

Suruhanjaya Komunikasi dan Multimedia Malaysia
Malaysian Communications and Multimedia Commission

COMPETITION (2): GOOD PRACTISES IN MALAYSIA

Practical measures for anti-competitive behaviours

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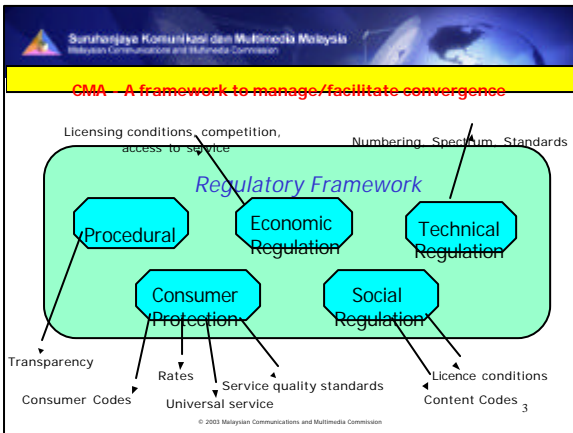
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INTRODUCTION

- Malaysia doesn't have a general competition law
- Several government policies that promotes competition:
 - Corporatisation and privatisation and policies
 - Licensing of new entrants
 - Domestic and international trade practices
- Competition issues viewed as incidental
 - Mergers and acquisition (M & A) seen from equity and investment angle
 - Trade policies emphasize inbound investments or trade
 - Local investment to develop specific industries
- CMA introduced competition provisions specific to the communications and multimedia industry. (April 1999)

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ECONOMIC LICENSING

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Former approach to licensing

In the former regime, licenses issued were services-specific as well as technology-specific.

This scenario restricted competition into narrow markets and did not allow licensees to move freely into related and adjacent activities.

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Reorganisation of market under CMA98

Licences are service-neutral as well as technology-neutral.

Licensees can compete in any of four markets within the sector, i.e. Facilities, Connectivity, Applications, and Content Applications.

Two main economic markets

- facilities based and
- services based.

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Licensing Migration Path

The old licenses which were issued based on specific technologies and specific services map onto new technology-neutral and service-neutral licenses

Old Licenses:

- Broadcasting license
- Telecommunication license
- VAN license
- ISP license

➔

New Licenses:

- Content Services
- Applications Services
- Network Services
- Network Facilities

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Service specific licenses, e.g. for the provision of telecommunications or broadcasting services are no longer issued.

The activities -based licensing should cater for any future convergence services that are not on the market today.

As an example, a company wishing to provide facilities -based telecommunications services will be issued with individual NFP, NSP and ASP licenses.

This company will not require separate or additional licensing if it wishes to provide new services employing new technologies, e.g. 3G.

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There are two types of licenses under each category

Two types of licenses are issued for each category.

Only activities with significant economic or social impact are individually licensed.

The long term objective is to move into less regulation.

Individual

Licensed

➔ Less regulation

Class

Licensed

Exempt

Unlicensed

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CMA Licensing Environment

Generic provisions of the Act that apply to all relevant activities

Standard licence conditions common to Individual and Class licences

Standard licence conditions common to Individual Licences

Special conditions

Undertakings

Individual

Class

Exempt

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CMA Licensing Regime [Four Horizontal Markets in Three categories]

Individual	Class	Exempt
NFP	NFP	NFP
NSP	NSP	NSP
ASP	ASP	ASP
CASP	CASP	CASP

➔ Less regulation

- Only activities with significant economic or social impact are individually licensed.
- The long term objective is to move to less regulation.

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Licensing - Current NFP List

Individual	Class	Exempt
Fixed links and cables	Niche or limited purpose network facilities	Broadcasting and production studios
Submarine cable landing centre		Incidental network facilities
Radio communications transmitters and links		Internet cross-connect equipment
Satellite control stations		Private network facilities
Satellite hubs		
Space station		
Earth station		
Towers, poles, ducts and pits		
Switching centre		
Public payphone facilities		

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Licensing- Current NSP List

Individual	Class	Exempt
Bandwidth services Broadcasting distribution Cellular mobile Access applications Space services	Niche customer access Niche connection	Incidental network service LAN service Private network service Router internetworking

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Licensing- Current ASP List

Individual	Class	Exempt
PSTN Public cellular IP Telephony Public payphone Public switched data	Audiotext hosting Directory Internet access Messaging	Electronic transaction Interactive transaction Networked advertising boards and cineplex Web hosting or client sever

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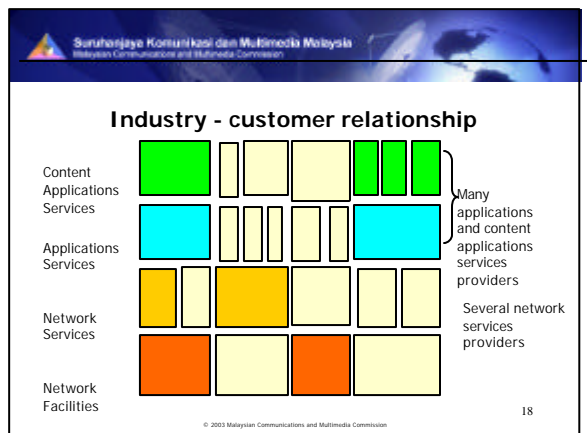
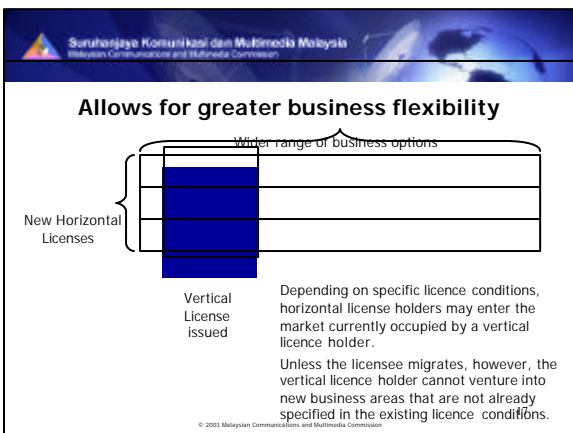
Licensing- Current CASP List

Individual	Class	Exempt
Satellite broadcasting Subscription broadcasting Terrestrial free to air TV Terrestrial radio broadcasting	Minister to decide on services to be registered under ASP Class	Internet content services

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- ### CURRENT LICENSING POLICY
- #### Ministerial Direction on General Licensing Policies, Direction No. 3 of 2001
1. Closed basket approach in the **NFP (I)** – licensees can only own and/or provide facilities listed on their licence
 2. **CASP (I)** categories - can only provide the services in their licence; Minister's prior approval required to do others; not allowed to provide satellite broadcasting services
 3. **No cross-sector** activities - the holder of an **ASP (I)** licence will not be granted a **CASP (I)** licence, vice versa.
 4. Open basket approach in the NSP (I) and ASP (I) categories.
 5. ASP (I) licences issued only up to 2005
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Eligible Industry Development Item

- R&D
- Skills Training
- Minority interest in SMIs
- Value Added procurement from Malaysian SMIs
- Local content production and development

Developing industry capabilities

Nurturing local content and culture

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SPECTRUM ASSIGNMENTS

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Spectrum Assignments under CMA98

- Prohibition on using spectrum without assignment.
- CMC may issue spectrum assignments.
- All assignments to be consistent with spectrum plan.
- Certain devices may be exempted from requirement of having an assignment.

- Spectrum Assignment
- Apparatus Assignment
- Class Assignment
- Spectrum Exemption

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Spectrum Assignment

- S.159 CMA Confers rights on a person to use one or more specified frequency bands for any purpose consistent with the assignment conditions
- Provides widest berth in terms of spectrum usage
- SA assignee may transfer and/or deal with any or all the rights assigned under the SA

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Apparatus Assignment

- S.164 CMA Confers rights on a person to use the spectrum to operate a network facility of a specified kind at a specified frequency or in any specified frequency band or bands
- In terms of usage, AA provides less room to move compared to SA and is valid for a maximum period of 5 years
- AA holder may authorise a third party to operate a network facility which is the subject of an AA

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Class Assignment

Allows the use of certain spectrum for certain devices.

Eg. Citizen band communications device, cellular mobile access device, leased channel radio access device, spread spectrum access device and trunked radio access device.

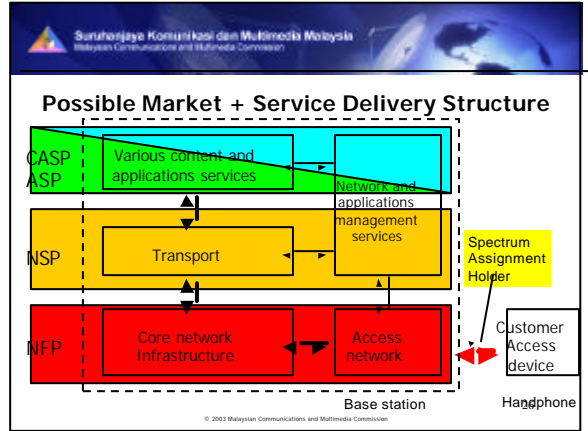
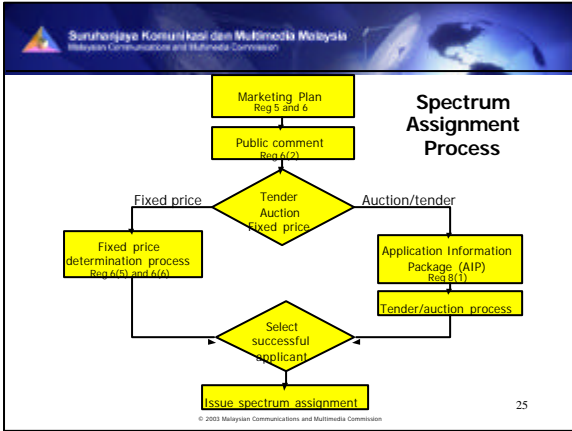
Spectrum Assignment Exemption Order

Exempts certain devices from the requirement of having an assignment.

Eg. Remote controlled consumer device, cordless telephone, medical and biological telemetry device, security device and wireless microphone.

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- ### ANTI-COMPETITIVE BEHAVIOUR: EXAMPLES
- Micro issues at industry level
 - Interlocking directorates
 - Holding companies with wholly-owned subsidiaries and associates companies
 - Trends towards oligopoly
 - Concentration of ownership
 - Anti-competitive practices at firm level
 - Resale price maintenance
 - Price fixing
 - Tied selling
 - Cartel agreements
 - Abuse of dominant position
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- ### COMPETITION REGULATION AND CMA
- Chapter 2 Part VI of CMA provides for competition regulation which applies to a communications market
 - A communications market is defined as an economic market for:
 - Network services
 - Applications services
 - Good and services used in conjunction with the above, or
 - Access to network facilities used in conjunction with either a network service or an applications service
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COMPETITION REGULATION AND CMA

The competition provisions in CMA are new and sector-specific

Purposes of provisions are :

- To provide protection for smaller service providers in the absence of a general competition policy or trade practices regulatory regime;
- To provide a context for, and certainty about, the manner in which the general powers and procedures under CMA should be administered; and
- To establish a framework and clear powers for the Commission to ensure that anti-competitive practices do not undermine the national policy objectives (NPO) for the communications and multimedia industry

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- ### SPECIFIC PROHIBITIONS UNDER COMPETITION REGULATION
- Specific Prohibitions
- Chapter 2 Part VI of CMA 98 expressly:
- Prohibits any conduct by any licensee which has the *purpose* of substantially lessening competition in a communications market (section 133);
 - Prohibits collusive arrangements and practices such as rate fixing, market-sharing and boycotts (section 135); and
 - Prohibits mandatory tying or linking arrangements regarding the provision or supply of products and services (section 136)
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GUIDELINES / INSTRUMENTS ON COMPETITION REGULATION

Guidelines published effective 1 February 2000:
Substantial Lessening of competition (section 134); and
Dominant Position (section 138)
Information Paper: Process For Assessing Allegations of Anti-Competitive Conduct

- Determination by the Commission (section 137) – may determine that a licensee is in a dominant position in a communications market
- Direction by the Commission (section 139) - may direct a licensee who is:
 - in a dominant position in a communications market; and
 - engaging in a conduct which has or may have the *effect*
 - substantially lessening competition in a communications market
 - to cease the conduct and implement appropriate remedies

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OTHER RELEVANT PROVISIONS ON COMPETITION REGULATION

Authorization of Conduct (section 140)

Provides that before engaging in any conduct that may be construed to have the purpose or effect of substantially lessening competition, a licensee may apply to the Commission for authorization of the conduct

Before authorizing the conduct, the Commission shall be satisfied that the authorization is in the *national interest*

Agreements With Foreign Operators (section 144)

Provides that the Minister may make rules in relation to agreements between licensees and foreign network facilities providers and/or network service providers

Designed to preclude foreign providers from acting in a manner that is detrimental to competition in the domestic market or damaging to local licensees

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Economic regulation objectives

- to promote consumer markets which offer choice, quality and affordability;
- to promote any -to-any connectivity for network services used for communications between end users;
- to promote competition in all communications markets; and
- to promote investment and innovation in network facilities, network services and applications services, and their efficient utilisation.

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Administrative goals of COMPETITION GUIDELINES

These goals are:-

- to provide protection for smaller operators in the absence of a general competitive policy or trade practices regulatory regime;
- to provide a context for, and certainty about, the manner in which the general powers and procedures under the Act should be administered. This reinforces the regulatory intent of the national policy for the development of the communications and multimedia sector;
- to establish a framework and clear powers for the Commission to ensure that anti-competitive practices do not undermine the national policy.

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COMPETITION

CMA 1998 laws on competition

Guidelines for Substantial Lessening of Competition

Guidelines for Dominance

Conduct

Purpose

Effect

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Substantial lessening of competition

- Conduct
- Purpose
- Effect

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What does "conduct" mean ?

- Conduct in its broadest sense encompasses any or all commercial activity in which a licensee could engage.
- This includes, but is not limited to:-
 - decisions to supply or not supply certain goods or services;
 - decisions on price setting;
 - decisions on the quality of goods or services offered;
 - either making or giving effect to an agreement or understanding, written or otherwise;
 - requiring others to make or give effect to an agreement or understanding, written or otherwise; and
 - making known that an agreement or understanding, written or otherwise, is sought.

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"Conduct" - examples

- For the purposes of this guideline, the Commission's view is that the relevant "conduct" means any action, or a lack of action, which can either actually or potentially affect the level of competition in a market. That is, the Commission is concerned with kinds of conduct which may have a potential negative effect on competition. Examples of certain conduct which would concern the Commission include but are not limited to:-
 - **Prodatory pricing**, where prices are set below production costs in the short term in order to eliminate competitors and increase long term profits.
 - **Foreclosure**, where the customer is forced to enter into a long term supply arrangement with a particular supplier, limiting competition in the market through customer choice restriction. Often these agreements will include customer penalties for early termination of the agreement.
 - **Refusal to supply** to actual or potential rivals goods or services which are necessary for market participation.
 - **Bundling**, which involves a refusal to supply a good or service separately from another good or service forcing consumers to purchase the bundle rather than just the service they want.
 - **Parallel pricing**, where there is collusion between rivals to vary prices in step.
 - Other pricing and supply behaviour described under the Guideline on Dominant Position.
- The Commission does not contend that the above examples of conduct will necessarily result in a substantial lessening of competition per se. The Commission will however closely monitor the market impact of such conduct.

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"Purpose" and "Effect"

- The concepts of "Purpose" and "Effect" are relevant to sections 133 and 139 of the Act respectively. Applying these two tests imposes different requirements on the Commission.
- The issue of the purpose of conduct is particularly relevant to the implementation of section 133. Only conduct with the *purpose* of substantially lessening of competition is prohibited under the section. Such conduct is prohibited irrespective of its effects, although the Commission expects that conduct without an effect of substantially lessening competition is unlikely to come to its attention in any case.
- Determining the purpose of conduct is often difficult. The broader principles that the Commission will apply in order to infer purpose will include:-
 - the nature of the conduct, including its scope to affect rivals in the market;
 - the circumstances of the conduct, including the process of decision-making which led up to the conduct; and
 - the likely effect of the conduct, where likely refers to reasonable possibility rather than probability.

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"Purpose" and "Effect" (2)

- It is possible for conduct to have more than one purpose. A licensee will be deemed to have engaged in conduct with a particular "Purpose" if that purpose is or was a substantial purpose of the conduct. This means that the particular purpose should be one of the purposes of the conduct and have been material to the decision to engage in the conduct.
- The Commission has extensive powers of inquiry and investigation which it can employ to determine whether any or all of these conditions are met. The Commission will use such powers if it has reason to believe that a breach of the Act has occurred.
- In contrast, determining the effect of conduct is a matter of fact which can be determined by "examination of the results". In the particular case of section 139, the issue is whether the conduct of a licensee has led to or may lead to substantial lessening of competition in a market where that licensee is in a dominant position. In this case, the issue of purpose is irrelevant, and only the assessment of whether substantial lessening of competition has occurred or may occur is necessary in order to activate the provisions of section 139.

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Analytical Framework For Substantial Lessening Of Competition

	Define the Context	Define the Market	Assessment of Conduct
Objective	Ensure that the Commission has appropriate powers to act	Define the boundaries of the relevant market.	Determine whether there is (or may be) a substantial lessening of competition within the relevant market.
Process	Consider which section of the Act the assessment is being made under. Identify the circumstances which initiated the assessment. Identify the key stakeholders in the process.	Identify all demand substitutes for the service. Identify all supply substitutes for the service. Determine the relevant product market. Determine the relevant geographical market. Determine the relevant temporal market.	Assess the likely changes in the degree of competitive rivalry in the absence of Commission intervention in the light of test criteria. Assess the likely changes in the degree of competitive rivalry in the case of Commission intervention in the light of test criteria. Assess the difference in the level of rivalry between the two cases. Assess whether the difference is substantial in the light of the objects of the Act and national policy objectives.

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Dominant Position

Policy objectives for the determination of dominant position

- 5.1 The establishment and maintenance of competitive communications markets is closely related to many of the objectives above. The Commission's powers under the provisions of the Act (sections 137 to 139) which deal with a dominant position are potentially a powerful instrument for this purpose. These powers go beyond the general competition provisions of Sections 133 to 136 of Chapter 2 of Part VI of the Act. They are designed to address situations where the market power of licensees is so extensive that competitive processes are incapable of restraining their conduct in a communications market. In these cases intervention is necessary in order to achieve effective competition.
- 5.2 The Commission has adopted this view because the objectives of economic regulation, as set out in the Explanatory Statement, include the *promotion* of competition. The Commission's view is that this includes action to remove impediments to competition where market conditions such as the dominant position of a licensee in a communications market may prevent the natural development of competition.

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Dominant Position (con't)

Policy objectives for the determination of dominant position (con't)

- 5.3 Although the dominant position of a licensee is qualitatively different from the possession of market power, the two concepts are closely linked. A dominant position reflects a degree of market power so great that its possessor can operate largely independently of its competitors and customers. Market power alone does not necessarily confer this independence.
- 5.4 The Act provides for the Commission to direct a licensee in a dominant position in a communications market to cease conduct which has the effect of substantially lessening competition. This "effect" test sets a different trigger for Commission intervention than the "purpose" test of section 133. The Commission therefore need not prove the intention of the dominant licensee. This test is needed to address the greater potential for a dominant licensee to inflict harm upon the extent of competition in the marketplace, even where such harm is unintentional.

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Analytical Framework For Determining Dominant Position

	Define the Context	Define the Market	Assessment of Dominant Position
Objective	Ensure that the Commission has appropriate powers to act.	Define the boundaries of the relevant communications market.	Determine whether the licensee is in a dominant position in the relevant market.
Process	Identify the circumstances which initiated the assessment. Identify the licensee most likely to be in a dominant position. Identify the key stakeholders in the process. Make initial assessment of the likelihood that the licensee is in a dominant position.	Identify all demand substitutes for the product or service. Identify all supply substitutes for the product or service. Determine the relevant product market. Determine the relevant geographical market. Determine the relevant temporal market.	Assess the behavioural features of the market as set out in the guideline for evidence of dominance. Assess the structural features of the market as set out in the guideline for evidence of dominance. Make final assessment of whether the licensee is in a dominant position.

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