

# Malaysia



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## 1 Framework

### 1.1 What are the overall policies and objectives for the electronic communications industry and have these been published in draft or final form? What legislation is relevant to telecommunications and radio frequencies?

The national policy objectives are contained in the Communications and Multimedia Act 1998 (“CMA”), which is also the legislation relevant to telecommunications and radio frequencies.

### 1.2 Is Malaysia a member of the World Trade Organisation? Has Malaysia made commitments under the GATS/GATT regarding telecommunications and has Malaysia adopted the WTO Basic Telecommunications Agreement?

Yes to all.

### 1.3 How is the provision of electronic communications networks or services regulated? Is the provision of electronic communications networks or services open to competition in Malaysia?

The CMA regulates the provision of facilities and services within the communications and multimedia industry (which includes the provision of electronic communications networks and services).

There are also regulations, instruments, codes and guidelines issued pursuant to the CMA which regulate specific facilities and services.

One of the key features of the CMA is a technology and service-neutral licensing regime based on 4 broad categories of licensable activities. Unless exempted, the provision of facilities and services within the communications and multimedia industry may require the following licences:

- Network Facilities Providers (“NFP”).
- Network Service Providers (“NSP”).
- Applications Service Providers (“ASP”).
- Content Applications Service Providers (“CASP”).

The above licences are further distinguished based on type, i.e. an individual (which allows close monitoring and control) or a class licence (which is a more ‘light handed’ form of regulation designed to promote industry growth and development).

In addition to the above, there may be other licences or authorisations required for the specific facilities and/or services provided (see sections 3, 6, 7 and 8 below).

With regard to competition, the CMA purports to prohibit:

- any conduct by any licensee which has the purpose of substantially lessening competition in a communication market;
- arrangements and practices which provide for rate-fixing, market-sharing and boycotting of a supplier or competitor; and
- mandatory tying or linking arrangements regarding the provision or supply of products and services.

### 1.4 Which are the regulatory and competition law authorities? How are their roles differentiated? Are they independent from the government?

The regulator of the communications and multimedia industry is the Malaysian Communications and Multimedia Commission (the “Commission”), whereas the regulator of competition law is the soon-to-be set up Malaysian Competition Commission under the Competition Act (which has been passed but only comes into force on 1st January 2012). The Competition Act does not, however, apply to any commercial activity regulated under the CMA.

If the Commission determines that a facilities or service provider is in a dominant position in a communications market, it may direct such facilities or service provider to cease any conduct which has (or may have) the effect of substantially lessening competition in such market and to implement appropriate remedies.

The Commission is not independent from the government and is currently under the auspices of the Ministry of Information, Communications and Culture (the “Ministry”).

### 1.5 Are decisions of the national regulatory authority able to be appealed? To which court or body?

The decisions of the Commission may be appealed to the Appeal Tribunal established by the Ministry, which consists of a High Court judge and at least two other members to be appointed by the Ministry.

Application to the courts for a judicial review of decisions may be done once all the remedies under the CMA have been exhausted.

## 2 Authorisation

### 2.1 What types of general and individual authorisations are used in Malaysia?

There is no general and individual authorisation regime in Malaysia. Malaysia instead has a technology and service-neutral

licensing regime based on 4 broad categories of licensable activities. The said 4 categories of licences are further distinguished based on type, i.e. an individual (which allows close monitoring and control) or a class licence (which is a more 'light handed' form of regulation designed to promote industry growth and development). See question 1.3 above for further details. Unlike the application process for an individual licence, a class licence merely requires registration, which is an administrative process.

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## 2.2 Please summarise the main requirements of Malaysia's general authorisation.

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The main requirements for an individual licence include the following:

- The licensee is required to be incorporated in Malaysia. An individual, a sole proprietorship or a partnership are all ineligible to apply for a class licence.
- The shareholding of the licensee shall comply with relevant Malaysia foreign investment restrictions.
- The licensee shall notify the Minister of any changes in the shareholding of the licensee which are required to be notified to the relevant authority.
- The licensee shall notify the Minister of any joint ventures with other licensee into which the licensee enters.

The CMA sets out other standard licence conditions which apply to individual licensees. Special licence conditions may also be imposed on a holder of an individual licence such as specific undertakings to be provided with respect to levels of investment, specific activities and operations.

A foreign individual who is not a permanent resident and a foreign company as defined under the Companies Act 1965 are ineligible to be registered as a class licensee. The CMA sets out standard licence conditions which class licensees are required to comply with. Examples of such conditions are that class licensees are required to comply with the CMA (and its subsidiary legislation), the Numbering and Electronic Addressing Plan ("NEAP") and the Spectrum Plan - see sections 6 and 8.

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## 2.3 In relation to individual authorisations please identify their subject matter, duration and ability to be transferred or traded.

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See question 1.3 above with regard to the licensing regime in Malaysia and the subject matter of the licences. Typically, the duration of an individual licence is ten years while the duration of a class licence is only for one year. Class licences are not transferable whereas individual licences are transferable once the prior written approval of the Ministry has been granted.

## 3 Public and Private Works

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### 3.1 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?

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The CMA contains provisions relating to inspection of land and installation of network facilities (which includes telecommunications infrastructure). A network facilities installation permit may be required. The Ministry may also make regulations regarding the carrying out of such activities.

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### 3.2 Is there a specific planning or zoning regime that applies to the installation of telecommunications infrastructure?

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The installation of network facilities (which includes telecommunications infrastructure) may require the approval of the state authority, local authority, or other relevant authority.

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### 3.3 Are there any rules requiring established operators to share their infrastructure, e.g. masts, sites, ducts or cables (i.e. dark fibre)? Are there any proposals to mandate 'passive access' to such basic infrastructure?

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The CMA states that NFPs and public utility companies must provide other NFPs with non-discriminatory access to any post, network facilities or right of way owned or controlled by them unless there is insufficient capacity, or for reasons of safety, security, reliability, or difficulty of a technical or engineering nature.

Although there is currently no proposal to mandate 'passive access', the Commission may regulate matters on access to any post, network facilities or right of way owned or controlled by an NFP.

## 4 Access and Interconnection

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### 4.1 How is network-to-network interconnection and access mandated?

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Unless exempted by the Ministry, NFPs and NSPs must provide access to their network facilities and services listed in the access list determined by the Commission to other facilities and/or service providers upon a request in writing to such NFP or NSP.

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### 4.2 How are interconnection or access disputes resolved?

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The parties must first attempt to resolve their dispute by negotiation between them. If the parties are unable to reach an agreement, the parties may seek to resolve their dispute by the Commission.

Upon receipt of a written notification of the dispute, the Commission will convene to decide on the dispute. The Commission may resolve the dispute on terms and conditions as it deems fit and the decision of the Commission is binding on the disputing parties. However, see question 1.5 above.

The Commission may publish guidelines setting out the principles and procedures which it takes into account when resolving disputes.

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

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NFPs and NSPs are required to publish an access reference document which complies with the Commission Determination on the Mandatory Standard on Access ("MSA") and which forms the basis of their interconnection contract/access agreement with other NFPs and NSPs. Where certain interconnection services are regulated under the MSA, NFPs and NSPs should include the rates they offer (not exceeding the maximum price prescribed in the MSA) in the access reference document. Where certain interconnection services are not regulated under the MSA, operators should include the rates they offer in the access reference document and ensure that such rates are offered on an equitable and a non-discriminatory basis.

**4.4 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?**

See question 4.3 above. The Commission determines a maximum pricing for certain interconnection and/or network access. However, this does not prevent the parties from negotiating for prices lower than those mandated by the Commission.

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

CMA licensees may be required to prepare and deliver to the Commission separate accounting records as required by the Commission from time to time. There are no explicit requirements for functional or legal separation.

**4.6 How are existing interconnection and access regulatory conditions to be applied to next generation (IP-based) networks?**

As the regulatory regime of the CMA is technology and service neutral, existing interconnection and access regulatory conditions can be applied to next generation (IP-based) networks. Where required the Commission may issue variations to the MSA from time to time to provide for next generation (IP-based) networks.

**4.7 Are owners of existing copper local loop access infrastructure required to unbundle their facilities and if so, on what terms and subject to what regulatory controls? Are cable TV operators also so required?**

Yes to all. See question 4.1 above.

**4.8 Are there any regulations or proposals for regulations relating to next-generation access (fibre to the home, or fibre to the cabinet)? Are any 'regulatory holidays' or other incentives to build fibre access networks proposed? Are there any requirements to share passive infrastructure such as ducts or poles?**

Yes. See question 4.1 above. However, the Ministry has directed for access to facilities and services provided over high speed broadband networks to be deferred to 15 September 2015.

Last mile NFPs are eligible for 100% investment allowance on capital expenditure incurred for broadband infrastructure to provide broadband services.

The predecessor to the Ministry contributed RM 2.4 billion under a public-private-partnership agreement with Telekom Malaysia Berhad to develop a next-generation high-speed broadband infrastructure and services in Malaysia.

There are currently no requirements to share passive infrastructure. However, see question 3.3 above.

## 5 Price and Consumer Regulation

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

Facilities and service providers are generally free to set their own rates. However, the Ministry may:

- intervene to determine and set rates for any competitive facilities or services for good cause or in the interest of the public;
- determine special rate regulation regimes for a particular group of persons or in a particular area; and
- make rules to prescribe the level of rates to be charged for specified or classes of services.

**5.2 Is the provision of electronic communications services to consumers subject to any special rules and if so, in what principal respects?**

CMA licensees must deal reasonably with consumers and adequately address consumer complaints.

In addition, facilities and service providers may be required to comply with the Consumer Code, a voluntary industry code prepared by the Consumer Forum, whether as part of their licence condition or as directed by the Commission.

## 6 Numbering

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

Telephone numbers and network identifying codes are allocated by the Commission in accordance with the NEAP.

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

NFPs and ASPs requiring the use of a telephone number may apply to the Commission for an assignment of a telephone number. Applications for number assignments must be made for such units or blocks as stipulated under the NEAP. The Commission may reserve any unassigned numbers under the NEAP for planning purposes or to realise the value of cherished numbers by way of auction or tender.

All assignment holders must comply with standard conditions for any assignment granted by the Commission.

**6.3 How are telephone numbers made available for network use and how are such numbers activated for use by customers?**

Following assignment of the assigned numbers by the Commission to operators, the operators can then issue such numbers to customers.

**6.4 What are the basic rules applicable to the 'porting' (i.e. transfer) of telephone numbers (fixed and mobile)?**

There is no 'porting' of fixed numbers. The NEAP requires that mobile number portability be provided and supported by all mobile service providers. Malaysia has opted to implement porting by using a centralised clearing house which functions as a reference database and order processing engine together with an All-Call-Query (ACQ) routing method whereby each mobile service provider will set up its own database to determine the latest porting status of the person called. An independent third party was appointed to build, operate and manage the number portability clearing house.

## 7 Submarine Cables

### 7.1 What are the main rules governing the bringing into Malaysia's territorial waters, and the landing, of submarine cables? Are there any special authorisations required or fees to be paid with respect to submarine cables?

The provision of a submarine cable landing centre and/or fixed links and cables require an NFP licence. There are restrictions on the laying down of submarine cables in exclusive economic zones as well as the continental shelf of Malaysia. The installation of submarine cables may require the approval of the state authority, local authority, or other relevant authority. Also see section 3 above.

## 8 Radio Frequency Spectrum

### 8.1 Is the use of radio frequency spectrum specifically regulated and if so, by which authority?

The Commission and the Ministry regulates spectrum frequencies. Spectrum frequencies are allocated by the Commission in accordance with the Spectrum Plan.

### 8.2 How is the use of radio frequency spectrum authorised in Malaysia? What procedures are used to allocated spectrum between candidates - i.e. spectrum auctions, comparative 'beauty parades', etc.?

Authorised users of radio frequency spectrum consist of the following:

- (1) Persons holding a spectrum assignment – a right to use one or more specified frequency bands for any purpose consistent with the assignment conditions.
- (2) Persons holding an apparatus assignment – a licence to use the spectrum to operate telecommunication apparatus in one or more specified frequency bands.
- (3) Users of class assignment – rights to use a frequency band or bands for a specified purpose.

In respect of (1) and (2) above, applicants are required to apply to the Commission for a grant of spectrum allocation.

The Spectrum Plan may include procedures for the assignment of spectrum assignments and apparatus assignments by auction, tender, at a fixed price to be determined by the Commission or the Ministry, or a conversion plan for the conversion of designated apparatus assignments into spectrum assignments.

### 8.3 Are distinctions made between mobile, fixed and satellite usage in the grant of spectrum rights?

Distinctions are made in the spectrum plan between mobile, fixed and satellite usage with regard to the use of different frequency bands.

### 8.4 How is the installation of satellite earth stations and their use for up-linking and down-linking regulated?

For the installation and use of satellite earth stations, the following is required: (a) an NFP individual licence issued by the Ministry; and (b) an apparatus assignment issued by the Commission. An NSP individual licence may also be required if the use of such satellite earth

stations for uplinking and downlinking results in the provision of network services such as broadcasting distribution services.

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

Yes. The Ministry may, by an order, grant exemptions to spectrum assignments.

### 8.6 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

The fees for a spectrum assignment are: (a) an annual fee component to contribute to the maintenance of the spectrum underlying the assignment; and (b) a price component set by either auction, tender or other method payable annually or in a lump sum.

The fees for an apparatus assignment are stated in the Communications and Multimedia (Spectrum) Regulations 2000. No fees are payable for a class assignment.

### 8.7 Are spectrum licences able to be traded or sub-licensed and if so on what conditions?

The spectrum assignment holder may transfer or otherwise deal with a 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 for the transfer; and (e) such other conditions as the Commission may impose.

The above may result in the spectrum assignment holder being prohibited to transfer or permitted: (a) if the assignment is transferred or otherwise dealt with in its entirety; (b) for a geographic area in multiples of the stated geographic unit; or (c) in multiples of the stated spectrum unit.

## 9 Data Retention and Interception

### 9.1 Are operators obliged to retain any call data? If so who is obliged to retain what and for how long? How are data protection (privacy rules) applicable specifically to telecommunications implemented in Malaysia?

There are no express obligations on operators to retain call data.

The Consumer Code contains provisions relating to collection of information (see question 5.2 above). In addition, the Internet Access Service Provider Sub-Code ("IASP Code") prepared by the Consumer Forum states that service providers must take reasonable steps to notify all consumers of its privacy policy before entering into a contract with them.

The Personal Data Protection Act 2010 (which has been passed but not yet in force) generally applies to the processing of personal data in commercial transactions.

### 9.2 Are operators obliged to maintain call interception (wire-tap) capabilities?

The Ministry may determine that a facilities and/or service provider implement the capability to allow authorised interception of communications.

### 9.3 What is the process for authorities obtaining access to retained call data and/or intercepting calls? Who can obtain access and what controls are in place?

An application must be made to the public prosecutor for authorisation to intercept or to listen to any communication transmitted or received by any communications. Only the following officers may have such access:

- a public officer;
- an officer appointed by the Commission and authorised in writing by the Ministry; and
- a police officer of or above the rank of Superintendent.

The public prosecutor must consider whether any communications is likely to contain any information which is relevant for the purpose of any investigation into an offence under the CMA before authorising such access.

## 10 The Internet

### 10.1 Are conveyance services over the internet regulated in any different way to other electronic communications services? Which rules, if any, govern access to the internet at a wholesale (i.e. peering or transit) and/or retail (i.e. broadband access) level? Are internet service providers subject to telecommunications regulation?

No. Conveyance of services over the internet is generally regulated the same way as other electronic communications services. See question 1.3 above.

There are no specific rules which govern access to the internet at a wholesale and retail level.

There are also no specific rules related to telecommunications only due to the convergent nature of the CMA.

### 10.2 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?

The courts have yet to interpret and apply any defences available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks. However, telecommunications operators and/or internet service providers who are 'innocent carriers' may have a legal defence against any action taken against them if they comply with the Content Code, a voluntary industry code prepared by the Content Forum.

### 10.3 Are telecommunications operators and/or internet service providers under any obligations (i.e. provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

There are no specific obligations to assist content owners under existing law. However, telecommunications operators and/or internet service providers are obligated to assist content owners where required to do so by an order of the court.

### 10.4 Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks? Are there any 'net neutrality' requirements?

The Ministry may make rules to prescribe the level of rates to be charged for specified or classes of services, e.g. there are rules regulating the maximum rates chargeable to customers of telecommunications operators and/or internet service providers. There are no 'net neutrality' requirements.

### 10.5 How are 'voice over IP' services regulated?

Voice over IP services are activities within the communications and multimedia industry and are generally regulated the same way as other electronic communications services. See question 1.3 above. The Commission has issued specific guidelines and regulations relating to voice over IP services.

### 10.6 Are there any rules to prevent, restrict or otherwise govern internet or email communications, in particular, marketing and advertising communications?

It is an offence for a person to initiate a communication using any ASP service (which includes internet and e-mail communications), whether continuously, repeatedly or otherwise, with the intent to annoy, abuse, threaten or harass any person.

The Consumer Code states that facilities and service providers must respect consumers' preferences regarding unsolicited mail and telephone calls. In addition, the IASP Code contains anti-spam measures to be taken by service providers.

## 11 USO

### 11.1 Is there a concept of universal service obligation; if so how is this defined, regulated and funded?

The Ministry may direct the Commission to determine a system to promote the widespread availability and usage of network services and applications services throughout Malaysia by encouraging the installation of network facilities and the provision for network services and applications services in underserved areas or for underserved groups within the community. Further, the Ministry may make regulations for the implementation of such system.

A Universal Service Provision Fund ("USP Fund") was established pursuant to the CMA and is controlled and operated by the Commission. The Ministry may make regulations on the USP Fund (including contributions to the USP Fund).

## 12 Foreign Ownership Rules

### 12.1 Are there any rules restricting direct or indirect foreign ownership interests in electronic communications companies whether in fixed, mobile, satellite or other wireless operations?

Since the repeal of the Guideline on the Acquisition of Interests, Mergers and Take-overs by Local and Foreign Interests on 30 June 2009, foreign ownership restrictions have been left to be determined by the relevant sector regulator. The Commission and the Ministry have yet to draw up any such restriction.

## 13 Future Plans

### 13.1 Are there any imminent and significant changes to the legal and regulatory regime for electronic communications?

It has been 13 years since the communications and multimedia

industry was converged under a single regulator and regulated on an entirely new regulatory framework. There does not appear to be any imminent and significant change to the legal and regulatory regime for electronic communications in the near future.



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Lai Ling graduated from Victoria University of Wellington, New Zealand in 1993 and was admitted as a Barrister and Solicitor of the High Court of New Zealand in the same year. After a number of years practicing in New Zealand, she returned to Kuala Lumpur and was called to the Peninsular Malaysia Bar in 1999.



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