

## **TECHNOLOGY, MEDIA, AND TELECOMMUNICATIONS (TMT) SERIES - MALAYSIA**

*This article is the second in a series exploring the Malaysian legal position with respect to various commonly asked questions in relation to the Technology, Media, and Telecommunications (“TMT”) legal regime in Malaysia.*

*In Part B of our TMT Series, we will be answering various queries pertaining to the Technology and Telecommunications legal regime in Malaysia.*

### **PART B: TECHNOLOGY & TELECOMMUNICATIONS**

#### **1. What is the regulatory regime for technology in the country?**

There is no single authority which has an overarching purview on the regulatory regime for technology in Malaysia. The said regime is broadly governed by the following ministries and governmental agencies which have different and sometimes overlapping roles in regulating technology:

- (a) The Ministry of Science, Technology and Innovation (“**MOSTI**”) is responsible for spearheading science, technology, innovation and economy (“**STIE**”) development efforts across the nation to address national issues and challenges regarding societal well-being and sustainable development. This includes leading STIE development through research and development (R&D) and commercialisation and innovation towards wealth creation for economic growth, environmental sustainability, and societal well-being. MOSTI also aims to develop STIE enablers and provide services in response to national issues through scientific approaches, advanced technology, and capacity building. To this effect, the Malaysian Science and Technology Information Centre (“**MASTIC**”), an agency under MOSTI, was formed to provide a platform for the sharing of STIE information among government and private sectors towards the development of STIE;
- (b) The Ministry of Communications and Multimedia (“**MCM**”) regulates matters relating to information technology and is tasked with determining policies and regulations in respect of the same. The Malaysia Digital Economy Corporation Sdn Bhd (“**MDEC**”), an agency established under the MCM, is responsible for developing, coordinating and promoting Malaysia’s digital economy, information and communications technology industry as well as to promote the adoption of digital technology amongst Malaysians;

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- (c) Digital Nasional Bhd (“**DNB**”) is a 5G Network Service Provider (defined below) established in 2021 by the Minister of Finance. DNB is tasked with accelerating the deployment of 5G infrastructure and the 5G network across the country, realising the potential of 5G in Malaysia to spur economic activity, bridging the urban-rural digital divide and improving the current state of infrastructure, promoting service-based competition within the communications industry, innovating infrastructure, and optimising the use of scarce resources. In summary, DNB’s objective is to achieve the goals of the Malaysia Digital Economy Blueprint (MyDIGITAL), specifically in respect of the delivery of the 5G network for the entire country;
- (d) The Ministry of Finance (“**MOF**”) is tasked with the responsibility for government expenditure, revenue raising, developing economic policies and preparing the Malaysian federal budget. The MOF also oversees financial legislation and regulation. Various bodies under the auspices of the MOF have significant regulatory purview over financial technology in Malaysia, such as the Securities Commission Malaysia (“**SC**”) which regulates digital asset exchanges and initial coin offerings in Malaysia, and the Central Bank of Malaysia / *Bank Negara Malaysia* (“**BNM**”) which issues currency, acts as banker and adviser to the Malaysian government and also regulates financial technology activities involving banking, investment banking, insurance or *takaful*, money changing, remittance, operating a payment system or issuing payment instrument businesses in Malaysia.

## 2. Are communications networks or services regulated?

Yes, communications networks and services in Malaysia are regulated under the Communications and Multimedia Act 1998 (“**CMA**”) and its subsidiary legislation.

With regard to the regulation of the 5G network in Malaysia, the rollout of the 5G network is currently still in its initial stage and the regulatory framework for the 5G network has yet to be established. It is likely that the deployment of 5G network in Malaysia will occur prior to the full development of a regulatory framework that would govern DNB – Malaysia’s 5G network provider. Currently, the MOF is responsible for monitoring the administrative and shareholding aspects of DNB and will remain as such until regulatory provisions are promulgated by the MCMC or other regulatory authorities having jurisdiction over DNB.

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**3. If so, what activities are covered and what licences or authorisations are required?**

Persons who own or provide network facilities (“**Network Facilities Providers**”), persons who provide network services (“**Network Service Providers**”), persons who provide applications services (“**Applications Service Providers**”) and persons who provide applications services which provide content (“**Content Application Service Providers**”) require licences under the CMA, which are separated into licences for individuals and by classes.

**4. Is there any specific regulator for the provisions of communications-related services?**

The Malaysian Communications and Multimedia Commission (“**MCMC**”), established by the Malaysian Communications and Multimedia Commission Act 1998 (“**MCMCA**”), specifically regulates the provision of communications-related services in Malaysia and is empowered to supervise, regulate and enforce legislation relating to communications and multimedia-related activities and is entrusted with:

- (a) Advising the Malaysian government on all matters concerning national policy objectives for communications and multimedia activities;
- (b) Making recommendations to the Malaysian government on various matters, including the grant of individual licences, cancellation of a person's registration under a class licence, and variations of licence conditions;
- (c) Implementing and enforcing the CMA;
- (d) Regulating the deployment and provision of 5G network services by DNB;
- (e) 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;
- (f) Holding public inquiries in relation to proposed changes to regulation; and
- (g) Issuing determinations on mandatory standards for matters subject to a voluntary industry code.

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**5. Is the regulator independent of government control?**

The MCMC is not independent of government control as the Minister of Communications and Multimedia (“Minister”) is empowered to regulate the MCMC under the CMA and the MCMCA.

**6. Are platform providers (social media, content sharing, and information search engines) regulated?**

In general, platform providers are not regulated in Malaysia. Only telecommunications operators which carry out the functions of Network Facilities Providers, Network Services Providers, Applications Service Providers and Content Applications Service Providers are regulated as provided in the CMA.

**7. If so, does the reach of the regulator extend outside the country?**

Notwithstanding that the MCMC does not have jurisdiction outside of Malaysia, Section 269 of the CMA provides that the Minister may direct the MCMC regarding the interworking arrangements between the MCMC and any other authority in Malaysia or in a foreign jurisdiction, or any international organization.

**8. Does a telecommunications operator need to be domiciled in the country?**

Telecommunications operators carrying out the functions of Network Facilities Providers, Network Services Providers, Applications Service Providers and Content Applications Service Providers will need to apply for an individual licence or a class licence under the CMA. In order to be eligible for such licences, in terms of domicile and foreign ownership, the applicant must be a Malaysian-incorporated company and the shareholding of the licensee company must comply with Malaysian foreign investment restrictions. With respect to market access, commercial presence in Malaysia is established through the incorporation of local joint venture companies with Malaysian individuals or Malaysian-controlled companies or through the acquisition of shares of existing licensed operators. Foreign companies are generally ineligible for licenses under the CMA.

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**9. Are there any restrictions on foreign ownership of telecommunications operators?**

The shareholding of a licensee must comply with relevant Malaysian foreign investment restrictions. Foreign equity restrictions are commonly imposed as licence conditions in practice and such restrictions apply to all licences issued under the CMA, except for Applications Service Provider licences, which can be 100% foreign-owned.

**10. Are there any regulations covering interconnection between operators?**

The CMA is the principal legislation for interconnection and access to facilities and services between operators. The establishment of an access regime under the CMA enables providers to obtain access to necessary facilities and services on reasonable terms and conditions.

Section 228 of the CMA provides that a Network Facilities Provider must provide non-discriminatory access to any post, pole, tower, or other above-ground facilities for carrying, suspending or supporting any network facilities (“**Post**”), network facilities or right-of-way. However, access may be denied in certain situations, such as where there is insufficient capacity, or for reasons of safety, security, reliability, or difficulty of a technical or engineering nature, as long the reason for the denial of access is not due to discrimination.

Network Facilities Providers and Network Service Providers are required to provide access to their network facilities or services listed in the access list under the CMA to any other Network Facilities Providers, Network Services Providers, Applications Service Providers and Content Applications Service Providers. Network Facilities Providers and Network Service Providers have to prepare a Reference Access Offer Agreement for each facility listed in the access list. The Access Provider has disclosure, negotiation, content and service obligations under the MCMC’s Determination on the Mandatory Standard on Access or under any determinations of MCMC.

Any written agreement between providers for access to listed facilities and services must be registered with the MCMC in order to be enforceable.

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## 11. If so are these different for operators with market power?

The MCMC is empowered to direct a licensee in a “dominant position” in a communications market to cease conduct in that communications market which has, or may have, the effect of substantially lessening competition in any communications market, and to implement appropriate remedies.

The MCMC-issued Guideline on Dominant Position, read together with the Competition Act 2010 (“**Competition Act**”) provides that in analysing whether a licensee is in a dominant position in a relevant communications market, the MCMC will consider the structure of the market and nature of competition in that market, including market shares; barriers to entry and expansion; countervailing power of buyers; and nature and effectiveness of economic regulation (if any). It should be noted that although the Competition Act does not govern the exercise by the MCMC of its powers under the CMA, the MCMC considers that the definition of a market under the Competition Act provides guidance in defining communications markets for the purposes of the CMA.

The effect of access regulation under the access list will be considered by the MCMC in order to determine whether a licensee is being sufficiently constrained in a communications market. The existence of access regulation will not prevent a licensee from being in a dominant position if it does not provide an effective constraint on the ability of a licensee to act independently in a market. Access regulation may only constrain the activities of licensees in relation to particular products supplied in a market rather than more generally in the market.

If the MCMC considers that a provider is in a dominant position, it may direct the provider to cease conduct that substantially lessens competition in the communications market.

On the other hand, the MCM and MOF had announced in a press conference on 16 March 2022 that the rollout of the 5G network will be on a Single Wholesale Network (“**SWN**”) model, a model that only allows one party, i.e. DNB, to develop and deploy the 5G network. Before this decision, the Dual Wholesale Network (“**DWN**”) model (a model where the development and deployment of the 5G network would be performed by two consortiums involving the Government, DNB, and private mobile network operators) was proposed by Malaysia’s private mobile network operators, who have prepared for investment towards deployment of the 5G network. However, the Malaysian Government chose to remain with the SWN model so as to ensure that all Malaysians can enjoy high-quality and wide 5G service coverage from telecommunication companies.

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However, the SWN model, as opposed to the DWN model, effectively removes competition between telecommunication providers vis-à-vis 5G network services as it would only allow DNB to provide the 5G network. This allows DNB to monopolise and compel other network providers to rely on wholesale services provided via the SWN while they serve retail customers.

In an attempt to combat monopoly in the deployment of the 5G network, the Malaysian Government reduced its equity stake in DNB from 100% to 30%, and will offer 70% of the DNB equity to private telecommunication companies, which are required to sign a wholesale access agreement to deploy the 5G network in Malaysia.

As at the time of writing, the plans for the deployment of the 5G network in Malaysia remain on an SWN model and it remains to be seen how the MCMC would view this arrangement in view of the MCMC's Guideline of Dominant Position and the Competition Act.

## **12. What are the principal consumer protection regulations that apply specifically to telecommunications services?**

Under Section 188 of the CMA, all Network Facilities Providers, Network Services Providers, Applications Service Providers and Content Applications Service Providers (save for those who are not required to have individual or class licenses or are exempted from licence requirements) are required to deal reasonably with consumers and adequately address consumer complaints, on pain of a fine not exceeding RM20,000 or to imprisonment for a term not exceeding 6 months or to both upon conviction.

The MCMC-issued General Consumer Code of Practice for the Communications and Multimedia Industry in Malaysia ("**Code**") forms the principal consumer protection regulation for telecommunication services in Malaysia and binds all service providers licensed under the CMA insofar as their licensed activities are concerned as well as members of the consumer forum established under the CMA.

The Code aims to provide model procedures on reasonably meeting consumer requirements, the handling of customer complaints and disputes, the use of alternative dispute resolution, procedures for the compensation of customers in the event the Code is breached, and the protection of consumer information, amongst others. The Code also seeks to achieve the relevant national policy objectives of the CMA, provide benchmarks for the communications and multimedia service providers for the benefit of consumers, promote a high level of consumer

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confidence in the delivery of services from the industry, and provide guidelines for self-regulation among industry players.

Consumers of telecommunications services would also enjoy protection vide the Consumer Protection Act 1999 (“CPA”) and the Consumer Protection (Electronic Trade Transactions) Regulations 2012 which impose disclosure requirements pertaining to the goods and services offered by a business and the identification details of that business, and prohibiting misleading practices and representations by businesses to consumers.

### 13. What legal protections are offered in relation to the creators of computer software?

Computer software enjoy copyright protection under the definition of “literary works” pursuant to the Copyright Act 1987 (“CA”).

Pursuant to Section 36A of the CA, creators of computer software may protect their copyright in their work via the application of technological protection measures to a copy or copies of their work. Except for very limited circumstances, the CA prohibits any person from circumventing, causing, or authorising any other person to circumvent such technological protection measures:-

- (a) which are used by the creators in connection with the exercise of their rights under the CA; and
- (b) which restrict acts in respect of his/her works which are not authorized by the owner concerned or permitted by law.

The High Court in *Creative Purpose Sdn Bhd & Anor v Integrated Trans Corp Sdn Bhd & Ors [1997] 2 MLJ 429* decided that the modification of computer software programmes to circumvent the security features of the software amounted to copyright infringement even if it was done without direct copying of the original programme.

If a software invention involves hardware and/or a technical effect or solves a technical problem in a novel and non-obvious manner, it may also be protected by patent rights, although the patentability of software in Malaysia remains unclear. To date, the Intellectual Property Corporation of Malaysia (MYIPO) has not prescribed any guidelines for the examination of software-based inventions.

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**14. Does Malaysia recognise specific intellectual property rights in respect of data/databases?**

There are no definitions as to what a “database” or “database right” constitutes, or any specific case laws addressing the extent of protection afforded to databases. Compilation of data in a database will either be recognized and enjoy copyright protection as a literary work under the head of “tables and compilations” under Section 3 of the CA, which includes in particular “*tables or compilations, whether or not expressed in words, figures or symbols and whether or not in a visible form*”, or as a derivative work under Section 8 of the CA by virtue of being a collection of works protected by copyright or data which constitute intellectual creation due to the selection and arrangement of their contents.

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