual property rights. In terms of enforcement, a specialist Intellectual Property Court was also established in Kuala Lumpur to hear intellectual property matters and develop the intellectual property jurisprudence in Malaysia.

The Patents Act 1983 provides for compulsory licensing in certain specific circumstances but there are strict conditions that must be satisfied prior to the issuance of a compulsory licence. For regulated products such as drugs medical devices, alcohol and tobacco, there are specific labelling and advertising requirements that may prescribe that certain phrases/names are prohibited and this may have trademark implications.

11.3 Data Protection and Privacy Considerations

The Personal Data Protection Act 2010 ("PDPA") came into force on 15 November 2013, and it applies to any person who processes and any person who has control over or authorises the processing of any personal data in respect of commercial transactions.

The PDPA applies to persons "established" in Malaysia or where the person is not established in Malaysia, uses equipment in Malaysia for processing the personal data otherwise than for the purposes of transit through Malaysia. Therefore, a foreign investor may potentially be considered a "data user" under the PDPA and may thus be subject to the requirements under the PDPA if it processes personal data using equipment in Malaysia.

The Personal Data Protection Commissioner ("Commissioner") is the data protection authority in Malaysia. Breaches of data protection law can lead to administrative sanctions and criminal penalties. Depending on the nature of the offence, contravening the PDPA may lead to a maximum fine of MYR500,000 and/or imprisonment term of up to three years although certain offences are compoundable, which may allow reduced penalties. There is no multiplier on penalties linked to economic loss.

To date, enforcement actions have been largely low to moderate, mainly in the form of monetary penalties imposed on entities in various sectors for offences such as failure to register as a data user, failure to obtain the requisite consent from the data subject and data breach. The highest fines imposed thus far have amounted to no more than MYR10,000.

Skrine is one of the largest and a leading legal firm in Malaysia with a global reputation and a wide range of highly-regarded practice groups to meet the increasingly diverse needs of its clients. The firm is committed to the development of legal minds and the improvement of the community in which it exists. In an increasingly borderless and competitive world, where the law is challenged in new ways daily, Skrine remains steadfast in its founding principles: wisdom, fortitude and ingenuity. Skrine is the sole Malaysian member of two leading international legal networks, namely Lex Mundi and the Pacific Rim Advisory Council (PRAC). These networks allow it to serve the needs of clients expanding abroad or engaged in cross-border matters by tapping into the best legal practices and resources available internationally and leveraging its existing strengths.

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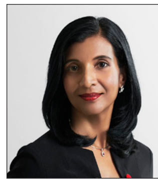
AUTHORS

To' Puan Janet Looi is the senior partner of Skrine and head of the firm's Corporate division. She is highly regarded for her expertise in takeovers, M&A and cross-border transactional work by both market observers and her peers. She is widely published in such diverse areas as corporate governance and climate change.



Selvamalar Alagaratnam is co-head of Skrine's Employment practice. She provides integrated support to a wide range of clients in various industries on all employment/human resource-related matters including compliance with all laws applicable to employment relationships; managing the exit of employees, whether by way of collective reduction in force exercises or individual terminations for misconduct or poor performance; protection of confidential and proprietary information; investigations and disciplinary actions; trade unions, both recognition and collective bargaining; dispute resolution at all levels; and business immigration. She is the Immediate Past Chair of the International Bar Association's Employment & Industrial Relations Law Committee.

Jillian Chia Yan Ping leads the Privacy and Data Protection practice at Skrine and is also part of the firm's TMT practice. She focuses on advising local and multinational companies in respect of data protection and privacy issues. Jillian's experience in this area includes reviewing and drafting of relevant documentation such as privacy policies, data processor agreements and data transfer agreements as well as undertaking comprehensive data protection exercises to bring her client's internal practices in line with the requirements of the privacy and data protection laws. She is a Committee Member of the Licensing Executives Society Malaysia (LESM).

Shi Wen is a corporate partner focussing on corporate advisory, merger and acquisition, oil and gas and maritime and shipping advisory. She also co-heads the Competition practice of Skrine and has in-depth knowledge and experience in this area. Shi Wen was invited to be one of the expert contributors for the Annotated Malaysian Companies Act 2016. She was also engaged by the Malaysian Energy Commission for the preparation and drafting of Competition Law Guidelines. She is also the Vice Chairman of the ICCM Competition Committee.

Skrine

Level 8, Wisma UOA Damansara
50 Jalan Dungun, Damansara Heights
50490 Kuala Lumpur
Malaysia

Tel: +603 2081 3999
Fax: +603 2094 3211
Email: skrine@skrine.com
Web: www.skrine.com

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