

EXPLORATORY INVESTIGATION ON THE ROLE OF LEGAL TO THE GROWTH OF MERGERS IN MALAYSIA

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ABSTRACT

Little has been written about mergers and acquisitions (M&A) in Asia although there are rapid growth of M&A in both Western and Asian countries. Most studies found on M&A in Asia focused on the effect of merged firm and the post performance while not many concentrated on the factors of the M&A transactions. This paper analysed the factors to the growth of mergers in Malaysia by collecting information from the selected groups who involved in M&A transactions. By gathering the information on the factors of M&A transactions, critical analysis has been done to disclose whether legal control play any part in the said transactions. The purpose of this research is expected to propose a further study on whether there is a need of regulatory competition for an effective merger in Malaysia. Finding of this research has suggested that legal control is one of the factors that contribute in the M&A transactions and the role of it are discussed in depth in this paper.

Keywords: *mergers & acquisitions, factors, competition law, corporate law*

INTRODUCTION

There should be a form of control and fair competition in the economic capital market in order to maintain efficiency in any corporation especially when there has been great development in the capital market either globally or domestically. Therefore, an effective control on mergers and acquisitions (here in after M&A) is needed particularly to companies who have been involved in series of M&A transactions. In Malaysia, the provisions regulating M&A is mainly provided under Corporate Law. However, regards have not been made on the impact of M&A on competition and in respect of practices of Competition Law or policy in Malaysia.

The Competition Act 2010 which has been passed by the Parliament; gazetted in June 2010 and has now come into force since January 2012 to which in essence safeguard against anti-competitive behaviour and the abuse of dominant position. However, nothing in this new provisions touch on merger control. To have a comprehensive Competition Law is not only promoting competition among undertakings in a particular market but also for the benefits enjoy by consumers and producers. Therefore, it is believed that Malaysia would need to start looking into competition issues in respect to M&A transactions of which currently within the purview of the Securities Commission.

This research studies the factors behind the M&A transactions and the role of legal regulatory framework in Malaysia in respect to merger controls. The results of this study would enable the researchers to find out what constitutes an approach that gives a better outcome for effective mergers in Malaysia.

The transactions that have been focused for the purpose of this research are made on Public Listed Companies in Malaysia for the M&A activities between the dates of 1st January 2006 and 31st December 2008. These dates are chosen for two reasons:

- i. Due to the emerging market in Malaysia, any data found too far back historically may no longer be germane and;
- ii. This is where there are recent amendments made to the laws pertaining to the M&A i.e. the Companies Act 1965, Securities Commission Act 1993 and the promulgation of new Capital Market & Services Act 2007.

The industries where companies for M&A transactions are most targeted are based on the 'announced' transactions as appeared in Bursa Malaysia unless otherwise noted for reasons of certainty and accuracy. The general purpose of this analysis is to bring new approach to control M&A and regulating the same not only for the efficiency of the corporations but also to the capital economic market as a whole. This study can later be used to determine whether in regulating M&A in Malaysia, any regards were placed for merger control within the realm of Corporate and Competition laws.

OVERVIEW OF REGULATORY FRAMEWORK GOVERNING M&A IN MALAYSIA

In Malaysia, the M&A transactions rely on various forms of legal and/or regulatory framework. Depending on the type of transactions, either share acquisitions or asset acquisitions, the process may involve legal control, non-legal or administrative control, regulatory approvals, statutory consents and non-regulatory consents and approvals to name few. Thus, regulating M&A plays a form of control to the same in Malaysia through various modes and methods.

However, the main legal 'merger control' that has been practised in Malaysia are the Companies Act 1965, the Securities Commission Act 1993, the Malaysian Code on Take-overs and Mergers 1998 to which announcement on 17th December 2010 was made by the Securities Commission of several changes to the current Malaysian Code on Take-overs and Mergers 1998. As highlighted by M.Adzmi, P.S.A and Jamarudi, EM (2009), the Securities Commission has a statutory duty to not only regulate the take-overs and mergers of companies but also to ensure that the confidence and/or protection of the investors are maintained throughout the process.

As mentioned above, the M&A transactions in Malaysia are governed mainly by the Corporate Law under the Malaysian Code on Takeovers and Mergers. The Code was provided by the Companies Act 1965 and regulated by the Panel on Take-Over and Mergers; it was then brought under the Securities Commission Act 1993. However, the Malaysian Code on Take-Over and Mergers 1998 has been replaced with the Malaysian Code on Take-Over and Mergers 2010 together with the Practice Notes which lay down how the relevant parties involved and affected to conduct themselves throughout the M&A transactions. The current provisions encompass protections to wider cluster of parties and increase transparency in order to boost Malaysian capital market, domestically and also internationally. However, nothing in the latest provisions emphasize the practice of *merger control* as under the Competition Law perspectives which take into account of the interest of the public as a whole when considering a proposed merger.

From the various statutory rules and regulation, soft laws, codes of conducts and practice notes, being the 'merger control' imposed, it may seem that high regards are placed to transparency, disclosure and protections but these comprehensive procedural laws of the M&A are mere administrative, burdensome and restricts freedom in the broad economic market, lacks the substantive rules require to the benefit of the economy as a whole. As M&A transactions relates to not only the investors and the shareholders but also a country's economic, M. Adzmi, P.S.A and Jamarudi. E.M (2010) argued that the 'merger control' as practiced in Malaysia does not reflect the *merger control* as advocated by the competition lawyers. Therefore, in this research, we aim to answer the question, 'does legal control play a role to any M&A transactions?' The answer to this research has been used as the basis of the ongoing research project which highlighted whether there is a need of regulatory competition for an effective merger control.

OVERVIEW ON THE FACTORS OF M&A TRANSACTIONS

In Malaysia, the capital market has been steadily developing after the 1997/1998 Asian financial crisis. Malaysia has shown its robust economic growth and M&A have been commonly regarded as a form of expansion with series of M&A transactions emerging. Malaysia was also ranked third for M&A transactions in Asia Pacific (excluding Japan) with announced deals worth RM120 billion in 2006 (N. Ramlah; 2008). This development is based upon the various changes that Malaysia has undergone, from changes in national policy, to setting up of various legislation and regulations, coupled with Malaysia's unique historical background and corporate culture. Thus, it is important to look into the general factors influencing M&A around the globe. In this research, factors will mean the element that brings about the effect or results of M&A.

Geographical Factor

A research indicated that distance of the target and Acquirer Company does not matter if there is a reinforced capacity to accurately evaluate the value of the target firm even from afar. Thus the probability of M&A increases, when the target is transparent, its value is easily evaluated. Hence, it is important to conduct an empirical study to investigate the validity of this hypothesis particularly relating to the accuracy of monitoring (Eero Lehto; 2006).

Nonetheless, if both the acquirer and the target are closer, they tend to share the same mode, form or method of communication even with only implied terms (Breschi and Lissoni; 2001). The study suggests that the communication gap is lessening when the staff education level rises. In M&A, firms may also 'internalise synergy' gains by common use of assets which may be possessed by an acquiring or a target company (Breschi and Lissoni; 2001). The study found that there could be 'geographical restrictions' associated with common use which may cause the company to favour a closer firm while distant M&A was found to have higher risk due to inaccurate information obtained. Thus, acquirers in M&A were found to prefer closer targets in terms of geographical location (Breschi and Lissoni; 2001).

However, the findings further indicated that in respect of cross-borders M&A, the staffs are typically highly educated with firms putting in heavy investments on research and development. The study further finds that sharing of fixed asset is more probable in cases of intra-regional M&A (Eero Lehto; 2006).

There have been extensive empirical studies on the spatial aspect of merger flows, for example, Green and Cromley (1984), Green (1987) and Green (1990) which investigated the U.S. model and Green and McNaughton (1989), and Aliberti and Green (1999) investigated the Canadian model of takeovers across regions which all found that distance (or rather short distance) is essential in ensuring a successful M&A.

It was further found that, the high educational level of the staff is a good measure to 'internalise the potential synergies of distant mergers and acquisitions, increase the probability of cross-border mergers and acquisitions at the expense of domestic mergers and acquisitions' (Eero Lehto; 2006). Furthermore, a firm's Research and Development stock, may signal a good monitoring ability, will raise the probabilities for cross-border or distant domestic M&A at the expense of the probability for intra-regional M&A (Eero Lehto; 2006).

The Managerial Theory for a Successful M & A

On the other hand, the management scholars would argue that, due to the none existence of synergy effects found in most literatures, they are often absent due to the difficulties in managing acquisitions successfully (Toth, 2007). Thus, many scholars have therefore referred to the managerial theories for a new rationalization that corresponds to the empirical evidence. Both managerial theories and institutional theories shared the same aim by questioning the paramount decisions to be made in any M&A by focusing instead on the agency problems under corporate governance, the role of financial markets and the inaccurate information and/or how these factors will lead and influence the managers' decisions. The main principle of the managerial theory is to not focus on the efficiency and to maximize profit but rather on the immediate goal of the managers in seeking the growth of the firm (Baumol, 1967).

Shleifer and Vishny (2003) on the other hand took a different perspective in their study where they found that non-optimality of M&A decisions originated from the inefficiency of the capital market. They however, based their findings solely on the managerial and stock market viewpoint without any regards to any potential real economy effects especially on combined assets. Thus, this theory is behavioural as the insights obtained by the manager are used to increase shareholder value in the sale and purchase of undervalued firms compared to their own. Hence, Shleifer and Vishny formed the resultant hypothesis to the managerial theories that 'firms that are overvalued take over firms that are undervalued' (Jensen and Camilla; 2010).

Beyond the Financial Factors- 'Softer Issues'

A recent study (Lafforet, C. and Wageman, R. 2009) suggests that amongst the reasons behind the immeasurable failures of M&A transactions are not the average financial or organizational assimilation but rather the managerial structure, the organizational system between two companies, transparency of the integration process and conflicting corporate cultures. In their survey, it was shown that though there were 93 percent reported of doing due diligence on the financials, but only 22 percent assessed the element of culture and people before the M&A deal was undertaken. By concentrating on these aforementioned issues, the study found that not many focused on 'softer issues' such as the integration of IT systems (55 percent), senior management and workforce (13 percent). The case study of 10 merger deals, confirmed the success or the failure of any M&A lies in the quality of the integration of the parties involved, from the management to the workforce (Lafforet, C. and Wageman, R. 2009). Based on their research, CEOs failed to look into the roles and relationship of the people involved thus making it a failure. The research further reveals four best practices that make a difference between successful and unsuccessful mergers, by looking at the 'softer issues' such as emotional challenges, aligned leadership, key talent and integration of the organization (Lafforet, C. and Wageman, R. 2009).

The research obviously provides a different insight in respect of M&A where the findings show that in confronting any M&A, attentions must not only be given to the finances but also to have a demonstrative leadership especially in assimilating two clashing corporate cultures having the human resource skill in dealing with its workforce with the necessary leadership speed, timing and total integration from those involved.

Factors That May Cause Failure in Any M & A Transaction

Most failed M&A will collapse during the due-diligence process as the parties discover inconsistent accounts, differing operating philosophies and realisation that they are unable to undergo the M&A (Veronikis, E; 2009) On another note, the staggered board structure feature also may make any attempts for hostile takeovers more difficult.

On the other hand, it is plausible that staggered boards may improve the company's shareholder value. For example when a firm developed a valuable product, it will be in the interest of the shareholders for the managers to defend the company from the change in control for fear of proprietary costs fell into the hands of competitors (Larcker Et. Al; 2010).

The Concerns of Merger & Competition under Competition Law

Considering the Competition Law, one need to assess the efficiency of the mergers in order to ensure there will be no potential for any anti-competitive effect of the merger. On another note, efficiencies can be a significant component of the rebuttal to the anti-competitive tendencies of a merger (Antitrust Bulletin; 2009). It is questionable whether efficiency should be of utmost importance and hence not taking into account the economic consequences which a defender of the efficiency theory would disagree.

Thus, it will not be guarantee that efficiencies from M&A will actually be implemented if a competitive market structure is destroyed by the M&A. Hence, one would raise the question what value is the *efficiency* through the M&A, if companies could accumulate so much economic power that they could increase prices rather than lowering them? Such a M&A that destroys the competitive market structure could lead to various forms of manipulation of the market without any regulatory control; examples might be the hindrance of new technologies, restricting consumer choice or creating a monopoly in certain industries (Antitrust Bulletin; 2009).

Case studies were made on rail, airline and pharmaceutical industry; it was shown that consumers do not benefit from efficiency through lower prices. In distinguishing against efficiency the study further raised other factors such as innovation that can be

observed in the steel, pharmacy, or tobacco industry and issue of private planning power that is prominent in the urban transportation and automobile industry and petroleum industry. Another issue is that of the power for economic sabotage in the defence weapon, petroleum and airline industry or that of political power in the steel, automobile and financial industry.

Evidently, it is clear that it has been shown that any efficiency attributable to M&A does not actually occur because there was huge financial losses in sales and markets that lead to bankruptcies rather than promoting technological innovation in the production (Gary Clyde Hufbauer & Ben Goodrich; 2002). It was criticised that, the supporters of efficiency are ignoring the effect of inefficiency in the structural market concentration and the economic power (James W. Brock & Norman P. Obst. 2009). Moreover, they do not recognize that a competitive marketplace is a social institution for controlling economic power and has a function for a decentralized balance of economic decision making (David Millon; 1988 and James May; 1989). The main objective of Competition Law in specific *merger control* policy is not just economic efficiency but rather, largely, on the challenges of finding the right balance between an efficient economic decision and maintaining a competitive market (Antitrust Bulletin; 2009).

METHODOLOGY: EXPLORATORY INVESTIGATION

This research is part of a three phase project that is being conducted by the researchers. The first phase was to analyse the current provisions regulating M&A in Malaysia and to answer whether any regards were placed for merger control and explored the approach undertaken by Competition Law jurisdictions experiences in so far it might throw light on problems faced by Malaysia (M. Adzmi, P.S.A and Jamarudi. E.M; 2010). Through the findings of the study made in the first phase, the researchers found that though there is comprehensive procedural law of the M&A transactions, the legal framework lacks the substantive rules in that the regulations may seem administrative and restricts the freedom in the broad economic market. The second phase of the project which this paper presents, ascertained the factors to the growth of mergers in Malaysia. Final phase of this project is to develop an effective merger control in Malaysia.

During the early stage of the second phase project, data was gathered using *Bursa Malaysia* website by analysing the announcements of each listed company. After looking through 437 companies listed on *Bursa Malaysia*, 85 companies were identified to be involved in M&A transactions with some companies have multiple M&A transactions. The data collected includes only M&A activities between 1st January 2006 and 31st December 2008 by the reasons as mentioned above. The purpose of analysing the announced transactions is to pose as guidance in the next data-collection phase, that is, survey via questionnaires. Based on the data collected, questionnaires were formed involving both open ended and close ended types of questions.

Survey via questionnaires was chosen as the researchers believed that it is the relevant medium to experience selected informants' views and opinions about the practice of M&A in Malaysia. On the other hand, the researchers do aware of the risk of using the questionnaires may reduce level of participation. Hence, the researchers have carefully designed the questionnaires using social psychology approach introduced by Dillman (1991).

The reasons for having open-ended questions are to gain first hand information on the factors to the growth of M&A in Malaysia and in the questionnaires, the researchers asked the respondents to state their profession in which they encountered with any M&A transactions and the sort of experience that they have dealt with M&A. This would help the researchers to determine whether the information given for the rest of the questions in the questionnaires can be reliable as characteristics of sample have been decided. The close-ended questions have been designed with simple options of 'yes' and 'no' in order to get the general statistic using simple nominal calculation. Below is the example of the questionnaires extract:-

1. Please state your profession in which you encountered with any Mergers & Acquisitions transactions?	
2. What sort of experience have you had in dealing with Mergers & Acquisitions?	
Please circle the answer for the appropriate questions.	
3. In your experience dealing with Mergers & Acquisitions, are you aware of Competition Law & Policy? YES / NO	4. If yes, whether we should have a regulatory framework regulating Competition Law & Policy in respect of Mergers & Acquisitions? YES / NO
5. Have you had any dealing with Mergers & Acquisitions? YES / NO	6. If yes, what is the outcome? Successful / Failure
7. If successful, what are the factors affecting it?	

<p>8. In any of the Mergers & Acquisitions transactions that you involved in, whether the Takeover Code is applicable?</p> <p style="text-align: center;">YES / NO</p>	<p>9. Do you think legal / regulatory framework helps the Mergers & Acquisitions transactions process?</p> <p style="text-align: center;">YES / NO</p>
<p>10. If your answer to question 9 is NO, please state why do you think legal / regulatory framework does not help the Mergers & Acquisitions transactions process?</p>	

5.0 RESULTS AND DISCUSSION

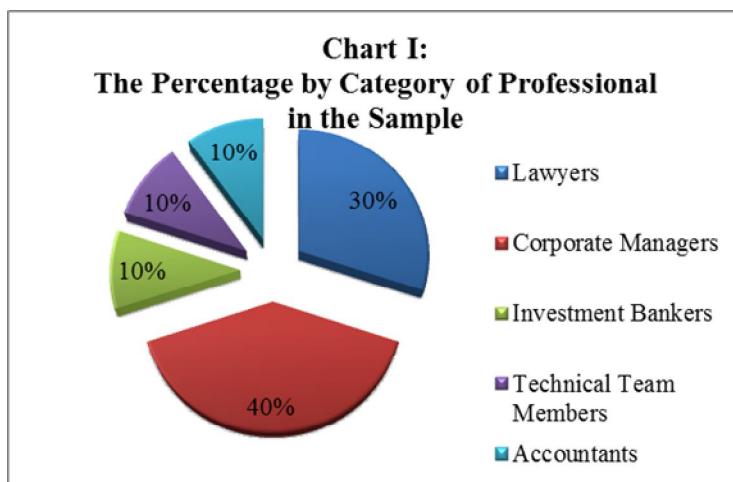


Chart I above shows the category of professional who are involved in M&A transactions and have participated in survey. Based on Chart I, the corporate managers are the highest number of professionals who have responded to the questionnaires, followed by the lawyers, while investment bankers, technical team members and accountants; all shared the same number of respondents.

Most of the corporate managers who participated in the questionnaires have experience with M&A transactions in terms of restructuring policy and system intergration. While most of the lawyers dealt with drafting sale and purchase agreement and conducting due dilligence exercise. For the investment bankers, their concern is more on compensation and benefits that might be triggered by the M&A transactions. The accountants who responded have experienced in assissting clients in their M&A regarding the transactions or activities which include local markets, inbound and outbound. Finally and interestingly, special respondents from the technical team members who have experienced in M&A transactions in ensuring the continuity of technology support after the M&A transactions.

Based on the responses received, it was found that 80 percent of the respondents have dealt with successful M&A transactions. The majority of the respondents agreed that the most vital factor affecting successful M&A transactions rely on managerial factor which include an excellent team work and great support from high level management. With the positive managerial factor, the transactions process can be done properly and more efficient which makes the due diligence stage run smoothly. Moreover, it is easier to reach meeting of minds among those involved in the transactions.

However, it was also found that 90 percent of the respondents involved on domestic M&A transactions. Hence, another factor for the success of those transactions could be the geographical factor which a number of scholars such as Green and Cromley (1984), Green (1987) and Green (1990) Green and McNaughton (1989), and Aliberti and Green (1999) have regard as important, as short distance play important part for successful takeover activities. The shorter the distance the easier to reach *consensus ad idem* (meeting of mind) among the parties involved in the transactions. In addition, there may also be other factors that may have been highlighted in the academic literature that might affect the M&A transactions namely pricing, minority protection issues, mandatory offers and voluntary offers.

One of the failures M&A transactions in the findings was a cross-border M&A transaction which again supported the view that short distance plays an important part of takeover activities. The respondent who dealt with such transaction commented that the reason for the failure is because there were issues related to entity to be acquired or merged which were difficult to settle. In the researcher humble opinion, cross region M&A transactions need a higher level of care and skill among those who are involved, especially during the post merger integration.

Another factor that leads to failure of the transaction is if the company involve in M&A transactions is an insolvent company which makes it hard to find a cooperating bank as creditors for funding. Moreover, reasons for failure were the commercial terms arranged by authority, namely the regulated industry which by large are financial institutions. The companies involved in the M&A failed to follow those policies or rules imposed on them.

Besides that, different industry has different degree of control and protection upon the process of M&A transactions. Does that mean that having the Malaysian Code on Takeovers and Mergers is not enough to centralise the degree of control and protection on all M&A transactions in Malaysia? Moreover, it should be noted that the pricing and failing to grab sufficient information during the due diligence can also be taken into account as the reason for M&A transactions failure.

One of the issues that have been raised in the questionnaires was whether the Malaysian Code on Takeovers and Mergers has been considered during the M&A transactions process regardless whether the transaction fails or successful. Since the Malaysian Code on Takeovers and Mergers does not consider stakeholders or consumers, the researcher questioned on whether the respondents aware of the existence of Competition Law and policy which specifically meant to control the behaviour of merged undertakings from hurting the society. For those who are aware of Competition Law and policy question was asked on whether they agree to such law to be implemented in Malaysia.

As a result, only 40 percent have used the Malaysian Code on Takeovers and Mergers as guidance for the M&A transactions, though 80 percent of the respondent agreed that legal or regulatory framework helps the M&A transactions process. The only plausible explanation to this figure would be either that the parties involved are not aware of the Malaysian Code on Takeovers and Mergers or there are issues in the transactions which are not covered under the Malaysian Code on Takeovers and Mergers. The minority of respondents who thought that legal or regulatory framework does not help the M&A transactions process thought that the legal framework might become in handy and that it might be abused if the regulatory framework is applied inconsistently.

Regarding to the awareness of Competition Law and policy, it was found that there are only 30 percent respondents who are aware of the law and 40 percent agreed that it should be implemented in respect of M&A in Malaysia. This shows that the majority of M&A transactions in Malaysia do not take into account of the effects on stakeholders or consumers. On the other hand, it was commented by one of the respondents that the M&A transactions process do concern about the consumers but not as the first priority. What concern the individual(s) involved in M&A transactions as to regards to consumers is the news and information of the merged firm to be spread to the consumers. Therefore, since there is no concern of welfare of the consumers, it is time for Malaysia to start considering for regulatory competition in controlling the M&A transactions.

CONCLUSION AND RECOMMENDATION

This study has explored the factors to the growth of mergers in Malaysia by using questionnaires as the method to gain information from the respondents who have involved in M&A transactions. By analysing the responses received, information on the factors for both failure and success M&A transactions as well as getting the answer on whether legal or regulatory framework plays its role in those transactions have been successfully gathered.

As overall result, it was found that majority of the respondents' views on the factors to both failure and success mergers and acquisitions transactions are consistent with other scholars. The legal or regulatory framework does play a role in the M&A transactions particularly the Malaysian Code on Takeovers and Mergers although it may not be the most vital factor. Nevertheless, interesting feedback was received regarding the practicability of the current regulatory framework in Malaysia as discussed above. This evidence has shown that there are some weaknesses drawn and observed in the current regulatory framework for the M&A transactions. Last but not least, the poor rate of awareness on the Competition Law and policy among the professionals is one of the major findings that also need to be taken into account.

Though all efforts have been taken throughout the study to look into various sources, data and analysis from the national and international level to ensure the representativeness of this study, there were few problems that have been encountered during the course of this study and surveys which may limit the representativeness of the research outcome.

The first issue was in getting professionals involved in the survey. As M&A is a very technical area, only certain group of participants are directly involved in the M&A deal. Only few firms of lawyers for example have handled and are handling M&A transactions. Further, due to the issue of confidentiality, most respondents are reluctant to participate in the questionnaires.

In addition, there were some difficulty in finalising the results of the surveys especially when analysing the rate of awareness of Competition Law and policy among the professionals. This is because, the research is exploratory in nature and relatively new legally and therefore, the quality of the results could be questionable. Perhaps, there could have been better methods of survey that can be adopted for a better result.

Based on the research findings and discussions, there are several recommendations are made as follows:-

1. A further research has to be done in order to collect more data to study merger control concerning the implementation of Competition Law and policy in M&A transactions. It would be great to study established merger control in other countries such as Japan, United Kingdom, South Africa and United States.

2. This research is exploratory and the results could be questionable but it still worth to take into account the poor rate of awareness of the Competition Law and policy among the professionals. There should be talks, courses or conferences to be done to improve awareness among these professionals about the Law.
3. Although the legal or regulatory framework is not the most vital factor in the process of M&A transactions, there is a need for the law to be revised and perhaps include the concept of merger control as proposed in Competition Law and policy.

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