

International Comparative Legal Guides



Telecoms, Media & Internet 2020

A practical cross-border insight into telecoms, media and internet laws and regulations

13th Edition

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1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

Malaysian telecommunications, internet, and audio-visual media distribution sectors have experienced considerable growth over the past decades, with market liberalisation and regulatory reforms contributing towards growth of the relevant industries.

(a) Telecommunications & Internet

The Ministry of Communications and Multimedia (“MCM”) is the main regulator of matters relating to telecommunications, and is tasked with determining telecommunications-related policies and regulations.

The most significant market participant in the Malaysian telecommunications industry is Telekom Malaysia Berhad (“TM”), which, *inter alia*, provides direct exchange line (“DEL”) services in the retail and wholesale telecommunications sector.

The reported annual revenue of the telecommunications and internet market participants as at 31 December 2018 is:

Market Participants	Annual Revenue
TM	RM11.82 billion
Maxis Berhad (“Maxis”)	RM9.192 billion
Celcom Axiata Berhad (“Celcom”)	RM6.7 billion
Digi.Com Berhad (“Digi”)	RM5.79 billion
TIME dotCom Berhad (“TIME”)	RM983 million

The revenue share of the telecommunications market participants as at 31 December 2018 is:

Market Participants	Market Revenue Share
TM	33%
Maxis	26%
Celcom	20%
Digi	18%
TIME	3%

In recent times, there has been a shift from DEL subscriptions to mobile cellular subscriptions.

In terms of mobile cellular subscription services, the significant market participants are:

Market Participants	Market Share
Digi	27%
Maxis	25%
Celcom	20%
U Mobile Sdn Bhd (“U Mobile”)	16%
Mobile Virtual Network Operators	12%

The broadband market comprises of fixed broadband and mobile broadband services.

The market is predominantly mobile, totalling 36.79 million in 2018 (93%), where its major market participants are:

Market Participants	Market Share
Digi	30.1%
Maxis	24.3%
U Mobile	18.2%
Celcom	17.3%

Fixed broadband takes up a small percentage (7%) of the broadband market, where the main players therein are TM, Maxis, and TIME.

(b) Audio-visual Media Distribution

The broadcasting industry has, in recent years, seen rapid growth following the introduction of Digital Terrestrial Television Broadcasting infrastructure, facilitating the migration of free-to-air (“FTA”) broadcasters from analogue to digital platforms. Notable FTA TV participants are Media Prima Berhad (“Media Prima”), and Malaysian Government (“Government”)-owned stations Radio Television Malaysia and Bernama, amongst others. Media Prima reported its revenue for 2018 to be RM1,185.7 million and stated that its television network commanded 34.5% of the overall television audience.

The overall Pay TV subscription service providers comprise of Astro Malaysia Holdings Berhad (“ASTRO”) and TM via its IPTV service “Unifi TV”.

As at the end of 2018, the number of Pay TV subscriptions was at 7.32 million. ASTRO dominates the Pay TV market with a 78% market share as at January 2019. ASTRO reported that its revenue stood at RM5.479 billion as at 31 January 2019 with it serving 5.713 million households.

The MCM had indicated in June 2018 that it is open to liberalising the Pay TV market, to allow competition and improvement of services to flourish and to end a monopoly in the lucrative sector worth billions, previously stifled by licensing rules and demand for large investments.

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The most important legislation which applies to (a) telecommunications, including the internet, and (b) audio-visual media distribution sectors is the Communications and Multimedia Act 1998 (“**CMA**”), which provides for regulation of the converging communications and multimedia industries. The CMA forms the backbone of regulatory authority over the above sectors. Under the CMA, the Communications and Multimedia Content Forum (“**CMCF**”) is empowered to formulate a Content Code to set out guidelines, procedures for good practice, and standards of content disseminated to audiences by service providers in the communications and multimedia industry in Malaysia. The Content Code is a commitment by industry players towards self-regulation in identifying what would be offensive and objectionable while spelling out the obligations of content providers within the context of the country’s social values.

Other legislation which also have application to the above sectors are:

- (i) Anti-Fake News Act 2018;
- (ii) Betting Act 1953;
- (iii) Capital Markets and Services Act 2007;
- (iv) Common Gaming Houses Act 1953;
- (v) Companies Act 2016;
- (vi) Computer Crimes Act 1997;
- (vii) Consumer Protection Act 1999;
- (viii) Copyright Act 1987 (“**CA1987**”);
- (ix) Digital Signature Act 1997;
- (x) Direct Sales and Anti-Pyramid Scheme Act 1993;
- (xi) Electronic Government Activities Act 2007;
- (xii) Electronic Commerce Act 2006;
- (xiii) Film Censorship Act 2002;
- (xiv) Financial Services Act 2013;
- (xv) Malaysian Communications Multimedia Commission Act 1998 (“**MCMCA**”);
- (xvi) Medicines (Advertisement and Sale) Act 1956;
- (xvii) Penal Code;
- (xviii) Personal Data Protection Act 2010 (“**PDPA**”);
- (xix) Pool Betting Act 1967;
- (xx) Postal Services Act 2012;
- (xxi) Sedition Act 1948; and
- (xxii) Strategic Trade Act 2010.

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The telecoms and audio-visual media distribution sectors fall under the communications and multimedia industry in Malaysia. The Malaysian Communications and Multimedia Commission (“**MCMC**”) established under the MCMCA acts as the primary regulator for the said industry. Under the purview of the MCMC, the MCMC is tasked with the development and enforcement of policies and regulations for networked information technology industry services and the operational and administrative aspects of the regulatory framework.

The MCMC specifically regulates the provision of communications-related services and is empowered to supervise, regulate and enforce legislation relating to communications and multimedia-related activities and is entrusted with:

- (i) advising the Minister of Communication and Multimedia (“**Minister**”) on all matters concerning national policy objectives for communications and multimedia activities;

- (ii) making recommendations to the Minister on various matters, including the grant of individual licences, cancellation of a person’s registration under a class licence, and variations of licence conditions;
- (iii) implementing and enforcing the CMA;
- (iv) issuing directions in writing to any person regarding compliance with licence conditions, including the remedy of a breach of a licence condition, the CMA or its subsidiary legislation;
- (v) holding public inquiries in relation to proposed changes to regulation; and
- (vi) issuing determinations on mandatory standards for matters subject to a voluntary industry code.

The Minister is empowered to regulate the MCMC under the CMA and the MCMCA. The Minister’s functions include the following:

- (i) making any determination on any matter under the CMA which is subject to the Minister’s decisions;
- (ii) granting licences;
- (iii) making regulations; and
- (iv) setting rates for facilities or services by providers.

Other agencies and self-regulatory bodies which have regulatory roles in the above sectors are as follows:

- (i) Advertising Standards Advisory;
- (ii) Central Bank of Malaysia;
- (iii) CMCF;
- (iv) Companies Commission of Malaysia;
- (v) Film Censorship Board of the Ministry of Home Affairs;
- (vi) Ministry of Domestic Trade and Consumer Affairs;
- (vii) Ministry of Finance;
- (viii) Medicine Advertisements Board of the Ministry of Health;
- (ix) Ministry of International Trade and Industry;
- (x) Multimedia Consumer Forum of Malaysia (“**CFM**”);
- (xi) Personal Data Protection Commissioner;
- (xii) Royal Malaysian Police; and
- (xiii) Securities Commission Malaysia.

1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment?

(a) Telecoms Including Internet

In 2012, the Government liberalised the telecoms services sector by allowing applications service providers to have up to 100% foreign equity participation.

Currently, network service providers and network facilities providers may have up to 70% foreign equity participation. However, according to a statement by the Minister in October 2018, the Government is considering whether to expand the foreign equity participation of network service providers and network facilities providers.

(b) Audio-visual Media Distribution

There are no provisions for foreign equity requirements or other investments in this industry.

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

Malaysia has been a member of the World Trade Organisation from 1 January 1995 and has made several commitments under the

General Agreement on Trade in Services including commitments on market access limitations for telecommunication services, and has adopted and implemented the telecoms reference paper.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

The regulatory framework for telecommunications networks and services (including electronic communications) is provided for under the CMA and its subsidiary legislation, which caters for a plenitude of issues relating to the provision of telecommunication networks and services including the licensing of telecommunication networks and services, the assignment of spectrums, phone numbers and electronic addresses, as well as touching on content regulation and consumer protection. The primary subjects of regulation under the CMA are applications services, network facilities, network services, and content applications services which are subject to stringent licensing and monitoring.

The responsibility of determining policies and regulations lies primarily with the MCMC, falling under the purview of the Minister, who is empowered to provide the MCMC with binding directions as to the performance of its functions. The MCMC regulates networked information technology industry services and the operational and administrative aspects of the regulatory framework, and has obligations towards both licensees under the CMA and industry consumers. Economic and technical regulation of the communications and multimedia industry also falls under the purview of the MCMC.

The Minister is in charge of the MCMC and has primary responsibility for determining policies and regulations in the communications and multimedia, broadcasting, information technology and postal sectors. Policy decisions on industry competition, including licensing, spectrum use principles, and rate regulation fall solely under the purview of the Minister.

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

As indicated in question 2.2 above, the telecommunications industry is regulated by the MCMC and the Minister. The CMA prohibits anti-competitive conduct by licensees thereunder, and competition in the telecommunications market is regulated by the MCMC and the Minister.

However, enforcement of competition laws and development of competition regulations fall under the purview of the Malaysian Competition Commission (“MYCC”), being the primary competition regulator under the Competition Act 2010. The MYCC’s main role is to protect the competitive process for the benefit of businesses, consumers and the economy. The MYCC works independently from the MCMC as the Competition Act 2010 does not apply to activities which are regulated under the CMA.

As the MCMC is under the MCM, the MCMC is not independent from the Government. The MYCC falls under the Ministry of Domestic Trade and Consumer Affairs and is also subject to Government control.

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

Section 18 CMA provides that parties affected by a decision or direction of the MCMC have a right of appeal against the same to

the Appeal Tribunal. There is no statutory right of appeal against a determination of the MCMC. The Appeal Tribunal’s decision is final and binding on the parties and may not be appealed further.

Section 120 CMA provides that an aggrieved person or person whose interest is adversely affected by a decision or direction (but not a determination) of the MCMC made pursuant to the performance of its powers and functions may raise an appeal to the Appeal Tribunal to review the merits and process of decisions or directions of the MCMC, unless the matter is not subject to an appeal to the Appeal Tribunal.

Under Section 121 CMA, a person affected by a decision or other action of the Minister or MCMC may apply to the Courts for a judicial review of such decision or other action.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

The authorisation regime for licensing under the CMA is activity-centric in nature and the relevant authorisations thereunder are divided into either individual or class licences.

Under Section 126 and Section 205 CMA, persons carrying out the following categories of activities under the CMA are prohibited from doing so without a valid individual or class licence, as the case may be:

Name	Description
Network Facilities Providers (“NFPs”)	Persons who own or provide network facilities/infrastructure, such as cables, towers, satellite earth stations, broadband fibre optic cables, telecommunications lines and exchanges, radio communications transmission equipment, mobile communications base stations and broadcasting transmission towers and equipment.
Network Service Providers (“NSPs”)	Persons who provide network services which provide basic connectivity and bandwidth to support a variety of applications, such as bandwidth services, broadcasting distribution services, cellular mobile services, switching services and gateway services.
Applications Service Providers (“ASPs”)	Persons who provide applications services which provide particular functions such as voice services, data services, internet access and electronic commerce which are delivered to end-users.
Content Applications Service Providers (“CASPs”)	Persons who are a subset of applications service providers which provide content, such as television and radio broadcast services and the provisioning of information services.

An individual licence comes with a high degree of regulatory control and may require compliance with special conditions. A class licence on

the other hand has less regulatory control and is designed to promote industry growth and development by easing market access.

It should be noted that according to the Licensing Guidebook published by the MCMC (“**Licensing Guidebook**”), certain types of activities, such as online publishing, are excluded from the requirement of obtaining a licence.

2.6 Please summarise the main requirements of your jurisdiction’s general authorisation.

Under the Licensing Guidebook, the following organisations/persons are ineligible for a class or individual licence:

- (i) Individual Licence:
 - (a) a foreign company as defined under the Companies Act 2016;
 - (b) an individual or a sole proprietorship;
 - (c) a partnership; or
 - (d) such other persons or classes of persons as may be decided by the Minister from time to time.
- (ii) Class Licence:
 - (a) a foreign individual who is not a permanent resident; or
 - (b) a foreign company as defined under the Companies Act 2016.

Regulation 3 of the Communications and Multimedia (Licensing) Regulations 2000 (“**Licensing Regulations**”) provides that an individual or a class licence shall, in addition to the standard conditions set out in the Schedule to the CMA, include the following standard conditions:

- (i) the licensee shall, in respect of all apparatus, equipment and installations possessed, operated, maintained or used under the licence, take all proper and adequate safety measures to safeguard life or property, including exposure to any electrical emission or radiation emanating from the apparatus, equipment or installations so used; and
- (ii) the licensee shall take reasonable steps to ensure that the charging mechanism used in connection with any of its network facilities and/or network services are accurate and reliable in all material aspects.

Further, the Schedule of the CMA and the Licensing Regulations provide for standard conditions that every licence-holder is to comply with, be it for individual or class licences. These include compliance with numbering and electronic addressing plans, spectrum plans, consumer codes and content codes.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

A class licence and individual licence may be granted for the four types of licensable activities, the subject matter of which is as described in question 2.5 above.

Pursuant to the Licensing Regulations:

- (i) The duration of the validity of individual licences are 10 years from the date of grant of the licence unless cancelled prior to its expiry. Applications to renew the individual licence must be submitted 60 days prior to its expiry.
- (ii) Class licences do not have similar durations for validity.

Under the Licensing Regulations, only individual licences may be transferred to another, and an applicant will have to submit the following to the Minister:

- (i) a formal letter that provides the relevant particulars of the proposed assignment or transfer, including the particulars of the proposed assignee or transferee, together with an application fee of RM5,000.00; and

- (ii) additional information or documents as may be requested by the MCMC.

Under the Schedule of the CMA, and the Licensing Regulations:

- (i) Individual licence-holders require compliance with relevant Malaysian foreign investment restrictions, and must notify the Minister of any changes on shareholdings which are required to be notified to the relevant authority.
- (ii) Class licence-holders do not have similar requirements.

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

Section 214 CMA provides that an NFP, for the purpose of determining whether any land is suitable for the purpose of installing or obtaining access to network facilities, may enter on, inspect the land and do anything desirable for that purpose, which includes making surveys, taking levels, sinking bores, taking samples, digging pits and examining the soil.

An NFP may rely on Section 214 CMA if:

- (i) the provider is authorised to do so by a network facilities installation permit issued by the MCMC under Section 226 CMA;
- (ii) the network facilities are low-impact network facilities;
- (iii) the network facilities are temporary network facilities for use by, or on behalf of, the Ministry of Defence for defence purposes; or
- (iv) the installation is carried out for the sole purpose of connecting a building or structure, or a line that forms part of a network facility.

Access and Interconnection

2.9 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

The CMA imposes an obligation on NFPs and public utilities providers to provide other NFPs with non-discriminatory access to any post, network facilities or right of way. This is subject to the exception that an NFP may be denied access where there is insufficient capacity, or for reasons of safety, security, reliability, or for difficulty of a technical or engineering nature.

The MCMC has published several determinations on access lists in 2005 and 2015, which set out the facilities or services with access obligations under the CMA (“**Access List**”).

The Mandatory Standard on Access Pricing (“**Standard on Access Pricing**”) fixes the maximum prices chargeable on the facilities and services listed in the Access List.

Parties to a dispute over compliance with the standard access obligations are first required to attempt to resolve such disputes by negotiation between the parties. If the parties cannot reach an agreement, they can seek resolution of the dispute by the MCMC pursuant to Chapter 7 of Part V CMA.

The MCMC will then convene as soon as practicable to decide the dispute and provide the parties with a written decision, if it is satisfied that:

- (i) an agreement will not be reached, or will not be reached within a reasonable time;
- (ii) the notification of the dispute is not trivial, frivolous or vexatious; and
- (iii) the resolution of the dispute would promote the objects of the CMA.

The MCMC also maintains a register of all the decisions it makes.

2.10 Which operators are required to publish their standard interconnection contracts and/or prices?

Written agreements for the provision of listed network facilities or network services under the access regime must be registered with the MCMC. Such access agreements are only enforceable if they have been registered with the MCMC. The MCMC is empowered to direct any party to a registered agreement to comply with the agreement. The MCMC is required to register the access agreement if it is satisfied that the agreement is consistent with:

- (i) the objects of the CMA;
- (ii) any relevant instrument under the CMA; and
- (iii) any relevant provisions of the CMA or its subsidiary legislation.

The MCMC also maintains a register of access agreements, which contains the following but excludes the terms and conditions of the agreement:

- (i) the names of the parties to the agreement;
- (ii) a general description of the matter pertaining to the agreement; and
- (iii) the date of the agreement.

Further, under the Commission Determination on the Mandatory Standard on Access, Determination No. 3 of 2016 (“**MSA**”):

- (i) All operators (i.e. all NFPs, NSPs, ASPs or CASPs) are required to provide, in response to a request in good faith from any other operator, any information which is reasonably necessary for the negotiation, conclusion and implementation of the MSA and the CMA.
- (ii) Each Access Provider (i.e. an NFP or NSP providing facilities or services listed in the Access List, or a licensee under the CMA) shall prepare and maintain a Reference Access Offer (“**RAO**”) for each facility and/or service listed in the Access List, which the Access Provider shall provide to third parties. The RAO includes the terms and conditions on which an Access Provider is to supply facilities and/or services.

2.11 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

Regulation of the pricing and cost in relation to the services and facilities provided is set out under the Standard on Access Pricing, which sets the maximum price for the provision of facilities and services between service providers, and is regulated by the MCMC. The Standard on Access Pricing is effective from 1 January 2018 until 31 December 2020.

2.12 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

The MCMC requires all operators to implement Accounting Separation (“**AS**”) and has adopted a two-level approach to AS, one for operators whose revenue and total assets both exceed RM3 billion and another for operators whose revenue or total assets are RM3 billion or below.

There are no functional or legal separation requirements on any operators.

2.13 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or ‘regulatory holidays’?

The CMA does not differentiate between high-speed broadband networks and regular broadband networks. The provisions in the CMA which apply to broadband networks also apply to high-speed broadband networks. The MCMC has published Technical Codes to govern the testing and certification of fixed and wireless communications equipment, which stipulate technical requirements for safety, frequency bands, interoperability, electromagnetic compatibility and non-interference.

High-speed broadband is addressed in the Access List, and pursuant to Section 149 CMA, NFPs are required to provide access to their high-speed broadband network facilities to any other NFPs or NSPs.

For passive infrastructure, NFPs are required to provide each other with non-discriminatory access to any post, network facilities, or right of way owned by them, save for reasons of insufficient capacity, or for reasons of safety, security, reliability, or difficulty of a technical or engineering nature.

The National Broadband Implementation Strategy, also known as the National Broadband Initiative, has been implemented as a national strategy to bring broadband to the whole nation. Investment in public-private partnership programmes such as the High-Speed Broadband and Broadband for General Population programmes have prioritised the expansion of internet coverage nationwide. Under the Fibre Optic Network Expansion initiative, existing core networks will be upgraded to fibre optics to cater for the provision of 3G and 4G broadband services.

The MCMC’s chairman (“**Chairman**”) had in September 2019 intimated that 5G demonstration projects would be rolled out from 1 October 2019 until 31 March 2020 and stated that the Government hopes “to expedite the deployment of 5G for businesses across industries such as agriculture, education, entertainment/media, digital healthcare, manufacturing and processing, oil and gas, smart city, smart transportation and tourism”. The projects would focus on facilitating and cultivating the development of a holistic and inclusive 5G ecosystem in the country, to “stimulate demand as well as adoption of 5G technology for both businesses and consumers” and that the MCMC hopes “to commercialize some of the use cases beginning third quarter 2020”. The 5G demonstration projects are aimed to facilitate, develop and foster potential development of 5G use cases in real time “and subsequently drive the growth of the 5G ecosystem in the country. It also aims to create awareness and stimulate demand for the use of 5G technology”. According to the Chairman, upon completion of the demonstration projects on 30 March 2020, potential 5G use cases would be identified and subjected to commercialisation.

As of the time of writing, there are no applicable incentives or ‘regulatory holidays’ pertaining to high-speed broadband networks.

Price and Consumer Regulation

2.14 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

Only fixed phone lines and internet dial-up rates are regulated under the Communications and Multimedia (Rates) Rules 2002, which address the retail prices for public switched telephone network services, which include rental on: exchange lines, local and national call charges, connection and reconnection fees; emergency services; operator assistance services;

directory assistance services; and payphone services for local calls, national calls and national calls through operator assistance, internet access services and audiotext hosting services.

Between providers, the Standard on Access Pricing sets the maximum price an NFP or NSP may charge for the facilities and/or services specified in the Standard on Access Pricing.

Between providers and consumers, the CMA requires that the rates charged by a provider must be in accordance with the market rates for the same facilities and/or services and providers are required to publish the rates charged for one or more services.

Section 198 CMA specifies that the rates in Section 197 CMA must be based on the following principles:

- (i) rates must be fair and not unreasonably discriminatory;
- (ii) rates should be oriented toward costs;
- (iii) rates should not contain discounts that unreasonably prejudice the competitive opportunities of other providers;
- (iv) rates should be structured and levels set to attract investment into the communications and multimedia industry; and
- (v) rates should take account of the regulations and recommendations of the international organisations of which Malaysia is a member.

Sections 199–201 CMA provide that the Minister may set the rates, the level of rates or a special rate regime for facilities and/or services provided by a provider.

2.15 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

One of the national policy objectives for the communications and multimedia industry is “to ensure an equitable provision of affordable services over ubiquitous national infrastructure”.

Under the CMA, the Minister has directed the MCMC to promote the widespread availability and use of network services and/or applications services throughout Malaysia, by encouraging network facilities and network services and/or applications services in underserved areas, or for underserved groups in the community.

The Universal Service Provision (“USP”) is an initiative by the MCMC to achieve the following objectives:

- (i) Provide collective and individual access to communications in underserved areas and underserved groups.
- (ii) Encourage the use of information and communications technology to build a knowledge society.
- (iii) Contribute to the socio-economic development of local communities.
- (iv) Bridge the digital divide.

A USP Fund was established and is controlled and operated by the MCMC to fund the USP under the CMA. The Minister can make regulations regarding the contribution to the USP Fund by licensees.

For example, licensees under the CMA (except for CASPs), whose total net revenue from the previous calendar year derived from the designated services listed in the Communications and Multimedia (Universal Service Provider) Regulations is more than RM2 million, must contribute 6% of the weighted net revenue derived from the designated services to the USP Fund.

When dealing with consumers the CMA imposes certain obligations onto providers. Section 188 CMA requires providers to deal reasonably with consumers and adequately address consumer complaints.

Additionally, among the standard conditions imposed on licence-holders under the Schedule of the CMA is a requirement to comply with the General Consumer Code of Practice

which is an industry self-regulatory code of practice developed by the CFM to foster the highest standards of business ethics and behaviour through industry self-governance. The said code provides for a mechanism to handle and resolve consumer disputes.

The MCMC further monitors and regulates the performance of NSPs and ASPs by fixing Quality of Service Standards.

Numbering

2.16 How are telephone numbers and network identifying codes allocated and by whom?

The MCMC is vested under Section 179 CMA with the control, planning, administration, management and assignment of the numbering and electronic addressing of network services and applications services.

The MCMC also allocates telephone numbers and electronic addresses in accordance with the Numbers and Electronic Addressing Plan issued on 17 October 2016 (“NEAP”).

2.17 Are there any special rules which govern the use of telephone numbers?

Please refer to question 2.16.

In addition to the above, the MCMC may reserve any unassigned numbers under the NEAP for planning purposes or to realise the value of cherished numbers.

The individuals whom are required to comply with the NEAP are all licence-holders under the CMA, all registrars for domain name registration and any other interested party specified by the MCMC.

2.18 Are there any obligations requiring number portability?

The NEAP imposes obligations on certain licensees, registrars and interested parties to implement Mobile Number Portability (“MNP”), i.e. the ability for end-users to change from one Public Cellular Service provider to another while retaining their mobile telephone number.

Under the NEAP, all licensees providing applications services for the delivery of voice and data communications shall:

- (i) do all acts necessary to prepare and/or facilitate the implementation of MNP; and
- (ii) ensure that all calls and data be delivered to the appropriate recipient mobile network.

The NEAP also requires all Porting Participants to comply with the MNP Industry Business Rules set out in Schedule E-1 of the NEAP.

The NEAP also imposes an obligation on Public Cellular Service providers to implement MNP in accordance with the NEAP.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

The MCMC is responsible for the assignment of radio spectrums in accordance with the CMA, the Communications and Multimedia (Spectrum) Regulations 2000 (“Spectrum Regulations”) and the Spectrum Plan, with the Minister holding the power to determine that a certain spectrum may be assigned to particular persons or classes of persons, or be reallocated for spectrum assignments.

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative ‘beauty parades’, etc.?

The CMA prohibits the use of any part of the spectrum to provide a network service without holding or being conferred such rights under one of the following categories of assignment:

- (i) spectrum assignment (which confers rights on a person to use one or more specified frequency(ies) for any purpose consistent with the assignment conditions, and is subject to specified fees);
- (ii) apparatus assignment (which confers on a person the right to use one or more specified frequency(ies) to operate an apparatus for a specified purpose, and is subject to specified fees); or
- (iii) class assignment (which allows the MCMC to issue and impose conditions on the class assignment to allow any person to use the frequency for a list of devices, and there is no need to pay a sum of fees).

According to the Spectrum Plan issued in May 2017 by the MCMC, there are several methods of assignment:

- (i) Application for Assignment at a Fixed Price – An applicant submits an application together with the prescribed application fee (fixed prices are set by the Minister for spectrum assignment, and by the MCMC for apparatus assignment);
- (ii) Exercise of Preferential Rights – Particular persons or classes of person who satisfy the conditions set by the Minister;
- (iii) Auction – The applicant who bids the highest price is given the assignment. Applicants must first submit their application to participate in the auction;
- (iv) Tender – Applicants must first submit an application and the MCMC will then assess all applications. There are mainly two types of tender, i.e., “beauty contest” and “comparative tender with price”; and
- (v) Reissuance of Spectrum Assignment – A spectrum assignment may be reissued to the existing spectrum assignment holder.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

A spectrum cannot be exempt from the licence requirement. However, the Minister may exempt an individual from requiring an assignment to use part of the spectrum pursuant to Section 157 CMA.

3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

The First and Second Schedule of the Spectrum Regulations provide a list of fees associated with the assignment of a right to use a spectrum.

The First Schedule of the Spectrum Regulations specifies the fixed and variable fees payable for an assignment and the Second Schedule of the Spectrum Regulations specifies the application fees for an assignment.

3.5 What happens to spectrum licences if there is a change of control of the licensee?

Regulation 19 of the Spectrum Regulations provides that a spectrum assignment holder may transfer or otherwise deal with the whole or any part of a spectrum assignment subject to:

- (i) the conditions of the spectrum assignment;
- (ii) the eligibility requirements applicable when the spectrum assignment was issued;
- (iii) the spectrum assignment not having been originally issued in the public or national interest;
- (iv) the rules made by the Minister; and
- (v) such other conditions as the MCMC may impose.

In complying with the conditions in (i)–(v) above, the licenceholder may have the right to transfer or otherwise deal with the spectrum assignment in the following manner:

- (i) absolute prohibition on transfer of or otherwise dealing with the assignment;
- (ii) permitted if the assignment is transferred or otherwise dealt with in its entirety;
- (iii) permitted for a geographic area in multiples of the stated geographic unit; or
- (iv) permitted in multiples of the stated spectrum unit.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

Please refer to question 3.5.

4 Cybersecurity, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

The legal framework for cybersecurity is set out under the CMA, the Computer Crimes Act 1997, the Defamation Act 1957, the Digital Signature Act 1997, the PDPA, and the Seditious Act 1948.

The National Cyber Security Policy was implemented by the Government with the aim to develop and establish a comprehensive programme based on a National Cyber Security Framework that comprises legislation and regulatory, technology, public-private cooperation, institutional, and international aspects to ensure the effectiveness of cybersecurity controls over vital assets and various sectors comprising the Critical National Information Infrastructure (“CNII”). The Government has stipulated ISO/IEC 27001 Information Security Management Systems as the minimum information security standard for all CNII sectors. There are also sector-specific guidelines that deal with cybersecurity in Malaysia. These include the Data Management and Management Information System Framework and Guidelines on Internet Insurance issued by the Central Bank of Malaysia.

Malaysia has established a national cybersecurity specialist agency, currently under the purview of the MCM known as CyberSecurity Malaysia, under the purview of the Ministry of Energy, Science, Technology, Environment, and Climate Change. CyberSecurity Malaysia provides specialised cybersecurity services and is tasked to continuously identify possible areas which may be detrimental to national security and public safety.

Additionally, Malaysia established the National Cyber Security Agency (“NACSA”) in February 2017 to act as the national leading agency for cybersecurity matters, with the objective of securing and strengthening Malaysia’s resilience in facing the threats of cyberattacks.

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

The legal framework governing the powers of the state to access private communications, including seizure of and/or requesting

for computerised data is set out under the following pieces of legislation:

- (i) CA1987;
- (ii) Capital Markets and Services Act 2007;
- (iii) CMA;
- (iv) Competition Act 2010;
- (v) Computer Crimes Act 1997;
- (vi) Criminal Procedure Code (“CPC”);
- (vii) Digital Signature Act 1997;
- (viii) Direct Sales and Anti-Pyramid Scheme Act 1993;
- (ix) Financial Services Act 2013;
- (x) PDPA;
- (xi) Pool Betting Act 1967;
- (xii) Postal Services Act 2012; and
- (xiii) Strategic Trade Act 2010.

The legislation in (i)–(xiii) above generally permits any police officer from the rank of Inspector or higher, or any officer authorised under the relevant legislation to search for, and seize, any computerised data stored in a computer or any other medium. This includes being provided with the necessary password, encryption code, decryption code, software or hardware and any other means required to enable comprehension of computerised data.

Additionally, the state is also empowered to intercept or to listen to any communication transmitted or received under the following legislation:

- (i) Section 252 CMA provides that the Public Prosecutor may on the application of an Authorised Officer or a police officer of or above the rank of Superintendent authorise the officer to intercept or to listen to any communication transmitted or received by any communications. Section 245 CMA defines “Authorised Officer” as any public officer or officer of the MCMC who has been authorised in writing by the Minister to exercise the powers of enforcement under the CMA.
- (ii) Section 266(1)(c) CMA provides that the Yang di-Pertuan Agong or the Minister authorised by him in that behalf may order that any communication or class of communications relating to any specified subject shall not be communicated or shall be intercepted or detained.
- (iii) Section 116C CPC provides that the Public Prosecutor may authorise a police officer to intercept any message transmitted or received or record any conversation by any communication, or to require a communications service provider to intercept and retain a specified communication or communications of a specified description.
- (iv) Section 50B CA1987 provides that the Public Prosecutor may authorise an Assistant Controller or a police officer not below the rank of Inspector to intercept or to listen to any communications transmitted or received by any communications. Section 5(2) CA1987 defines “Assistant Controller” as any public officers and persons in the employment of the Intellectual Property Corporation of Malaysia appointed by the Minister of Domestic Trade and Consumer Affairs to be Assistant Controllers of Copyright.
- (v) Section 112 PDPA provides that any officer authorised by the Personal Data Protection Commissioner to investigate the commission of an offence under the PDPA shall have all or any of the special powers of a police officer of whatever rank in relation to police investigations in seizable cases as provided under the CPC, which would include the powers of interception of and recording communications as provided under Section 116C of the CPC and as described above.
- (vi) Section 6 of the Security Offences (Special Measures) Act 2012 provides that the Public Prosecutor may authorise any

police officer or any other person to intercept any message transmitted or received or listen to any conversation by any communication, or to require a communications service provider to intercept and retain a specified communication or communications of a specified description.

- (vii) Section 37 of the Strategic Trade Act 2010 provides that the Public Prosecutor may authorise any Authorised Officer to intercept, listen to and record any communication transmitted or received by any communications.

4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

Under Section 265 CMA, the Minister may determine that a licensee or class of licensees shall be required to implement the capability to allow authorised interception of communications. “Communication” is defined under Section 6 CMA as “*any communication, whether between persons and persons, things and things, or persons and things, in the form of sound, data, text, visual images, signals or any other form or any combination of those forms*”, which covers traditional telephone calls, VoIP calls, emails and any other forms of communication.

4.4 How does the state intercept communications for a particular individual?

Please refer to question 4.2.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

The CMA provides that Authorised Officers or police officers conducting searches pursuant to Section 247 or Section 248 CMA shall be given access to computerised data whether stored in a computer or not. Section 249 CMA allows an Authorised Officer to be provided with the necessary password, encryption code and decryption code to enable comprehension of computerised data during a search with or without a warrant.

4.6 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

The PDPA regulates how long personal data should be held by data users, which includes telecom operators and internet infrastructure operators.

Section 10 PDPA provides that personal data stored for processing by a data user shall not be kept longer than is necessary for the fulfilment of that purpose. Further, the PDPA imposes a duty on data users to take all reasonable steps to ensure that all personal data is destroyed or deleted if it is no longer required for the purpose for which it was to be processed.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

Distribution of audio-visual media is mainly governed by the CMA with other pieces of legislation, including:

- (i) Anti-Fake News Act 2018;

- (ii) Consumer Protection Act 1999;
- (iii) Direct Sales and Anti-Pyramid Scheme Act 1993;
- (iv) Film Censorship Act 2002;
- (v) Financial Services Act 2013;
- (vi) Medicines (Advertisement and Sale) Act 1956; and
- (vii) Sedition Act 1948.

Under Section 211 CMA, the distribution of audio-visual media which is indecent, obscene, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass any person is prohibited.

The Content Code, a voluntary industry code, has been published by the CMCf which provides recommended guidelines, procedures and standards relating to the distribution of audio-visual media content. Content is defined under the CMA as “any sound, text, still picture, moving picture or other audio-visual representation, tactile representation or any combination of the preceding which is capable of being created, manipulated, stored, retrieved or communicated electronically”.

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

Regulation of content distributed via traditional distribution platforms is different compared to content distributed via the internet.

Content distributed via traditional platforms would require a CASP licence under the CMA. However, providers of content applications services via the internet are exempt from the requirement to obtain this licence under Order 6 of the Communications and Multimedia (Licensing) Exemption Order 2000.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

The distribution of audio-visual media would generally require either a CASP individual licence or a CASP class licence (as further described in question 2.5).

The Communications and Multimedia (Licensing) Regulations 2000 provide that CASP individual licences are applicable to satellite broadcasting, subscription broadcasting, terrestrial FTA TV, terrestrial radio broadcasting and other content applications services which are neither exempt under the CMA nor subject to a CASP class licence. CASP class licences are applicable to content applications services which are limited in its availability or of limited content.

The rights and obligations attached to an individual licence are spelt out in Section 43 CMA. Individual licensees must comply with the terms and conditions of their licences and the provisions of the CMA.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

Under Section 36 CMA, only individual licences may be assigned or transferred with the written approval of the Minister.

6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. ‘mere conduit’ or ‘common carrier’) available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

The Courts have yet to apply any defences available to telecommunications operators and/or internet service providers in respect of liability for content carried over their networks.

However, in the High Court case of *Stem Life Berhad v Mead Johnson Nutrition (Malaysia) Sdn Bhd & Anor* [2013] MLJU 1582, it may be gleaned that the ‘innocent disseminator’ defence may potentially be raised by telecommunications operators and/or internet service providers under Malaysian law in relation to defamatory publications on the internet. However, whether the defence would apply in Malaysia has not been decided upon by the Courts, and may constitute *obiter dictum* at best.

The Court in *Stem Life Berhad* (*supra*) also discussed the conflicting English cases of *Godfrey v Demon Internet Ltd* QB [2001]; [1999] 4 All ER 342 and *Bunt v Tilley* 3 All ER 336; [2006] EWHC 407 (QB), where it preferred the latter’s decision, in that an internet service provider carrying out a passive role in facilitating postings on the internet would not be deemed to be a ‘publisher’ for the purposes of liability for defamation. The Court also discussed the Hong Kong Court of Appeal case of *Oriental Press Group Limited v Feraworks Solutions Limited* where the said defence was raised.

However, it should be noted that the Court in *Stem Life Berhad* (*supra*) further stated that “where a libel is made on the internet, an action may lie against amongst others, the author, website owner, website editor, internet service provider, content developer, website administrator and so forth. This unfortunately, is not clear law under the Malaysian jurisprudence as it is still a developing area of the law”, and hence, the Courts’ position on the same has yet to be crystallised in a judgment.

There are, however, statutory defences which may apply to telecommunications operators and/or internet service providers in respect of content carried on their networks:

Section 109 CMA provides that compliance with a mandatory standard shall be a defence against prosecution, whilst Section 264 CMA further provides that: “Any network facilities provider, network service provider, applications service provider or content applications service provider or any of his employees, shall not be liable in any criminal proceedings of any nature for any damage (including punitive damages), loss, cost, or expenditure suffered or to be suffered (whether directly or indirectly) for any act or omission done in good faith in the performance of the duty imposed under section 263.”

Further, Section 98(2) CMA provides that “compliance with a registered voluntary industry code shall be defence against any prosecution, action or proceeding of any nature whether in court or otherwise regarding a matter dealt with in the Code”.

As such, telecommunications operators and/or internet service providers may be able to rely on the Content Code as a defence against any prosecution, action or proceeding of any nature whether in a court or otherwise. Under the Content Code, the concept of an “Innocent Carrier” is one that neither has any control over the composition of such content nor any knowledge of such content. An innocent carrier is not responsible for the content provided.

Section 43C(1) CA1987 exempts a service provider from liability for copyright infringement if the infringement by its user occurs by reason of any of the following:

- (i) the transmission, routing or provision of connections by the service provider of an electronic copy of the work through its network; or
- (ii) any transient storage by the service provider of an electronic copy of the work in the course of such transmission, routing or provision of connections.

The exemption is, however, limited to the following situations:

- (i) the service provider did not initiate or direct the transmission of the electronic copy of the work;
- (ii) the service provider did not select the electronic copy of the work, but the transmission, routing or provision of connections was carried out through an automatic technical process;
- (iii) the service provider did not select the recipient of the electronic copy of the work except as an automatic response to the request of another person; or

- (iv) the service provider did not modify the electronic copy of the work other than as part of a technical process.

Section 43D(1) CA1987 provides that a service provider shall not be held liable for infringement of copyright for the making of any electronic copy of the work on its primary network, if it is:

- (i) from an electronic copy of the work made available on an originating network;
- (ii) through an automatic process;
- (iii) in response to an action by a user of its primary network; or
- (iv) in order to facilitate efficient access to the work by a user, provided that the service provider does not make any substantive modification to the contents of the electronic copy, other than a modification made as part of a technical process.

Section 43E CA1987 exempts a service provider from liability in the following situations:

- (i) when storing an electronic copy of a work where this is done at the direction of its user; and
- (ii) when referring or providing a link or an information location service to its users where an electronic copy of the work is available at an online location of another network, provided that the service provider does not have knowledge of the infringing activity, does not receive any financial benefit directly attributable to the infringement and has responded promptly to a notification to take down the infringing copy.

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

Under Section 43H CA1987 if an electronic copy of any work accessible in a network infringes the copyright of a work, the owner of the copyright which has been infringed may notify the service provider of the network of such infringement by issuing to the service provider a notification requiring the service provider to remove or disable any access to the electronic copy on the service provider's network. Upon receipt of the notification the service provider is to comply with the notice within 48 hours. A service provider who has removed the infringing copy of the work shall notify the person who made said copy available of the action taken by the service provider.

Section 43H CA1987 also provides that the person whose electronic copy of the work was removed or to which access has been disabled may issue to the service provider a counter notification requiring the service provider to restore the electronic copy or access to it on the service provider's primary network.

Upon receipt of the counter notification the service provider shall provide the copyright owner with a copy of the counter notification and inform the copyright owner that the removed material or access to the material will be restored in 10 business days. The service provider shall restore the removed material or access to it after 10 business days of receipt of the counter

notification, unless the service provider has received another notification from the copyright owner that an action seeking a Court order to restrain the issuer of the counter notification from engaging in any infringing activity relating to the material on the service provider's network has been filed.

6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

There is presently no legislation in Malaysia providing for 'net neutrality' requirements. Section 3(3) CMA provides that "*nothing in this Act shall be construed as permitting the censorship of the internet*". However, Section 211 CMA provides that a CASP, or any person using a content applications service, shall not provide content which is indecent, obscene, false, menacing, or offensive in character with intent to annoy, abuse, threaten or harass any person.

Under the CMA, providers may charge different customers different rates. However, such rates are unlikely to vary by much as Section 197 CMA requires that such rates be in accordance with the market rate. Further, Section 198 CMA requires that such rates are to be determined on the basis of certain principles including:

- (i) rates must be fair and, for similarly situated persons, not unreasonably discriminatory;
- (ii) rates should be oriented toward costs and, in general, cross-subsidies should be eliminated; and
- (iii) rates should not contain discounts that unreasonably prejudice the competitive opportunities of other providers.

The CMA generally does not permit providers to simply block different types of traffic over their networks.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

Telecommunications operators and/or internet service providers have an obligation to block access to certain sites or content under Section 211 and Section 263 CMA. Section 211 CMA imposes an obligation on CASPs, and any other persons using a content applications service, to not provide content which is indecent, obscene, false, menacing, or offensive in character with intent to annoy, abuse, threaten or harass any person.

Section 263 CMA provides that a licensee shall use its best endeavour to prevent facilities or services that it provides from being used in, or in relation to, the commission of any offence. This may include complying with an order to block communications relating to a specified subject under Section 266 CMA.

However, consumer VPN services are not presently regulated or blocked.



Jessie Tan Shin Ee graduated from the University of Sheffield (UK), with a Bachelor of Law. Jessie's expertise lies in the field of commercial and corporate law, employment, data protection, and intellectual property laws, amongst others. She has advised international and local clients from various industries, particularly the technology, media and telecommunications ("TMT") sector and advises on complex commercial arrangements in connection therewith. In relation to matters relating to TMT, *The Legal 500* has stated that "Jessie Tan is the name to note" and *Chambers* has listed Jessie as a "recognised practitioner". Jessie regularly advises clients on their rights, obligations, liabilities, arrangements and strategies in relation to TMT matters, particularly with regard to regulatory related concerns and compliance issues. Throughout her practice, she has prepared, negotiated, and advised on a wide range of TMT-centric agreements and data protection-related documentation, addressing policies, procedures, best practices, and regulatory issues for clients from various jurisdictions.

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