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The International Comparative Legal Guide to:

Telecoms, Media & Internet Laws & Regulations 2019

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Malaysia



Shearn Delamore & Co.

Janet Toh

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.

- (a) The telecommunications sector in Malaysia has seen significant growth in recent decades. The primary regulator of telecommunications in Malaysia is the Malaysian Communications and Multimedia Commission (“the Commission”/“MCMC”). Though market liberalisation has played a big role in ensuring the growth of the industry, regulatory reforms have been a contributing factor too. Telekom Malaysia (“TM”) is the largest player, providing fixed-line services in the retail and wholesale telecommunications sector in Malaysia, while Celcom, Digi, Maxis and U Mobile are the larger players in the mobile sector.

Malaysia had a rational four-player telco market right up to 2016, when U Mobile started to become more aggressive with unlimited data plans, while TM’s webe (now known as “Unifi”) entered as the fifth mobile player. Another recent operator to have emerged on the scene is LTE-only operator Yes. In terms of revenue market share, Maxis is the leader with a market share of 35% in 2017. Meanwhile, Celcom’s revenue market was 27% in 2017, whilst Digi’s revenue market share averaged at 26%.

- (b) Audio-visual Media Distribution

The broadcasting industry in Malaysia has been growing rapidly in recent years with the introduction of the Digital Terrestrial Television Broadcasting (“DTTB”) infrastructure, which allows for free-to-air (“FTA”) broadcasters to migrate from analogue to the digital platform from 2016. Malaysia Pay TV service providers are met with an increasingly demanding and competitive market by providing more channels as well as services. Although competition is beginning to emerge in Malaysia’s Pay TV market, Astro All Asia Networks (“ASTRO”) still dominates despite the rapid move towards digitalisation, as high-speed internet remains underpenetrated in rural areas.

ASTRO, with approximately 75% market penetration of Malaysian TV households in 2017, ventured into the IPTV service in 2010. ASTRO is reported to have revenues of RM 5.5 billion in January 2018. The broadcasting industry in Malaysia is open to competition and foreign investment.

- (c) Internet

TM is the dominant fixed broadband player in the country,

with over 2.35 million of the 2.5 million broadband subscribers as at the end of August 2017. TM continues to monopolise the fixed broadband market with approximately 95% of the market share. The biggest competitors of TM are Time dotCom Bhd and Maxis Berhad.

Mobile companies such as Maxis Berhad, Celcom Axiata Bhd, and Digi.com Bhd play a major role in the provision of cellular or mobile broadband services in Malaysia. The internet industry in Malaysia is liberalised and open to foreign investment.

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.

- (a) Telecoms, including internet

- Communications and Multimedia Act 1998 (hereinafter referred to as the “CMA”).

The purpose of the CMA is to provide for and to regulate the converging communications and multimedia industry. The CMA forms the core legislation governing the communications and multimedia industry in Malaysia. The CMA provides for the Communications and Multimedia Content Forum to prepare and draw up a Content Code after appropriate consultations, and to enforce the Code containing governing standards and practices in the communications and multimedia industry.

The Content Code, which the Communications and Multimedia Content Forum of Malaysia has adopted for the purpose of statutory duty, sets out the guidelines and procedures for good practice and standards of content disseminated to audiences by service providers in the communications and multimedia industry in Malaysia.

- Personal Data Protection Act 2010.
- Companies Act 1965.
- Penal Code.
- Financial Services Act 2013.
- Computer Crimes Act 1997.
- Consumer Protection Act 1999.
- Consumer Protection (Electronic Trade Transactions) Regulation 2012.
- Copyright Act 1987.
- Digital Signature Act 1997.
- Electronic Commerce Act 2006.
- Electronic Government Activities Act 2007.
- Capital Markets and Services Act 2007.
- Sedition Act 1948.

- Strategic Trade Act 2010.
 - Postal Services Act 1999.
 - Film Censorship Act 2002.
 - Companies Act 2016.
 - Financial Services Act 2013.
 - Direct Sales Act 1993.
 - Common Gaming Houses Act 1953.
 - Betting Act 1953.
 - Pool Betting Act 1967.
- (b) The above legislation is also relevant to the audio-visual sector as the CMA unified the regulations.

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.

- (a) Telecoms
- Ministry of Communications and Multimedia – Malaysian Communications and Multimedia Commission. The Ministry of Communications and Multimedia has primary responsibility for determining policies and regulations. The Malaysian Communications and Multimedia Commission was established under the Malaysian Communications and Multimedia Commission Act 1998 as a regulator for the communications and multimedia industry in Malaysia; it regulates the networked information technology industry services and the operational and administrative aspects of the regulatory framework.
 - Securities Commission Malaysia.
 - Personal Data Protection Commission/Department.
 - Minister of Information, Communications and Culture.
 - Minister of Domestic Trade and Consumer Affairs.
 - Companies Commission of Malaysia.
- (b) Audio-visual Media Distribution
- Ministry of Communications and Multimedia Malaysia.
 - The Malaysian Communications and Multimedia Commission.
 - Department of Personal Data Protection.
 - Film Censorship Board Malaysia – Advertising Standards Advisory.

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) The communications and multimedia sector in Malaysia has gone through major transformation over the last two decades. It has evolved from the time of the monopoly incumbent operator to the subsequent privatisation of Telekom Malaysia and liberalisation of the telecommunications sector, to the convergence regime under the CMA. This exercise changed the telecommunications sector, which was monopolistic in structure, to one that was highly competitive and service-oriented.
- There has been effort by the government to liberalise the market and it has allowed for the injection of foreign investment. In 2012, the government liberalised the services sector by allowing 100% equity participation in phases. The Commission began allowing 100% foreign equity participation for Applications Service Providers (“ASP”) licensees in April 2012.

However, only 70% foreign participation is allowed for network facilities providers and network service providers.

- (b) Audio-visual Media Distribution
- There are no rules restricting foreign ownership or investment in the 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 since 1 January 1995 and is a member of the GATT. Malaysia has, under the GATS, made several commitments on limitation on market access, 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 CMA provides a regulatory framework for the communications and multimedia industry. The CMA has an expansive scope, ranging from spectrum allocation and consumer protection to content regulation and investigatory powers. The main subjects of regulation under the CMA are applications services and network services. The CMA further pertains to content applications services, which appear to include online intermediaries.

The Ministry of Communications and Multimedia has primary responsibility for determining policies and regulations. The governmental actors involved in the administration of the Act are “the Minister charged with responsibility for communications and media” and the Malaysian Communications and Multimedia Commission, which was established under the Malaysian Communications and Multimedia Commission Act 1998, and which regulates networked information technology industry services and operational and administrative aspects of the regulatory framework. The Minister of Communications and Multimedia (“Minister”), to whom the Commission is answerable, has primary responsibility for determining policies and regulations in the communications and multimedia, broadcasting, information technology and postal sectors.

The Minister can give the Commission general directions relating to performance of the Commission’s functions and the Commission must comply with them. Certain policy decisions affecting competition in the industry, such as licensing and the principles for spectrum use and rate regulation, are reserved for the Minister. The Commission’s primary functions include:

- Advising the Minister on all matters concerning national policy objectives for communications and multimedia activities.
- 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.
- Implementing and enforcing the CMA.
- Issuing directions in writing to any person regarding compliance with licence conditions, including remedy of a breach of a licence condition, the CMA or its subsidiary legislation.

- Holding public inquiries in relation to proposed changes to regulation.
- Issuing determinations on mandatory standards for matters subject to a voluntary industry code, if the Commission is satisfied that the voluntary industry code has failed and will continue to fail.

With its creation, the Commission set forth 10 national policy objectives to:

- establish Malaysia as a major global centre and hub for communications and multimedia information and content services;
- promote a civil society where information-based services will provide the basis of continuing enhancements to quality of work and life;
- grow and nurture local information resources and cultural representation that facilitate national identity and global diversity;
- regulate for the long-term benefit of the end user;
- promote a high level of consumer confidence in service delivery from the industry;
- ensure an equitable provision of affordable services over ubiquitous national infrastructure;
- create a robust applications environment for end users;
- facilitate the efficient allocation of resources such as skilled labour, capital, knowledge and national assets;
- promote the development of capabilities and skills within Malaysia's convergence industries; and
- ensure information security and network reliability and integrity.

The Commission is committed not only to the licensees under the CMA, but also to the consumers and to the economic and technical regulation of the communications and multimedia industry. In addition, the Commission provides for the framework of the licensing requirements of the communications and multimedia industry. Pursuant to section 81 of the CMA, the Commission maintains a register, in both physical and electronic form, of all matters which are required to be registered under the CMA and its subsidiary legislation.

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

Malaysia saw its regulator, the Malaysian Communications and Multimedia Commission, set up in 1999, one year after the introduction of the converged telecoms legislation, the CMA. The CMA contains competition provisions which prohibit a licensee from engaging in conduct which has the purpose of substantially lessening competition in a communications market. The Commission is not independent from the government.

The Commission, however, works separately from the Malaysia Competition Commission ("MyCC"), which was established on 1 April 2011 with the purpose of enforcing the Competition Act 2010. MyCC's key role is to implement and enforce the provisions of the Competition Act 2010, to function as an advocate on competition matters, to conduct studies on competition-related activities and to enhance public awareness of the impact of competition on the economy of Malaysia.

The Competition Act 2010 does not apply to commercial activities under the CMA which, as mentioned above, has its own competition regulations with the Commission as the regulating body.

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

The decision of the Commission is appealable by way of judicial review. Section 18 of the CMA provides that the Appeal Tribunal may review any matter on appeal, including a decision or direction of the Commission, but not a determination of the Commission. Section 18 also provides that any decision made by the Appeal Tribunal is final and binding on the parties to the appeal, and is not subject to further appeal. Section 23A of the CMA further provides that any decision given by the Appeal Tribunal may be enforced in the same manner as a judgment or an order of the High Court.

Section 120 of the 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 may appeal to the Appeal Tribunal for a review of the merits and the process of certain decisions or directions of the MCMC, unless the matter is not subject to an appeal to the Appeal Tribunal. Further, section 121 of the CMA provides that a person affected by a decision or other action of the Minister or the Commission may apply to the court 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 CMA provides for an activity-based licensing regime that is technology neutral. Within the activity categories, there are two key types of licences. Section 126 of the CMA prohibits any person from: (a) owning or providing any network facilities; (b) providing any network services; or (c) any applications services except with a valid individual licence or a class licence, both of which are granted under the CMA.

The four categories of licensable activities are a Network Facilities Provider, Network Services Provider, Applications Service Provider and a Content Applications Service Provider, which are summarised as follows:

- Network Facilities Provider's ("NFP") licence
NFPs are the owners/providers of network facilities, namely infrastructure such as cables, towers, satellite earth stations, broadband fibre optic cables, telecommunications lines and exchanges, radiocommunications transmission equipment, mobile communications base stations and broadcasting transmission towers and equipment.
- Network Service Provider's ("NSP") licence
NSP licences are given for the purpose of the provision of basic connectivity and bandwidth to support a variety of applications. NSPs would usually deploy the said network facilities. Examples of NSP services are bandwidth services, broadcasting distributions services, and access application services.
- Applications Service Provider's ("ASP") licence
ASP licences are given to those who provide for specific particular functions. This would include electronic commerce, internet access, voice services, and messaging services. Application Services are defined as "services provided by means of, but not solely by means of, one or more network services" in the CMA.

- (d) Content Application Service Provider's ("CASP") licence
This category of licence is granted to a special subset of ASPs who provide content to end users. This includes satellite broadcasting, terrestrial free-to-air TV, limited content application services and internet content application services.

For each of the above four categories of licence, the licence may be an Individual or Class Licence and the type of licence required will largely depend on the licensable activity. A summary of the types of licences is as follows:

- (a) Individual licence
An individual licence is a licence granted for a specified person to conduct a specified activity, and this may be subject to conditions imposed upon such a licence. An individual licence requires a higher degree of control and thus may include additional and/or special conditions.
- (b) Class licence
A class licence refers to a licence for any or all persons to conduct a specified activity. It is a "light-handed" form of regulation to promote industry growth and development with easy market access.
- (c) Exempt/unlicensed
Pursuant to the Communications and Multimedia (Licensing) (Exemption) Order 2000, certain activities are exempted from the requirement of obtaining a licence. These include internet content application services and web-hosting services.

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

Standard licence conditions for an individual and class licence are provided in the Schedule of the CMA.

Individual licence

The following persons or classes of persons shall be ineligible to apply for an individual licence:

- a foreign company as defined under the Companies Act 2016;
- an individual or a sole proprietorship;
- a partnership; and
- such other persons or classes of persons as may be decided by the Minister from time to time.

Class licence

For a class licence, the licensee must comply with the numbering and electronic addressing plan issued under the CMA, and they must also comply with the spectrum plan and any consumer code registered, as well as other standard conditions declared by the Minister or any other subsidiary legislation. The following persons or classes of persons are not eligible to be registered as class licensees:

- a foreign individual who is not a permanent resident; and
- a foreign company as defined under the Companies Act 2016.

Regulation 3 of the Communications and Multimedia (Licensing) Regulations 2000 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:

- 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

- 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.

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?

There are four, namely a network facilities provider, network service provider, applications service provider or a content applications service provider. The Schedule under the CMA does provide that a class licence replaces any other licence granted by the Minister, and shall be the sole licence held by the licensee in respect of the network facilities authorised under the licence, as provided under section 126 of the 1998 Act. An individual licence is required by the following providers:

- Network Facilities Providers:
 - earth stations;
 - fixed links and cables;
 - radio communications transmitters and links;
 - satellite hubs;
 - satellite control stations;
 - space stations;
 - submarine cable landing centres;
 - towers, poles, ducts and pits used in conjunction with other network facilities; or
 - such other network facilities which are not exempt under the CMA or are not subject to a class licence under Part IV of the Communication and Multimedia (Licensing) Regulations 2000, or are not listed in this subparagraph.
- Network Service Providers:
 - bandwidth services;
 - broadcasting distribution services;
 - cellular mobile services;
 - access applications services;
 - space services;
 - switching services;
 - gateway services; or
 - such other network services which are not exempt under the CMA or are not subject to a class licence under Part IV of the Licensing Regulations, or are not listed in this subparagraph.
- Applications Service Providers:
 - satellite broadcasting;
 - subscription broadcasting;
 - terrestrial free-to-air TV;
 - terrestrial radio broadcasting; or
 - such other content applications services which are not exempt under the CMA or are not subject to a class licence under Part IV of the Licensing Regulations, or are not listed in this subparagraph.

Individual licences may be transferred by the applicant, who will have to provide the following to the Commission:

- a formal letter (details of transfer) and an application fee of RM 5,000 per licence; and
- additional information or documents as may be requested by the Commission.

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?

The CMA provides for the inspection of land in order to determine if the land is suitable for installing or obtaining access to network facilities. Section 214 of the CMA allows a network facilities provider to, in the purpose of determining whether any land is suitable for the purpose of installing, or obtaining access to, enter on, inspect the land and do anything desirable for that purpose. This includes making surveys, taking levels, sinking bores, taking samples, digging pits and examining the soil.

Naturally, the installation of network facilities needs to be authorised with a network facilities installation permit, issued by the Commission under section 226 of the Act. If an NFP is authorised to carry out the installation of network facilities, the NFP may enter and occupy any land and do anything that is necessary or desirable for those purposes.

Access and Interconnection

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

There is an obligation under Part X of the CMA, specifically under section 228 of the CMA, for a network facilities provider to provide non-discriminatory access to any post, network facilities or right-of-way. Access may be denied where there is insufficient capacity or for reasons of safety, security, reliability, or difficulty of a technical or engineering nature, of a non-discriminatory nature. The Commission provides for the Commission Determination on Access List No.1 of 2015, which sets out the facilities or services with access obligations under the CMA.

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

Each Access Provider or operator has 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 Commission Determination on the Mandatory Standard on Access 2009 (“MSA”) or under any determinations of the Commission. An Access Reference Document (“ARD”) contains terms and conditions of access, including rates of facilities and services on the Access List.

All those with the obligations to provide the facilities and services on the Access List (Access Providers) are obliged to prepare an ARD, setting out detailed terms and conditions of access. Access Seekers are then to negotiate an Access Agreement with the Access Provider based on, and aligned with, the MSA and ARD.

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?

The Commission regulates the pricing and cost in relation to the services and/or facilities provided. The Commission has issued the Commission Determination on the Mandatory Standard on Access

Pricing, the latest being Determination No.1 of 2017, which sets the prices from 2018 to 2020, and which came into effect on 1 January 2018. Hence, the prices of all the facilities and services listed in the Determination apply to Access Providers and Access Seekers beginning from 1 January 2018.

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

Operators are required to have account separation. The revised Guidelines on Implementation of Accounting Separation in Malaysia were published by the Commission on 1 November 2016. The Commission requires separate accounts for, namely, operators with revenue and total assets in Malaysia exceeding RM 3 billion and below RM 3 billion.

There is, however, no requirement of functional or legal separation.

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’?

High-speed broadband networks which are no different to other communication and multimedia activities are regulated, and are also subject to the Access List. Malaysia has the National Broadband Implementation Strategy or better known as National Broadband Initiative (“NBI”) which puts in place a national strategy that brings broadband to the whole nation. Malaysia has invested in national public-private partnership programmes such as High Speed Broadband and Broadband for General Population, prioritising the growth of internet coverage over other parameters. Since 2008, the government had signed a Public-Private Partnership (“PPP”) agreement with Telekom Malaysia Berhad (“TM”) to roll out high-speed broadband infrastructure in selected areas.

This project is called the High Speed Broadband (“HSBB”) Project for the deployment of a network with speeds greater than 10 Mbps in strategic areas with high economic impact. Since 2014, the Commission has implemented an initiative called Fiber Optic Network Expansion, in which the existing core networks that connect the communications towers will be upgraded to fibre optics. The upgrading of core networks will enable 3G and 4G broadband services to be provided. This is to accommodate the demand for high-speed broadband.

In January 2018, TM and Tenaga Nasional Berhad (“TNB”) signed a Memorandum of Understanding (“MoU”) to jointly develop an implementation plan to deliver on the government’s Nationwide Fibreisation Plan (“NFP”).

The Commission has published Technical Codes for the testing and certification of both fixed and wireless communications equipment. These documents deal primarily with the technical requirements for safety, frequency bands, interoperability, electromagnetic compatibility and non-interference.

Price and Consumer Regulation

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

Currently, only fixed phone lines (“PSTN2”) and internet dial-up rates are regulated. The Communications and Multimedia (Rates)

Rules 2002 (“Rates Rules”) came into operation on 1 March 2002, revoking the Telephone Regulations 1996 (“Telephone Regulations”). The Rates Rules regulate the retail prices for Public Switched Telephone Network (“PSTN”) 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.

NFPs, NSPs, ASPs, and CASPs are generally allowed to set the retail price according to market rates. Retail rate regulation is set out in Chapter 4 of Part VIII of the CMA. Sections 197 and 198 relate to rate setting by service providers, wherein section 198 provides the principles that service providers should follow in setting their rates. Section 197 of the CMA provides that providers may set rules in accordance with the market rates, and further publish the rates charged to customers for one or more services.

Section 198 of the CMA provides that the provider shall set the price based on the following principles:

- (a) rates must be fair and, for similarly situated persons, not unreasonably discriminatory;
- (b) rates should be oriented towards costs, and cross-subsidies should be eliminated;
- (c) rates should not contain discounts that unreasonably prejudice the competitive opportunities of other providers;
- (d) rates should be structured with levels set to attract investment into the communications and multimedia industry; and
- (e) rates should take account of the regulations and recommendations of the international organisations of which Malaysia is a member.

Sections 199 to 201 relate to the powers of the Minister in relation to setting rates; for example, the Minister may make rules under section 201, i.e., the current Rates Rules, or the Minister may determine a special rate regulation regime under section 200.

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?

Section 2 of the CMA provides that one of the 10 policy objectives is to promote a high level of consumer confidence in service delivery from the industry, which is further reflected in section 188 of the CMA, which sets out that providers must deal reasonably with consumers and adequately address consumer complaints. To ensure enforcement of the provision, operators can be fined no more than RM 20,000, or imprisonment for a term not exceeding six months or both. The CMA provides for consumer protection, such as rate regulations and consumer dispute resolutions.

The Commission’s General Consumer Code of Practice sets out the mechanism for the handling and resolution of consumer disputes. The Commission monitors and regulates the performance of Network Service and Application Service providers by setting Quality of Service Standards.

Numbering

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

The Commission is empowered to control, plan, administer, manage and assign the numbering and electronic addressing of network services and application services. The Commission allocates

telephone numbers and network identifying codes in accordance with the Numbering and Electronic Addressing Plan (“NEAP”), issued on January 2006.

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

Pursuant to section 179(1) of the CMA, the Commission is vested with the control, planning, administration, management and assignment of the numbering and electronic addressing of network services and applications services. The NEAP governs the use of telephone numbers.

The following persons are required to comply with the NEAP:

- (i) all licensees;
- (ii) all registrars; and
- (iii) any other parties specified by the Commission.

The NEAP provides that the Commission may reserve any unassigned number for planning purposes or to realise the value of cherished numbers.

2.18 Are there any obligations requiring number portability?

Mobile Number Portability (“MNP”) was implemented by the Commission to allow consumers to switch mobile service providers without the need to change their mobile numbers, in line with the aim of ensuring effective competition in the market. This is to enable freedom of choice and to enhance competition in the market. All licensees providing application services for the delivery of voice and data communications shall:

- (a) perform all acts necessary to prepare and/or facilitate the implementation of MNP; and
- (b) ensure that all calls and data are delivered to the appropriate recipient mobile network, in accordance with the provisions of the NEAP.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

In Malaysia, the Commission manages spectrum allocation for telecommunication use, and regulates as well as ensures that use of spectrum is in accordance with the CMA and the Communications and Multimedia (Spectrum) Regulations 2000.

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.?

There are three types of assignments in Malaysia, namely Spectrum Assignment, Apparatus Assignment, and Class Assignment:

- (a) Spectrum Assignment confers rights on a person to use one or more specified frequency(ies) for any purpose consistent with the assignment conditions. This is subject to specified fees.
- (b) Apparatus Assignment confers on a person the right to use one or more specified frequencies to operate an apparatus for a specified purpose. This is subject to specified fees.
- (c) Class Assignment 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.

Section 177 of the CMA provides the procedures for spectrum assignment and apparatus assignment which are included in the Spectrum Plan (latest edition of 2014). The Spectrum Plan is a document developed by the Commission, pursuant to section 172 of the CMA. It contains information on frequency allocation for various wireless services in Malaysia, international allocation of spectrum as agreed by the International Telecommunication Union (“ITU”) for all three ITU regions, procedures for assignment and reassignment of spectrum and general information on spectrum usage in Malaysia.

The Spectrum Plan provides for several methods of assignment, which include the following:

- (a) Fixed Price – where the assignment is offered on a fixed price set by the Minister for spectrum assignment, or the MCMC for apparatus assignment.
- (b) Auction – where the assignment is made based on the highest bid price. This requires a marketing plan where the present options and/or proposal shall be laid out.
- (c) Tender – where there is competition for a particular spectrum band. There are mainly two types of tender, i.e., “beauty contest” and “comparative tender with price”.

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

There is no spectrum that can be made licence-exempt. The Minister may, however, exempt a person from requiring an assignment via an Exemption Order as provided under section 157 of the 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 relevant instrument is the Communications and Multimedia (Spectrum) Regulations 2000. The First and Second Schedule provide a list of appropriate fees depending on the nature of the services. The First Schedule of the Communications and Multimedia (Spectrum) Regulations 2000 (“the Regulations”) provides for fixed fees as well as variable fees for the assignment of an apparatus or spectrum.

The Second Schedule in the Regulations provides for the application fees that have to be paid.

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

Regulation 19 of the Communications and Multimedia (Spectrum) Regulations 2000 provides, in sub-regulation (1), for the conditions which a spectrum assignment holder may transfer or otherwise deal with the spectrum assignment, subject to:

- (a) the conditions of the spectrum assignment;
- (b) the eligibility requirements applicable when the spectrum assignment was issued;
- (c) the spectrum assignment not having been originally issued in the public or national interest;
- (d) the rules made by the Minister under section 163 of the Act; and
- (e) such other conditions that the Commission may impose.

The conditions which a spectrum assignment holder may be subjected to under sub-regulation (1) above may result in the right of the spectrum assignment holder to transfer or otherwise deal with the spectrum assignment in the following ways:

- (a) transfer or otherwise dealing with the assignment is absolutely prohibited;

- (b) transfer or otherwise dealing is permitted if the assignment is transferred or otherwise dealt with in its entirety;
- (c) transfer or otherwise dealing is permitted for a geographic area in multiples of the stated geographic unit; or
- (d) transfer or otherwise dealing is 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 the answer to question 3.5.

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

The relevant legislation that governs cyber security is the CMA, the Computer Crimes Act 1997, the Personal Data Protection Act 2010, the Defamation Act 1957, the Sedition Act 1948 and the Digital Signature Act 1997. Malaysia was one of the first nations in Southeast Asia to design a National Cyber Security Policy. Its efforts to secure cyber space have included the creation of CyberSecurity Malaysia and the National Cyber Security Policy.

CyberSecurity Malaysia is the national cyber security specialist agency under the purview of the Ministry of Science, Technology and Innovation (“MOSTI”). The role of CyberSecurity Malaysia is to provide specialised cyber security services and to continuously identify possible areas that may be detrimental to national security and public safety, including: Cyber Security Emergency Services; Security Quality Management Services; InfoSecurity Professional Development and Outreach; and Cyber Security Strategic Engagement and Research.

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.

Section 252 of the 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, if he considers that any communications is likely to contain any information which is relevant for the purpose of any investigation into an offence under this Act or its subsidiary legislation. The CMA defines an “authorised officer” as any public officer or officer appointed by the Commission and authorised in writing by the Minister, charged with the responsibility for communications and multimedia. “Intercept”, on the other hand, is defined as “the aural or other acquisition of the contents of any communications through the use of any electronic, mechanical, or other equipment, device or apparatus”, whilst “Communications” is defined 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”.

In regard to the modern means of evidence collection, subsections 116b and 116c of the Criminal Procedure Code (hereinafter referred to as “this Code”) were introduced in the 2012 amendment to this Code, in order to deal with searches and seizures involving computers and other storage devices and information contained in

communications. Section 116b(1) of this Code provides that a police officer, not below the rank of Inspector, conducting a search under this Code shall be given access to computerised data, whether stored in a computer or otherwise. Section 116b(3) of this Code further provides that “access” includes being provided with the necessary password, encryption code, decryption code, software or hardware and any other means required to enable comprehension of the computerised data.

Section 116c of this Code also provides that the Public Prosecutor may authorise a police officer to intercept communications if he considers that it is likely to contain any information relating to the commission of an offence.

Section 6 of the Security Offences (Special Measures) Act 2012 (“SOSM”) allows the Public Prosecutor (the Attorney General) and police officers to intercept all communications likely to contain any information relating to the commission of a security offence. A “security offence” is an offence stated in Chapter VI (offences against the state) or Chapter VIA (offences relating to terrorism) of the **Penal Code**; for example, activity detrimental to parliamentary democracy, sabotage, waging war against the Yang di-Pertuan Agong (the King of Malaysia) and committing terrorist acts. Section 6(1) states that the Public Prosecutor may authorise any police officer:

- to intercept, detain and open any postal article in the course of transmission by post;
- to intercept any message transmitted or received by any communication; or
- to intercept or listen to any conversation by any communication,

if he considers that it is likely to contain any information relating to the commission of a security offence.

Under section 6(2) SOSM, a police officer not below the rank of Superintendent of Police may do any of the above without authorisation of the Public Prosecutor in urgent and sudden cases where immediate action is required, leaving no moment for deliberation. In practice, this may give police the power to intercept communications in a wide range of circumstances, including electronic communications.

The Copyright (Amendment) Act 2012 has extended the right of the police to gain access to computerised or digitalised data when carrying out investigations. Under section 50B of the Copyright Act 1987, the Public Prosecutor (the Attorney General) may authorise an Assistant Controller or a police officer not below the rank of Inspector Officer to intercept or to listen to any communications for the purpose of any investigation into an offence under the Copyright Act or its subsidiary legislation, if he considers that the communication is likely to contain information relevant to the investigation.

The Computer Crimes Act 1997 (“CCA”) generally protects against the misuse of computers, for example, hacking. Section 10 (1) of the CCA provides that whenever it appears to any Magistrate, upon information and after such inquiry as he thinks necessary, that there is reasonable cause to believe that in any premises there is evidence of the commission of an offence under the CCA, he may, by warrant directed to any police officer of or above the rank of Inspector, empower the officer to enter the premises, by force if necessary, and there to search for, seize and detain any such evidence, and he shall be entitled to:

- “(a) *have access to any program or data held in any computer, or have access to, inspect or check the operation of, any computer and any associated apparatus or material which he has reasonable cause to suspect is or has been in use in connection with any offence under this Act;*
- (b) *Require—*
- (i) *the person by whom or on whose behalf the police officer has reasonable cause to suspect the computer is or has been so used; or*

- (ii) *any person having charge of or otherwise concerned with the operation of, the computer, apparatus or material, to provide him with such reasonable assistance as he may require for the purposes of paragraph (a); and*
- (c) *require any information contained in a computer and accessible from the premises to be produced in a form in which it can be taken away and in which it is visible and legible.”*

Section 115 of the Personal Data Protection Act 2010 provides that an authorised officer conducting a search shall be given access to computerised data, whether stored in a computer or otherwise. The access 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. This is consistent with the provision in section 79 of the Digital Signature Act 1997.

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?

Section 265 of the CMA provides the Minister with the power to determine that a licensee or a class of licensees shall implement the capability to allow authorised interception of communications. Communication is defined under section 6 of the 1998 Act, 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 where an authorised officer or a police officer conducts a search under sections 247 or 248, they shall be given access to computerised data whether stored in the computer or not. Section 249 of the 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 Personal Data Protection Act 2010 (“PDPA”) regulates the collection of personal data in relation to commercial transactions in Malaysia. Section 10 of the PDPA for the retention principle states that data shall not be kept longer than is necessary, and it is the data user’s duty to ensure that all personal data is destroyed or permanently 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?

The CMA regulates the activities of audio-visual media. The Content

Code which the Communications and Multimedia Content Forum of Malaysia has adopted for the purpose of the statutory duty sets out the guidelines and procedures for good practice, and standards of content disseminated to audiences by service providers in the communications and multimedia industry in Malaysia. 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.

The law has recognised the differences in distribution. For traditional distribution, a licence will be required as provided under the CMA. Order 6 of the Communications and Multimedia (Licensing) Exemption Order 2000 exempts a person who provides internet content application services from requiring a licence from the MCMC.

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

The CMA provides for two types of licences, namely individual and class licences. The rights and obligations attached to an individual licence are spelt out in section 43 of the CMA, of which one of the obligations allows the Minister to make regulations on matters that may be included in an undertaking by a prospective licensee. Individual licences are applicable to satellite broadcasting, subscription broadcasting, and terrestrial free-to-air TV, while class licences will be applicable to limited content applications services.

Please refer to question 2.5. Individual licensees are required to understand the terms and conditions of the licence and adhere to 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?

Section 36 of the CMA provides that the grant of an individual licence shall be personal to the licensee, and the individual licensee shall not be assigned or transferred to any other party unless the prior written approval of the Minister has been granted.

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?

Section 263 of the CMA 1998 provides that a licensee under the CMA has a duty to prevent the network facilities that it owns or provides, or the network service, applications service or content applications service that it provides, from being used in, or in relation to, the commission of any offence under any law of Malaysia. Section 109 of the CMA provides that compliance with a mandatory standard shall be a defence against prosecution, whilst

section 264 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) of the 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”.

Therefore, telecommunications operators and/or internet service providers would 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) of the Copyright Act 1987 on the other hand exempts a service provider from liability for copyright infringement if the infringement by its user occurs by reason of any of the following:

- the transmission, routing or provision of connections by the service provider of an electronic copy of the work through its network; or
- 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:

- the service provider did not initiate or direct the transmission of the electronic copy of the work;
- 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;
- 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
- the service provider did not modify the electronic copy of the work other than as part of a technical process.

Section 43D(1) of the Copyright Act 1987 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:

- from an electronic copy of the work made available on an originating network;
- through an automatic process;
- in response to an action by a user of its primary network; or
- 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 of the Copyright Act 1987 exempts a service provider from liability in the following situations:

- when storing an electronic copy of a work where this is done at the direction of its user; and
- 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?

Section 43H of the Copyright Act 1987 provides that where 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 in the manner as determined by the Minister. The copyright owner must compensate the service provider for any damages, loss or liability arising from the compliance by the provider within 48 hours from the receipt of the notification. 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.

The person whose work was removed or to which access has been disabled may send a counter-notice to the service provider. The service provider shall, upon receipt of the counter-notice, promptly provide the issuer of the first notification with a copy of the counter-notice and inform the issuer that the removed work or access to the work will be restored in 10 business days, unless the service provider has received another notification from the issuer of the first notification, informing it that he has filed an action seeking a court order to restrain the issuer of the counter-notice from engaging in any infringing activity relating to the material on the service provider's network.

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, as of now, no legislation in Malaysia regulating "net neutrality". Generally, section 3(3) of the CMA provides that nothing in this Act shall be construed as permitting the censorship of the internet. Section 211 of the CMA, however, provides that no

content applications service provider shall provide content which is indecent, obscene, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass any person. This implies that net neutrality is a qualified right in Malaysia.

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?

Section 263 of the 1998 Act provides that a licensee shall act, to the best of his ability, to prevent the network facilities that he owns or provides from being used in relation to the commission of any offence. A licensee would be obligated to, as far as reasonably necessary, prevent the commission of an offence, upon written request by the Commission or any other authority.



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Janet focuses on intellectual property and technology issues in a wide variety of transactions, and has worked on a wide range of agreements, including distributorship, licensing, outsourcing, service and consultancy agreements. She has advised clients on intellectual property protection and ownership issues, advertising issues, consumer protection, copyright, domain names, e-commerce, franchise, gaming, regulatory approvals for food and drugs, and telecommunications issues. Janet has also conducted due diligence for various acquisition projects, IT-related contracts, e-commerce and telecommunications, and has advised leading multinational companies in the pharmaceutical, tobacco and internet-related services industries on IP protection.

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