

Regulating Competition in the Malaysian Communications Industry

Nazura Abdul Manap¹, Mahmud Zuhdi Mohd Nor² and Safinaz Mohd Hussein^{1 +}

¹ Law Faculty, Universiti Kebangsaan Malaysia

² Law Faculty, Universiti Kebangsaan Malaysia

The telecommunications, broadcasting and Information Technology is converging. In Malaysia, their convergence is also witnessed in its regulation, the Communications and Multimedia Act 1998. One area that the Act addressed and introduced into Malaysia is competition regulation. Under the Act, Part VI Economic Regulation regulates 3 competition related areas. These 3 areas are licensing, general competition provisions and access to services. The aim of this paper is to examine these 3 areas by stating what they provide and whether the provisions meet the objective of the Economic Regulation to “promote competition.”

Keywords: Competition, Communications, Malaysia, Convergence.

1. Introduction

The telecommunications, broadcasting and IT industries in Malaysia is regulated under the Communications and Multimedia Act 1998. Competition is regulated under the Act in Part VI (Economic Regulation). The purposes of Part VI are to “promote consumer market which offer choice, quality and affordability, any-to-any connectivity, competition in markets and investment and innovation in the sector.” These purposes are to be reflected in three chapters of Part VI of the CMA 1998 i.e. licensing regulation, general competition provisions and provisions on access to services. This paper examines the provisions of these three chapters. It introduces the licensing regime that regulates the communications and multimedia industry to see whether the licensing regimes encourages competition. Secondly, it looks at the express prohibitions under the general competition provisions to see what is expressly prohibited and lastly it provides the access provision under the Communications and Multimedia Act 1998. In short the paper seeks to find out whether as an overview the provisions on licensing, general competition practices and access to services promotes the aims of the Economic Regulation.

2. Economic Regulation

2.1 Licensing

The first chapter of the Economic Regulation is licensing. Licensing is not uncommon in any industry and it usually involves formalities. Licensing are there for a number of reasons namely monitoring which enables the national regulatory authority (NRA) to identify the players in the market and for the imposition of obligations concerning the performance of their activities. More important, licensing relates to business entry and the players regard this aspect of regulation as a key obstacle to investment and new ventures. Licensing has often been regarded as a barrier to entry if it imposes conditions and obligations which causes hardship to new players. In a system where barriers to entry is high, competition is lessened. Barrier to entry relates to any factor that operates as a cost that has to be borne by a new entrant into a market. In the telecommunications industry, to allow new entrant access to the incumbents’ established distribution network is an example of a policy that reduces barriers to entry. From the economic regulation point of view,

⁺ Corresponding author. Tel.: +603 89216372; fax: + 603 89253217.
E-mail address: finaz@ukm.my.

licensing can be used to constrain competition. This is illustrated in a situation where a country imposes a condition of natural monopoly where, for example, there are designated firms responsible for the supply of utilities services. Although the content of the licence and the procedures used to select the appropriate firm may be matters of concern, it is the policy of restraining competition, rather than the particular regulatory instrument used, which is of significant importance. A matter of concern could be when the reason for regulation is to monitor, and a question is further raised as to whether this *raison d'être* restricts competition in any way?

In Malaysia, this is real enough when Paragraph 71 of the Explanatory Statement to the Communications and Multimedia Bill 1998 stated that the objectives of Chapter 1 of the Economic Regulation is to “control and monitor the entry...of providers”. The reason for control is to promote consumer confidence, to ensure only players who are financially stable are given licence. Hence limitation in the number of players will result in better quality of service and promotion of consumer confidence. An express statement to show that the purpose of the licences is to control market entry and ownership of national assets and monitor the operations of owners of significant national assets shows a strong entry barrier. The CMA 1998 seeks to promote competition in the market by introducing the Economic Regulation. However, the licensing regime as discussed above, places weight on “control and monitoring” of players in the industry. The licensing provisions need to be assimilated in line with the purpose of the whole Economic Regulation. Therefore, it should give way to certain amendments. One such step is towards moving away from individual licence and detailed licence provisions *en route* for a more flexible class licence system similar to that of general authorisation in the EU. Even though this is a big leap but surely needs considerable deliberation. It is further submitted that conditions in the licences should also be minimised and not contained too many requirements, which will, at the end of the day limit the competence of prospective entrants or shorten the licence operability. This is vital especially if Malaysia wants to ensure eligibility and capability of local players.

The current regime prohibits foreign companies from owning an individual licence. At the same time, merits of application places undue burdens on a new player. The current licensing regime should not put any limit on the number of players owning individual licence. Such limitation does not only prevent entry, it also strengthens the position of existing licence holder. The current licensing regime which clearly stresses the need to control and monitor the entry of player, seen through the existence of individual licence (which has as its purpose to control entry) and the imposition of conditions (special and standard) in the licences, are contrary to what the Act seeks to promote i.e. convergence and competition in which the licensing framework should reflect. It can therefore be concluded that the current licensing regime of the CMA 1998 are inadequate to promote competition in the industry.

2.2 General Competition Practices

In achieving its aim at regulating the long term benefit of the end user, the Malaysian Communications and Multimedia Act 1998 (CMA 1998) introduced general rules on competition practices within its Economic Regulation. The purpose of the rules on competition practices is the protection of small providers in the absence of a general competition or trade practices regulation and to ensure that anti-competitive practices do not undermine the national policy. There are three express prohibitions under the General Competition Practices namely a prohibition on anti-competitive conduct, a prohibition on entering into collusive agreements and a prohibition on tying or linking arrangements. Other than these three express prohibitions, the rules on general competition practices also contains provisions that deal with dominant position and authorization of conduct. However for the purpose of this paper, it will only discuss the three express prohibitions.

In Malaysia, section 133 of the CMA 1998 deals with the prohibition on anti-competitive practices which provides that “a licensee shall not engage in any conduct which has the purpose of substantially lessening competition in a communications market”. The discussion centers on three main headings i.e. the kinds of conduct that is prohibited under the section, “purpose” and “effect” tests and the term “substantial lessening competition.” Not all conduct in the industry comes within the purview of section 133 of the CMA 1998. “Conduct” that is prohibited is the conduct of a licensee. “Conduct” is explained in the guideline on substantial lessening of competition as “any or all commercial” activity in which a licensee could engage and includes any action or lack of action, which can either actually or potentially affect, the level of competition in a market. However, it does not define what “commercial activity” is. It only explains that conduct which may have a potential negative effect on competition includes predatory pricing, foreclosure,

refusal to supply bundling and parallel pricing. These conduct may hamper competition, however these conduct will not be *per se* prohibited but will be closely monitored by the Commission.”

The “purpose” and “effect” tests is an element of section 133. In section 133, only conduct which has the “purpose” of substantial lessening of competition is prohibited irrespective of its effects. However it is added that conduct without an effect of substantial lessening of competition is unlikely to come to the Commission’s attention. Conduct may have more than one purpose. The “purpose” that is relevant here refers to its substantiality to a conduct and this relates to the purpose being material to the decision to engage in the conduct. In other words, the “purpose” that is relevant relates to the purpose that leads to the institution of the conduct. However, having said all that, the Guideline added that to infer “purpose” the Commission will consider:

- i. the nature of the conduct, including its scope to affect rivals in the market;
- ii. the circumstances of the conduct, including the process of decision-making which led up to the conduct; and
- iii. the likely effect of the conduct, where likely refers to reasonable possibility rather than probability.

The employment of the word “purpose” suggests the intention on the part of the licensee to substantially lessen competition as oppose to the word effect. The latter does not reflect the requirement of “intent” on the part of the licensee but rather the effect of a particular conduct toward competition in the market. Section 6.2(a) of the Guideline explains that section 133 is only catering for conduct which has the purpose of lessening competition and “such conduct is prohibited irrespective of its effects”. Therefore, looking at the two provisions, section 133 of the CMA 1998 and section 6.2(a) of the Guideline, the prohibition in section 133 simply means that a licensee is prohibited from intentionally engaging in a conduct which has the purpose of the substantially lessening competition regardless of the effect of such conduct towards the market. However, the same Guideline in sections 6.2(b) and (d) states that “any conduct without an effect of substantially lessening competition is unlikely to come to the Commission’s attention” and to infer “purpose” the Commission “will consider the likely effect of the conduct, where likely refers to reasonable possibility rather than probability.” These provisions therefore seemed to be in conflict with each other.

Section 133 of the CMA 1998 prohibits the conduct which “substantially lessens competition” (SLC). The meaning of substantially lessening competition has its roots in Australian trade practices law. Reference to the term “substantially” in the Guideline on substantial lessening of competition relates to several Australian sources, which described “substantially” in the following:

- i. “it must be capable of being fairly described as a lessening of competition that is real, or of substance as distinct from a lessening that is insubstantial, insignificant or minimal.”
- ii. “... in the context of section 46 (of the Trade Practices Act 1974) “substantial” is intended to signify “large or weighty” or “considerable, solid or big.”
- iii. “...one must look at the relevant significant portion of the market, ask oneself how and to what extent there would have been competition therein but for the conduct, assess what is left, and determine whether what has been lost in relation to what would have been is seen as a substantial lessening of competition. ... it is a degree to which competition has been lessened which is critical, not the proportion of that lessening to the whole of the competition which exists in the total market. Thus a lessening in a significant section of the market, if a substantial lessening of otherwise active competition may, according to circumstances, be a substantial lessening competition in a market.”

It is also stated in the guideline on substantial lessening of competition that the “reduction in the number of suppliers in a market does not, in itself, constitute a substantial lessening of competition.” It is only significant if it affects the levels of rivalry in the relevant market.

The second express prohibition is the prohibition on entering into collusive agreements. Section 135 of the CMA 1998 prohibits collusive agreements. Literally collusive means fraudulently concerted or devised. It has the element of fraud. Collusive conduct is conduct engaged in by a group of competitors in a market. Such conduct is a horizontal conduct because it is engaged by competitors who trade at the same functional level of the chain of distribution. Section 135 of the CMA 1998 provides that, “a licensee shall not enter into any understanding, agreement or arrangement, whether legally enforceable or not, which provides for- (a) rate fixing; (b) market sharing; (c) boycott of a supplier of apparatus; or (d) boycott of another competitor.” However there is no other explanation on collusive agreements.

The third express prohibition under the general competition practices involves tying or linking arrangements. This prohibition is provided under section 136 of the CMA 1998. Tying or tie-ins agreement is a situation where one firm puts a condition for acquiring one product that another product also has to be acquired or tied together. Bundling is also similar to tie-ins. Bundling is a situation where a firm “bundles” products together i.e. sells two or more product together as a bundle and attractive prices are charged for the bundle. The effect of bundling and tie-ins agreements may be similar i.e. the customer is required to purchase more than one product or service because the products or services are tied or bundled together and the products is sold together. The terms “tying” and “bundling” are often used to refer to the same competition prohibition. The terms are often used without distinction although the two is actually different. Tying refers to selling products differently but the products are tied together by the provider. In other words, a particular product will not be sold separately. On the other hand, bundling refers to selling the products together, i.e. not separately but as a package. Section 136 of the CMA 1998 states that, “a licensee shall not ... make it a condition for the provision or supply of a product or service in a communications market that the person acquiring such product or service in the communications market is also required to acquire or not to acquire any other product or service either from himself or from another person.” Similar to section 135, there is no elaboration, at this point, on this prohibition. However as mentioned earlier, the Guideline on SLC did mention that “bundling” are not conduct that is prohibited *per se* and this seems to be in conflict with section 136 of the CMA which is an express prohibition. The general competition practices provisions serves as a general provision on competition. Anti-competitive practices is addressed by the three express prohibitions stated above. However the provisions could be elaborated to give clear meaning so that the inconsistencies could be avoided to ensure that the provisions promotes competition.

2.3 Access To Services

Access to the incumbent’s network is essential in the electronic communications industry. This is due to the complex nature of the electronic communications industry where players’ or undertakings’ activities cannot be carried out in isolation. The undertakings must be able to gain access to resources for example, the infrastructure to the network, controlled by others, more often than not, owned by the incumbent. Refusal of access often arises where the incumbent’s activities are not limited to network operation but extend to the provision of services. On some of these markets for services, the incumbent may be in competition with other undertakings requesting access. As a result they may be reluctant to share access to a resource they regard as having been built through their own efforts. In such a situation, rules are needed to ensure that access is indeed provided under conditions that are satisfactory for the performance of market activity. In the absence of regulatory intervention such access would not be ensured, an outcome not in line with competition expectations. Hence, regulatory tools are therefore vital to ensure that access is granted under appropriate conditions.

Access to the existing local network or access network is usually the incumbent’s main source of market power. Therefore securing access to the existing local network or access network by undertakings can foster effective competition. However, the issue of securing access by undertakings to the facilities or resources needed to engage in market activity is one of the complexities in the electronic communications industry. The difficulties faced by new entrants include to get access to rights of way, the costs of network construction, induce the customers to change access and/or service providers and the dilemma of infrastructure duplication and wastages or inefficient rollout and investment (which is not encouraged). Consequently, steps towards promoting competition have been taken by regulators around the world to reduce the investment in new infrastructure (to avoid network duplication) and encourage growth in the competitive service offerings and options available to the customers by establishing effective competition in the access network. Therefore, the obligation to offer access must be imposed on the incumbent at all feasible points reasonably requested by the other undertakings (players). Yet, ensuring access by undertakings to the facilities or resources needed to engage in market activity is one of the principle challenges in the electronic communications. However it has been noted that the introduction of effective competition must not be at the expense of infrastructure duplication, leading to inefficient allocation of resources and unnecessary wastage. The introduction of effective competition must encourage and promote optimum utilisation of existing infrastructure which can lower market entry costs by allowing a new entrant to gain access to customers and offer broadband services without having to substantially invest in network facilities.

In Malaysia, competition-driven initiatives like the provisions on access in the CMA 1998 has been introduced. The terms “access” and “interconnection” have at times been used to refer to the same thing i.e.

the right to use another provider's network to carry one's own service, but it has also been used to refer to different things, i.e. where the former is referring to the right to use and the latter to interconnect between each other so that the users of the service may interconnect with each other. Certain countries differentiate between access and interconnection. Under the Malaysian Communications and Multimedia Act 1998 (CMA) "access" means access to a network facility or a network service listed under Chapter 3 of part VI. This simply means that under the CMA 1998 "access" refers to both the access to the network facility and also the interconnection of the network services. Interconnection refers to the linkage between two networks. Interconnection can be seen as a form of access.

Most countries afford *ex-ante* provisions on access because access to the network is considered to be very specific to the industry. The chapter on access to services under the CMA 1998 seeks to, "establish a regime to ensure that all network facilities providers, network services providers and applications service providers can gain access to the necessary facilities and services on reasonable terms and conditions in order to prevent the inhibition of the provision of downstream services." Further, paragraph 83 of the Explanatory Statement to the CMA 1998 states that, "the services which are included in the access list and subject to the standard access obligations, and the regulation of access to such services, will and must change over time. Accordingly, the arrangements set out in this Part are designed to be flexible and robust over time."

In Malaysia, services requiring access is listed in the access list. Access list refers to the list of facilities and services that are subject to the access and interconnection regime. Section 146 of the CMA 1998 provides that MCMC may determine that a service be included in or removed from the access list and a network facilities provider and a network service provider is under an obligation to provide access to their facilities or services listed in the access list. This obligation to provide is to be made upon request and on reasonable terms and conditions, of at least the same technical or more favourable technical standard and quality and on an equitable and non-discriminatory basis. At present there is also an obligation on the part of each licensed network operator (LNO) to permit interconnection of another LNO's network with the network of that LNO. This obligation is stipulated as a condition of the LNO's licence. Access to facilities and services in the electronic communications industry is important for the promotion of competition. The result that the regulators seek to achieve by access regulation is the opening up of the market by the availability of unrestricted access and interconnection to promote competition in the market.

A commonly accepted rule on access is that not all services are subjected to access regulation. A list of services or certain declared services will be subjected to a standard access obligation. Under the CMA 1998, there is a requirement to provide a standard access obligation under section 149 of the CMA 1998. The requirement provides that the parties should negotiate to reach an agreement for access. When the parties fail to reach to an agreement the parties is deemed to have a dispute and Dispute Resolution Procedures shall take effect. It is observed that the access regulation do not impose any "different standard" on a provider with significant market power (SMP). However, it is proposed that a different standard could be imposed on a provider with SMP especially so that they may not use the exception to the provision of access to their advantage. This approach will assist in the implementation of access provisions hence promote competition in the industry.

3. Conclusion

The Economic Regulation under the CMA 1998 is to promote consumer choices, quality of services, affordability, etc. These provisions therefore, should ensure that the above objectives are met. The absence of judicial interpretations to the Economic Regulation under the CMA 1998 results in the lack of proper interpretation and application of its provisions. This paper has highlighted several issues (which could be further elaborated and discuss) relating to interpretation and inadequacy of the provisions governing the Economic Regulation. The aim of these provisions is to promote competition in the communications industry but at this stage it has been highlighted that:

1. The licensing regime is a barrier to entry. It places heavy conditions on an individual licence and imposes limitation on the number of licensees in the industry. It is therefore recommended that the licensing system be reassessed;
2. The general competition practices provisions do not have clear provisions on competition because it contain confusing guidelines which needs clarification; and
3. The provisions on access to services could further promote competition by imposing different standards on players with SMP. This would ensure that players with SMP could not use the access rules to exempt itself from providing access to smaller players.

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