



# ITU-MCMC International Training Program 2015

## *Competition Issues: Mergers and acquisitions*

*Kuala Lumpur*

*26 August 2015*

*Scott W Minehane*

*([scott.minehane@windsor-place.com](mailto:scott.minehane@windsor-place.com))*

*Windsor Place Consulting*



# Agenda

---



1. Overview
2. Competition policy in Asia – regional M&A in focus
3. Reforming asymmetries in regulation of the telecommunications sector and other markets
4. Case study: Malaysia
5. Conclusions



## (1) Overview - the role of competition policy



- Competition policy is central part of economic regulation, providing a set of tools to promote sustainable competition.
- In a competitive market, individual suppliers cannot dictate terms, but must respond to the rivalry of their competitors.
- Competition policy may be implemented through general competition laws, or through competition enhancing rules in specific sectors.
- The laws and regulations applied in competition policy in the telecommunications market broadly take two forms:
  - Telecommunications-specific regulations; and
  - Competition law
- Most countries have sector-specific regulation for the telecommunications sector, in addition to broader competition regulations
- Such arrangements generally include provisions to stop (or make subject to certain rules) mergers or acquisitions ("M&A"), that would reduce competition



## (1) Overview - the development of competition policy under the WTO



- Competition policy has been promoted by the World Trade Organisation ("WTO") since the 1996 WTO Ministerial Conference in Singapore identified businesses as a source of distortion in international free trade.
- Article 20 of the WTO 1996 Singapore Ministerial Declaration called for the establishment of a working group to formally examining the relationship between trade and competition policies

### WTO Regulation Reference Paper 1996

- The Reference Paper is a blueprint for sector reform that largely reflects 'best practice' in telecommunications regulation. It provides definitions and principles on the regulatory framework for the telecommunications markets
- The reference paper was contained in the annex to the Fourth Protocol to the GATS Agreement, the Agreement on Basic Telecommunications negotiated under the auspices of the World Trade Organization in February 1997, which came into effect on 1 January 1998.

See: [https://www.wto.org/english/tratop\\_e/serv\\_e/telecom\\_e/tel23\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm)



## (1) Overview - the evolution of competition law in Asia



- In the Asia-Pacific region, competition law has grown rapidly in the last 2 decades. Now over 20 jurisdictions in Asia have competition regimes
- ASEAN has played a role in promoting the introduction of competition laws, by making such provisions a prerequisite for member states in fulfilment of the 2007 ASEAN Economic blueprint

Country	Competition Provision
Thailand	Trade Competition Act 1999 (Thai Competition Act)
Indonesia	Law No. 5 of 1999 on the Prohibition of Monopoly and Unfair Business Competition Practises (Indonesian Competition Act)
Singapore	The Competition Act 2004
Vietnam	The Law of Competition (no 27-2-4-QH11) 2004
Lao PDR	Decree 15/PMO on Trade Competition 2004- Not a generic competition law but governs trade and prohibits anti-competitive practises – such as monopolisation and collusion
Malaysia	The Competition Act 2010 – prevents anti-competitive practises but does not govern mergers and acquisitions



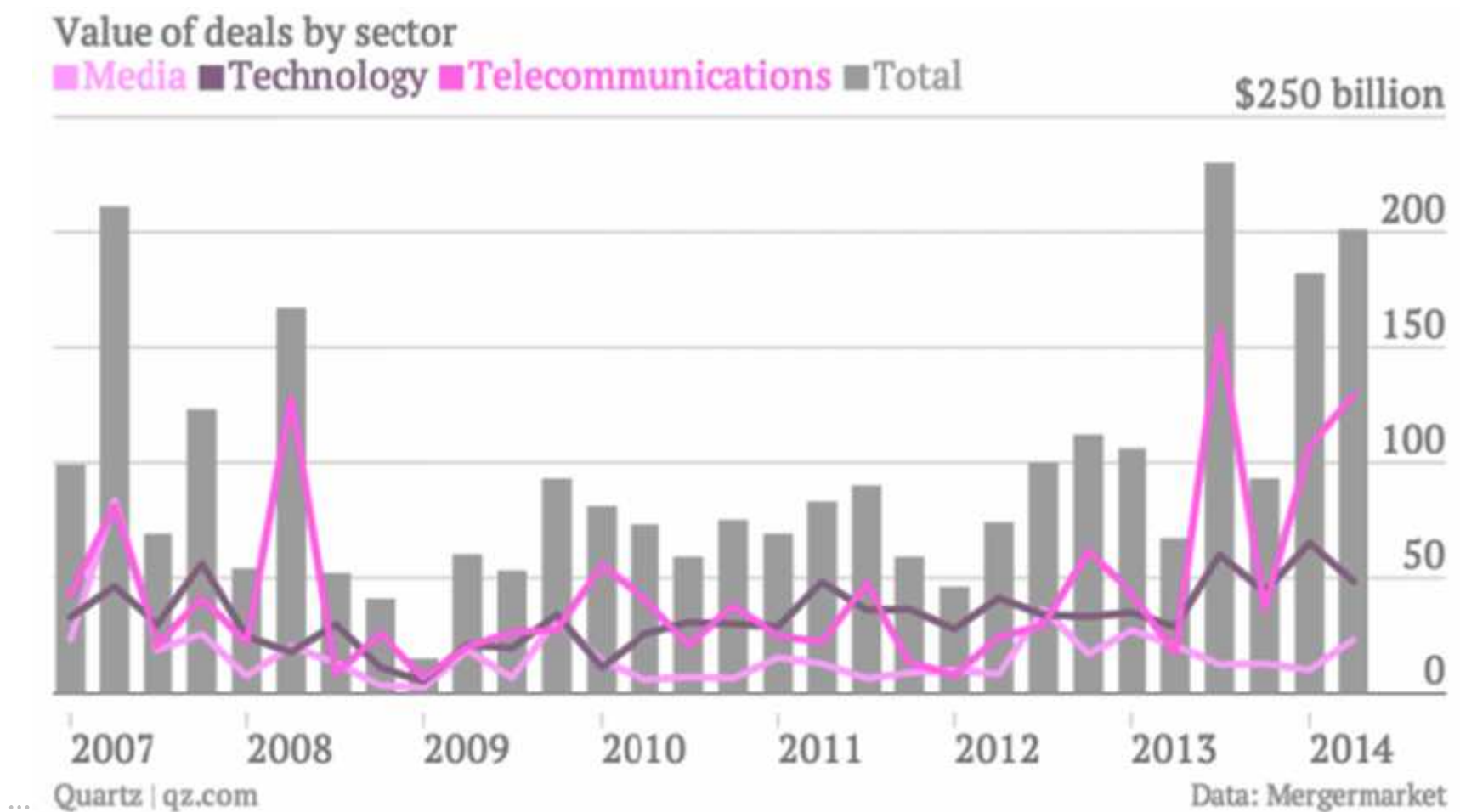
## (1) Overview - the evolution of telecom competition regulation



- Often, the communications industry is the first sector where competition is regulated, by frameworks that are distinct from later competition policy
- Telecommunications-specific regulations have traditionally taken into consideration the strong market position of an incumbent or dominant operator.
- This has resulted in competition in telecom markets being regulated by more restrictive, and in some cases - duplicative mechanisms, as compared with other sectors.
- Looking forward, this model of regulation is not sustainable in the long-term, and is not in the interests of consumers – who stand to pay higher costs where competition is reduced
- In Asia, as competition law develops and the telecom sector continues to grow, there is a need to better integrate competition policy with telecommunications-specific regulation. I will return to this later.

## (2) Competition policy in Asia – M&A in the telecom sector

- The value of M&A taking place in the telecom sector continues to grow markedly in proportion to deals in other industries.





## (2) Competition policy in Asia – regional M&A in focus



- M&A have taken a formative role in shaping the Asian telecom market – by allowing national carriers to grow within domestic and regional sectors
- Telecom deals have enabled regional operators to compete with global players trying to enter and dominate Asian markets
- For instance, the regional footprint of the operators such as SingTel, Axiata and Telenor was facilitated by M&A policy.
  - SingTel has become Asia's largest telecommunications company by acquiring strategic stakes in mobile operations across Asia.
  - AXIATA has subsequently established itself as a key regional competitor, by acquiring majority shareholdings in a series of national operations within Asia.
- To ensure future development in the Asian telecom market, domestic regulators need ensure that sector M&A is governed by rules that are consistent with general competition provisions





## (2) Competition policy in Asia – regional M&A in focus



### XL Axiata's acquisition of Axis, 2014

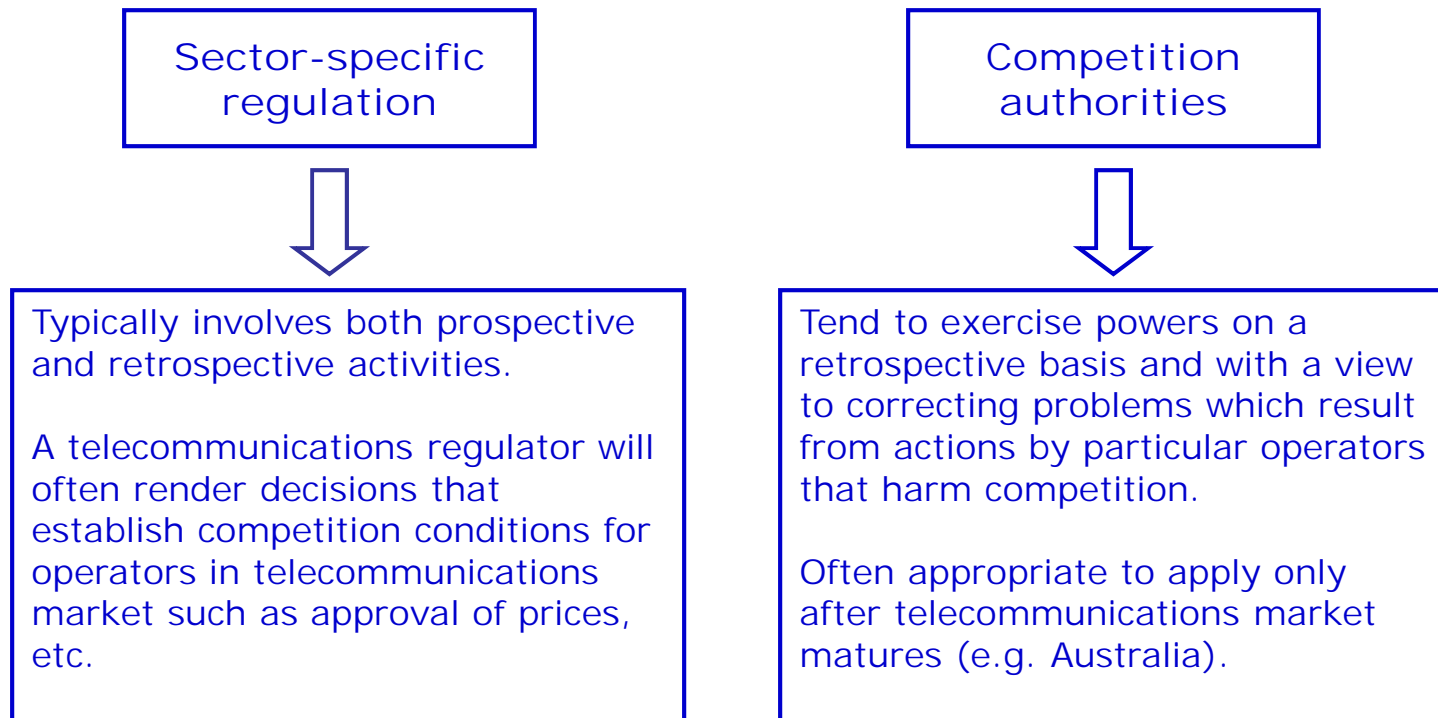
- In September 2013, the Indonesian mobile operator XL Axiata expressed its intention to acquire and merge with Axis telecom, a operator that was Axiata's smaller rival in the region
  - The Indonesian Ministry of Communications and Information Technology (MoCI) agreed to the transaction going ahead, on the condition that the merged entity would hand back several blocks of 2100MHz mobile spectrum
  - The Indonesian anti-monopoly authority approved the takeover in March 2014, and XL Axiata completed the acquisition of Axis telecom
- 
- As the Axiata case demonstrates - the multiple layers of regulation that the telecommunications sector is subject can effect to limit operators seeking to engage in M&A in the industry, allowing various regulators to place conditions on deals



### (3) Reforming asymmetries in regulation of the telecom sector and other markets



- Looking forward - the next step for Asian policymakers to better integrate telecommunications regulation and competition law, where they currently exist side-by-side
- When two or more authorities co-exist, it is key to ensure that they do not subject the telecommunications industry to greater intervention and restriction than other markets





### (3) Reforming asymmetries in regulation of the telecom sector and other markets



- Some common principles for promoting competition are articulated in telecommunications regulation and competition law.
- Policymakers need to build upon this platform – in order to bring telecom regulation into line with competition law governing other sectors

Telecom Regulation	Competition Law
<ul style="list-style-type: none"><li>• Mandatory Interconnection/access sharing</li><li>• Non-discrimination in terms and conditions</li><li>• Cost-oriented pricing</li><li>• Sufficiently unbundled</li><li>• Prohibition against cross-subsidization</li></ul>	<ul style="list-style-type: none"><li>• Essential facilities doctrine</li><li>• Non-discrimination</li><li>• Prohibition against:<ul style="list-style-type: none"><li>➤ Anti-competitive pricing</li><li>➤ Tied sales and bundling</li><li>➤ Cross subsidization</li></ul></li></ul>



### (3) Reforming asymmetries in regulation of the telecom sector and other markets



#### AT&T's unsuccessful attempt to merge with T-Mobile USA, 2011

- On March 20, 2011, AT&T announced that it would purchase T-mobile USA, for approximately USD39 billion from Deutsche Telekom
- The US FCC sought to prevent the merger from taking place
- On August 31 2011, The antitrust division of the United States Department of Justice announced that it would block the takeover, filing a lawsuit to do so within the federal court
- AT&T sought to continue with the deal and fight the claim, however the FCC proceeded to release a staff report that was highly critical of the merger, and threatened to refer the case to an administrative law judge for an examination of its legality under antitrust law (meaning AT&T would be forced to prove before the court why the deal was in the public interest)
- AT&T was forced to abandon its bid on December 19, 2011, and had to pay Deutsche Telekom a USD4 billion breakup fee



### (3) Reforming asymmetries in regulation of the telco sector and other markets



- Nevertheless, in order for Asian telco markets to move forward, regulators need to reform asymmetries that have developed, between the regulation of the telco sector and general competition laws
- To establish a more competitive regulatory framework, is essentially – to the greatest extent possible – that industry players should be treated equally
- Domestic regulators need to be more consistent in their regulation of the telecom sector with other industries, lest the market be unfairly constrained
- Governments should ensure that any sector specific provisions relating to competition issues do not conflict with the general competition law; and
  - Further - that key aspects of the general competition provisions, as they may apply to licensed telecommunications operators, are reflected in any competition regulations issued in accordance with the Telecommunications Law.
- In order to do this, deeper legal community understanding and skills need to be entrenched in domestic settings, to ensure certainty and clarity in the application of competition rules across the board



## (4) Case study: Malaysia



- The reform of competition law within Malaysia represents a key case study of how policymakers can integrate telecommunications regulation and competition policy – with a view to promoting competition and growth in the sector

### Background

- While Malaysia implemented the Competition Act 2010, the Communications and Multimedia Act 1998 ('CMA') detailed the applicable competition law which governs the Malaysian communications and multimedia sector.
- The Malaysian Communications and Multimedia Commission ('MCMC') continues to regulate competition in Malaysia's communications sector.
- The provisions dealing with competition law are contained in Chapter 2, Part VI (Economic Regulation), specifically sections 133 to 144 of the CMA.



## (4) Case study: Malaysia



### Competition provisions

The key sections of the CMA, prior to its review, were:

- Section 133 provides that “a licensee shall not engage in any conduct which has the purpose of substantially lessening competition in a communications market”.
- Section 137 provides that “the Commission may determine that a licensee is in a dominant position in a communications market”.
- Section 139(1) provides for the Commission to direct a licensee in a dominant position in a communications market to cease a 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.
- Section 143 provides that a person who contravenes any prohibition under Chapter 2 commits an offence.
- Section 142(1) provides for the Commission to seek an interim or interlocutory injunction against any conduct prohibited in Chapter 2.



## (4) Case study: Malaysia



- Significantly, the CMA previously failed to adequately regulate mergers and acquisitions within the telecommunications space
- Yet the Competition Act 2010 specifically excludes the telecom industry from being governed by its provisions
- While still in a draft stage the 2015 review of the CMA by the MCMC – has identified this as an issue, and as such there is a view to bringing the provisions of the Act into line with broader competition laws
- As part of the review, the relevant provisions of CMA would be amended, to give the MCMC detailed and specific powers to regulate and oversee mergers and acquisitions in the sector
- The Malaysian case highlights how inconsistencies in regulation can arise, through multiple layers of policy that govern the telecom space, as compared with other sectors





## Concluding remarks

---



- Deal activity has proliferated throughout Asia, becoming a key plank of market growth and competition in the region
- Within the communications industry specifically – mergers and acquisitions have presented a central aspect of both domestic and regional market development
- However, going forward, to protect competition within the sector, policymakers need to bring telecommunications regulation into line with broader competition policy.
- Domestic telecommunications markets and M&A activity within the industry need to be governed by regulations that are consistent with competition provisions for deals in other sectors. In this context as Mobile services are become more important this is going to a new focus area.
- Consistent regulatory practise would promote clarity and certainty for operators and stakeholders looking to engage in business in domestic markets, protecting competition and consolidating sector growth

# Appendix

## ICT Regulation Toolkit

Module 1: Regulating the Telecommunications Sector: Overview

Module 2: Competition and Price Regulation

Module 3: Authorization of Telecommunication/ICT Services

Module 4: Universal Access and Service

Module 5: Radio Spectrum Management

Module 6: Legal and Institutional Framework

Module 7: New Technologies and Impact on Regulation

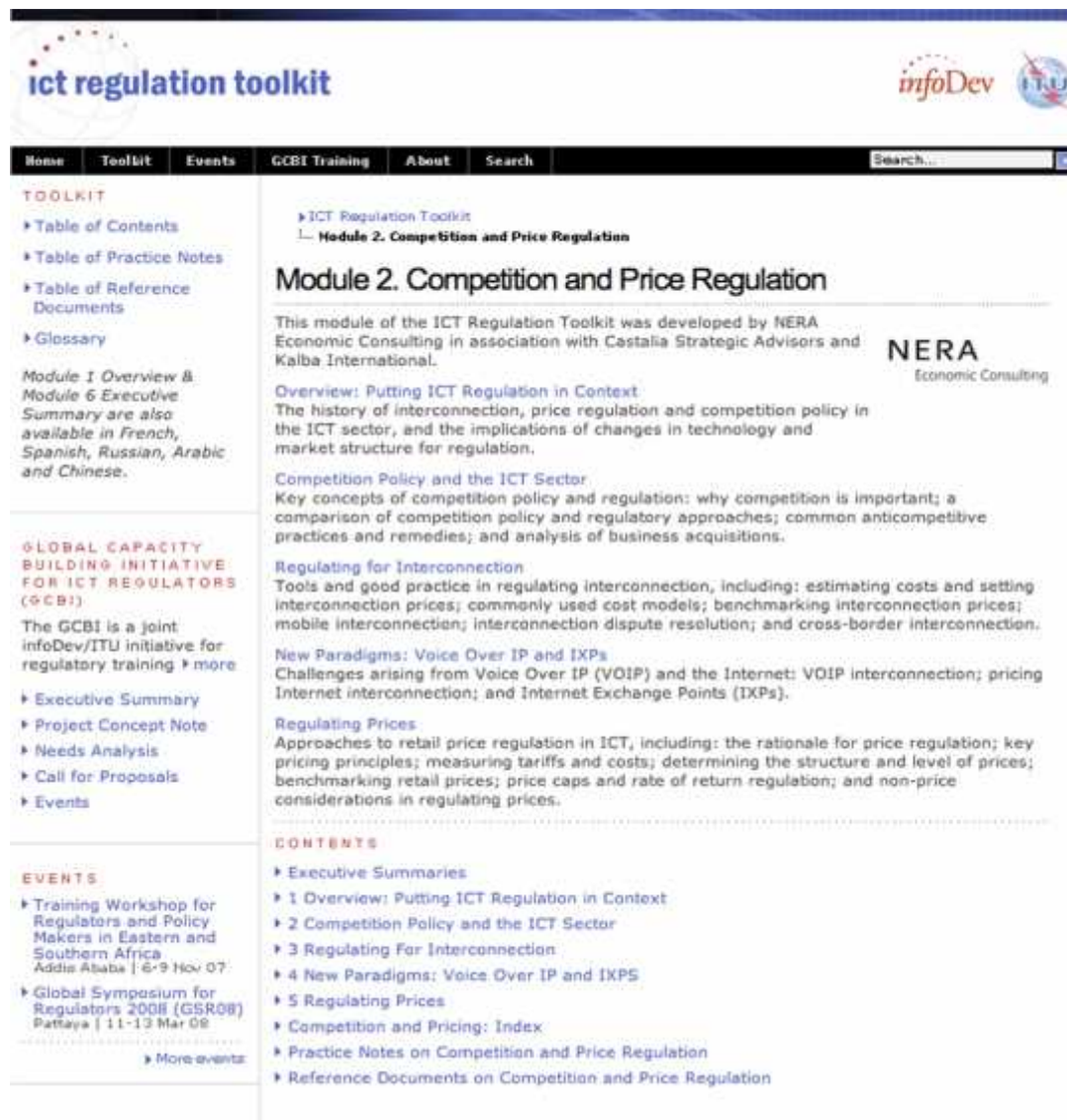


## Appendix



### ICT Regulation Toolkit - Competition Module 2

- What we mean by competition? - Concept of contestability
- Why focus on competition? - “Public interest or social good” is best served when markets work efficiently
- The roles of competition policy and regulation - Approaches to encouraging competition including ex ante and ex post regulation
- Key concepts in competition policy - Define relevant market or markets and assess the level of competition
- Common forms of anti-competitive conduct - abuse of dominance, refusal to supply, price squeezes, cross- subsidization, misuse of information, predatory pricing
- Remedies for anti-competitive conduct - remedies available to governments and regulators to address above
- Approaches to analyzing mergers, joint ventures and acquisitions



The screenshot shows the 'ict regulation toolkit' website. The header includes the 'infoDev' and 'ITU' logos. A navigation bar contains links for 'Home', 'Toolkit', 'Events', 'GCBi Training', 'About', and 'Search'. A search bar is located on the right. The main content area is titled 'Module 2. Competition and Price Regulation' and is developed by NERA Economic Consulting. It provides an overview of the module, its history, and its focus on competition policy and regulation. The left sidebar contains links to various sections of the toolkit, including 'Table of Contents', 'Table of Practice Notes', 'Table of Reference Documents', 'Glossary', and 'Module 1 Overview & Module 6 Executive Summary'. The bottom section lists 'EVENTS' such as the 'Training Workshop for Regulators and Policy Makers in Eastern and Southern Africa' and the 'Global Symposium for Regulators 2008 (GSR08)'.



## Appendix



### Reference sources for competition regulation

- United States, Department of Justice and Federal Trade Commission
- European Commission, Guidelines on Market Analysis
- Implementation of the Non-Accounting Safeguards
- Malaysia, Guideline on Substantial Lessening of Competition
- New Zealand, Commerce Commission, Mergers and Acquisitions Guidelines
- United States, Federal Communications Commission, Telecommunications Carrier's Use of Customer Proprietary Network Information and Other Customer Information
- United States, Horizontal Merger Guidelines 1992
- ITU/WTO Workshop on Telecom and ICT regulation



# Thank You

I am happy to answer  
any questions...

*Scott W Minehane*  
*([scott.minehane@windsor-place.com](mailto:scott.minehane@windsor-place.com))*  
*Windsor Place Consulting*  
*+61 412 995535*

